
City Attorney

City of Oakland
Public Ethics Commission
January 8, 2007

In the Matter of)
) Complaint No. 06-20
)

Judy Cox filed Complaint No. 06-20 on November 1, 2006.

I. SUMMARY OF COMPLAINT

Ms. Cox filed Complaint No. 06-20 alleging that Larry Levine and Associates (aka "Voter Information Guide") failed to make required filings in connection with a mass mailing sent to Oakland voters prior to the November 6, 2006, election. Ms. Cox also alleges that the mailing itself violates Oakland's False Endorsement In Campaign Literature Act. **Attachment 1.**

II. FACTUAL BACKGROUND

Ms. Cox alleges that during the week of October 23, 2006, Oakland residents received a piece of campaign mail entitled "Voter Information Guide For Democrats." The mailer lists a variety of state and local candidates and ballot measures with recommendations on how to vote for them. **Attachment 2.** The mailer lists only one Oakland candidate, Courtney Ruby, and only one Oakland ballot measure, Measure O. (Courtney Ruby was a successful candidate for the Office of City Auditor. Measure O was adopted to provide for Instant Runoff Voting in future Oakland elections.) The remainder of the mailer is devoted to state and county candidates and measures. The mailer contains the following language regarding Measure O:

City of Oakland
NO on Measure "O"
Protect your right to hear the candidates on the issues before you vote.

Ms. Cox alleges that the party responsible for the mailer failed to file any disclosure statements with the FPPC (Fair Political Practices Commission), Secretary of State, or the Public Ethics Commission. As of October 29, 2006, she alleges that there was no record or disclosure regarding the mailer. Ms. Cox also alleged during a conversation with Commission staff that the mailer possibly violates provisions of Oakland's False Endorsement In Campaign Literature Act ("False Endorsement Act") on grounds that it misrepresents the position of local Democratic organizations regarding Instant Runoff Voting.

III. ANALYSIS

A. Alleged Failure To File Campaign Statements

The party responsible for the mailer, the Voter Information Guide, is a "slate mailer organization" based in Southern California and currently registered with the Secretary of State. Government Code Section 82048.4 defines a "slate mailer organization" as any person who 1) produces one or more "slate mailers" and exercises control over the selection of the candidates or measures supported or opposed in the mailers, and 2) receives or is promised \$500 in a calendar year to produce such mailers. A "slate mailer" is basically defined as more than 200 "substantially similar" pieces of mail which supports or opposes a total of four or more candidates or ballot measures.

Slate mailer organizations are required to file campaign statements in connection with their activities. Contrary to Ms. Cox's assertion, there is no state or local requirement for slate mailer organizations to file campaign statements with either the Public Ethics Commission or the FPPC. Depending on what candidates or ballot measures a slate mailer organization supports or opposes, the slate mailer must file with the Secretary of State and/or a local jurisdiction. Those organizations that produce slate mailers involving state candidates or measures, or local candidates and measures being voted on in more than one county, are required to file with the Secretary of State and the county in which the organization is domiciled. There is no requirement for a slate mailer organization to file locally with a city clerk unless it produces slate mailers used exclusively within that city.

Commission staff reviewed a November 6, 2006, letter from Larry Levine and the electronic filings for the Voter Information Guide on the Secretary of State's website. **Attachment 3.** The campaign statement for the pre-election reporting period of October 1, 2006, through October 21, 2006, was electronically filed on October 22, 2006. The filing reveals that the Voter Information Guide received \$1,500 from Ms. Ruby on October 16, 2006. The asterisk printed by her name in the mailer indicates that she paid to have her name included. Because the Voter Information Guide produces slate mailers supporting or opposing measures appearing in a state election (as this mailer did), the Voter Information Guide was not required to file locally with the Office of the City Clerk.

B. Allegations Of False Endorsement

O.M.C. Section 3.14.040 provides that no person, within 45 days of an election, shall "knowingly pay for, direct, supervise or authorize the distribution of any campaign literature that contains a false endorsement if such person acts either with knowledge of the falsity of the endorsement or with reckless disregard for the truth or falsity of the endorsement."

A "false endorsement" is defined as the "use of any statement, signature, name, photograph or image which represents as a fact that a person supports or opposes a candidate or measure when the person does not." [Section 3.14.030(C)]

"Campaign literature" includes "sample ballots, press releases, flyers, door hangars, pamphlets, brochures, cards or billboards distributed with the intent of influencing the outcome of an election." [Section 3.14.030(A)]

The Commission is authorized to "receive complaints alleging a violation of the Act for the purpose of determining whether to request the District Attorney to prosecute an alleged misdemeanor violation. No complaint alleging a violation of this Act may be filed with the Public Ethics Commission until after the election in which the alleged false endorsement was distributed. Nothing in this section is intended to create a mandatory duty for the Public Ethics Commission to request prosecution of an alleged misdemeanor violation." [Section 3.14.060(B)]

Ms. Cox asserts that the slate mailer violates Oakland's False Endorsement Act because it implies that the Democratic Party opposed Measure O when in fact local Democratic clubs actually supported it. She cites language in the mailer which states:

"EVALUATIONS & RECOMMENDATIONS BY: ***The Democratic Party***, American Government Professors, Firefighters, Environmental Leaders, Nurses and Health Care Workers, Classroom Teachers, Law Enforcement Officers, and Senior Citizen Organizations" (Emphasis added.)

