

CITY OF OAKLAND
PUBLIC ETHICS COMMISSION
LOBBYIST REGISTRATION AND CAMPAIGN FINANCE COMMITTEE
SPECIAL MEETING
One Frank Ogawa Plaza
Tuesday, August 22, 2006
Building Bridges Room, 3rd Floor
7:00 p.m.
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Committee Membership: Commissioners Sukey Wilder, Ralph Kanz, Douglas Love

Staff Members: Commission Staff:
Daniel Purnell, Executive Director
City Attorney Representative:
Mark Morodomi, Deputy City Attorney

AGENDA

- A. Roll Call And Determination Of Quorum
- B. Approval of Minutes From The July 12, 2006, Meeting
- C. Open Forum
- D. A Staff Report And Action To Be Taken Regarding Requests To Develop A Proposal For Regulating Automated Telephone Calls During Local Elections
- E. Review And Discussion Of The Oakland Campaign Reform Act (OCRA)

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The meeting will adjourn upon the completion of the Committee's business.

You may speak on any item appearing on the agenda; however, you must fill out a Speaker's Card and give it to a representative of the Public Ethics Commission. All speakers will be allotted three minutes or less unless the Chairperson allots additional time.

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Approved for Distribution

Date

Minutes of Meeting
PUBLIC ETHICS COMMISSION
LOBBYIST REGISTRATION AND CAMPAIGN FINANCE COMMITTEE
SPECIAL MEETING
Wednesday, July 12, 2006
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DRAFT

Commission Membership: Sukey Wilder (Chair), Ralph Kanz, Douglas Love

Staff Members: Commission Staff:
Daniel Purnell, Executive Director
City Attorney Representative:
Mark Morodomi, Deputy City Attorney

MINUTES OF MEETING

A. Roll Call And Determination Of Quorum

The meeting was called to order at 7:00 p.m.
Members present: Commissioners Wilder, Kanz, and Love

Staff present: Daniel Purnell, Executive Director

B. Open Forum

There were no speakers.

C. Review And Discussion Of The Oakland Campaign Reform Act (OCRA)

The Committee continued its review and discussion of the Oakland Campaign Reform Act.

The meeting adjourned at 9:05 p.m.

CITY OF OAKLAND
Public Ethics Commission

Caryn Bortnick, *Chair*
Sukey Wilder, *Vice-Chair*
Ralph Kanz
Fredericka (Ricka) L. White
Curtis Below
Douglas Love
John Hancock



Daniel D. Purnell, Executive Director

One Frank Ogawa Plaza, 4th Floor, Oakland, CA 94612 (510) 238-3593 Fax: (510) 238-3315

TO: Committee on Lobbyist Registration and Campaign Finance
FROM: Daniel Purnell
DATE: August 22, 2006

RE: A Report And Action To Be Taken Regarding Requests To Develop A Proposal For Regulating Automated Telephone Calls During Local Elections

At its regular meeting of July 10, 2006, the Public Ethics Commission directed staff to research and report back with a proposal to regulate automated telephone calls during local elections. As staff reported in its July 10 memorandum, Commission staff received a number of calls from people complaining about the use of recorded telephone messages during the June, 2006, election. People objected either to the content of the calls or the fact that some calls did not disclose who sent them.

The following is an outline and discussion of issues pertaining to the regulation of automated telephone calls in local elections. The Committee will have to determine what elements it would like to see included in any proposed ordinance so that staff can draft specific language for future Commission and City Council consideration. As a reference, staff has included a comparative matrix of existing laws from San Diego, San Francisco and Los Angeles. These cities currently regulate automated telephone calls during local campaigns.

I. REGULATING AUTOMATED TELEPHONE CALLS

A. Who Should Be Regulated?

San Francisco regulates automated telephone calls made by any "person." The Los Angeles ordinance applies to any "person or committee." In both San Francisco and Los

Angeles, the term "person" is defined broadly to include individuals as well as fictitious entities such as corporations and political committees. San Diego's ordinance narrowly limits its application to "candidates or committees." By limiting its application to "candidates or committees," San Diego's ordinance appears to exempt from its regulation persons who do not meet the legal definition of a "candidate" or "committee."

