



STUDY SESSION MEMORANDUM

TO: Mayor and Members of City Council

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DATE: December 11, 2018

SUBJECT: Study Session for December 11, 2018
Campaign Finance and Elections Working Group – Staff Report

EXECUTIVE SUMMARY

This study session memorandum will provide council with an opportunity to confirm that the Campaign Finance and Elections Working Group (working group), a group established by the city manager at the direction of the City Council, has completed its goals as defined in its Charter and allow this working group to end.

The working group has satisfied its goals pursuant to its Charter which can be found here:

https://www-static.bouldercolorado.gov/docs/Election_working_group_charter-1-201801091618.pdf?_ga=2.254951240.1595357094.1543248890-142577884.1522354914

The working group took on a detailed review of the city’s campaign finance and initiative processes and made its recommendations for charter amendments related to its review of the city’s municipal initiative processes in April 2018. Thereafter, the group met on April 11, April 17, April 25, May 23, June 13, June 27, July 25, August 22, August 29, September 26 and November 1, 2018 to work on campaign finance reform detailed in the working group’s Charter. Those meetings resulted in recommendations for changes to the Boulder Revised Code. The draft ordinances that documented the changes that the working group made can be found on the Campaign Finance and Elections Working Group’s web page:

<https://bouldercolorado.gov/elections/campaign-financeelections-working-group>

The ordinance was not placed in this packet as the working group wanted to have the study session discussion based on the concepts of the working group’s recommendations.

KEY ISSUES IDENTIFIED

Throughout the working group’s meetings, the discussions centered around curing existing gaps and ambiguities within Boulder’s current election laws that conflict with promoting election integrity. There were two key items that the working group wanted to address: (1) illuminating the source of funding for candidate and issue campaigns in Boulder, and (2) enhancing and restoring faith in the election process.

The working group’s Charter tasked the group to provide maximum campaign finance disclosure under existing law and to provide further campaign finance disclosure regulations in ways that may be permitted, and even those that have not been previously judicially recognized. The working group was also cognizant of requirements of the courts to make sure disclosures are not overly burdensome. Because of these objectives, the working group’s discussion was guided by three main principals:

1. Transparency;
2. Closing loopholes; and
3. Requiring disclosure of individuals rather than only entities (sometimes referred to as piercing the corporate veil).

The working group was able to come to a consensus regarding its recommendations on campaign finance reform, and in doing so, were able to prepare a final report for council review (**Attachment A to study session packet**).

BACKGROUND

At its December 19, 2017 meeting, the City Council directed the city manager to form a working group to address concerns raised by council members and members of the public regarding the city’s campaign finance and election laws. The Charter for the working group was presented on January 4, 2018 and described the expectations established by the City Council for analysis of the City Charter and Boulder Revised Code provisions related to campaign finance, initiative and referendum provisions and other election matters.

Per the responsibilities detailed in the working group’s Charter, the working group set out to study, consider and recommend campaign finance regulations which promote the integrity of the election process by providing maximum campaign disclosure regulations that are either existing, or have yet to be established, through legislation. Additionally, these regulations should promote election integrity as well as protecting constitutional rights. The working group also set out to study, consider and recommend changes to campaign finance enforcement. The city’s current enforcement procedure is laid out below.

Campaign Finance Enforcement - Current Procedure

Campaign finance enforcement generally occurs in two ways. The first way is through staff review of disclosure reports as they are filed during the election season. The second way is through an external, complaint-based process.

It is the complaint-based process that is governed by Chapter 13-4. The Chapter provides a path for members of the public to make a formal complaint and for the respondent to provide information in response. The complaint is reviewed by the clerk’s office to determine whether probable cause exists that further investigation would disclose a violation. At this stage, city staff is prohibited from making public the results of any inquiry or investigation. From that review, the clerk’s office follows one of the following:

- (1) If no probable cause exists, the clerk’s office closes the file and notifies both parties. At this stage, city staff is prohibited from making public the results of any inquiry or investigation.
- (2) If there is probable cause and the error or omission can be cured, the clerk’s office notifies the respondent and gives 72 hours for the cure to be effected. When the cure is complete, there is deemed to have been no violation. The file is then closed, and the parties are notified. At this stage, city staff is prohibited from making public the results of any inquiry or investigation.
- (3) If there is probable cause and the matter can be resolved without further hearing (i.e. there are no disputed facts, or it is a legal analysis), the final decision is made by the clerk’s office and the parties are notified. At this stage, city staff is prohibited from making public the results of any inquiry or investigation.
- (4) If there is probable cause that further investigation would disclose a violation, and more information is needed, the matter is set for a hearing. Generally, a hearing is to resolve issues of fact rather than issues of law. At this stage, the hearing is public and the results of any inquiry or investigation are made public through the hearing process.
- (5) The purpose of the hearing is to determine whether sufficient evidence of a violation by the respondent exists to warrant bringing a civil or criminal action.

ANALYSIS

Timing of Making Changes to Election Procedures

Historically, the City Council has not made changes to election procedures between April and December of any year. This is to make sure that the rules don’t change during the time that people are drafting initiatives, preparing for candidacy, or making other election preparations. The Boulder Chamber of Commerce sponsors the College of Political Knowledge at the beginning of April in candidate election years, where clerk staff and sitting council members talk

to the public about how to run for city council. The staff updates the manual for the committees and candidates containing all election requirements for the upcoming election and it is distributed in May. To make any revisions to that manual, the final council action necessitating changes needs to be completed in March. By not adopting changes to election or campaign procedures from that time until the election, the same rules apply for each election through the entire process.

Legal comments on recommendations

Several of the recommendations in the Campaign Finance and Elections Working Group’s Final Report (the “Report”) raise potential legal issues that would be prudent to examine carefully, should council choose to proceed towards legislation. The preliminary “issue spotting” below should not be taken as the final word, legally, nor should it be regarded as any sort of criticism of the policy virtues of these proposals. Additionally, there are a number of recommendations in the Report which, while they present policy questions, no legal issues are involved (as in the case of the recommendations concerning the role of the city clerk). Accordingly, those recommendations are not discussed below.

For convenience, the recommendations are addressed in the order in which they appear in the Report, according to the headings used in the Report.

Expand the definition of “express advocacy.” The focus in the early US Supreme Court decisions on “express advocacy” (and the adoption of this concept by jurisdictions nationwide, including Boulder) stemmed from the use of this term in federal election laws, and the fact it was not defined in those laws. In construing this term, the early cases looked for so-called “magic words” (“vote for,” “support,” “oppose,” etc.). Subsequent decisions of the Court have clarified that “express advocacy” is not a *constitutional* limit on disclosure requirements. Accordingly, the Court has approved campaign finance disclosure in connection with communications that are the “functional equivalent” of express advocacy.

Require disclosure of “electioneering communications.” As part of the Supreme Court’s acceptance of disclosure requirements beyond express advocacy, disclosure of “electioneering communications” has been approved by the Court. These are communications devoid of express advocacy or its equivalent, but which nonetheless mention the candidate, and do so within a close proximity to the election.

While the legal authority for requiring disclosure in connection with electioneering in candidate elections is well established, the working group also suggests requiring such disclosure in issue elections. This is uncharted territory, legally, and may implicate some of the same legal issues that led Colorado federal courts to throw out detailed reporting by issue committees, at least until substantial sums are received and spent by the committee. The major test that would be applied by the courts on disclosure requirements would include whether the burden was justified by the value of the information provided to the public, probably under a strict scrutiny standard.

Identify natural persons who are making contributions and expenditures. The Court has explained that disclosure requirements, such as that suggested here, because they interfere with certain constitutionally protected rights, must satisfy judicial “exacting scrutiny,” meaning that

there must be a “substantial relation” between the regulation and a “sufficiently important government interest.” Such interests can include avoiding corruption or its appearance, providing the electorate with information about election spending, and gathering data with which to enforce election laws. Because of the city’s fairly low \$100 contribution limit for official and unofficial candidate committees, there may be a question whether these *additional* disclosure requirements would “substantially” serve the government’s interest, beyond what is already accomplished by the contribution limit. These requirements would likely not have the same exposure when applied to issue committees, where no \$100 limit applies, provided that they are only applied to issue committees that have reached the dollar amount for contributions that require reporting of contributions and expenditures. Federal courts in Colorado have held such reporting requirements too burdensome unless the issue committee spends in excess of \$3,500. Disappointingly, the courts have not said what amount above \$3,500 would be acceptable.

