FAIR POLITICAL PRACTICES COMMISSION
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March 9, 2005

Prasanna W. Rasiah, Deputy City Attorney
City of Berkeley
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704

Re: Your Request for Informal Assistance
Our File No. I-04-089

Dear Mr. Rasiah:

This letter is in response to your request on behalf of the City of Berkeley for informal assistance[1] regarding the campaign provisions of the Political Reform Act (the "Act").[2]

QUESTIONS

1. How can candidates comply with reporting requirements of both the Berkeley Election Reform Act ("BERA") and the Act when submitting campaign reports required by the Commission?

2. How can candidates subject to the BERA segregate officeholder expenditures and contributions received for officeholder expenditures from other campaign expenditures in the same bank account?

CONCLUSIONS

1. Such candidates must file campaign reports as required by the Commission, including summary and schedule pages. The Option A and Option B approaches (see "Facts") meant to comply with the BERA do not conflict with the Act and may be employed by candidates subject to the BERA. With regard to the Form 460 summary page, candidates subject to the BERA could submit a summary page as required by the Commission and additional summary pages that show the segregated officeholder

[1] Informal assistance does not confer the immunity provided by a Commission opinion or formal written advice. (Regulation 18329(c)(3), copy enclosed.)

[2] Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

information provided that these additional pages are clearly identified and do not create confusion. (See discussion.)

2. Pursuant to regulation 18329(c)(4)(F), because your question does not present a question under the Act, we are unable to provide informal assistance on this issue.[3]

FACTS

The BERA is an initiative ordinance passed by Berkeley's voters in 1974 which contains contribution limitations and disclosure requirements. The BERA makes a distinction between campaign and officeholder contributions. In addition, BERA defines a "contribution" more narrowly than the Act does:

> "'Contribution' means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, *made directly or indirectly in aid of or in opposition to the nomination or election of one or more candidates* or the qualification for the ballot or voter approval of one or more measures." (BMC section 2.12.100.) (Emphasis added.)

The Berkeley Office of the City Attorney previously concluded that officeholder contributions and expenditures were not subject to the BERA, so long as they were not used in aid of or in opposition to the nomination or election of a candidate. The BERA also limits candidate contributions to $250 and prohibits business entities from contributing to candidates altogether. (BMC sections 2.12.415; 2.12.440.) It also requires that each candidate have a single campaign checking account rather than multiple accounts as permitted by the Act. (BMC section 2.12.250A.)

The consequence of these differing rules is that a payment made to an elected official in Berkeley for officeholder expenses is considered a contribution under state law but is not considered a contribution under the BERA. Thus, it must be reported on campaign disclosure statements but is not subject to local contribution limitations, thereby creating the appearance of impropriety in the eyes of members of the public in Berkeley. In addition, because the BERA permits only a single bank account per candidate, campaign contributions for a future election and a prior election to retire campaign debt as well as officeholder contributions must all be deposited into the same bank account, resulting in potential accounting challenges.

You request assistance regarding how the Act and the BERA may be reconciled regarding the receipt and reporting of "officeholder" contributions so that locally elected officials may effectively manage and report both campaign and officeholder contributions

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[3] Please note that a candidate is in compliance with the Act so long as all expenses for a particular office are paid out of one bank account. Accordingly, except as provided in regulation 18524, the Commission does not advise on how to segregate funds within a bank account if such segregation is preferable for compliance with the local ordinance.

in such a way that the public will easily understand. You have proposed two possible options:

- Option A: Campaign statements could list officeholder contributions with a specific notation (such as "OH") to distinguish them from campaign contributions.

- Option B: A statement could include separate schedules for contributions, expenditures, and other financial activity that applied only to officeholder payments and expenditures.

You have also suggested that it would be helpful if a segregated officeholder fund could be tracked on the summary page of Form 460 in some manner.

ANALYSIS

Regulation 18525 addresses incumbent candidates' election expenses and officeholder expenses. Although regulation 18525(a) sets forth the kinds of expenditures that must be made from accounts for election to future office by incumbent elected officers, officeholder expenses are not listed among them. Subdivision (b) of that regulation deals with expenditures not specifically listed, and states, in pertinent part:

> "(b) An incumbent elected officer may make expenditures for purposes not enumerated in subdivision (a) from either the campaign bank account established pursuant to Government Code Section 85201 for election to the incumbent term of office or from a campaign bank account established pursuant to Government Code Section 85201 for election to a future term of office. This section shall not be construed to permit an incumbent elected officer to make expenditures from any campaign bank account for expenses other than those associated with his or her election to the specific office for which the account was established and expenses associated with holding that office."

