



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807
(916) 322-5660 • Fax (916) 322-0886

October 22, 1998

Kathryn Donovan
Pillsbury, Madison & Sutro
400 Capitol Mall, Suite 1700
Sacramento, California 95814-4419

**Re: Your Request for Advice
Our File No. A-98-249**

Dear Ms. Donovan:

This letter is in response to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ You are requesting advice on behalf of San Franciscans for Sensible Government ("SFSG"), a nonprofit mutual benefit corporation.

QUESTION

Will the SFSG incur disclosure obligations if it engages in an advertising campaign against high city taxes which includes messages about the voting patterns of a specific incumbent supervisor?

CONCLUSION

SFSG will incur disclosure obligations if it spends in excess of \$1,000 on its proposed brochure containing several messages about the specific incumbent supervisor. The communication in the brochure, taken as a whole and in context, unambiguously urges a particular result in an election and constitutes express advocacy. The other elements of SFSG's proposed advertising campaign do not contain express advocacy. Therefore, those elements would not trigger any disclosure obligations.

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

FACTS

SFSG has from time to time engaged in lobbying activities in the City and County of San Francisco. SFSG is not a committee, as that term is defined in the Political Reform Act.

SFSG is preparing to engage in an advertising campaign against high city taxes. This advertising campaign will be undertaken independently of any candidate or campaign committee. SFSG anticipates that it will spend in excess of \$1,000 on the advertising campaign. The advertising campaign will occur during portions of the months of October and November. The City and County of San Francisco will be holding an election on November 3, 1998. Each advertisement would refer to an incumbent member of the San Francisco Board of Supervisors whose name will appear on the November ballot. Each of the messages will refer to this same particular supervisor.

SFSG would like to use the following messages in radio spots for its advertising campaign. These messages will be aired randomly and separately from one another.

Message 1.

[Name of incumbent supervisor] has proposed more new taxes than any politician in San Francisco history. If you want to know more about high San Francisco taxes, call 1-800-hightax. San Franciscans for Sensible Government.

Message 2.

[Name of incumbent supervisor] tried to double the tax you pay when you sell your home. If you want to know more about San Francisco taxes, call 1-800-hightax. San Franciscans for Sensible Government.

Message 3.

No city in California has an income tax. [Name of incumbent supervisor] tried to create one in San Francisco. If you are concerned about high city taxes, call 1-800-hightax. San Franciscans for Sensible Government.

Message 4.

San Francisco already has the highest business tax in California. [Name of incumbent supervisor] tried to increase it by 30 percent. If you are concerned about high city taxes, call 1-800-hightax. San Franciscans for Sensible Government.

Message 5.

[Name of incumbent supervisor] has proposed \$86 million in new San Francisco taxes. If you think San Francisco taxes are too high, call 1-800-hightax for more information. San Franciscans for Sensible Government.

In addition to airing these messages as radio spots, SFSG would like to prepare a brochure that consists of all five messages. The brochure would be distributed through direct mail.

Calls to 1-800-hightax would be handled by a telephone operator or voicemail message. Callers would be offered a brochure that consists of a breakdown of the voting records of incumbent members of the San Francisco Board of Supervisors on tax issues. The brochure does not advocate a vote for or against any specific candidates or measures.

SFSG proposes the following scripts for the telephone operator or voicemail message answering calls to 1-800-hightax:

1. Telephone Operator Script

Operator: Thank you for calling San Franciscans for Sensible Government's San Francisco Tax Watch order line. May I have your name, address and telephone number so that we may send you our brochure?

Caller: (Answers No)

Operator: Thanks for calling, goodbye.

Caller: (Answers Yes)

Operator: Can you give me your name and spell it for me?

Operator: What is your telephone number?

(If caller questions need for telephone number)

Operator: We don't need the number to mail you a brochure, you don't have to provide it if you don't want to.

Operator: Where did you see our advertisement?

Caller: (Gives information)

Operator: Thank you for your time and interest. We'll be happy to mail you our brochure.

(End call)

If the caller asks the operator any questions, the operator is required to respond: "I'm sorry but I am not qualified to answer that question. You can call the San Franciscans for Sensible Government office number for more information at (xxx-xxx-x xxx)."

2. Voicemail Script

Voicemail message: "Welcome to the San Franciscans for Sensible Government information hotline. Founded in 1995, San Franciscans for Sensible Government is a coalition of 1,200 San Francisco small businesses, major employers, property owners and residents that tracks city government spending and tax increases. The organization does not advocate for or against passage of ballot measures or for the election or defeat of candidates for public office. If you would like copies of materials SFSG has sent out over the last several years, please leave your name, address and telephone number. Thank you."

You have asked whether SFSG will incur any disclosure obligations under the Act as a result of the above-described advertising campaign.