Clarify regulations for committees that coordinate advertising. This section proposes additional disclosure in connection with coordinated expenditures by committees. Unlike contributions, the city imposes no limits on expenditures (indeed, any such limits would be unconstitutional). In this context, the disclosure requirements proposed here would likely easily satisfy the “exacting scrutiny” standard described above.

Ensure proper disclosure for various types of media. Here the group proposes disclosure to the public through “ribbons”—disclosures that accompany print and electronic campaign ads. The focus of this disclosure requirement is identifying to the public the “top contributors” to the committee paying for the ad. As with the “natural persons” disclosure proposal discussed above, this disclosure requirement, in the context of the city’s \$100 contribution limit, may not “substantially” add to service of the government’s interest, sufficient to pass constitutional muster. In issue elections, where there is no \$100 limit, this sort of “ribbon” requirement may fare better constitutionally. It would be advisable, however, for this requirement to only be applied to issue committees that are spending an amount over \$3,500. Federal courts have held Colorado’s issue committee disclosure requirements unconstitutional, when applied to issue committees receiving and spending small amounts—\$3,500.

Recommended changes to Chapter 13-2 by the working group

Chapter 13-2 of the Code addresses the requirements related to campaign finance issues, including reporting requirements for candidate and issue committees, disclosure requirements on campaign advertisements, matching fund eligibility, prohibited contributions and definitions. The reporting requirements for committees describe the timing and content required for disclosure of the committee formation and all contributions and expenditures. Chapter 13-2 was adopted to implement the campaign finance reform initiatives passed by the voters in 1999. An outline of the Chapter’s table of contents is attached (**Exhibit A**).

The changes recommended by the working group include:

1. Expansion of the purposes, findings and legislative intent.
2. Replace references to “issue” with “ballot measure.”

3. Expand the definition of “express advocacy” to include the functional equivalent of the “magic words” rather than limiting the definition to only the words themselves.
4. Add a definition of “electioneering communications” to broaden the campaign activities that require disclosure.
5. Define candidate and ballot measure forums to define election activities that do not require formation of a committee.
6. When the person forming a committee and accepting a contribution or making an expenditure is an entity, require disclosure of the individuals that have an ownership or equity interest in the entity or hold an office or decision-making role in the entity.
7. Change the definition of independent expenditure to refer only to expenditures by a natural person.
8. Because the reporting schedule is the same for all committees, remove the schedule from each committee section so it is described once rather than three times.
9. Establish the reporting requirements for electioneering communications as commencing when the committee spends an aggregate of \$1,000 during an election cycle.
10. Define the disclosure requirements for electioneering communications.
11. Require campaign advertisements to contain disclosure of the sponsor’s name and top contributors and define the methods for doing so via video, audio and written campaign advertisements.
12. Specify disclosure requirements for contributions aggregating over \$1,000.
13. Add requirements for entities making contributions to disclose the individuals behind the entity.

The staff has drafted amendments to Chapter 13-2 to implement the recommendations of the working group. The working group has recommended that the entire Chapter be re-written and reorganized. Staff does not believe that a comprehensive redraft of Chapter 13-2 could be completed in time for adoption in the first quarter of 2019. The staff would be able to do some level of re-writing of the Chapter. If so, it would request that a subgroup of the committee work with a staff member with the idea of meeting the objective of putting an ordinance before council in late February—early March time-frame.

