

March 27, 2014

Terri A. Griffin, City Clerk
City Clerk's Office
100 Santa Rosa Avenue, Room 10
Santa Rosa, CA 95404

Re: Your Request for Informal Assistance
Our File No. I-14-027

Dear Ms. Griffin:

This letter responds to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").¹

FACTS

The City of Santa Rosa is revising its campaign finance regulations, and you seek the FPPC's review of the draft ordinance for identification of any conflicts with the Political Reform Act pursuant to Sections 81013 and 81009.5.

Specifically, you request review of the ordinance's electronic filing provisions. In addition, you seek comment on the new robocall regulations and the FPPC's opinion as to whether the additional disclaimer requirements and robocall regulations contained in sections 10-32.190, 10-32.200, and 10-32.210(A) would apply to county or state committees that make independent expenditures in support of or opposition to City Council candidates or ballot measures. You assume the City's regulations imposing additional filing requirements for independent expenditures (sections 10-32.090, 10-32.180 and 10-32.210(B)) would not apply to such committees.

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.

ANALYSIS

Generally, the Act permits local governments to impose additional requirements relating to campaign finance and disclosure, so long as those requirements do not conflict with the Act. Section 81013 of the Act provides:

“Nothing in this title prevents the Legislature or any other state or local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with this title.”

As described in the Commission’s *Olson* Opinion, Section 81013 addresses generally the authority of local agencies to impose obligations beyond those set forth in the Act and makes clear that the Act is not intended to so occupy the field it regulates that local government agencies are powerless to enact additional regulations. (*In re Olson* (2001) 15 FPPC Ops. 13.)

However, the authority granted to local agencies is limited by Section 81009.5(b). That provision prohibits a local government agency from enacting any ordinance imposing filing requirements “additional to or different from” those set forth in Chapter 4 of the Act unless the additional or different filing requirements apply only to:

“[T]he candidates seeking election in that jurisdiction, their controlled committees or committees formed or existing primarily to support or oppose their candidacies, and to committees formed or existing primarily to support or oppose a candidate or to support or oppose the qualification of, or passage of, a local ballot measure which is being voted on only in that jurisdiction, and to city or county general purpose committees active only in that city or county, respectively.”

The purpose of this section is to provide a uniform approach to filing requirements for candidates and committees active throughout the state while simultaneously preserving flexibility for local jurisdictions to require additional or different filing requirements for committees active only in local elections. In addition, Section 85703 of the Act, added by Proposition 34, provides:

“Nothing in this act shall nullify contribution limitations or prohibitions of any local jurisdiction that apply to elections for local elective office, except that these limitations and prohibitions may not conflict with the provisions of Section 85312 [concerning member communications].”

As expressly provided, the City of Santa Rosa’s ordinance is intended to be a supplement to, and not conflict with, the Political Reform Act and its implementing regulations. The draft ordinance Section 10-32.020 provides, in part: “This chapter is intended to supplement the Political Reform Act of 1974 (California Government Code Sections 81000 *et seq.*).”

The Commission is empowered to give advice only with respect to the Act. (Section 83114.) In reviewing a local jurisdiction's ordinance, FPPC Legal Division staff may advise whether the ordinance does or does not conflict with the Act. The responsibility for interpretations as to the enforceability or constitutionality of a proposed local ordinance rests with that jurisdiction's city attorney or county counsel.

A. Local Electronic Filing Requirements.

Section 84615 of the Act permits cities and counties to mandate electronic filing of campaign reports for candidates and committees in their jurisdiction. These requirements may apply to candidates who raise or spend \$1,000 or more in a calendar year. (Section 84615.) Under Section 84615(a), an ordinance must be adopted by the local legislative body approving the use of electronic filing. The electronic filing system must be able to accept filings in a format that is compatible with the Secretary of State's electronic filing system, it must ensure the integrity of the data transmitted, it must issue to filers a confirmation that reports were received, and meet other requirements. (Sections 84615(b)-(d).) The system must permit filers to meet the requirement for signing statements under penalty of perjury, and must permit filers to complete and submit filings free of charge. (Sections 84615(g) and (h).) The local filing officer must make the electronically filed data available on the Internet in an easily understood format, free of charge. (Section 84615(f).)