- The Committee should determine whether any ordinance regulating automated telephone calls should apply broadly to all "persons," or narrowly to a smaller class of persons such as candidates or committees.

B. What Is Regulated? [distribution and financial thresholds]

Both San Diego and San Francisco regulate recorded telephone calls made to 500 or more individuals or households. San Diego includes in its 500-call threshold "live" as well as recorded telephone communications. Los Angeles uses a "cost of production" threshold: It regulates recorded telephone calls if they constitute "independent expenditures" costing \$1,000 or more. Under the Los Angeles approach, the number of recorded calls is irrelevant so long as the telephone calls 1) constitute an independent expenditure, and 2) cost more than \$1,000 to produce.

If the Committee is interested in recommending a "number-of-calls" threshold, it can use the same 500-call threshold in San Francisco and San Diego or select some other number. (For purposes of scale, there are approximately 187,669 registered voters in Oakland. Five hundred calls thus represents a relatively small percentage of the total potential targeted audience, even for a district City Council race.) If the Committee is interested in establishing a "cost of production" threshold, it can similarly select the \$1,000 Los Angeles threshold or some other number. This other number would depend largely on how the "cost of production" is defined.

- The Committee should determine whether to propose a "number of calls" or "cost of production" threshold.

C. What Is Regulated? [content of the communication]

San Francisco regulates all automated telephone messages made to 500 or more individuals or households. The ordinance does not limit itself to political communications, even though the ordinance exists within its local campaign code. The San Diego ordinance applies to live or recorded telephone calls "for the purpose of supporting or opposing a city candidate or city measure." The Los Angeles ordinance applies to "independent expenditures of \$1,000 or more."

An "independent expenditure" is defined under California law as 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." Under this definition, the Los

Angeles ordinance would apparently not apply to a recorded telephone call produced and distributed by a candidate supporting his or her own candidacy or opposing a challenger's. The Los Angeles ordinance would also not apply to a recorded telephone call that does not "expressly advocate the election or defeat" of a clearly identified candidate or measure.

Participants in campaign activities can avoid regulations pertaining to "independent expenditures" by omitting express references to the election or defeat of a candidate or measure. These so-called "election communications" can still have the desired effect of influencing voter behavior by linking a candidate or measure to a favorable or unfavorable set of allegations. (For example, a telephone message urging voters to "vote against Jane Doe on Election Day" could meet the definition of an independent expenditure because it expressly advocates her defeat. A telephone message stating that "Jane Doe is a terrorist" would not meet the definition of an independent expenditure because it does not mention her defeat on Election Day, even though the message is highly unfavorable and may influence people to vote against her.)

Some of the recorded telephone calls distributed during the last election in Oakland reportedly did not expressly advocate the election or defeat of particular candidates, but mentioned their names in the context of an unfavorable set of allegations. In the absence of an expressed advocacy for or against a candidate's election, the mere unfavorable mention of a candidate's name would likely keep similar telephone messages outside the Los Angeles ordinance and perhaps outside San Diego's ordinance. As stated above, the San Francisco language appears to regulate **any** telephone communication, but it may be too broadly worded to enforce effectively.

Since political speech enjoys a high degree of protection under the First Amendment, care must be taken in drafting laws that regulate communications that mention the names of candidates but do not expressly advocate their election or defeat. In 2003, the U.S. Supreme Court upheld a federal law requiring certain financial disclosures for broadcast communications that identify a candidate, but do not expressly advocate his or her election or defeat and which communications are broadcast within a certain period or time before the election. The significance of this decision is that local governments may stand on firmer legal ground when attempting to regulate automated telephone calls even if the message does not meet the definition of "independent expenditure."

- The Committee should determine whether any proposed ordinance should regulate those communications that qualify as independent expenditures, or regulate a broader class of so-called "election communications."

