



FAIR POLITICAL PRACTICES COMMISSION

February 20, 1998

Joyce M. Hicks
Assistant City Attorney
City of Oakland
One City Hall Plaza, 6th Floor
Oakland, California 94612

**Re: Your Request for Advice
Our File No. I-98-007**

Dear Ms. Hicks:

This letter is in response to your request for advice on behalf of the City of Oakland regarding the campaign provisions of the Political Reform Act (the "Act").¹ We are treating your request as one for informal assistance because it includes questions that are hypothetical in nature.² (Regulation 18329(b)(8)(D).)

QUESTIONS

1. Would the cost of a poll be considered a campaign expenditure by the City of Oakland if city staff commissions the poll to determine the feasibility of a ballot measure, presents the results to the city council, and the city council adopts a resolution to place the measure on the ballot?

2. May city officials use the results of the poll in informational material once the city council votes to place the measure on the ballot without the cost of the poll being characterized as a campaign expenditure?

3. May persons other than city officials use the results of the poll to campaign for the measure once the city council votes to place the measure on the ballot without the cost of the poll being characterized as a campaign expenditure?

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

² Informal assistance does not provide the requestor with the immunity provided by formal written advice. (Regulation 18329(c)(3).)

CONCLUSIONS

1. The cost of conducting the poll will not be a reportable expenditure prior to the city council taking action to place the measure on the ballot.
2. If Oakland uses the results of the poll in a communication, such as an advertising campaign, that expressly advocates the qualification or passage of a ballot measure, then the cost of conducting the survey, as well as the cost of making the communication, would be a reportable expenditure at the time the communication is distributed.
3. A payment made to or at the behest of a committee is properly characterized as a contribution rather than an expenditure. Providing survey data to a committee which either requests the information or uses the information for political purposes results in a nonmonetary contribution to the committee.

FACTS

You are requesting advice on behalf of the City of Oakland. The City of Oakland proposes to conduct a poll to determine whether it is feasible to create a public safety assessment district or impose a special tax. The purpose of the district or the tax would be to raise money to enhance police and fire services. The cost of the poll would exceed \$1,000. Pursuant to Proposition 218, local governments may not impose a special tax unless it is submitted to the voters and approved by a two-thirds vote. (Cal. Const. art XIII C, § 2, subd. (d).) In addition, Proposition 218 requires assessment districts to mail out ballots to property owners within the district to determine whether a majority protest exists against an assessment. (Cal. Const. art XIII D, § 5.) If there is a majority protest, the district may not levy the assessment.

ANALYSIS

Campaign Disclosure Obligations, Generally

Under the Act, if a state or local government agency makes payments for political purposes, the agency will have campaign reporting obligations if the agency qualifies as a committee.³ (Regulation 18420.) An entity qualifies as a committee, and is subject to the campaign reporting requirements of the Act, if it receives contributions, makes independent expenditures, or makes contributions over a specified threshold level. (Section 82013.)

If Oakland makes "independent expenditures" of \$1,000 or more in a calendar year, Oakland will be considered a committee and will be required to file campaign statements.

³ Please note that nothing in the Act should be construed to condone or authorize campaign-related activities by a state or local government agency. (See Comment to Regulation 18420.) Under many circumstances, such activities may be illegal. (See Cal. Pen. Code § 424; *Stanson v. Mott* (1976) 17 Cal.3d 206.)

(Section 82013(b).) An “independent expenditure” means an expenditure made in connection with a communication that expressly advocates the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected committee. (Section 82031.)

If Oakland makes “contributions” totaling \$10,000 or more in a calendar year to or at the behest of a committee, Oakland will be considered a major donor committee and must file campaign statements. (Section 82013(c).) A “contribution” is any monetary or nonmonetary payment made for political purposes for which full and adequate consideration is not received. (Section 82015(a); Regulation 18215(a).) A payment is made for political purposes if it is made to an organization formed or existing primarily for the purpose of influencing or attempting to influence the action of voters for or against the qualification or passage of any measure. (Section 82015(a)(2)(D).)

Question # 1

You would like to know whether the cost of a poll would be considered a campaign expenditure by the City of Oakland if city staff commissions the poll to determine the feasibility of a ballot measure, presents the results to the city council and the city council adopts a resolution to place the measure on the ballot.