The draft ordinance would require Santa Rosa City Council candidates to file electronically if they have received contributions or made expenditures of \$1,000 or more in connection with a city election. The ordinance states as follows:

"10-32.060 Electronic filing of campaign disclosure statements.

(A) Except as set forth in subsections (E) and (F), every City Council candidate, committee, or other person required to file a campaign statement, report, or other document with the City Clerk that has received contributions or made expenditures of \$1,000 or more in connection with a City election shall electronically file that campaign disclosure statement, report, or other document according to procedures established by the City Clerk.

(B) Any City Council candidate, committee, or other person not required to electronically file with the City Clerk pursuant to subsection (A) may do so voluntarily.

(C) A City Council candidate, committee, or other person that has electronically filed a campaign statement or report using the City Clerk's electronic filing system is not required to file a paper copy of that campaign statement or report with the City Clerk.

(D) A City Council candidate, committee, or other person required by California law to file (a) an original campaign statement, report, or other document with the Secretary of State or another elections official and (b) a copy of that statement with the City Clerk may elect to file the copy with the City Clerk either in paper format or by using the City Clerk's electronic filing system.

(E) If the City Clerk's electronic filing system is not capable of accepting a particular type of campaign statement, report, or other document, that campaign statement, report, or other document shall be filed in paper format with the City Clerk.

(F) Once a committee is subject to the electronic filing requirements imposed by this section, the committee shall remain subject to the electronic filing requirements, regardless of the amount of contributions received or expenditures made during each reporting period, until the committee terminates pursuant to this chapter and the Political Reform Act of 1974.

(G) This section shall become effective July 1, 2014.

The electronic filing provisions set forth in the draft ordinance meet the legal requirements of Section 84615 for a local jurisdiction to enact electronic filing. And we assume that Santa Rosa's electronic filing system will meet the technical requirements specified in Section 84615.

B. Additional Disclaimers on Campaign Communications Funded by Independent Expenditures.

The Santa Rosa ordinance calls for additional disclaimers on ads supporting or opposing city council candidates paid for by independent expenditures, including on-ad disclosure of the top three contributors to the committee placing the ad.

“10-32.190 Additional disclaimer requirements for campaign communications funded by independent expenditures.

(A) Any person or committee making an independent expenditure of five hundred dollars (\$500.00) or more shall include in any campaign communication produced by the expenditure, the words “Paid for by” followed by the full name, street address, and phone number of the person or committee making the independent expenditure and the name of at least one principal officer if made by a committee. Any campaign communication supporting or opposing a City Council candidate that is paid for by an independent expenditure must include a statement that it was not authorized by a candidate or a committee controlled by a candidate. Such disclaimers shall be printed in 12-point type or larger in any printed campaign communication, and prominently displayed or presented in a clear and conspicuous manner in any non-printed campaign communication, including, but not limited to, television ads, radio ads, Internet ads, and live telephone calls.

(B) Disclosure of Major Contributors. Any mailing financially supported by an independent expenditure shall indicate on the envelope containing the mailing, and on the mailing itself, the name of the committee making the independent expenditure, and the names of the top three financial contributors to the committee at the time the mailing is being prepared. This required disclaimer shall be in substantially the following form: “This information is paid for by

[Name of Committee] and has been supported by [names of top three contributors].”

The expanded disclaimer requirements that the ordinance requires for communications funded by independent expenditures are permissible under Section 81013, as they do not conflict with the Act or prevent anyone from complying with the Act, and they apply only to communications supporting or opposing candidates in local City of Santa Rosa elections.

We have a minor comment on the ordinance’s top three contributors disclaimer. The disclaimer requires the statement that “This information is paid for by [Name of Committee] and has been supported by [names of top three contributors].” However, you may have situations where a contributor supports the goals of a committee, but does not approve of a particular mailer. For these on-advertisement disclaimers, you may want to consider rephrasing the statement to say “This information is paid for by [Name of Committee] whose top three funders are [names of top three contributors].” The latter sentence is a factual statement and does not imply that a contributor has reviewed and supported a particular mailer.

C. Local Robocall Regulations.

The proposed Santa Rosa ordinance requires that recipients of robocalls have the ability to “opt-out” from receiving additional calls from a committee. The ordinance also proposes additional disclaimers for robocalls supporting or opposing council candidates paid for by independent expenditures.

