

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

In Re City of Bozeman No. COPP 2018-CFP-057	DISMISSAL
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On December 3, 2018, the City of Bozeman self-filed a formal Campaign Finance and Practices complaint with the Commissioner of Political Practices (COPP), naming itself as both the Complainant and Respondent in the matter. The COPP complaint contained multiple attachments pertaining to a district court complaint filed in Montana’s 18th Judicial District Court in Gallatin County by Roger Koopman, Paul Johnson, and Does 1-5. *Koopman, et al. v. City of Bozeman, et al.*, Cause No. 18-1215-C. The *Koopman* lawsuit—which the City incorporated by reference as the basis for the COPP complaint—alleged that the City of Bozeman, through its elected officials and employees: clearly advocated for the passage of a municipal bond issue; used public time and resources to advocate for the passage of this bond issue; and coordinated expenditures, communications, and other activities supporting the bond issue with a ballot issue committee, Bozeman Citizens for Safety (BCFS).

SUBSTANTIVE ISSUES ADDRESSED

Proper filing as an incidental committee; reporting electioneering communication expenditures; use of public resources by public employees; coordination of committee expenditures.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Montana's 2018 General election was held on November 6, 2018. Absentee ballots were mailed out in Gallatin County on October 12, 2018. "Electioneering" communication reporting period went into effect on August 13, 2018, sixty days prior (see Admin. R. 44.11.605(2)(b)). (Commissioner's Records.)

Finding of Fact No. 2: On July 23, 2018, the Bozeman City Commission adopted and approved Resolution No. 4936, submitting to Bozeman voters a bond issue for a Bozeman Public Safety Center (BPSC). This issue appeared on the ballot for Bozeman voters during Montana's 2018 General election, held on November 6, 2018. (Commissioner's Records.)

Finding of Fact No. 3: The City of Bozeman (the City) filed a C-2 Statement of Organization as an incidental political committee with COPP on June 22, 2018. The stated purpose was, "Inform public of impact of passage or failure of Bozeman Public Safety Center ballot issue on City operations[.]" The C-2 listed Brian LaMeres as the Treasurer. Mr. LaMeres is currently employed as a Controller in the Finance Department for the City of Bozeman. (Commissioner's Records.)

Finding of Fact No. 4: The City of Bozeman filed an initial C-4 committee finance report using CERS¹ on August 8, 2018, dated May 1 through August 3. The City reported \$7,694.97 in "Staff time on educating regarding Bozeman Public Safety Center *See attachment[.]" The submitted attachment broke this staff time down in more detail. The report also included two expenditures totaling \$772.33 and two debts totaling \$10,631.87; and copies of invoices received from The Nest Collective provided with the C-4 report to more

¹ CERS is an acronym for Campaign Electronic Reporting System, the e-filing system used by candidates and political committees to submit campaign finance reports and other required forms to COPP.

fully describe the services provided to the City. (Commissioner's Records.)

Finding of Fact No. 5: The Nest Collective is a Bozeman, Montana business described as a full service communications firm. (Nest Collective website, <http://www.thenestbzn.com/>.)

Finding of Fact No. 6: The City of Bozeman entered into a Professional Services Agreement with The Nest Collective on June 11, 2018 to "assist the City of Bozeman with development of strategy, messaging, and create an educational campaign for the City of Bozeman Public Safety Building[.]" The agreement concluded November 6, 2018. (Commissioner's Records.)

Finding of Fact No. 7: The City filed a periodic C-4 committee finance report on October 2, 2018, dated August 4 through September 27. This report disclosed \$17,482.30 in "Staff time on educating regarding Bozeman Public Safety Center *See attachment[.]" The attachment broke this staff time down in more detail. The City also reported making five expenditures totaling \$7,514.72 and reported three debts in the amount of \$5,230.05; it included copies of invoices received from The Nest Collective to more fully describe the services provided to the City. (Commissioner's Records.)

Finding of Fact No. 8: Bozeman Citizens for Safety (BCFS) filed a C-2 Statement of Organization as a ballot issue committee with COPP on October 5, 2018, describing the purpose of the committee as "City of Bozeman Public Safety Bond- Support[.]" The C-2 listed Carson Taylor as the committee's Treasurer, Chris Mehl as Deputy Treasurer, and Terry Cunningham as an Additional Officer. (Commissioner's Records.)

Finding of Fact No. 9: The Bozeman City Commission is comprised of Mayor Cyndy Andrus, Deputy Mayor Chris Mehl, Commissioner I-Ho Pomeroy, Commissioner Jeff Krauss, and Commissioner Terry Cunningham. (City of Bozeman website, <https://www.bozeman.net/government/city-commission>.)