Thus, pursuant to regulation 18525(b), an officeholder may use his campaign account to pay for officeholder expenses associated with holding office under the Act. (See also, *Hiltachk* Advice Letter, A-04-006; *Danner* Advice Letter, No. A-96-109.)

The Act requires committees, including candidate-controlled committees, to file campaign statements disclosing expenditures made by the committee. (Sections 84200, 84211(b).) "Expenditure" means:

> "… a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes. 'Expenditure' does not include a candidate's use of his or her own money to pay for either a filing fee for a declaration of candidacy or a candidate statement prepared pursuant to Section 13307 of the Elections Code…." (Section 82025.)

Consequently, officeholder expenses must be reported on candidate's campaign statement (Form 460) filed with the Commission.

Similarly, contributions received by a candidate-controlled committee must also be reported. (Section 84211(a).) "Contribution" means:

> "… 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…." (Section 82015.)

Pursuant to this definition, any monetary payments received by a candidate-controlled committee for the express purpose of paying for officeholder expenses are reportable contributions under the Act.

You have stated that, although a payment made to a candidate who is an elected official in Berkeley for officeholder expenses is a contribution under the Act, such a payment is not a contribution under the BERA, creating reporting difficulties for local candidates subject to BERA.

Your question relates to the imposition of local reporting requirements for purposes of complying with a local ordinance or resolution. The Commission is charged with interpreting and enforcing the provisions of the Act, and may provide advice only with respect to those provisions. (Section 83114.) While the interpretation of local resolutions is generally beyond the scope of Commission advice (see *Kunkel* Advice Letter, No. I-89-598; *Zundel* Advice Letter, No. I-94-111), the Act does contain a provision permitting the addition of local requirements as long as the requirements do not prevent a person from complying with the Act. (Section 81013.) Therefore, we provide assistance on Berkeley's local requirements only with regard to whether they are allowed under section 81013. (See *Dillon* Advice Letter, No. I-02-058.)

Under the Act, candidates must file the Form 460 required by the Commission, including summary and schedule pages. BERA also imposes filing requirements. To address the issue of differing rules, you proposed Option A and B, discussed below.

With regard to local requirements, we have previously advised that even if an ordinance is consistent with the Act, it is conceivable that under some circumstances a local requirement might be invalid under section 81013. (*Cederdahl* Advice Letter, No. I-92-467.) For example, we have advised that when local filing requirements become so burdensome or confusing that they seriously interfere with filings required by the Act, the state law preempts the local ordinance. (*Cederdahl, supra*; *Nielsen* Advice Letter, No. A-82-006.) However, this determination cannot be made absent a specific factual showing of substantial hardship or confusion caused by a particular requirement. (*Ibid.*)

Option A

You have proposed that campaign statements could identify contributions received and expenditures made for the purpose of paying for officeholder expenses with a specific notation (such as "OH") to distinguish them from other payments required to be reported by the BERA. This practice would not conflict with the Act. However, we recommend using a notation that is not easily confused with the existing Form 460 codes.

Option B

A statement could include separate schedules for contributions, expenditures, and other financial activity that applied only to contributions received or expenditures made for the purpose of paying for officeholder expenses. This practice would not conflict with the Act. A candidate may voluntarily submit two sets of one schedule, where one set lists items required to be reported by the Political Reform Act but excludes contributions and expenditures for the purpose of paying for officeholder expenses and where an additional set lists those officeholder items.

Summary Page

You have also suggested that it would be helpful if a segregated officeholder fund could be tracked on the summary page of Form 460. As you have observed in your incoming correspondence, there does not appear to be a logical place on the summary page to make notations relating to officeholder payments. However, candidates subject to the BERA could submit a summary page as required by the Commission and additional summary pages that show the segregated officeholder information provided that these additional pages are clearly identified and do not create confusion.

Finally, you seek advice regarding how funds may be segregated for purposes of the BERA. Because your question pertains to a local law, it does not present a question under the Act. Pursuant to regulation 18329(c)(4)(F) (enclosed), the Commission does not provide informal assistance in these circumstances. Responsibility for interpretation and enforcement of local provisions not covered by the Act rests with the City of Berkeley. (*Kunkel, supra.*)

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

Sincerely,

John W. Wallace
Assistant General Counsel

By: Natalie Bocanegra
Counsel, Legal Division

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