

RAVI MEHTA
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

August 12, 1997

Robert Leidigh
Olson Hagel Fong Leidigh Waters & Fishburn LLP
555 Capitol Mall, Suite 1425
Sacramento, California 95814

**Re: Your Request for Advice
Our File No. A-97-329**

Dear Mr. Leidigh:

On June 13, 1997, you telephoned this office requesting "same-day" advice concerning the annual picnic for the state legislators and staff to be held on July 2, 1997; you represent and were calling on behalf of Cruz M. Bustamante, Speaker of the Assembly. Pursuant to your call, we provided you with advice, that day, over the telephone. As you are aware, advice requested and received from this office via the telephone is deemed informal assistance under Regulation 18329. Informal assistance carries no immunity for action under subdivision (c) of Regulation 18329.

On June 16, 1997, you sent a letter to this office, via facsimile transmission, requesting notification, no later than June 17, 1997, of any change in the advice given in our telephone conversation of June 13, 1997. You also requested that formal advice be given on this topic.

Telephone advice, by its very nature, is informal and is based on information and research which must be gathered in a relatively short period of time. For this reason we do not "confirm" telephone advice by way of a formal, written reply, especially when given less than twenty-four hours to do so. We will revisit advice given informally when formal advice is specifically requested and when we are provided the statutory amount of time to respond. With this procedure, as you know, there is no guarantee that the formal advice will match the informal assistance.

This letter will provide formal advice based on the facts set forth in your letter of June 16, 1997. As you know, in your letter (and in our telephone conversation) you indicated that the annual picnic would be occurring on July 2, 1997. Because you did not request formal advice sufficiently in advance of the date of the annual picnic (again, according to the dates prescribed by statute), we were prepared to issue a "no advice" letter based on the occurrence of past conduct. On or about July 22, 1997, while the "no advice" letter was in its final review process,

you spoke with Ms. Luisa Menchaca of this office and informed her that the annual picnic had **not** occurred on July 2nd and would be held as soon as the state budget was completed. Consequently, with this change of facts, a substantive letter can be, and is now being, provided to you. However, because of this recent information, a response to your letter of June 16, 1997, necessarily has been delayed. Any action taken by your client prior to receipt of this formal advice has no immunity.

As stated, this letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ Please bear in mind that nothing in this letter should be construed as evaluation of any conduct which may already have taken place. Further, this letter is based on the facts as they have been presented to us. The Commission does not act as the finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Can Speaker Bustamante host the annual picnic in the manner described below without receiving campaign contributions (which would be prohibited, since he is in the "blackout" period)?

2. Can Speaker Bustamante host the annual picnic in the manner described below without receiving "donations" to an "officeholder expense account" (which are limited to \$10,000 annually)?

3. Can Speaker Bustamante host the annual picnic in the manner described below without receiving a "gift" of the value of the donated items (given that the gift limit is \$290 annually)?

CONCLUSIONS

1. Yes.

2. Yes.

3. Yes. However, any food, refreshments or incidentals provided to the Speaker or his staff will be deemed to be gifts to him and his staff and would be subject to the \$290 gift limit.

FACTS

The legislative budget process is a difficult one and legislators and staff toil hard in their efforts to achieve a workable compromise. A tradition has developed at the Capitol that the

¹ Government Code Sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulation.

Speaker of the Assembly throws a picnic in Capitol Park around the conclusion of the budget process. It is a chance for legislators and staff to unwind and to dialogue in an informal atmosphere, away from the normal tensions inherent in the legislative process.

Former Speaker Willie Brown hosted these picnics for several years. Last year, Speaker Curt Pringle did likewise. It is a way for the leader of the Assembly to say "thanks" to all the participants for their hard work. This year, Speaker Cruz M. Bustamante is planning to host a similar picnic.

Typically, the food, beverages, labor and entertainment for the picnic are donated. There will be no payments of cash received by the Speaker or any political committee or the Rules Committee. Any vendors will be paid directly by the donors. Based upon past experience, the types of food served have ranged from hot dogs or burgers or chicken or possibly steaks.

It is anticipated that this year's fare will include chicken and hot dogs, but that will depend on the donors. Side dishes have included beans, salad, cole slaw, corn, bread, ice cream, candy, soft drinks, beer and wine. This year will likely be similar. The other necessities such as paper plates, napkins, plastic utensils, decorations, children's entertainment, BBQ pits and charcoal, bandstand, live band and T-shirts for staff who volunteer to help with the event, would also be donated. In the past, the California Conservation Corps has, at no charge, helped with cleaning up after the event and has provided recycle bins, and the Capitol grounds crew and the State Police have been on duty during the event. Again, it is anticipated this would be similarly handled this year.

The donations of items for the event (or of payments to be made directly to vendors for non-donated items) will be solicited by Assembly staff acting at the request of the Speaker. Based upon past experience, the total aggregate cost of all donated items and vendor-provided items is likely to be in the range of \$40,000. Based upon anticipated attendance (again, based upon past experience of 1,000 to 2,000) this would prorate to between \$20 and \$40 per attendee. Persons who may be solicited to provide goods or services may include lobbyist employers; others (such as the band) may not be lobbyist employers.

The event will not involve any campaign activity on behalf of any officeholder or candidate. There are no "tickets" for admission to the event. It is held outdoors in Capitol Park, a public space. In the past, passersby have availed themselves of the food, drink and entertainment. In some years, if the "Big 5" were still in budget negotiations, they have taken a break and joined the attendees.

