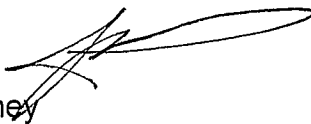


CITY OF OAKLAND
CITY ATTORNEY'S OFFICE

LEGAL OPINION

TO: DANIEL D. PURNELL
Executive Director
Public Ethics Commission

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



DATE: September 2, 2010

RE: Independent expenditure committees and the expenditure ceiling for candidates

INTRODUCTION

In 1999, the Oakland City Council approved Ordinance 12158, The City of Oakland Campaign Reform Act (OCRA), with the purposes of placing limitations on contributions made to political campaigns, establishing expenditure ceilings for certain campaigns, and providing for enforcement procedures. (OCRA is found at Oakland Municipal Code Chapter 3.12.)

You have asked this Office to opine as to the provisions concerning independent expenditure committees and the expenditure ceiling for candidates.

QUESTIONS

1) What is an "independent expenditure committee" as used in OCRA Section 3.12.220? Does it refer to a committee defined under Government Code Section 82013(a) and/or Section 82013(b)?

2) What does the phrase "in the aggregate" mean as used in OCRA Section 3.12.220 with respect to whether an independent expenditure committee has spent more than the specified threshold limits in any given election for City office?

3) What is the proper methodology for adjusting the current threshold limits in Section 3.12.220 (i.e., \$15,000 and \$70,000) by the increase in the CPI when the

existing cross-reference to Section 3.12.180 is inapplicable? Should the method contained in Section 3.12.200 be used instead?

4) Do the existing cross references to Sections 3.12.050C and 3.12.060C in Section 3.12.220 actually refer to existing Sections 3.12.050B and 3.12.060B, respectively?

SUMMARY CONCLUSIONS

1) The term "independent expenditure committee" as used in OCRA Section 3.12.220 means any "committee" that makes \$1,000 or more in "independent expenditures." It includes committees as defined by Government Code Subsections 82013(a) and 82013(b).

2) The phrase "in the aggregate" means the total amount that an independent expenditure committee has spent on a single race, regardless of how many separate payments were made by that independent expenditure committee in support of or opposed to a single candidate.

3) The existing reference to Section 3.12.180 is a citation error. The City Council intended the threshold limits in Section 3.12.220 to be increased by the method described in Section 3.12.200.

4) The existing reference to Sections 3.12.050(C) and 3.12.060(C) in Section 3.12.220 is a renumbering error. Reference should have been made to Sections 3.12.050(B) and 3.12.060(B), respectively.

ANALYSIS

Question 1: What is an "independent expenditure committee" as used in OCRA Section 3.12.220? Does it refer to a committee defined under Government Code Section 82013(a) and/or Section 82013(b)?

OCRA Has Not Defined "Independent Expenditure Committee"

Because there is no definition in OCRA of "independent expenditure committee," the Executive Director of the PEC has asked the City Attorney's Office for an interpretation. OCRA provides that Oakland's ceilings on campaign expenditures lift when an "independent expenditure committee" spends more than certain trigger amounts set in the ordinance. The triggers are \$15,000 for district elections and \$70,000 in City-wide elections. (The City Clerk adjusts the amounts annually based on changes in the Consumer Price Index.)

3.12.220 - Expenditure ceilings lifted.

If a candidate declines to accept expenditure ceilings and receives contributions or makes 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. (Emphasis added.)

OCRA refers to the definitions of the state Political Reform Act, "Government Code Sections 81000 et seq., as they appear in 1998 . . ." for interpretations of other terms.

3.12.040 - Interpretation of this Act.

Unless the term is specifically defined in this Act or the contrary is stated or clearly appears from the context, the definitions set forth in Government Code Sections 81000 et seq., as they appear in 1998 shall govern the interpretation of this Act.

The State Government Code Implies That An Independent Expenditure Committee Is A Committee That Makes Independent Expenditures.

The 1998 state Political Reform Act itself does not have a definition of "independent expenditure committee." It does have definitions for "independent expenditure" and "committee."

"Independent expenditure" means an expenditure made by any person, including a payment of public moneys by a state or local government agency, 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.)