Recommended changes to Chapter 13-4 by the working group

The working group discussed enforcement of campaign finance provisions extensively. There is a lot of confusion about the process. In reviewing the enforcement provisions for campaign finance issues holistically, the primary points of enforcement are to (a) grant remedial remedies to the city manager, such as filing corrected reports or publishing corrective advertisements or paying a penalty, and (b) provide a citizen complaint procedure. Part of the confusion in the current code is a result of interspersing normal civil and criminal enforcement provisions with the above two items. An outline of the Chapter’s table of contents is attached (**Exhibit B**).

The changes recommended by the working group include:

1. Separation of the staff enforcement from the citizen complaint procedure.
2. Clarify the role of the complainant if there is a hearing on the complaint.

3. Allow appointment of a hearing officer rather than requiring the hearing officer to be the city manager.
4. Clarify when documents related to complaints are no longer confidential and may be disclosed by the city.
5. Replace references to “city manager” with “city clerk,” except in the appointment of a hearing officer.

The issue related to confidentiality is to balance two competing interests. The initiative for campaign finance reform provided for all complaints and responses to be confidential unless a hearing was held. This was because the primary purpose was compliance, not punishment, and if a potential violation could be cured, it should be cured, and no violation pursued. However, the confidentiality requirement is not binding on the complainant. As a result, complainants have made their complaints public, but the city has not been able to respond or provide its final determinations of whether a violation existed or not. The city also has an overarching goal of transparency. To balance these two interests, the working group originally directed that the final determination of the city on a complaint, whether or not there was a hearing, could be made public. If a complaint was cured, no violation would be deemed to have occurred. The final report of the committee has divergent views on the issue of confidentiality.

Staff drafted amendments to Chapter 13-4 to implement what was recommended by the working group; however, staff believes that Chapter 13-4 could be substantially streamlined into fewer sections. To have all the enforcement provisions for campaign finance together, staff recommends moving the provisions of Section 13-2-21(b) regarding civil penalties to Chapter 13-4. Staff believes this could be accomplished for council consideration and adoption in the first quarter of 2019.

Recommendations of the Working Group that are not in Staff Recommendations

The working group recommended reorganizing and redrafting Chapter 13-2. If that were to be done, the city’s election campaign reporting database and the manual for committees and candidates would need to be revised to coincide with the changes ultimately approved by council, and then there would have to be education and outreach regarding the changes from past and then-effective election procedures. The totality of that work cannot be completed by the first quarter of 2019.

The working group also recommended leaving the \$100 contribution limit for candidates and requiring disclosure of individuals behind entities at a contribution aggregate of \$1,000 or more. Staff is concerned that these amounts are too low and recommends they be revised to be more consistent with court decisions on related issues.

QUESTIONS FOR COUNCIL

1. Does council wish to consider reorganization and amendments to Chapter 13-2 in the first quarter of 2019 to implement the recommended changes for Chapter 13-2 described in 1-13 above?

2. Does council wish to consider reorganization and amendments to Chapter 13-4 in the first quarter of 2019 to implement the recommended changes for Chapter 13-4 described in 1-5 above?

NEXT STEPS

Staff intends to implement council’s direction and develop materials to complete the following:

- A. Consider reorganization and amendments to Chapter 13-2 in the first quarter of 2019 to implement the recommended changes for Chapter 13-2 described in 1-13 above?
- B. Consider reorganization and amendments to Chapter 13-4 in the first quarter of 2019 to implement the recommended changes for Chapter 13-4 described in 1-5 above?

Note: This recommendation does not include adding an appeal procedure at the point of determination of no probable cause because of increased risk of litigation against the city pursuing a claim for which the staff does not believe there is probable cause. There was not a consensus for change among the working group.

Proposed processes for the staff process if the staff recommendations are adopted:

- Complete revisions to Chapter 13-2 and 13-4 for presentation to council at the second business meeting in February 2019;
- Develop an implementation plan including drafting new guidelines and changes to the manual by April 2019;
- Conduct education for the public and forums on the manual revisions during the second quarter of 2019; and
- Develop a work plan for items approved by the voters, including signature verification process for the 2019 election.