Finding of Fact No. 10: BCFS timely filed a C-6 Committee Finance report on October 5, 2018, dated June 2 through October 1. The report disclosed BCFS received contributions from three City of Bozeman elected officials with the required occupation and employer information: Chris Mehl (via loan); Terry Cunningham; and Cyndy Andrus. This report also disclosed BCFS received financial contributions from an additional three City of Bozeman employees, and one incidental political committee, the Bozeman Police Protective

Association.² BCFS reported making two expenditures: \$703.25 to Super Cheap Signs on August 23 for “150 yard signs and stakes” and \$63.29 to Super Cheap Signs on August 24 for “Shipping signs and stakes[.]” (Commissioner’s Records.)

Finding of Fact No. 11: The City timely filed a periodic C-4 committee finance report on October 25, dated September 28 through October 20, 2018. The report disclosed \$7,810.39 in “Staff time on educating regarding Bozeman Public Safety Center *See attachment[;]” as before, the attachment broke staff time down in more detail. The City also reported three debts totaling \$4,998.50; and included copies of invoices received from The Nest Collective to more fully describe the services provided to the City. (Commissioner’s Records.)

Finding of Fact No. 12: BCFS timely filed a C-6 periodic committee finance report on October 26, dated October 2 through October 24, 2018. This report disclosed BCFS received financial contributions from one City of Bozeman elected official including the required occupation and employer information: City Commissioner Jeff Krauss. BCFS reported making three expenditures: \$106.25 to The Nest Collective, Inc. on October 10 for “Yard sign design[.]” \$501.00 to Townsquare Media on October 15 for “Radio ads, KMMS AM & FM Oct 16-23[.]” and \$81.25 to Peak Recording on October 15 for “Radio spot production[.]” (Commissioner’s Records.)

Finding of Fact No. 13: BCFS timely filed a closing C-6 committee finance report on November 19, dated October 25 through November 16, 2018. The report disclosed BCFS received financial contributions from one City of Bozeman elected official including the required occupation and employer information: City Commissioner I-Ho Pomeroy. BCFS reported one expenditure: \$744.96 to Chris Mehl on November 16 for “Loan repayment, \$744.96 of \$800.00 total to Chris Mehl. Remaining loan amount was forgiven[.]” (Commissioner’s Records.)

Finding of Fact No. 14: BCFS 2018 committee finance records indicate the committee received a total of nine contributions, including four who identified their employer as the City of Bozeman. COPP identified four contributors as City of Bozeman elected officials. (Commissioner’s Records.)

Finding of Fact No. 15: The City timely filed a closing C-4 committee finance report on November 21, dated October 21 through November 21, 2018. This report disclosed \$967.86 in “Staff time on educating

² As of December 2018, the Bozeman Police Protective Association has not filed either a C-2 Statement of Organization or any C-4 financial reports with COPP.

regarding Bozeman Public Safety Center[,]" with the attachment breaking down this staff time in more detail. The City report included seven expenditures totaling \$3,511.80. (Commissioner's Records.)

Finding of Fact No. 16: The City hand-delivered a response to this Complaint to COPP on December 6, 2018. This response laid out three basic points about the City in regards to this matter: (1) that all City of Bozeman public meetings, distributed materials, and any other activities were purely educational in nature, and did not advocate for or encourage passage of the BPSC issue; (2) where City of Bozeman elected officials or employees advocated for passage of the BPSC issue, they did so on their own time, in their capacity as an individual citizen; and (3) that the City did not coordinate any official activities with BCFS, nor did any City of Bozeman employees or elected officials assist BCFS while acting in their official capacity. The response also explained that the City contracted The Nest Collective, LLC, to help develop and distribute educational materials, which often included the BPSC logo, the slogan "Keep Bozeman Safe" or "Bozeman is Safe. Let's Keep it that Way[,]" and a text block containing the "Paid for by" attribution, information on the date of the election, and a link to a website containing additional information. The City's December 6 response included nine affidavits from various city officials or employees, discussed *infra*.

An associated email received by COPP that same day from Randy Cox, the City's legal representation, provided a list of all City of Bozeman elected officials or employees who worked with The Nest Collective on the education effort: Chuck Winn, Assistant City Manager; Andrea Surratt, City Manager; Anna Rosenberry, Assistant City Manager; Chris Mehl, Deputy Mayor; Cyndy Andrus, Mayor; Greg Sullivan, City Attorney; J. Colleen Herrington, Municipal Judge; Jim Veltkamp, Deputy Police Chief; Josh Waldo, Fire Department Chief; Karl Seel, Municipal Judge; Melody Mileur, Communications Coordinator; Steve Crawford, Police Department Chief; Tanya Andreasen, Neighborhoods Coordinator; Scott Mueller, Deputy Chief/Fire Marshall; Mike Maltaverne, Deputy Fire Chief; and Karen Stambaugh, Assistant City Attorney. (Commissioner's Records.)

