Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
February 1, 2010

In the Matter of)
) Complaint No. 09-15
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Anthony Moglia filed Complaint No. 09-15 on November 17, 2009.

I. SUMMARY OF COMPLAINT

Mr. Moglia filed Complaint No. 09-15 alleging that Oakland Councilmember Jean Quan misused public resources to promote her candidacy for Mayor. ***Attachment 1.***

II. FACTUAL SUMMARY

Like other elected officials in Oakland, Ms. Quan maintains a website hosted or linked by the City's computer system at "oaklandnet.com." Some of the websites are hosted and maintained on "oaklandnet.com"; others are hosted and maintained by private website services. By activating a link on oaklandnet.com for Jean Quan, viewers are transported to a private website at www.JeanQuan.org. Ms. Quan states she maintains this website using campaign funds.[1] On the "JeanQuan" website, viewers are invited to subscribe to her weekly "E-newsletter" by clicking a "subscribe here" button. Viewers are then automatically connected to a third website supported and managed by a company called "Constant Contact." The company specializes in generating electronic newsletters for its customers. The "Constant Contact" website requests viewers to check a box indicating "the areas of interest for which you would like to receive occasional email from us." ***Attachment 2.*** The two options are: "Campaign Email List" and "Newsletter List." Clicking the "Campaign Email List" and providing some personal information results in a computer-generated email thanking the viewer for registering and promising "periodic emails specific to your interests." Ms. Quan told Commission staff that she secures payment to Constant Comment using a personal credit card for which she obtains reimbursement from her "Quan for Mayor 2010" campaign account.

Mr. Moglia alleges in his complaint that in Issue No. 356 of Ms. Quan's electronic newsletter, Ms. Quan authored a story entitled "What's The Controversy Over Instant Run Off Voting." The story claimed that a "controversy" was raised over Oakland's 2006 City Charter amendment calling for the implementation of Instant Run-Off Voting.

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[1] The Fair Political Practices Commission ("FPPC") has advised that constituent newsletters constitute an appropriate use of campaign funds. [See "Pearson" Advice Letter; No. I-91-287]

Attachment 3. The story stated "This week, the East Bay Express this week (sic) exposed political maneuverings that appear to be an attempt to stop the Instant Run-off Voting (IRV) from taking place next year." The story provided a direct link to the East Bay Express article. ***Attachment 4.*** The East Bay Express article reports on questions raised by declared Mayoral candidate Don Perata over the approval and implementation of the IRV process. Ms. Quan states in her electronic newsletter story that "I support and have an interest in the voting process taking place as approved by the voters, but the issue is more than any one race or candidate." The article provides email links to the Oakland City Council and California Secretary of State so viewers can "let...them know what you think."

Mr. Moglia contends that the "use of public funds and resources to compile a Campaign Email List and convey political opinion by Councilwoman Quan in order to benefit Quan For Mayor 2010 and Quan's mayoral candidacy is a clear and ongoing violation of Penal Code Section 424(a) and Government Code Section 8314."

III. ANALYSIS

A. Applicable Law And Commission Jurisdiction

The Commission does not have the authority to determine violations of state law. City Charter Section 202(a) provides:

> *"There is hereby established a Public Ethics Commission which shall be responsible for responding to issues with regard to compliance by the City of Oakland, its elected officials, officers, employees, boards and commissions with regard to compliance with* ***City regulations and policies*** *intended to assure fairness, openness, honesty and integrity in City government including, Oakland's Campaign Finance Reform Ordinance, conflict of interest code, code of ethics and any ordinance intended to supplement the Brown Act, and to make recommendations to the City Council on matters relating thereto, and it shall set City Councilmember compensation, as set forth herein."* (Emphasis added.)

City Charter Section 202(b)(5) provides:

> *"The City Council shall* ***by ordinance*** *prescribe the function, duties, powers, jurisdiction and terms of the members of the Commission, in accordance with this Article."* (Emphasis added.)

There is nothing in the City Charter, the Commission's own enabling ordinance (O.M.C. Chapter 2.24) or any of the ordinances which the Commission is authorized to enforce that authorizes the Commission to determine alleged violations of the Government and Penal Code Sections cited in Mr. Moglia's complaint. Pursuant to its General Complaint Procedures, however, the Executive Director may recommend that a complaint be referred to "another governmental or law enforcement agency better suited to address the issues." [GCP Section III(B)(1)(e)]

B. Use Of City Computer System For "Campaign Purposes"

Penal Code Section 424(a) makes it unlawful for any "city officer" to appropriate public money or resources, without authority of law, to his or her own use or to the use of another. Government Code Section 89001 prohibits the sending of newsletters or other mass mailings "at public expense." Government Code §8314 makes it unlawful for any elected state or local officer... "to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law."

Section 8314(b) contains several definitions which are relevant Mr. Moglia's allegations:

- *Section 8314(b)(2) defines "campaign activity" as an "activity constituting a contribution as defined in Section 82015 or an expenditure as defined in Section 82025. 'Campaign activity' does not include the incidental and minimal use of public resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities.*

- *Section 8312(b)(3) defines "public resources" as "any property or asset owned by the state or any local agency, including, but not limited to, land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state-compensated time."*

- *Section 8312(b)(4) defines "use" as "a use of public resources which is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated."*

Section 8314(e) also contains a reference to Penal Code Section 424:

> *"The incidental and minimal use of public resources by an elected state or local officer, including any state or local appointee, employee, or consultant, pursuant to this section shall not be subject to prosecution under Section 424 of the Penal Code."*

As stated above, Ms. Quan does not use the City's website to host the sign-in feature for her "Campaign Email List". That feature is hosted by the "Constant Comment" website for which she secures payment with a personal credit card. A viewer must pass through both a City-maintained website and a private, campaign-funded website before a viewer can access the "Constant Comment" website to request future campaign-related emails. Under these facts, it appears that there is only a "minimal and incidental use" of City resources for purposes of Government Code Section 8314 and Penal Code Section 424.

C. Personal Commentary In An Electronic Newsletter To Constituents

Mr. Moglia objects to Ms. Quan's commentary regarding Instant Runoff Voting in her e-newsletter and the link she supplied to a "derogatory opinion article" contained in the East Bay Express. He contends this personal commentary and reference to Mr. Perata constitutes an improper use of public funds.

The above facts demonstrate that viewers can access Ms. Quan's electronic newsletter through her campaign-paid website at "JeanQuan.org". While the City's website provides a link to "JeanQuan.org", none of the costs of maintaining "JeanQuan.org" or the expense of producing or distributing the E-newsletter are borne by the City. Thus it would appear to be appropriate for Ms. Quan to opine on a current legislative and political topic such as IRV in her constituent newsletter. Simply providing a link to Ms. Quan's private website through "oaklandnet.com" would again appear to be an "incidental and minimal use" of public resources.

IV. STAFF RECOMMENDATION

Commission staff recommends that Complaint No. 09-15 be dismissed on grounds that the Commission has no jurisdiction or authority to determine alleged violations of state law and there does not appear to be a material issue that could be referred to another agency.

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.*