If the working group recommendations beyond staff recommendations are adopted, the following would have to be added to this work plan:

- An analysis of online petition implementation and cybersecurity considerations.
- Reorganize and redraft Chapter 13-2 for implementation after the 2019 election.
- Rewrite candidate and committee manual and campaign reporting database to implement reorganization.

ATTACHMENTS

Exhibit 1 – Chapter 13-2 table of contents

Exhibit 2 – Chapter 13-4 table of contents

Outline of Chapter 13-2 - Campaign Financing Disclosure

11-14-18

13-2-1. – Legislative Intent.

- (a) Purpose Generally.
- (b) Purpose of Limitations on Contributions.
- (c) Purpose of campaign finance disclosure requirements.
- (d) Matter of Local Concern.
- (e) Purpose of reporting requirements.
- (f) Background – Regulatory Model and Local Modifications.
- (g) Findings – Different Reporting Requirements for Campaign Expenditures for Candidates and Candidate Committees from Unofficial Candidate Committees and Independent Expenditures.
- (h) Purpose - Transparency in the Campaign Expenditures without Regulate Speech.
- (i) Purpose – Issue Committee Disclosure and Reporting Requirements.
- (j) Findings – Sources of Contributions; Transparency of Funding Ballot Issues Campaigns; Reporting and Disclosure Requirements; Simplicity of Reporting; Electioneering and Express Advocacy; Dark Money.

13-2-2. – Definitions.

13-2-3. – Financial Interest Disclosure Statement by Candidates and Council Members.

- (a) Purpose.
- (b) Financial Disclosure Statement Requirements.

13-2-4. – Annual Filing Dates and Disclosure Periods—Candidates and Council Members.

- (a) Candidate Statement of Financial Disclosure.
- (b) Council Member Statement of Financial Disclosure.
- (c) Financial Disclosure Requirements.

13-2-5. – Statement of Organization of Official Candidate Committee.

- (a) Statement of Organization for the Candidate Committee Required.
- (b) Requirements for the Candidate Committee.
- (c) Filing Requirements for Changes to Candidate Committee.
- (d) Contribution and Expenditures on Behalf of a Candidate.

13-2-6. – Statement of Organization of Unofficial Candidate Committee.

- (a) Statement of Organization for the Unofficial Candidate Committee Required
- (b) Filing Requirements for Changes to Unofficial Candidate Committee.
- (c) Coordinated Expenditures with Candidates are Considered Contributions to the Candidate.
- (d) Record Keeping Requirements for Unofficial Candidate Committees.
- (e) Prohibition of Combination of Unofficial Candidate Committee with Issue Committee.

13-2-7. – Statement of Organization of Ballot Measure Committee.

- (a) Statement of Organization for the Issue Committee Required.
- (b) Filing Requirements for Changes to Issue Committee.
- (c) Changes to Ballot Measures Supported or Opposed Prohibited After Filing of Statement of Organization.
- (d) Prohibition of Combination of Issue Committee with Unofficial Candidate Committee.

13-2-8. – Statement of Contributions and Expenditures of Official Candidate Committee.

- (a) Filing of Statement of Contributions and Expenditures.
- (b) Content of Statement of Contributions and Expenditures.

13-2-9. – Statement of Contributions and Expenditures of Unofficial Candidate Committee.

- (a) Filing of Statement of Contributions and Expenditures Required.
- (b) Content of Statement of Contributions and Expenditures.
- (c) Reporting Requirements Expenditure over \$200.00.

13-2-10. – Statement of Contributions and Expenditures of Electioneering Communications.

- (a) Filing of Statement of Contributions and Expenditures.
- (b) Content of Statement of Contributions and Expenditures.
- (c) Certification that Communications were not controlled by or coordinated with any candidate or official candidate committee.
- (d) Applicability of requirements to Unofficial Candidate Committee.
- (e) Applicability of requirements to Candidate Committee.
- (f) Additional Reporting Requirements for Natural Persons.
- (g) Additional reporting Requirements for Entities.

13-2-11. – Independent or Individual Expenditures by Natural Persons.

- (a) Notice of Independent Expenditures to City Manager.
- (b) Disclosure Requirements.
- (c) Consequences of Coordination with any Candidate or Official Candidate Committee.
- (d) Record Keeping Requirements associated with Independent Expenditures.