D. What Kind Of Regulation?

The San Diego ordinance contains the following requirements for automated telephone calls:

1. The call must state the name of each candidate or committee paying for the communication

2. The statement must be "clearly audible" and at the same volume and speed as the rest of the message
3. The candidate or committee must retain a transcript of the communication and a record of the number of calls for each message

The San Francisco ordinance contains the following requirements:

1. The call must state who was paying for the communication
2. The statement must be "clearly audible" and at the same volume and speed as the rest of the message
3. The candidate or committee must retain a transcript of the communication and a record of the number of calls for each message

The Los Angeles ordinance contains the following requirements:

1. The communication must disclose the identity of any donor who contributes \$25,000 or more within a 6 month period before the communication (no acronyms allowed)

The fundamental burden imposed by the above ordinances is some form of disclosure to identify within the recorded message who is financially responsible for its broadcast. This can be done in a number of ways, such as: 1) requiring the message to identify the political committee paying for the message, 2) requiring any political committee to disclose its FPPC identification number, and/or 3) if the person or persons paying for the message is not a political committee, then the name and address of the person(s) contributing the largest sum(s) for its broadcast. The Committee should also consider whether to recommend that a record of the transcript and the number of calls made using it are retained for a minimum period of time and/or filed with the City within a specific period after its broadcast.

1. Additional Regulation

At the July 10, 2006, meeting, Commissioner Hancock apprised the Commission that a number of state and federal agencies currently regulate recorded, commercial telephone solicitations. Among the provisions currently in effect and which might be applicable to a local ordinance are requirements that:

- a) all identifications come before any recorded message, or perhaps after a brief greeting; and
- b) a live operator precede any pre-recorded message.

- The Committee should determine what should be required of those who make recorded telephone communications.

E. Exceptions

Of the three ordinances reviewed, only San Diego provided exceptions to its regulation. The San Diego disclosure regulations do not apply to: 1) candidates personally engaging in a live telephone communication; and 2) a so-called "member communication" directed solely to members, employees or shareholders of an organization that is not a political party. Since the San Diego ordinance applies to "live" telephone messages as well as recorded ones, the first exception seeks to distinguish between conversations directly with the candidate as opposed to those made by paid or volunteer staff. The second exception has its origins in state Proposition 34, which effectively excluded from campaign financial reports any payments made to communicate with members of an organization (except political parties) for the support of, or opposition to, a candidate or ballot measure.

- The Committee should consider whether to except these or any other types of recorded telephone communications from the proposed ordinance.

F. Effect Of Violation

San Diego, San Francisco and Los Angeles have local ethics commissions that are authorized to impose administrative fines of up to \$5,000 for violations of local campaign laws, including the provisions pertaining to automated telephone calls. The Oakland City Charter limits the maximum amount of fines for violation of any ordinance to \$1,000.00.

- The Committee should consider whether to recommend that the Ethics Commission be authorized to impose fines of up to \$1,000 per violation of the proposed ordinance regulating automated telephone calls.

II. SUMMARY

Commission staff recommends that the Committee determine which of the above elements it would like staff to include in a draft ordinance regulating automated telephone calls for further consideration by the Committee, the Commission and members of the public.

Respectfully submitted,

Daniel D. Purnell
Executive Director

	SAN DIEGO	SAN FRANCISCO
PERSONS REGULATED?	candidates or committees	any person
WHAT IS REGULATED? <i>(distribution or financial triggers)</i>	live or recorded telephone communications with 500+ individuals or households	recorded telephone messages distributed to 500+ individuals or households
WHAT IS REGULATED? <i>(content of the communication)</i>	communications "for the purpose of supporting or opposing a city candidate or city measure"	all recorded telephone messages (regardless of content)
WHAT KIND OF REGULATION?	requires a statement that the communication is made "on behalf of" the name of each candidate or committee paying for the communication	requires a statement that the communication was paid for by the name of the person paying for the message
OTHER INCIDENTS OF REGULATION?	statement must be "clearly audible" and the same volume and speed as the rest of the message	statement must be audible and the same volume and speed as the rest of the communication
RETENTION OR FILING OF TRANSCRIPT OR OTHER DATA?	candidate or committee paying for the communication shall retain a transcript of the communication and a record of the number of calls for each message	person paying for the communication shall retain a transcript of the communication and a record of the number of calls for each message
EXCEPTIONS TO REGULATION?	disclosure requirements shall not apply to 1) a candidate personally engaging in a live telephone communication and 2) communications directed solely to members, employees or shareholders of an organization that is not a political party	no exceptions