

November 26, 2013

Gerald O. Carden, County Counsel  
Placer County Counsel's Office  
175 Fulweiler Avenue  
Auburn, CA 95603

Re: Your Request for Advice  
**Our File No. A-13-149**

Dear Mr. Carden:

This letter responds to your request for advice on behalf of the Placer County Treasurer-Tax Collector, Jenine Windeshausen, regarding her duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when rendering advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that all advice is based only on the provisions of the Act. We offer no opinion on the application of other laws that may apply, such as laws governing the appropriate use of public funds.

### QUESTION

Does the Act prohibit or otherwise regulate the Placer County Treasurer-Tax Collector (hereafter the "Treasurer") if she appears, as part of her duties as Program Administrator of the mPOWER Placer public affairs campaign, in a 30 minute public affairs block of time purchased by the county on radio station KFBK? She will be interviewed about the mPOWER Placer Property Assessed Clean Energy (PACE) program and the interview will be played 24 times during the term of the contract (November 18, 2013 through February 9, 2014).

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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.

## CONCLUSION

Under the facts described below, the Act does not prohibit or otherwise regulate the County Treasurer if she appears in this county-purchased public affairs program.

## FACTS

The County of Placer operates a PACE Program under the name mPOWER Placer. The Board of Supervisors established the program in 2010, and authorized the elected Placer County Treasurer Tax-Collector to serve as its Program Administrator.

As part of the duties as Program Administrator, the Treasurer has recently contracted, on behalf of the County, to purchase an advertising package which includes a 30 minute public affairs block of time on KFBK, a Clear Channel radio station. The public service radio time is intended to raise public awareness of the mPOWER Placer PACE Program.

It is contemplated that the Treasurer will record the public affairs items in an interview format with one of the station's on-air talents to be broadcast, and it will be played 24 times during the term of the contract, from November 18, 2013 through February 9, 2014. The content of the interview will be entirely focused on the mPOWER Placer PACE program. The 30-minute block of time will be pre-recorded and edited.

The Treasurer is expected to be introduced during the program by name and by title as the Treasurer and mPOWER Placer Program Administrator. However, you noted the following:

- The block will not contain any reference to the position being an elected position or to the 2014 election cycle where the Treasurer will likely be seeking re-election. The communication will have nothing to do with a campaign for election of the Treasurer.
- The program will not include any communication that expressly advocates the election or defeat of any clearly identified candidate.
- The program will not contain express advocacy, will not refer to the Treasurer's or the opponent's candidacy, and will not solicit contributions.

## ANALYSIS

Your question raises two questions regarding the use of public funds in connection with the mPOWER broadcast.<sup>2</sup>

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<sup>2</sup> Because the radio station, KEBK, is merely broadcasting the program in exchange for the county's payment, the station's costs to produce the program are not for a "political purpose" and thus do not raise an issue as to whether they are making a campaign contribution or expenditure under the Act. (See Sections 82015(a) and 82025.)

## 1. Use of Public Funds

Two regulations interpreting Section 89001, limit the use of public funds for communications that may be considered campaign related or intended to benefit an incumbent elected official. These two sections are Regulation 18901 (Mass Mailings Sent at Public Expense) and Regulation 18901.1 (Campaign Related Mailings Sent at Public Expense).

However, both regulations apply only to the distribution of tangible items. Because the radio broadcast is not considered distribution of a tangible item, the Act's mass mailing restrictions under Section 89001 do not apply to these communications. (See *Chernabaeff* Advice Letter, No. I-09-022 and *Jacobs* Advice Letter, No. A-06-076.)

## 2. Campaign Reporting

A "contribution" is defined as "a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes." Where a payment is made at the behest of a candidate,<sup>3</sup> the payment is a contribution unless (1) "full and adequate consideration is received from the candidate," or (2) "it is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office." (Section 80215(b)(2).)<sup>4</sup>

However, when the payment is made by the candidate's own agency, as is the case under the facts here, there is no issue of a gift or behested payment under the Act. With regard to the issue of whether the use of county funds for the program that features the elected Treasurer-Tax Collector are campaign contributions under the Act, we look to the Act's definitions and regulations applicable to contributions by government agencies.

Regulation 18215(c)(4) provides that a payment made at the behest of a candidate, which is for a communication by the candidate or any other person that meets all of the following is not a contribution:

"(i) Does not contain express advocacy;

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<sup>3</sup> Under Sections 82007, 84214 and Regulation 18404(d), the Treasurer is a "candidate" under the Act as long as she remains in office. Regulation 18225.7 provides that a payment is "made at the behest of" an officer or candidate if the payment is made under the control or at the direction of, in cooperation, consultation, coordination, or in concert with, at the request or suggestion of, or with the express, prior consent of. Therefore, since the Treasurer is coordinating and cooperating with both the county and KFBK in producing the public service announcement, the county's payments for them is "at the behest" of the Treasurer.

<sup>4</sup> Where a payment is not a contribution, it may in some circumstances be considered a gift or behested payment. However, when the payment is made by the official's own agency, characterization of the payment in this manner is generally not an issue.

“(ii) Does not make reference to the candidate’s candidacy for elective office, the candidate’s election campaign, or the candidate’s or his or her opponent’s qualifications for office; and

“(iii) Does not solicit contributions to the candidate or to third persons for use in support of the candidate or in opposition to the candidate’s opponent. Under such circumstances, the payment for the broadcasts will not be considered to be made for a political purpose and are therefore permissible under the Act.”

In addition, Regulation 18420.1 elaborates on the issue of “express advocacy” when payments for communications are made by a government agency at the behest of a candidate. As pertinent to your question, Regulation 18420.1(b) provides that a payment made for a communication by a government agency at the behest of a candidate *does not* “expressly advocate” that candidate’s election or his or her opponent’s defeat *unless* the communication meets either of the following criteria:

“(1) The communication clearly constitutes what would be considered campaign material or activity.

“(2) The communication, because of its style, tenor and timing, can be reasonably characterized as campaign material.”

You noted that:

- The broadcast will not contain any reference to the Treasurer’s position being an elected position or to the 2014 election cycle where the Treasurer will likely be seeking re-election. The communication will have nothing to do with a campaign for election of the County Treasurer.
- The program will not include any communication that expressly advocates the election or defeat of any clearly identified candidate.
- The program will not contain express advocacy, will not make reference to the Treasurer’s candidacy, or opponents and will not solicit contributions.

Under these circumstances, we do not think the contents of the program would meet the criteria necessary to make the county’s payment for it a “contribution” under either Regulation 18215(c)(4) or Regulation 18420.1.

Please note that there are other bodies of law, separate and apart from the Act’s provisions, that may apply to telephone messages, text messaging, and electronic mail by the county if the messages relate to a campaign including, but not limited to Government Code Sections 8314 and 54964, and Penal Code Section 424, which proscribe the use of public

moneys for campaign-related activities by state and local governmental entities. (See also *Vargas v. Salinas* (2009) 92 Cal.4th 1 and *Stanson v. Mott* (1976) 17 Cal.3d 206.) However, we do not interpret or enforce these provisions and are merely bringing them to your attention in the event you have not already analyzed their applicability, if any.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: John W. Wallace  
Assistant General Counsel  
Legal Division

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