ANALYSIS

Prior to the passage of Proposition 208 on November 5, 1996, payments received or behested by an elected official were considered campaign contributions, unless some exception applied. Section 82015 defines "contribution" as any payment, 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. A payment is made for political purposes if it is: (1) for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or (2) received by or made at the behest of a candidate. (Regulation 18215(a).)²

Section 82007 defines "candidate," in pertinent part, as any individual who is listed on the ballot for elective office. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to section 84214. Thus, legislators who are elected officials, such as the Speaker, are considered candidates under section 82007 and any payments they behest are presumed to be for political purposes and could be considered contributions. (*Danner* Advice Letter, A-96-056.) Members of the state Senate or Assembly and statewide officials are prohibited from soliciting contributions until twelve or six months before the next primary election. (Section 85305.)

We have also advised that when a cosponsor, such as a nonprofit entity, handles the specific arrangements concerning an event (e.g., the acquisition of food) and this is not performed in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of the official, then the payments would not be considered contributions to the official. (*Schmidt* Advice Letter, No. A-96-171; *Schmidt* Advice Letter, No. A-96-096; and *Wierbinski* Advice Letter, No. A-96-106.)

However, where an Assemblywoman arranged for door prizes for conference attendees, we advised that the costs of such items would be considered contributions to her under the Act. (*Richardson* Advice Letter, No. A-96-159.) Where refreshments included a closing dinner, served at a meeting and made available to attendees, participants and staff, we advised that non-Senate entities that paid for the cost of refreshments at the behest of the sponsoring Senators would be making contributions to each Senator, on a pro-rata basis. (*Schmidt* Advice Letter, No. A-96-072.) Finally, we have advised that where a public official's staff is involved in coordinating the payments, payments for food for attendees will be considered contributions to the official. (*Napolitano* Advice Letter, No. A-96-112.)

Where payments are not contributions, the payments may be considered gifts under some circumstances. (Section 82028.) Regulation 18941 provides that a gift is "received" or "accepted" when the recipient knows that he or she has either actual possession of the gift or takes any action exercising direction or control over the gift. Therefore, we have advised that if an Assembly Member does not receive or control food provided at an event, the food will not be considered a gift to the member. (*Wierbinski* Advice Letter, *supra*.)

² A candidate "behests" a contribution when the contribution 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." (Regulation 18225.7(a).)

When the voters enacted Proposition 208, the initiative established the option of noncampaign officeholder accounts. Section 85313 provides that an officeholder may accept contributions “for expenses related to assisting, serving, or communicating with constituents, or with carrying out the official duties of the elected officer, provided aggregate contributions to such a fund do not exceed ten thousand dollars (\$10,000) within any calendar year and that the expenditures are not made in connection with any campaign for elective office or ballot measure.”

In interpreting section 85313, we recently advised in the *Gallegos* Advice Letter, No. A-97-052, that a payment made in connection with a career fair for constituents would **not** result in campaign contributions or contributions to the officeholder account of a cosponsoring legislator. The event was being held for the purposes of assisting, serving, and communicating with his constituents; the event was being cosponsored by other parties in addition to himself; the official would not be receiving anything of value; and the payments by third parties were limited to providing food from a fast food restaurant and t-shirts to the attendees. Similarly, in a previous letter to you, we advised that donations, including food, to the “Recognition Day” event (an event organized by the Administration and Legislature to recognize the efforts of emergency workers and volunteers who assisted Californians in the floods of January 1997) would not be considered campaign contributions to the officeholders nor contributions to their officeholder accounts where the event is being held for the purposes of assisting, serving and communicating with constituents of the officeholders. (*Leidigh* Advice Letter, No. A-97-126.)

As noted in both the *Gallegos* and *Leidigh* Advice Letters, *supra*, we have not yet fully developed advice or rules regarding Proposition 208 officeholder accounts. For instance, regulation 18215(a)(1) provides one definition of a contribution: a payment made for the purpose of influencing an election, while section 85313 specifically prohibits officeholder contributions from being used for campaign purposes. However, section 85313(b) states, in relevant part: “[c]ontributions to an officeholder account shall not be considered campaign contributions.” Therefore, the Commission plans to adopt regulatory amendments that will more specifically regulate contributions made to officeholder accounts and payments to support community, legislative, and governmental public events cosponsored by officials. Please bear in mind that the final form of any adopted regulation may deviate significantly from current advice.

In the meantime, we will address existing law and advice as implicated by the specific facts presented by your letter.

The annual picnic is an event that is intended to act as a “thank-you” to all persons who participated and assisted the Legislature in adopting the state budget. Historically, the Speaker and his or her staff make the arrangements for the picnic requesting third parties to donate the food, labor and entertainment.

We believe the Speaker’s actions (and those of his staff) to organize this event are efforts to serve his constituency which is the state for purposes of this analysis. Accordingly, we conclude that the annual picnic is analogous to the Career Fair and the Recognition Day events

discussed in the *Gallegos* and *Leidigh* Advice Letters. Therefore, donations of food, beverages, labor, etc., to the annual picnic would not result in campaign contributions to the Speaker or contributions to his officeholder account. Any food, refreshments or incidentals provided to the Speaker or his staff will be deemed to be gifts to him and his staff and would be subject to the \$290 gift limit. (Section 89503; Regulation 18941.1.)

If you have any questions, please feel free to contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel

A handwritten signature in cursive script that reads "Lisa L. Ditora". The signature is written in black ink and ends with a horizontal line.

By: Lisa L. Ditora
Staff Counsel, Legal Division

SGC:LLD:jlw