Finding of Fact No. 17: An affidavit from Cyndy Andrus was among those included in the City's response. Mayor Andrus swore that she understood the difference between education and advocacy regarding the BPSC issue and had been trained by Bozeman City Attorney Greg Sullivan "as to the line between what I may do as a public official and what I may do as a private citizen[.]" Mayor Andrus stated she attended or gave numerous informational presentations regarding the BPSC to the public in her capacity as Mayor, time which she properly

tracked and was reported on City of Bozeman financial reports. Andrus further stated she did not publicly advocate for the BPSC beyond writing a Letter to the Editor for the Bozeman Daily Chronicle expressly supporting the issue. On November 4, 2018, the Chronicle published this letter, which was signed “Cyndy Andrus, Mayor of Bozeman[.]” Andrus’ affidavit stated this letter was written “on my own time, using my own personal computer[.]” but that, in error, it was provided to the Chronicle using her City email account. While Mayor Andrus stated she was aware of the BCFS committee, personally contributed \$100.00 to that committee and “picked up some yard signs from Chris Mehl’s front porch on one occasion and on one occasion Chris Mehl dropped off yard signs on my front porch[.]” she asserted she had no other involvement or interactions with BCFS. (Commissioner’s Records.)

Finding of Fact No. 18: Steve Crawford, the Bozeman Police Chief, also provided an affidavit. Chief Crawford swore that he developed an “understanding of the difference between advocacy and education by receiving guidance from the Bozeman City Attorney, Greg Sullivan[.]” Chief Crawford stated he engaged in educational activity regarding the BPSC issue in his capacity as Police Chief, time which he properly tracked and was reported on City of Bozeman financial reports. In particular, Chief Crawford stated he assisted The Nest Collective with an educational video, and that he co-wrote an educational piece about the BPSC for the Bozeman Daily Chronicle, which piece was on October 7, 2018. Chief Crawford also stated that he was aware of the existence of the BCFS committee and that, “Terry Cunningham contacted me from his private email inquiring if I would participate in the production of a video” for BCFS, Chief Crawford declined to participate and did not have any other involvement or interactions with the committee. (Commissioner’s Records.)

Finding of Fact No. 19: City Commissioner Terry Cunningham also provided an affidavit. Commissioner Cunningham swore, “I am and have been well aware of the line that exists between what I can do as a private citizen and what I can do as a public official. I learned, through a series of conversations and presentations by the City Attorney’s office and, in particular, Greg Sullivan the City Attorney, that there was a prohibition against use of public time, resources, equipment, or money to solicit support for or opposition to the passage of a bond issue[.]” Commissioner Cunningham estimated he attended “8 to 15 public presentations” on the BPSC issue in his role as a City Commissioner, but that he did not promote the issue at any of these events. Commissioner Cunningham stated that this time was properly tracked and was reported on City of Bozeman financial reports.

Cunningham further stated he did engage in support of the BPSC as a private citizen, specifically with the formation of the BCFS committee. According to Cunningham, the word “Citizens” was included in the BCFS name specifically to “distinguish between roles as elected officials and private citizens[,]” and no BCFS decisions were made on City time or with City resources. Commissioner Cunningham also wrote a Letter to the Editor expressly supporting the BPSC issue, which the Bozeman Daily Chronicle published on October 19, 2018, signed “Terry Cunningham, City Commissioner, Bozeman[.]” Cunningham stated “[t]here was no City resources, time, supplies, or anything else involved in my advocacy letter[.]” (Commissioner’s Records.)

Finding of Fact No. 20: City Commissioner Jeff Krauss provided an affidavit. Commissioner Krauss swore, “I have long understood that it is prohibited for me to advocate for or against a ballot issue while using local government...resources[,]” and that “[o]ther than my comments from the City Commission dais during discussion of placing the bond issue on the November 2018 ballot, I did not participate in my official capacity at any City-arranged community events regarding the Bozeman Public Safety Center[.]” Krauss did expressly support the BPSC issue on multiple radio appearances, but he stated such appearances were conducted “[o]n my own time and in my individual capacity[.]” Krauss also expressly supported the BPSC issue via a Facebook post made to his personal page, which was Boosted for approximately \$20.00. Per Krauss, this post was reported as an in-kind contribution to BCFS, and he donated an additional \$100.00 of his own personal funds to the committee, plus placed two BCFS yard signs on his personal property. (Commissioner’s Records.)