A "committee" is any person or combination of persons who either (a) receives \$1,000 in contributions, (b) makes independent expenditures of \$1,000, or (c) makes political contributions of \$10,000 or more.

"Committee" means any person or combination of persons who directly or indirectly does any of the following:

- (a) Receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year;
- (b) Makes independent expenditures totaling one thousand dollars (\$1,000) or more in a calendar year; or
- (c) Makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees. (Government Code Section 82013.)

Putting these two sections together, under the text of the 1998 state Political Reform Act, an "independent expenditure committee" should mean any "committee," defined by Government Code 82013 (a),(b), or (c), that makes "independent expenditures."

Proposition 208 And FPPC Staff's 1998 Usage Of "Independent Expenditure Committee"

As mentioned above, the terms of OCRA are to be interpreted with the definitions of the 1998 Political Reform Act. (OCRA Section 3.12.040.) The City Council adopted OCRA in 1999. Although it has been amended since then, in 1998 the Political Reform Act included provisions – very similar to those in OCRA -- for expenditure limits and the lifting of expenditure limits when an "independent expenditure committee" spends more than a set amount in independent expenditures. The people of the state of California enacted Government Code Section 85404 and 85500 through Proposition 208. Section 85404(c) reads:

If an independent expenditure committee or committees in the aggregate spend in support or opposition to a candidate for statewide office more than 25 percent of the applicable voluntary expenditure ceiling, the voluntary expenditure ceiling shall be increased two times the limit specified in Section 85400 for any candidate running for the same statewide office. Any candidate running for that office who originally accepted voluntary expenditure ceilings shall be exempt from the limits that political party committees may contribute to a candidate in Section 85304, and such candidates shall be permitted to continue receiving contributions at the amounts set forth in subdivision (c) of Section 85402. (Former Government Code Section 85404(c), emphasis added.)

Proposition 208 did not define the term "independent expenditure committee." However, FPPC staff, in interpreting Proposition 208 in 1997, referenced Government Code Section 85500(b) and used the term "independent expenditure committee" to include any committee that made \$1,000 or more in independent expenditures. ("[I]ndependent expenditure committee as defined by Government Code Section 85500(b)." Frommer Advice Letter, Cal. FPPC Adv. A-97-297. (July 1, 1997).) Section 85500(b) states:

(b) Notwithstanding subdivision (d) of Section 85301, any committee that makes independent expenditures of one thousand dollars (\$1,000) or more supporting or opposing a candidate shall not accept any contribution in excess of two hundred fifty dollars (\$250) per election." (former Government Code Section 85500(b). (Emphasis added.)

See also Shaw Advice Letter, Cal. FPPC Adv. A-97-066 (April 2, 1997), see also usage in Lapsley Advice Letter, Cal. FPPC Adv. A-97-014 A-97-014 (February 05, 1997); Johnson Advice Letter Cal. FPPC Adv. I-97-427 (September 30, 1997). Thus the FPPC staff used this shorthand in a context, similar to Oakland's current context, Proposition 208's expenditure ceilings (former Government Code Section 85404(d)) as well on limits on contributions to "any committee that makes independent expenditures" (former Government Code Section 85500(b)).

In January 1998, a federal district court enjoined enforcement of Proposition 208. In the 2000 November election, while the case was on appeal, the voters adopted Proposition 34, which repealed Proposition 208. The repeal swept away the state's expenditure limit along with the trigger involving "independent expenditure committees." However, as of 1998, the time period referenced for definitional guidance in Oakland's OCRA, an "independent expenditure committee" under state law was any committee that made \$1,000 or more in independent expenditures.

The Fair Political Practices Commission Staff's Current Narrower Usage Is Inapplicable to OCRA

The FPPC's staff usage of the term "independent expenditure committee" has varied over time. Currently FPPC staff uses the term "independent expenditure committee" narrowly. This narrow usage is not applicable to OCRA.

According to FPPC Manual 6, "Independent expenditure committees do not receive contributions for the purpose of making expenditures supporting or opposing California candidates or ballot measures." FPPC Manual 6. In other words, under current FPPC staff usage, any committee that receives political contributions is not an "independent expenditure committee." This usage is based on the staff's delineation between three subsections of Government Code Section 82013, *supra*, which defines

committees. See also Garcia Advice Letter, Cal. FPPC Adv. I-00-198 (September 6, 2000.)