We have advised that payments made by an individual or entity, other than a candidate or committee, in connection with activities that are exploratory in nature, such as taking a poll of the voters to determine what issues are considered significant, are not considered “expenditures.” (Powell Advice Letter, No. A-85-241.) We have also advised that a person’s obligation to report expenditures in support of or in opposition to a ballot measure does not begin until the matter becomes a measure. (*In re Fontana* (1976) 2 FPPC Ops. 25.) A proposal can become a measure in two different ways. First, an initiative, referendum, or recall becomes a measure when the proponents begin to circulate signature petitions to qualify the measure for the ballot. Second, a constitutional amendment or other proposition submitted to a popular vote by a legislative body becomes a measure when the legislative body places the proposal on the ballot.

Accordingly, the cost of the poll conducted to determine whether to place a measure on the ballot will not be a reportable expenditure prior to the city council taking action to place the measure on the ballot.

Question # 2

You would also like to know whether city officials may use the results of the poll in informational material once the city council votes to place the measure on the ballot without the cost of the poll being characterized as a campaign expenditure.

Although a person’s obligation to report expenditures in support of or in opposition to a ballot measure does not begin until the matter becomes a measure, we have advised that

expenditures made prior to that time may need to be recaptured on the first campaign report. (*Martini* Advice Letter, No. A-93-378.) In addition, we have advised that payments made to conduct a survey may become reportable expenditures if the subsequent use of the survey results would constitute an expenditure. (*Winkler* Advice Letter, No. A-86-035.)

An “expenditure” is defined as a payment made for political purposes. (Regulation 18225(a).) A payment is made for political purposes if it is for the purpose of influencing or attempting to influence the actions of the voters for or against the qualification of passage or any measure. (Regulation 18225(a)(1).) A payment made in connection with a communication is considered to be made for political purposes if the communication expressly advocates the qualification, passage or defeat of a clearly identified ballot measure. (Regulation 18225(b).)

Thus, if Oakland uses the results of the poll in a communication, such as an advertising campaign, that expressly advocates the qualification or passage of a ballot measure, then the cost of conducting the survey, as well as the cost of making the communication, would be a reportable expenditure at the time the communication is distributed. (*Pessner* Advice Letter, No. A-78-080.)

A communication expressly advocates the qualification, passage or defeat of a measure if it contains express words of advocacy (i.e., “vote for,” “support,” “cast your ballot,” “sign petitions for”). (Regulation 18225(b)(2).) However, express advocacy is not limited to communications using certain key phrases. A communication contains express advocacy if it “refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.” (Regulation 18225(b)(2); see *Federal Election Commission v. Furgatch* (9th Cir. 1987) 807 F.2d 857, 864 [interpreting a similar express advocacy standard].)

If the city prepares the informational material, you may send a copy of the proposed communication to the Commission, and we will advise you as to whether the communication contains express advocacy.

Question # 3

You would like to know whether persons other than city officials may use the results of the poll to campaign for the measure once the city council votes to place the measure on the ballot without the cost of the poll being characterized as a campaign expenditure by the city.

A payment made to or at the behest of a committee is properly characterized as a contribution rather than an expenditure. (Sections 82015, 82025; Regulations 18215, 18225.) We have previously advised that providing survey data to a committee which either requests the information or uses the information for political purposes results in a nonmonetary contribution to the committee. (*Polisner* Advice Letter, No. I-92-118.) The value of the contribution is the fair market value of the survey. The fair market value of the survey is the cost the committee would otherwise have to pay to purchase the information on the open market. (Section 82025.5.)

On the other hand, if a city conducts a poll and makes the results of the poll available to the public, either by presenting the information at a public meeting of the city council or by providing the data to a newspaper, such action would not result in a contribution. (*Winkler* Advice Letter, *supra*.) Similarly, simply providing the results to a committee that neither requests nor uses the results would not be considered a contribution.

Proposition 218--Mail-out Ballot and Protest Procedure

To raise funds for police and fire services, the City of Oakland may either create a public safety assessment district or impose a special tax. Pursuant to Proposition 218, assessment districts must mail out ballots to property owners within the district to determine whether a majority protest exists against an assessment. (Cal. Const. art XIII D, § 5.) If there is a majority protest, the district may not levy the assessment.

In the *Ewing* Advice Letter, No. A-97-061, we considered whether a group of persons who received \$1,000 or more to advocate a yes or no vote in the ballot and protest procedure was considered a "committee" with reporting obligations under the Act. We advised that the group of persons was not a committee because the mail-out ballot and protest procedure was neither an "election" nor "measure" as defined by the Act. (See Sections 82022, 82043.)

Accordingly, any payments made by the City of Oakland in connection with the mail-out ballot and protest procedure will not be considered expenditures or contributions.

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Julia Butcher
Staff Counsel, Legal Division

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