Based on the above law, a violation of Oakland's False Endorsement Act would be possible only if:

- The statement that the Democratic Party provided "evaluations & recommendations" for the positions presented in the mailer represents as a fact that the Democratic Party opposed Measure O when in fact it did not; ***and***
 - Larry Levine and Associates paid for, directed, supervised or authorized the distribution of the slate mailer with knowledge that the statement was false or acted with reckless disregard for the statement's truth or falsity.
- 1) **Do statements contained in the mailer represent as a fact that the Democratic Party opposed Measure O when it fact it did not?**

Commission staff reviewed the websites of local Democratic Party organizations. The East Bay Young Democrats, the MGO Democratic Club and the Alameda County Democratic Party all had expressly endorsed Measure O or the idea of

Instant Runoff Voting in Oakland. **Attachment 4.** It does not appear that the state Democratic Party took any position on Measure O.

Commission staff spoke with David Krute, a representative from the Voter Information Guide. He said that he and his partner David Levine personally chose to oppose Measure O without a request or encouragement from any other person or party. He said his organization found out about Measure O as a result of a canvass they always perform after the filing deadlines in each of California's 58 counties. He claimed that his partner and he independently opposed Instant Runoff Voting in their slate mailings during the San Francisco election several years ago. While he claims his slate mail organization tends to support Democratic candidates and ballot measures, he said he had "no idea" what the Democratic Party's position was regarding Measure O. He emphasized that language contained in the mailer made it clear that the endorsement by one person, such as the Democratic Party, does not necessarily mean it endorses or opposes any other candidate or measure appearing on the mailer.

The language Mr. Krute refers to is a mandatory disclaimer that the California Political Reform Act requires on all slate mailers. It states as follows:

"NOTICE TO VOTERS

*THIS DOCUMENT WAS PREPARED BY VOTER INFORMATION GUIDE, NOT AN OFFICIAL PARTY ORGANIZATION. Appearance in this mailer does not necessarily imply endorsement by others appearing in this mailer, nor does it imply endorsement of or opposition to any issues set forth in this mailer. Appearance is paid for and authorized by each candidate and ballot measure designated by an *. Not paid for or authorized by candidates not designated by an *. Candidates for non-partisan office chosen without regard to party affiliation."*

The issue raised is whether the statement that the Democratic Party provided "evaluations and recommendations", and the mailer's title asserting that it is a "Voter Information Guide For Democrats", can be reasonably read to mean that the Democratic Party was opposed to Measure O. On its face, it would appear these statements convey the message that the Democratic Party supports or opposes the candidates and measures appearing in the mailer, including Measure O. In order to reach this conclusion however, it is necessary to accept the premise that the Democratic Party agrees with **all** the recommendations listed on the mailer. This premise is controverted by the required notice on the mailer that states: 1) the mailer is "not an official party organization" and 2) "[a]pppearance in this mailer does not necessarily imply endorsement by others appearing in this mailer."

Commission staff notes that it is in the nature of slate mailers to endorse or oppose a wide variety of candidates and measures, some of which pay to be included and some of which are selected by the slate mailer organization. This is why state law requires the mandatory notice in the first place: To advise voters that it is not an official party communication, and that not all candidates and measures are going to be endorsed or opposed by others appearing in the mailer. Given this disclaimer on the

face of the mailer, and the fact that some of the candidates and measures paid to be included without the "evaluation or recommendation" of the groups listed on the mailer, Commission staff questions whether a reasonable reading can conclude that the mailer actually represents that the "Democratic Party" opposed Measure O.

2) If the statements in the mailer represent as a fact that the Democratic Party opposed Measure O, did Larry Levine and Associates make such statements with knowledge that the statement was false or act with "reckless disregard" for the statement's truth or falsity?

Commission staff's conversation with Mr. Krute established that he and his partner alone decided to oppose Measure O. He stated he had "no idea" what the Democratic Party's position was regarding Measure O. Based on these statements, it cannot be concluded that they acted with any knowledge of an alleged falsity since they admit that they had "no idea" whether the Democratic Party endorsed Measure O or not. The next question is whether any false statements were made with "reckless disregard" for their truth or falsity. (The term "reckless disregard" means that a person acts with a high degree of negligence without concern for the dangers or consequences of his or her actions.)

If Mr. Krute and his partner portrayed the position of the Democratic Party as being opposed to Measure O, then the admission that they had "no idea" what that position actually was would arguably constitute more than simple negligence. The mailer itself was sent to more than 200 households. Other language on the mailer encourages voters to "use this guide when voting by mail or take it to the polls." Commission staff believes there is information on which a person could conclude that Larry Levine And Associates acted with "reckless disregard" *if* the mailer could reasonably be read to mean that the Democratic Party opposed Measure O.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 06-20 on grounds that the slate mailer organization 1) had no filing obligations with the City Clerk, the FPPC or the Public Ethics commission; and 2) did not represent as a fact that the Democratic Party opposed Measure O in light of the notices and disclaimers appearing on the mailer.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*