

CITY OF OAKLAND
CITY ATTORNEY'S OFFICE
LEGAL OPINION

TO: REBECCA KAPLAN
City Council

JONATHAN STANLEY
Chairman, Public Ethics Commission

FROM: JOHN A. RUSSO
City Attorney
Office of the City Attorney

DATE: September 28, 2010

RE: **Independent expenditure committees and the expenditure ceiling for candidates – determining if the trigger amounts have been met**

INTRODUCTION

In light of the City Attorney's published formal opinion of September 2, 2010, candidate for Mayor Rebecca Kaplan has asked a series of questions concerning independent expenditure committees and the City's candidate expenditure ceilings.¹ The September 2, 2010, opinion provided the definition of "independent expenditure committee" under the Oakland Campaign Reform Act (OCRA) and discussed the independent expenditure trigger amounts for when candidate expenditure ceilings are lifted. (The opinion is available at <http://www.oaklandcityattorney.org/Ops-Reps/Ops-Reps.html>.) (OCRA is found at Oakland Municipal Code Chapter 3.12.)

¹ As the City of Oakland municipal corporation's legal officer, the City Attorney does not usually issue advice or opinions at the request of candidates in elections. However in this case, the Public Ethics Commission has asked similar questions. And on September 23, 2010, the Rules and Legislation Committee scheduled discussion of this topic as an urgency item its September 30, 2010, committee meeting. Moreover, the questions raise genuine legal questions that may affect the conduct and integrity of an ongoing City election, are matters of first impression, and may result in later questions by City elections officials. For these reasons, the City Attorney's Office has decided to exercise its discretion to issue this public opinion.

QUESTIONS

1) If an "independent expenditure committee" under OCRA has not produced any materials whatsoever that advocate for or against the election of specific candidate(s), what are the methods by which it will be determined whether the independent expenditure committee has triggered the lifting of the expenditure ceiling?

2) Who has the authority to decide whether independent expenditures have triggered the lifting of the expenditure ceilings? Is the decision to be made by the City Attorney's Office? The Public Ethics Commission? Does the mere declaration by an independent expenditure committee or a candidate lift the candidate expenditure ceiling?

3) What is the procedure to decide whether qualifying independent expenditures have occurred to lift the expenditure ceiling?

4) What are the criteria for determining whether the expenditure in question was actually "independent?" For example, would it be permitted for a candidate to set up a committee, raise funds for it, actively participate in its staff selection and other key decisions, have it spend funds attacking other elected officials, and then to claim that this was an "independent" expenditure such that the expenditure ceiling in the candidate's own election would be lifted?

5) What reports must an "independent expenditure committee" file to disclose its independent expenditures and where must they be filed?

SUMMARY CONCLUSIONS

1) The expenditure must be (A) "in connection with a communication"; and (B) that communication must be one 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 the election. An independent expenditure is made at the time the committee makes a payment in connection with the development, production, or dissemination of the communication, or when the communication is disseminated to the public, whichever is earlier. Accordingly, any calculation must consider payments made for future communications, not only what has been produced.

2) OCRA is silent on any process to lift the expenditure ceiling. OCRA provides for the lifting of the ceilings automatically if the trigger amount is exceeded. OCRA neither authorizes the City Attorney's Office or the Public Ethics Commission to make any determination that the expenditure ceiling should be lifted, nor does OCRA grant any official the power to lift the expenditure ceiling. A mere declaration by a candidate or committee does not lift the expenditure ceilings; it is the actual fact of the

independent expenditures exceeding the trigger amount that automatically lifts the ceiling.

3) See Answer to Question 2.

4) The definition of "independent expenditure" is in the state Political Reform Act. The expenditure must not be "made to or at the behest of the affected candidate or committee."

5) A committee must file Supplemental Independent Expenditure Reports with City of Oakland, City Clerk on October 5 and October 21. In addition, a committee is required to file Late Independent Expenditure Reports with the City Clerk during the 16 days immediately preceding the election for independent expenditures that cumulatively total \$1,000 or more to support or oppose a single candidate. Those reports must be filed within 24 hours of the expenditure.

ANALYSIS

Question 1: If an "independent expenditure committee" under OCRA has not produced any materials whatsoever that advocate for or against the election of specific candidate(s), what are the methods by which it will be determined whether the independent expenditure committee has triggered the lifting of the expenditure ceiling?

Under OCRA Section 3.12.220, the independent expenditure committee's spending must be "in" the relevant election.

§3.12.220 – Expenditure ceilings lifted.

If a candidate declines to accept expenditure ceilings and receives contributions or make qualified campaign expenditures equal to fifty (50) percent or more of the expenditure ceiling, or if an independent expenditure committee in the aggregate spends more than fifteen thousand dollars (\$15,000.00) on a District City Council or School Board election or seventy thousand dollars (\$70,000.00) in a City Attorney, Auditor, Councilmember-at-Large or Mayoral election, the applicable expenditure ceiling shall no longer be binding on any candidate running for the same office, and any candidate running for the same office who accepted expenditure ceilings shall be permitted to continue receiving contributions at the amounts set for such candidates in Sections 3.12.050C and 3.12.060C of this Act. The independent expenditure committee amounts of fifteen thousand dollars (\$15,000.00) and seventy thousand dollars (\$70,000.00) respectively, shall be increased in proportion to any increase of the voluntary expenditure ceiling amounts

resulting from an increase in the CPI as provided by Section 3.12.180 of this chapter. (OCRA Section 3.12.220, emphasis added.)²

The best guidance as to what kind of spending is "in" the election is found in the Political Reform Act's definition of "independent expenditure." Under the definition of "independent expenditure," the expenditure must be (1) "in connection with a communication"; and (2) the communication must be one that "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 the election. (Government Code Section 82031.)

