



FAIR POLITICAL PRACTICES COMMISSION

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August 23, 2004

Michael T. McKeeman
Seyfarth & Shaw, LLP
560 Mission Street, Suite 3100
San Francisco, CA 94105

**Re: Your Request for Advice
Our File No. A-04-171**

Dear Mr. McKeeman:

This letter is in response to your request on behalf of the Oakley Elementary School District for advice regarding the campaign reporting provisions of the Political Reform Act (the "Act").¹

QUESTION

You have enclosed two documents addressing the upcoming election featuring Measure X and ask whether they are subject to the provisions of the Act.

CONCLUSION

The documents do not contain "express advocacy" and therefore are not expenditures subject to regulation under the Act. We offer no opinion, however, as to other areas of the law which may govern the expenditure of District funds for this communication.

FACTS

You have forwarded a draft fact sheet with a draft voter registration cover letter. Oakley Elementary School District requests a written opinion on whether the documents expose the District to obligations under the Act. The documents will be created using District funds and will be sent home with students in the District. The documents have not been created at the request of any ballot measure committee formed to support or

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

oppose Measure X, nor was there coordination between the district and any such committee in the creation of the documents. The documents are quoted below, with bold text as in the original. The first document states:

Voter Registration Cover Letter

August 2004

Dear Parents:

On November 2, 2004, all of the registered voters in the Oakley Union School District will be asked to vote on Measure X. Measure X is a \$16.5 million general obligation bond to provide two additional elementary schools in Oakley and to modernize Oakley and Gehringer Elementary Schools. I have enclosed a Fact Sheet to provide more details about Measure X.

I am writing today to encourage every parent in the District to be registered to vote. Enclosed with this letter you will find a Voter Registration Form. If you are not registered to vote at your current address, please fill out the form and send it back to your child's school tomorrow. If you are already registered to vote, or you do not wish to register to vote, please return to [sic] form to school so it may be reused. I also encourage you to check with friends and neighbors to make sure they are registered to vote on November 2, 2004. If you need more forms, they are available at your child's school.

If you have any questions about Measure X, please call me at [xxx-xxxx].

Sincerely,

Richard Rogers
Superintendent

The second document, or fact sheet, states:

**Oakley Elementary School District
Measure X
Fact Sheet**

On Tuesday, November 2, 2004, the voters in the Oakley Elementary School District will be asked to consider Measure X. Measure X is a \$16.5 million school bond to relieve overcrowding in local elementary schools by building new schools. Measure X will also provide funds to renovate and modernize the two oldest schools in the District, Gehringer Elementary School and Oakley Elementary School.

Measure X funds will:

- Build two new elementary schools in Oakley.
- Renovation and Modernization [sic] at Oakley and Gehring Elementary Schools.
- Upgrade and modernize school libraries.
- Fix and replace leaky roofs.
- Improve handicapped access to schools.

Measure X will help to prevent overcrowding at local elementary schools. District enrollment has increased over the past five years and is expected to increase by an additional 22% over the next five years. Building new classrooms and schools will allow the district to continue to serve neighborhoods and minimize the distance students travel each day to get to school.

Measure X will provide local funds to enable the district to receive more state matching funds for new construction. By combining state and local bond funds with developer fees, the Oakley School District will be able to provide adequate classroom space for local students. Without local bond funds; [sic] state bond funds and developer fees alone will not build the classrooms needed in Oakley.

None of the money would be used for school administrator or teacher salaries. All of the money generated by Measure X would pay for school construction projects. The average yearly cost to property owners in the District would be \$30 per \$100,000 of assessed home valuation (not market value).

Construction costs cannot be paid for by lottery funds. State law (Government Code Section 8880.5) forbids the use of lottery funds for school construction.

An Independent Citizens Oversight Committee will monitor the use of all bond funds. By law, if Measure X is approved by local voters, the school board will appoint an Independent Citizens Oversight Committee to ensure bond proceeds are expended only on specific local school facilities.

For more information about Measure X, please call [same number as cover letter].

ANALYSIS

Your letter requests advice addressing the "validity" under the Act of two documents sought to be sent home with students from the Oakley Elementary School District. The first document is a cover letter notifying parents of an upcoming bond measure and encloses the second document, a fact sheet on the bond measure prepared by

the district. The cover letter also implores parents to register to vote, implores them to encourage others to vote, and encloses voter registration forms. Finally, the letter invites recipients to call the Superintendent, Richard Rogers, if they have any questions about Measure X, the bond measure.

