



FAIR POLITICAL PRACTICES COMMISSION

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October 14, 2013

Ernest J. Dronenburg, Jr.
Assessor – Recorder – County Clerk
1600 Pacific Highway, Suite 103
San Diego, CA 92101-2480

Re: Your Request for Informal Assistance
Our File No. I-13-123

Dear Mr. Dronenburg, Jr.:

This letter responds to your request for advice regarding the behested payment provisions of the Political Reform Act (the “Act”).¹ The Fair Political Practices Commission does not provide advice relating to past conduct. (Regulation 18329(b)(8)(A), enclosed.) Because your request likely involves facts regarding past conduct, we are treating it as a request for informal assistance, and are limiting such assistance to an explanation of the general terms of the Act relating to behested payments.²

QUESTION

What are the reporting requirements for legal services that were provided at no charge to an elected official in his official capacity?

CONCLUSION

Legal services provided for a governmental purpose at no cost to a governmental agency at your behest are a reportable behested payment if the value exceeds \$5,000 in a calendar year. A behested payment must be reported on Form 803 within 30 days.

¹ 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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3), (4).)

FACTS³

You are the County Clerk of San Diego County, an elected position. Part of your official duties include issuing marriage licenses. Following the United States' Supreme Court's decision in *Hollingsworth v. Perry*, 570 U. S. ____ (2013) and the Ninth Circuit Court of Appeal's lifting of its stay banning same sex marriages in California, which together effectively legalized same sex marriage in California, you requested legal representation by the county of San Diego for the purpose of limiting this ruling. Through the requested attorney, you intended to file a writ of mandamus against Governor Jerry Brown, and others, requesting that the California Supreme Court order the Governor not to enforce the State Registrar directive to issue marriage licenses to same sex couples. The county declined to provide legal representation.

You then arranged with the Freedom of Conscience Defense Fund ("the Fund") to provide all legal services at no charge to you or the County with the caveat that any final court award of attorney fees would go to the Fund. Charles S. LiMandri of the Fund, the attorney acting for you in your official capacity as petitioner, prepared the writ and all subsequent filings between July 19, 2013, and August 14, 2013. Before the California Supreme Court could rule on the writ, you voluntarily requested dismissal of writ of mandate, which the court granted on August 14, 2013. There was consequently no motion for attorney fees, nor was there any obligation for you or the County to pay the Fund or Mr. LiMandri for legal services rendered. The total worth of legal services provided, even though pro bono, was \$11,240.

ANALYSIS

Section 82015(b)(2)(B)(iii) states that if an individual or entity, at the behest of an elected officer, makes monetary or in-kind payments totaling \$5,000 or more in a calendar year is a contribution unless it is clear from the surrounding circumstance that the payment was made for purposes unrelated to his or her candidacy for office purposes (Section 82015 (b)(2)(B).) If the payment was made "principally for personal purposes" it "may be considered a gift." (Section 82015 (b)(2)(B)(i).) Finally, if the payment was not for personal purposes but was made principally for a legislative, governmental or charitable purpose, you must file a report detailing those payments with your agency within 30 days after reaching the \$5,000 threshold and each 30 days thereafter for additional donations by the same donor.

The report is filed on FPPC Form 803, entitled "Behested Payment Report." Thus, as a general rule, in instances when any local or state elected officer requests that a person make any type of payment to another person related to a legislative, governmental or charitable purpose, that payment is reportable by the officer on Form 803 once its value reaches \$5,000 or more. (Section 82015(b)(2)(B)(iii).) We attach for your review an advice letter with facts similar to your own that you might find instructive. (See *Totten* Advice Letter A-12-101, copy enclosed.)

³ These facts are based on your letter requesting advice as well as telephone conversations we had with you.

Behested payments, under the Act, refer to payments that are 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 . . . or his or her agent.” (Regulation 18215.3(a).) A payment made at the behest of a candidate is a contribution unless (as pertinent here) “it is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office.” A payment is presumed to be unrelated to a candidate’s candidacy for elective office if it is “made principally for legislative, governmental, or charitable purposes.”

The [in-kind] payment that you describe was apparently made in response to your request for legal services provided to you in your official capacity. The legal services were directed toward filing a writ of mandate to direct the Governor and others to apply the above-mentioned same sex marriage ruling on a limited basis and not to the county you represent as County Recorder. The behest was made in connection with your duties as a county recorder and to assist you in performing your governmental duties. (See *Steele* Advice Letter, A-06-091 [finding payments to a consultant to assist boardmember in her official capacities had a governmental purpose].)

As an elected officer, you are responsible for reporting to your agency on the Form 803 any services, including free legal services, provided to you for a governmental purpose if the value of the services reaches the \$5,000 annual threshold.

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:jgl