§82031. Independent Expenditure.

"Independent expenditure" means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or 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 candidate or committee. (Government Code section 82031.)

The trigger amount in Section 3.12.220 is based on expenditures meeting this definition.

Note that a committee makes an independent expenditure when the committee makes a payment in connection with the development, production, or dissemination of the communication, or when the communication is disseminated to the public, whichever is earlier. However, a payment for a communication that is never disseminated to the public is not an independent expenditure. (Government Code Section 82025; Fair Political Practices Commission, p. 3-6, Manual 6, (October 2008).) Accordingly, any calculation must consider payments made for future communications, not only what has been produced.

Question 2: Who has the authority to decide whether independent expenditures have triggered the lifting of the expenditure ceilings? Is the decision to be made by the City Attorney's Office? The Public Ethics Commission? Does the mere declaration by an independent expenditure committee or a candidate lift the candidate expenditure ceiling?

OCRA is silent on any City process to lift the expenditure ceiling. Indeed, the ordinance provides for the lifting of the ceilings automatically if an independent expenditure committee exceeds the trigger amount. The ordinance states that "if an independent expenditure committee in the aggregate spends . . . seventy thousand

² Under the CPI increase formula of OCRA Section 3.12.200, the current trigger amount is \$95,000.

dollars (\$70,000.00) in a . . . Mayoral election, the applicable expenditure ceiling shall no longer be binding . . .”(OMC Section 3.12.220.)

OCRA neither authorizes the City Attorney's Office or the Public Ethics Commission to make any determination that the expenditure ceiling should be lifted, nor does OCRA grant any official the power to lift the expenditure ceiling. A mere declaration by a candidate or committee does not lift the expenditure ceiling; it is only the actual fact of the expenditures exceeding the trigger amount that automatically lifts the ceiling. Since the law does not provide for any preliminary determination, whether the expenditure ceiling was lifted would likely be a factual determination in a Public Ethics Commission investigation into whether a candidate breached the expenditure ceiling. That the expenditure ceiling was lifted would be a defense to an investigation. If the Public Ethics Commission investigation found that an independent expenditure committee exceeded the independent expenditure trigger amount of \$95,000, the PEC could not bring any enforcement investigation against any Mayoral candidate accused of exceeding the expenditure ceiling. This is because by law there would be no ceiling.

Question 3: What is the procedure to decide whether qualifying independent expenditures have occurred to lift the expenditure ceiling?

As discussed above, any fact finding and determination could occur in the context of an enforcement matter into whether a candidate had exceeded the expenditure ceilings.

Question 4: What are the criteria for determining whether the expenditure in question was actually "independent?" For example, would it be permitted for a candidate to set up a committee, raise funds for it, actively participate in its staff selection and other key decisions, have it spend funds attacking other elected officials, and then to claim that this was an "independent" expenditure such that the expenditure ceiling in the candidate's own election would be lifted?

The definition of "independent" expenditure is in the state Political Reform Act. The expenditure must not be "made to or at the behest of the affected candidate or committee." (Government Code section 82031, supra.) Whether the facts of a particular case met this definition would be up to the fact finder, the Public Ethics Commission.

Question 5: What reports must an "independent expenditure committee" file to disclose its independent expenditures and where must they be filed?

The state Political Reform Act governs the filings of reports disclosing independent expenditures. A committee must file Supplemental Independent Expenditure Reports with City of Oakland, City Clerk on October 5 and October 21 if the committee makes more than \$1,000 in independent expenditures during the pre-election reporting periods. (Government Code Section 84203.5.)

In addition, the Political Reform Act requires committees to file Late Independent Expenditure Reports with the City Clerk during the 16 days immediately preceding the election for independent expenditures that cumulatively total \$1,000 or more to support or oppose a single candidate. Those reports must be filed within 24 hours of the expenditure. (Government Code Section 84204.)

CONCLUSION

1) For an expenditure to count toward the calculation for the lifting of the ceilings, the expenditure must be (A) "in connection with a communication" and (B) that communication must "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 the election. But any calculation must consider payments made for future communications, not only what has been produced

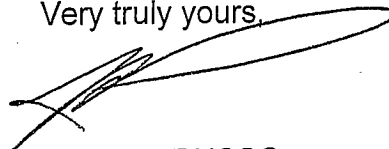
2) OCRA is silent on any process to lift the expenditure ceiling. OCRA provides for the lifting of the ceilings automatically if the trigger amount is exceeded. OCRA neither authorizes the City Attorney's Office or the Public Ethics Commission to make any determination that the expenditure ceiling should be lifted, nor does OCRA grant any official the power to lift the expenditure ceiling. A mere declaration by a candidate or committee does not lift the expenditure ceilings; it is the actual fact of the independent expenditures exceeding the trigger amount that automatically lifts the ceiling.

3) See Answer to Question 2.

4) For the expenditure to be independent, it must not be "made to or at the behest of the affected candidate or committee."

5) A committee must file Supplemental Independent Expenditure Reports with City of Oakland, City Clerk by October 5 and October 21. In addition, a committee must file Late Independent Expenditure Reports with the City Clerk during the 16 days immediately preceding the election. Those reports must be filed within 24 hours of the expenditure.

Very truly yours,



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