In FPPC staff short hand, committees that receive political contributions (Section 82013(a)) are exclusively "recipient committees, committees that only make independent expenditures (Section 82103(b)) are "independent expenditure committees," and committees that only give \$10,000 or more in political contributions (Section 82013(c)) are exclusively "major donor committees." Mark Advice Letter, Cal. FPPC Adv. I-93-139 (May 20, 1993).

The term "independent expenditure committee" is also not defined by the current Political Reform Act, or its interpreting regulations. Moreover, current state law does not have expenditure limits as Oakland does now. OCRA, by its own terms, looks to earlier state law for definitional guidance. For these reasons, the FPPC current staff usage is not applicable to OCRA. Given the history of FPPC's staff usage in the similar context in 1998 and the text of the former Political Reform Act, we conclude that "independent expenditure committee" in OCRA means any "committee" that makes \$1,000 or more in independent expenditures. This includes committees as defined by Government Code Subsections 82013(a) and 82013(b).

Question 2: What does the phrase "in the aggregate" mean as used in OCRA Section 3.12.220 with respect to determining whether an independent expenditure committee has spent more than the specified threshold limits in any given election for City office?

OCRA Section 3.12.220 ("Expenditure ceilings lifted") provides in relevant part:

If a candidate declines to accept expenditure ceilings and receives contributions or makes 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) ***on a District City Council or School Board election*** or seventy thousand dollars (\$70,000) ***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. (Emphasis added.)

The phrase "in the aggregate" as used in this section means the total amount that an independent expenditure committee has spent on a single race, regardless of how many separate payments the independent expenditure committee made on that race.

The goal of statutory construction is to ascertain and effectuate the legislature's intent, looking first to the words of the statute, giving them their usual and ordinary meaning. People v. Jefferson, 21 Cal. 4th 86 (1999); Palmer v. GTE California, Inc., 30 Cal. 4th 1265 (2003); People v. Cheek, 25 Cal.4th 894 (2001). The American Heritage

Dictionary of Idioms defines "in the aggregate" as "considered as a whole." The American Heritage Dictionary of the English Language defines "aggregate" as "A total considered with reference to its constituent parts." The usual and ordinary meaning of the phrase "in the aggregate," therefore, must mean to apply to all of the various payments that an independent expenditure committee has made.

The ordinance applies this trigger to expenditures made in any single race, not the total in all City races. This is because the ordinance specifically uses the word "or" between the different kinds of races, and not the word "and." It would not make sense to lift the ceiling for the mayoral race, for example, when an independent expenditure committee has spent \$70,000 on the City Auditor and the Councilmember-at-Large races. Thus, the ordinance provides that the expenditure ceiling is lifted when an independent expenditure committee spends \$15,000 on a district or school board race (but not both), or spends \$70,000 on one of the citywide races, not all of them.

Moreover, the trigger in Section 3.12.220 is calculated by looking at all payments made by an independent expenditure committee in an election or race, and not just payments supporting or opposing a single candidate or campaign in that race. The language reads:

...if an independent expenditure committee in the aggregate spends more than...\$15,000 on a District City Council or School Board **election** or... \$70,000 in a City Attorney, Auditor, Councilmember-at-Large or Mayoral **election**. (Emphasis added.)

It does not read:

...if an independent expenditure committee in the aggregate spends more than...\$15,000 on a District City Council or School Board **candidate** or... \$70,000 in a City Attorney, Auditor, Councilmember-at-Large or Mayoral **candidate** . (Emphasis added.)

If the City Council intended for the expenditure ceiling to be lifted when its payments made to a single candidate or campaign surpassed the limit, it would have used the latter language.

In sum, if there are multiple candidates in the race for City Councilmember At Large, for example, an independent expenditure committee's payments supporting or opposing any, some or all the candidates in the City Councilmember At Large race would be totaled to determine whether the \$70,000 trigger has been met for that race. When the trigger amount is hit by any single "independent expenditure committee," the expenditure limit is lifted for all candidates in the race. OCRA Section 3.12.220 ("the applicable expenditure ceiling shall no longer be binding on any candidate running for the same office).