13-2-12. – Statement of Contributions and Expenditures of Ballot Measure Committee.

- (a) Filing of Statement of Contributions and Expenditures Required.
- (b) Content of Statement of Contributions and Expenditures.

13-2-13. – Reporting by Committees: Schedule – Maintenance of records – Joint Advertisements.

- (a) Reporting Schedule.
- (b) Record Keeping Requirement.

13-2-14. – Election Materials and Advertisement Supporting or Opposing Candidate or Ballot Measure to Contain Sponsor's Name.

- (a) Disclosure of Top Contributors.
- (b) Disclosure Requirements for Video Advisement.
- (c) Disclosure Requirements for Electronic or Paper Print Advertisement.
- (d) Disclosure Requirements for Video Advisement.
- (e) For purposes of this section, an advertisement that is distributed via social media shall follow the disclosures required by this section for distribution as a video.

13-2-15. – Solicitation for Candidate Campaign Funds.

- (a) Approval by the Candidate or Committee.
- (b) Disclosure Requirements if Solicitation is paid for by other persons but authorized by a candidate or committee.
- (c) Disclosure Requirements if Solicitation is paid for by other persons but not authorized by a candidate or committee.

13-2-16. – Filing, Preservation, and Public Inspection of Statements.

- (a) Statements to Include Current Information.

- (b) City Manager Forms and Record Keeping Requirements for Persons Required to File Statements and Notices.
- (c) City Record Keeping Requirements.

13-2-17. – Notice of Disclosure Requirements and Enforcement.

The city manager shall administer the provisions of this article and shall:

- (a) City Publication Summaries of Expenditures for Candidates, Committees, Independent Expenditure and Expenditures for Electioneering Communications.
- (b) Forms for Filing the Statements.
- (c) Prepare Materials for candidate, Committee, or Person Making an Electioneering Communication.
- (d) City Record Keeping Requirements.
- (e) Notification Requirements to Persons Required to File Statements.
- (f) Publication Requirements for Candidates that will Receive City Matching Funds.

13-2-18. – Candidate Contribution Limitation.

- (a) Contribution Limits for a Candidate, Candidate Committee, or Unofficial Candidate Committee.
- (b) Disclosure Requirements for Entities that Contribute to Election Campaigns; Record Keeping Requirements for Committees.
- (c) Attribution of Contributions from Entities and Natural Persons.

13-2-19. – Entity Disclosure Requirements.

13-2-20. – Anonymous Contributions.

- (a) Restrictions on Anonymous Contributions to a Candidate, Candidate Committee, Unofficial Candidate Committee, or to Another for an Electioneering Communication.
- (b) Restrictions on Anonymous Contributions to an Issue Committee.

13-2-21. – Unexpended Campaign Contributions.

13-2-22. – Public Matching Funds.

- (a) City Allocation of Matching Funds.
- (b) Timing of Matching Fund Requests.

13-2-23. – Eligibility for Matching Funds.

- (a) Minimum Fund-Raising Requirements.
- (b) Matching Funds Contract Requirements.

13-2-24. – Violations and Penalty.

- (a) Criminal Acts and Penalties.
- (b) Civil Remedies.

Outline of Chapter 13-4 – Complaints Related to Election Procedures 11-14-18

13-4-1. - Legislative Intent.

13-4-2. - Allegation of Election Code Violation.

13-4-3. - Initial Review of Request for Action.

13-4-4. - Denial of Request for Action by City Manager.

13-4-5. - Determination by City Manager Final.

13-4-6. - Power of City Manager to Hold Hearings.

13-4-7. - Hearing Procedures.

13-4-8. - Negative Determination by City Manager.

13-4-9. - Power of City Manager to Issue Remedial Order or Warning Letter.

13-4-10. - Referral to City Attorney for Criminal or Civil Prosecution.

13-4-11. - Remedies Not Exclusive.

13-4-12. - No Appeal to City Council.

13-4-13. - Confidentiality of Investigation.