APPLICABLE LAW

A. California Law Regarding Express Advocacy

Under the Act, an organization is a committee and has disclosure obligations if it, among other things, makes independent expenditures totaling \$1,000 or more in a calendar year. (Section 82013(b).) An independent expenditure is defined in the Act as "an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate ... 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 candidate or committee." (Section 82031.)²

You indicate that the advertising campaign will be undertaken independently of any candidate or campaign committee. You also indicate that SFSG will spend in excess of \$1,000 on its proposed advertising campaign. Therefore, to determine whether SFSG will incur

² Regulation 18225 defines express advocacy. It provides in pertinent part: "A communication 'expressly advocates' the ... election or defeat of a candidate ... if it contains express words of advocacy such as "vote for," "defeat," "reject," "sign petitions for," or otherwise refers to a clearly identified candidate ... so that the communication taken as a whole unambiguously urges a particular result in an election." (Regulation 18225(b)(2).)

disclosure obligations as a result of this campaign, we must analyze whether the communications described by you expressly advocate the election or defeat of a clearly identified candidate or taken as a whole and in context, unambiguously urge a particular result in an election. We must first review the guiding federal principles that assist us in applying and interpreting Section 82031.

B. Federal Case Law

The United States Supreme Court formulated the express advocacy standard in *Buckley v. Valeo* (1976) 424 U.S. 1 to avoid problems of overbreadth in regulating speech, i.e., the application of reporting requirements to communications involving public issues that also happen to involve campaign issues. (*Buckley*, 424 U.S. at 80.) In *Buckley*, the court recognized that the distinction between the discussion of issues, and the advocacy of the election or defeat of a candidate who has taken a position on those issues (e.g., affirmative action, immigration reform, bilingual education), may often dissolve in practical application. This problem is pervasive because candidates campaign for office by associating themselves with public issues. Not only do candidates campaign on the basis of their positions on various issues, but the campaigns themselves generate issues of public interest.

In *Buckley*, the Court indicated that express advocacy will contain words of advocacy for election or defeat such as "vote for," "support," "reject," or "Smith for Congress." (Id. at 44, n. 52.) Subsequent court decisions have clarified the scope of express advocacy. The Court in *Federal Elections Commission v. Massachusetts Citizens for Life* (1986) 479 U.S. 238, indicated that a communication need not include the catch phrases listed in *Buckley* in order to be express advocacy. The fact that the message at issue was "marginally less direct" than such phrases did not change the fact that the "essential nature" of the communication went beyond issue discussion to express electoral advocacy." (Id. at 249.)

In a decision that has shaped California's law for the past decade, the federal appellate court governing California stated that the list in *Buckley* "does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." (*Federal Election Commission v. Furgatch* (9th Cir. 1987) 807 F.2d 857, 863, cert den., 484 U.S. 850 (1987).) To limit the concept of express advocacy to certain key phrases would preserve First Amendment rights "only at the expense of eviscerating" the Federal Election Campaign Act and would permit independent campaign spenders to "remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate." (Id.) Instead, to be express advocacy under the federal statute, the court opined that speech "must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." (Id. at 864.) The court also held that the subjective intent of the speaker alone is not determinative; what the readers or viewers understand is equally as significant. (Id. at 863.)

Courts that have been called upon to determine whether particular language is “express advocacy” have recognized that such an analysis is often a “close call.” The *Furgatch* court explained that “[b]ecause of the unique nature of the disputed speech, each case so depends upon its own facts as to be almost *sui generis*, offering limited guidance for subsequent decisions.” (*Furgatch* at 861.) With these principles in mind, we turn to the difficult question of whether the communications described above meet the express advocacy standard of Section 82031.

ANALYSIS

The Individual Messages for Radio

The radio spots described above will be aired randomly and separately from each other. Each message, standing alone, does not unambiguously urge a particular result in an election. The individual messages represent issue discussion as opposed to election- or candidate-oriented speech. We find that each individual message when taken as a whole and in context fails to meet the express advocacy standard.

Brochure Containing all Messages

We next analyze the SFSG brochure that contains several messages about the incumbent supervisor. The brochure would be distributed through direct mail. It would be mailed within days of the election. The brochure would state that this particular supervisor: 1) has proposed more new taxes than any politician in San Francisco history; 2) tried to double the tax you pay when you sell your home; 3) tried to create a city tax in San Francisco; 4) tried to increase business taxes by 30 percent; and 5) has proposed \$86 million in new San Francisco taxes.

We find that this communication, taken as a whole and in context, unambiguously urges a particular result in an election. The brochure contains a clear message advocating the defeat of this incumbent. The focus of this communication is no longer on the issue of taxes, but rather is focused on the incumbent, and his or her actions as a public officeholder. We have no doubt that this brochure asks the reader to vote against this incumbent supervisor, particularly given the proximity of this mailing to the election. The brochure meets the express advocacy standard set forth in Section 82031.

Phone Bank and Voicemail Scripts

We find that the phone bank script and voicemail script when taken as a whole and in context do not urge a particular result in an election.³ Therefore, neither script is considered express advocacy under the Act.

To summarize, we conclude that the brochure containing multiple messages about the incumbent supervisor contains express advocacy. Money expended on its production and distribution are, therefore, independent expenditures. If SFSG spends in excess of \$1,000 on this portion of its advertising campaign, it will incur disclosure obligations.

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

Sincerely,

Steven G. Churchwell
General Counsel

Deborah Allison
By: Deborah Allison *by/ Lynclay Doherly*
Staff Counsel, Legal Division

SGC:DLA:jlw

³ You have not provided a copy of the brochure that SFSG proposes to send to members of the public who call the tax hotline which is a separate brochure from the multiple messages brochure. You have not asked whether this brochure constitutes express advocacy. Accordingly, this letter does not comment on its contents. Please note that if this brochure does contain express advocacy, the costs associated with the phone bank and voicemail service may be considered to be part of the cost of the brochure.