

March 21, 2013

Wendy L. House  
Deputy City Attorney  
Lounsbery Ferguson  
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960 Canterbury Place, Suite 300  
Escondido, CA 92025-3870

Re: Your Request for Informal Assistance  
**Our File No. I-13-017**

Dear Ms. House:

This letter responds to your request for informal assistance regarding the contribution provisions of the Political Reform Act (the “Act”).<sup>1</sup> The Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders assistance. (In re Oglesby (1975) 1 FPPC Ops. 71.) Additionally, this letter should not be construed as assistance on any conduct that may have already taken place (*see* Regulation 18329(b)(8)(A)). Because your question is general in nature and does not refer to particular officials or organizations, we are treating your request as one for informal assistance.<sup>2</sup>

### QUESTION

Is a payment by an annual donor to a non-profit organization a behested payment when it is made proximate in time to a solicitation letter that features an elected official?

### CONCLUSION

The payment is a behested payment if a reasonable person would perceive the payment was in response to a solicitation that features an elected official.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

## FACTS

You serve as the City Attorney for the City of San Marcos. You write concerning an upcoming event for a non-profit entity that seeks solicitations of monetary or non-monetary donations. There is an elected official who is “featured” in the non-profit’s solicitation letter for an annual fund-raising event. The non-profit has donors who have a history of contributing \$5,000 or more each calendar year even before an elected official was featured on the solicitations.

You understand that any new donors who respond to the solicitation would prompt behested payment reporting and assume that if a donor with a history of annual donations increased his or her donation by \$5,000 or more in response to the solicitation would also prompt reporting. You ask specifically whether a donor continues his or her habitual donation whether the amount would be reportable as a behested payment.

We note that the facts provided do not specifically describe the event, the official(s) involved, or the solicitation and ensuing donations. Accordingly we can only provide general guidance on your question.

## ANALYSIS

Payments made principally for legislative, governmental, or charitable purposes of \$5,000 or more (in the aggregate from the same source) in the same calendar year must be reported within 30 days when made at the behest of an elected officer. (Section 82015(b)(2)(B)(iii).) The purpose of the behested payment reporting requirement is to capture reporting for payments that are not direct contributions to elected officials, but payments in which the public has an interest given the officials’ role in the exchange. Regulation 18215.3(a) states that a payment is made at the behest of an elected officer when it is “made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of the elected officer.”

Regulation 18215.3 explains that if an elected official is “featured” (as defined, Regulation 18215.3(b)(1)) in a solicitation, then the responses to that solicitation are behested payments. Under your facts, the official is signing the solicitation letter, and is therefore featured. Whether the response to that solicitation is a behested payment depends on the circumstances of the payment. We have previously found that a payment in response to a solicitation is a behested payment if a reasonable person would conclude, based on the surrounding circumstances, that the payment had a connection to the solicitation. (*Holmes Peak* Advice Letter, No. A-12-094.)

Examples of such a connection would be if a donor returned a payment in the envelope provided in the solicitation letter or made a donation online using a link in an email. Temporal connections such as a donor making a \$5,000 payment within a month (for example) of receiving the solicitation letter might cause a reasonable person to view it as a behested payment.

Conversely, if the annual donor has a recurring donation of money or goods/services that is not renewed annually based on a solicitation letter, and is not related temporally or is automatically renewed, it would likely not be seen as a behested payment.

Under your facts, you have a donor or donors who have participated in an event for the non-profit in the past, and may participate again at the same level. The only difference would be that this year, an elected official is featured on the solicitation letter. In this case, because we cannot know or assign motivation to the donor, the reasonable person standard must apply. By determining the method of payment, whether it was temporally related to the solicitation, if the solicitation is mentioned in renewing the donation, and other similar factors, you can determine whether these recurring donations are “behested payments” under the Act. As stated above, if the donor sent in a contribution in response to the solicitation featuring an elected official, by using the reply envelope, reply email link, or otherwise, it would be considered a behested payment.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Heather M. Rowan  
Senior Counsel, Legal Division

HMR:lh