Question 3: What is the proper methodology for adjusting the current threshold limits in Section 3.12.220 (i.e., \$15,000 and \$70,000) by the increase in the CPI when the existing cross-reference to Section 3.12.180 is inapplicable? Should the method contained in Section 3.12.200 be used instead?

Section 3.12.220 (“Expenditure ceilings lifted”) provides, in relevant part:

The independent expenditure committee amounts of fifteen thousand dollars (\$15,000) and seventy thousand dollars (\$70,000) respectively, shall be increased in proportion to any increase of the voluntary expenditure ceiling amounts resulting from an increase in the CPI [Consumer Price Index] as provided by Section 3.12.180 of this chapter. (Emphasis added.)

The reference to Section 3.12.180 (“Volunteer services exemption”) is clearly in error, because it is not the section that refers to calculating “any increase of the voluntary expenditure ceiling amounts.”

The ordinance states that trigger amount shall “be increased in proportion to any increase of the voluntary expenditure ceiling amounts.” Section 3.12.200 is the section that refers to increase of “the voluntary expenditure ceiling amounts.”

If context or other considerations show erroneous use of one word for another, substitution of which will make statute harmonious, courts may correct the error.

“[I]f the context of the statute or other considerations therefrom arising show that the word has been by the Legislature erroneously used for another word which, when substituted for the mischievous one, will make the statute harmonious in all its parts and with the obvious purpose and intent of the statute so that its enforcement will be in full accord with such purpose and intent, then the courts may correct the error.” (Meier v. Superior Court of California, in and for Stanislaus County, 67 Cal.App. 135, 140 (1924).)

The reference to Section 3.12.180 is clearly in error and contradicts the remainder of the ordinance. Section 3.12.180 is not the section that refers to increase of the voluntary expenditure ceiling amounts, 3.12.200 is. The City Council intended to increase the current trigger amounts in Section 3.12.220 by the method described in Section 3.12.200, the section that increases voluntary expenditure ceiling amounts.

Question 4: Do the existing cross references to Sections 3.12.050(C) and 3.12.060(C) in Section 3.12.220 actually refer to existing Sections 3.12.050(B) and 3.12.060(B), respectively?

Section 3.12.220 (“Expenditure ceilings lifted”) provides, in relevant part:

...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 above-referenced sections, Sections 3.12.050C and 3.12.060C, do not set campaign contribution amounts, so they are clearly referenced in error. OCRA does set forth two campaign contribution limits for candidates who accept the expenditure ceilings, \$100 from individuals (Section 3.12.050B), and \$1,000 from broad-based political committees (Section 3.12.060B).

Ordinance 12207 C.M.S., approved by the City Council on February 8, 2000, repealed earlier versions of Sections 3.12.050(B) and 3.12.060(B), and provided, "Previous sections 3.12.050(C) and 3.12.060(C) shall be renumbered as sections 3.12.050(B) and 3.12.060(B), respectively." While Ordinance 12207 C.M.S. renumbered these sections, it failed to amend the other cross-references to these sections, found in Section 3.12.12.220, as well as in two other places: Sections 3.12.190 and 3.13.070(D). This led to the confusion underlying your Question #4, and leads us to the conclusion that the existing cross-reference to Sections 3.12.050C and 3.12.060C in Section 3.12.220 actually refer to existing Sections 3.12.050B and 3.12.060B, respectively.

CONCLUSION

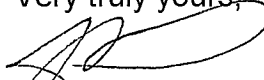
The term "independent expenditure committee" as used in OCRA Section 3.12.220 means any "committee" that makes \$1,000 or more in "independent expenditures." It includes committees as defined by Government Code Subsections 82013(a) and 82013(b).

The phrase "in the aggregate" means the total amount that an independent expenditure committee has spent on a single race, regardless of how many separate payments were made by that independent expenditure committee in support of or opposed to a single candidate.

The existing reference to Section 3.12.180 is a citation error. The City Council intended the threshold limits in Section 3.12.220 to be increased by the method described in Section 3.12.200.

The existing reference to Sections 3.12.050(C) and 3.12.060(C) in Section 3.12.220 is renumbering error. Reference should have been made to Sections 3.12.050(B) and 3.12.060(B), respectively.

Very truly yours,



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