“10-32.200 Local Robocall Regulations.

(A) Opt-out mechanism requirement. Any person or committee that authorizes or makes payment for a robocall shall require the person, committee, or vendor making the robocall to provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request for additional substantially similar calls made during the same calendar year. When the called person elects to opt out using such mechanism, the mechanism must automatically record the called person’s number to the caller’s do-not-call list and immediately terminate the call. When the recorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a telephone number that enables the called person to call back at a later time and opt out of receiving additional substantially similar robocalls during the same calendar year.

(B) Accurate caller identification information requirement. Any person or committee that authorizes or makes payment for a robocall shall be prohibited from allowing the person, committee or vendor who places the robocall to knowingly transmit misleading or inaccurate caller identification information.”

“10-32.210 Additional disclaimer and disclosure requirements for robocalls funded by independent expenditures.

(A) Robocall disclaimers. Any person or committee that authorizes or makes an independent expenditure in any amount for a robocall shall include in the robocall message the words “Paid for by” followed by the full name and telephone number of the person or committee authorizing or paying for the robocall. Any robocall supporting or opposing a City Council candidate that is paid for by an independent expenditure must include a statement that it was not authorized by a candidate or a committee controlled by a candidate. Such disclaimers shall be audible and played at the same volume and speed as the rest of the recorded telephone message.

(B) Robocall disclosure. Any person or committee that authorizes or makes an independent expenditure in any amount for a robocall shall report such independent expenditure by filing with the City Clerk a completed FPPC Form 496, to which is attached a transcript of the robocall message and a record of the number of calls placed for each message. Such report shall be filed with the City Clerk by personal delivery, guaranteed overnight mail, fax or email within 48 hours after the robocall has been made. The report shall include the name, address, and telephone number of the person or committee making the independent expenditure and the ballot measure(s) or name(s) of the candidate(s) whom the robocall message is intended to support or oppose. The report shall also include the information required to be provided in FPPC Form 496 or any successor form thereto.

(C) Any person or committee that authorizes or makes an independent expenditure in any amount for a robocall shall comply with all local robocall regulations set forth in section 10-32.200.”

Note that the FPPC can only advise as to whether the ordinance’s robocall provisions conflict with the Act; we do not advise as to the provisions’ viability under other state statutes or constitutional law. The additional disclaimer requirements and robocall regulations contained in ordinance sections 10-32.200, and 10-32.210(A) would apply to county or state committees that make independent expenditures in support of or opposition to City Council candidates or ballot measures in Santa Rosa. These additional requirements regarding campaign disclaimers do not conflict with the Act or prevent anyone from complying with the Act, and thus are permissible under Section 81013.

With respect to the robocall report in 10-32.210(B) requiring any person that makes an independent expenditure of any amount for a robocall to report the independent expenditure within 48 hours on Form 496 with an attached transcript of the robocall message and the number of calls placed, this constitutes an additional filing requirement under the Act. As such, we concur with your conclusion that because it imposes additional filing requirements, under Section 81009.5, the provision would not apply to county or state committees that make independent expenditures in support of or opposition to City Council candidates or ballot measures.

D. Additional Filing Requirements for Independent Expenditures.

The Santa Rosa ordinance also contains additional filing requirements for independent expenditures. Section 10-32.090 requires a “late formed committee”, i.e., any person or combination of persons who spends \$500 or more in the 16 days before the election supporting or opposing a City Council candidate or city ballot measure, to report such expenditures on a Form 496 24-hour report.

“10-32.090 Late formed committee; reporting of expenditures.

(A) Each late formed committee which prior to an election expends funds in the amount of five hundred dollars (\$500.00) or more, agrees, either orally or in writing, to expend funds in of the amount of five hundred dollars (\$500.00) or more, or receives goods or services valued in of the amount of five hundred dollars (\$500.00) or more in support of or in opposition to a City Council candidate or City ballot measure shall report each expenditure, agreement to make an expenditure, or receipt of goods and services.

(1) Such report shall be made on FPPC Form 496 (Late Independent Expenditure Report) and filed with the City Clerk pursuant to Section 10-32.060 within 24 hours of the time the expenditure is made or agreed to be made or the goods or services are received. An expenditure or agreement to make an expenditure or receipt of goods or services shall be reported in subsequent campaign statements without regard to reports filed pursuant to this section.”