The school district will qualify as an independent expenditure committee and incur reporting obligations if it makes independent expenditures of \$1,000 or more in a calendar year. (§ 82013, subd. (b).)² An "expenditure" is a payment made for political purposes. (§ 82025; Reg. 18225, subd. (a).) Therefore, a payment made by a non-political, educational organization, such as the school district, is usually not an expenditure. However, regulation 18225, which defines "expenditure," specifies that the term "expenditure" includes any payment made by a non-political organization for a communication that "expressly advocates the nomination, election or defeat of a clearly identified candidate, or the qualification, passage or defeat of a clearly identified ballot measure." (Regulation 18225, subd. (b).)

A communication "expressly advocates" the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if: (1) it contains express words of advocacy such as "vote for," "elect," "support," "cast your ballot," "vote against," "defeat," "reject," "sign petitions for," or (2) it otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election. (Reg. 18225, subd. (b)(2).)

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* at 80.) In *Buckley*, the court recognized that the distinction between the discussion of issues, and the advocacy of the enactment or defeat of ballot measures containing those issues (e.g., affirmative action, immigration reform, bilingual education) may often dissolve in practical application. This problem is also present in communications about candidates 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 of 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 Election Commission v. Massachusetts Citizens for Life* (1986) 479 U.S. 238, 249, 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

² Committees must disclose their monetary activities. (§§ 84200- 84216.5.) An individual or an organization becomes a "committee" by: (1) receiving contributions of \$1,000 or more in a calendar year; (2) making independent expenditures of \$1,000 or more in a calendar year; or (3) making contributions of \$10,000 or more in a calendar year. (§ 82013.) Thus, there are three types of committees under the Act: recipient committees, independent expenditure committees, and major donor committees.

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. (*Massachusetts Citizens for Life* at p. 249.)

The Ninth Circuit Court of Appeals and California courts have spoken since. (See *ACLU v. Heller* (9th Cir. 2004) 2004 U.S. App. LEXIS 16209; *California Pro-Life Council Inc., v. Getman* (9th Cir. 2003) 328 F.3d 1088; *Federal Election Commission v. Furgatch* (9th Cir. 1987) 807 F.2d 857, cert. den., 484 U.S. 850 (1987); *The Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal.App.4th 449 (2002, rev. den. 12/22/02); *Schroeder v. Irvine City Council et al*, 97 Cal.App. 4th 174 (rev. den. 6/26/02). We extrapolate three elements from the decisions:

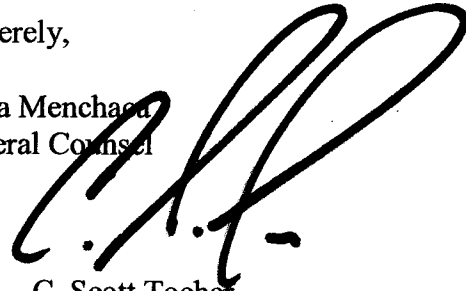
- A communication is “express” if its message is “unmistakable and unambiguous, suggestive of only one plausible meaning.”
- A communication “advocates” if it presents “a clear plea for action, and thus speech that is merely informative is not covered by the Act.”
- “It must be clear what action is advocated.” (*Furgatch, supra*, at p. 864.)

We turn now to the two documents you have submitted and examine them for words of “express advocacy” as interpreted by *Davis* and relevant decisions. While the references to the upcoming election are patent and the opinion of Measure X of the Superintendent apparent, we do not see within these documents the words of “express advocacy” as defined by the courts and found in regulation 18225, subdivision (b)(2). Specifically, the only expressed plea for action is found in the cover letter, which merely exhorts the reader to register to vote. No similar plea for action can be found in the “Fact Sheet,” which provides information about the impact of Measure X on the district and how the measure would be implemented. As a result, stripped of the informational material which does not rise to “express advocacy,” there is no clear plea for voters to vote for Measure X. Accordingly, the payment of funds for the creation and distribution of these documents do not constitute independent expenditures under the Act. We note, however, that the Commission could reevaluate in the future the impact of developments in the law and construe the regulation differently pursuant to controlling legal authority. At this time that judgment has not been made and so we have given the advice above. We encourage you to continue to consult with the Commission in the future regarding communications that may constitute “express advocacy.”

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

Sincerely,

Luisa Menchaca
General Counsel

A handwritten signature in black ink, appearing to read 'C. Scott Tocher', written over the typed name of the sender.

By: C. Scott Tocher
Counsel, Legal Division

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