In addition, the ordinance would require any person or committee that makes independent expenditures of \$500 or more during a calendar year supporting or opposing a City ballot measure or City Council candidate to file a supplemental independent expenditure report on Form 465.

“10-32.180 Notice of independent expenditures.

Any person or committee that makes independent expenditures which aggregate to five hundred dollars (\$500.00) or more during a calendar year in support or in opposition to any City ballot measure or City Council candidate shall deliver notice in writing of such independent expenditure, as well as the amount of such expenditure, and a detailed description of the use of such independent expenditure. Such notice shall be filed with the City Clerk pursuant to section 10-32.060 on FPPC Form 465 or any successor form thereto. The notice shall specifically state the ballot measure(s) or name(s) of the candidate(s) whom the independent expenditure is intended to support or oppose. The notice shall also include the information required to be provided in FPPC Form 465 or any successor form thereto and the email address, if any, of the person or committee making the independent expenditure. Each independent expenditure shall require delivery of a new notice. Such notice shall be filed for the same reporting periods and by the same deadlines as are expenditures by candidates pursuant to the California Political Reform Act and Section 10-32.070.”

We concur with your conclusion that the City ordinance's provisions imposing additional filing requirements for independent expenditures in Sections 10-32.090 and 10-32.180 would not apply to county or state committees that make independent expenditures in support of or opposition to City Council candidates or ballot measures. Under Section 81009.5, a local jurisdiction may not impose additional filing requirements unless they apply only to candidates seeking election in that jurisdiction, their controlled committees or committees primarily formed to support or oppose their candidacies, and to committees primarily formed to support or oppose the qualification or passage of a local ballot measure being voted on in that jurisdiction and to city or county general purpose committees active only in that city or county, respectively.

In addition, we note that the Political Reform Act and its regulations were amended in 2012 to require 24-hour reporting of independent expenditures on the Form 496 24-hour report within 90 days of the election, and to require the cumulative amount of independent expenditures made on a candidate or measure on that report. As such, the Form 465 Supplemental Independent Expenditures report is becoming duplicative. Accordingly, you may wish to consider deleting Section 10-32.180, if it does not significantly add to what is disclosed on the 24-hour independent expenditure reports. The intent of these two provisions of the ordinance seems to be to reduce the reporting threshold for independent expenditures in Santa Rosa from \$1,000 to \$500, so perhaps you could draft a simpler section just changing the threshold for independent expenditure reporting.

F. Committee Qualification Threshold.

Under the Act, the committee qualification threshold in Section 82013 is receiving contributions of \$1,000 or more in a calendar year from others, making \$1,000 or more in independent expenditures in a calendar year, or making contributions totaling \$10,000 or more in a calendar year. Under the Santa Rosa ordinance, in the definition of "late formed committee," the committee qualification threshold includes persons who have "solicited contributions, have received contributions *in any amount*, or have made any expenditures *in any amount* for the purpose of supporting or opposing a City Council candidate or City ballot measure" during the last 16 days before an election. (Emphasis added.) While this provision does not pose a conflict with the Political Reform Act, as we advised Santa Rosa in the *Choteau* Advice Letter, No. I-98-212, it does take the committee qualification threshold down very low. Reducing the committee qualification threshold too low may mean you are inadvertently imposing campaign reporting rules on speech that does not warrant inclusion in those rules. The Supreme Court case *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) is instructive.²

² In that case, Margaret McIntyre distributed leaflets on the car windshields of persons attending a public meeting at a middle school in Ohio expressing her opposition to a proposed school tax levy. Ms. McIntyre made the leaflets on her home computer and had them copied at a printer. Though she produced the leaflets independently, she signed them as the views of "Concerned Parents and Tax Payers." Mrs. McIntyre was subsequently fined \$100 for violating Section 3599.09(A) of the Ohio Elections Commission Code prohibiting the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature. The Court held that the freedom to publish anonymously is protected by the First Amendment and "extends beyond the literary realm to the advocacy of political causes." When a law burdens such anonymous speech, the Court applies "exacting scrutiny," upholding the restriction only if it is narrowly tailored to serve an overriding state interest.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jgl