Finding of Fact No. 21: Deputy Mayor Chris Mehl also gave an affidavit. Deputy Mayor Mehl swore, “In my capacity as a City official, I well understand the line between education and advocacy that City officials and employees should not cross while working on City time, on City property, or using City resources[,]” and that he “learned about that line and the kinds of activities that are and are not permissible both from the Bozeman City Attorney, Greg Sullivan, as well as from the experience afforded by many years in public life[.]” Deputy Mayor Mehl stated he was involved in the City’s education efforts regarding the BPSC issue in his official capacity as deputy Mayor, but never advocated for the measure in his official capacity or at City events. Deputy Mayor Mehl also stated this time was properly tracked and was reported on City of Bozeman financial reports.

Mehl further stated that, as a private citizen, he engaged in support of the BPSC, specifically with the formation of the BCFS

committee. Mehl stated that he filed the committee's C-2 Statement of Organization with COPP. Mehl denied any BCFS activities were coordinated with the City, stating, "All time I devoted to advocacy with BCFS was on my own time, using my own resources and except for response to an occasional request for a yard sign I did not discuss any BCFS activity with any City officials or employees[.]" Mehl stated that no BCFS materials were stored on City of Bozeman property, and that neither the yard signs or radio advertisements produced and paid for by BCFS were discussed or coordinated with the City. (Commissioner's Records.)

Finding of Fact No. 22: City Commissioner I-Ho Pomeroy also provided an affidavit. Commissioner Pomeroy swore, "I understand the difference between education regarding a ballot issue and advocating for or against that issue. I have received advice from the Bozeman City Attorney Greg Sullivan and Assistant City Attorney Karen Stambaugh regarding where the line is[.]" Commissioner Pomeroy stated she attended multiple educational events regarding the BPSC in her official capacity as a City Commissioner, but never advocated for its passage at these events. Commissioner Pomeroy stated this time was properly tracked and was reported on City of Bozeman financial reports. Commissioner Pomeroy also stated she did not work or meet with The Nest Collective regarding the City's educational efforts. Commissioner Pomeroy stated she was aware of the existence of the BCFS committee, and contributed \$100.00 to the committee in addition to placing BCFS signs on her personal property and on the property of the private business she owns. (Commissioner's Records.)

Finding of Fact No. 23: Greg Sullivan, the Bozeman City Attorney, also provided his affidavit. Mr. Sullivan swore, "I worked closely with City officials and employees to advise them on the requirements of the Disclose Act. In addition, the Bozeman City Attorney's Office worked closely with staff from the Commissioner's office" and ultimately registered the City of Bozeman as an Incidental Political Committee, as "the thresholds for reporting expenditures as required by the Disclose Act were going to be exceeded" by the City's educational activities regarding the BPSC. Mr. Sullivan stated that all time spent by City of Bozeman employees or elected officials was properly tracked and reported on financial reports. Mr. Sullivan also stated he provided training to City of Bozeman employees and officials providing guidance on the prohibition against use of public time, facilities, or other resources to advocate for the BPSC. (Commissioner's Records.)

Attached to Mr. Sullivan's affidavit were copies of three email messages exchanged between Mr. Sullivan and Commissioner Jeff Mangan asking for guidance regarding proposed educational

materials on the BPSC put together by the City. With the first, dated June 26, 2018, Mr. Sullivan provided an attachment detailing a proposed BPSC presentation prepared by The Nest Collective; Commissioner Mangan responded “Looks fine. Add an attribution (Paid for by City of Bozeman, Jane Doe treasurer, + address)[.]” The second email, dated August 31, 2018, Mr. Sullivan provided an attachment detailing a proposed utility bill insert; Commissioner Mangan responded, “It looks fine, Greg[.]” The final message, dated September 28, 2018, Mr. Sullivan provided an attachment detailing a proposed banner; Commissioner Mangan responded, “Add the appropriate attribution/s as you’ve already noted. Looks fine to me[.]” (Commissioner’s Records.)

Finding of Fact No. 24: Andrea Surratt, Bozeman City Manager, provided an affidavit as well. Ms. Surratt swore that, “Based on my long experience in city government which includes involvement with several ballot issues, and on guidance from Bozeman’s City Attorney, I understand the prohibition on advocating for a ballot issue or a candidate while on City property, on City time, or utilizing City resources[.]” Ms. Surratt stated she was heavily involved with the City’s education efforts regarding the BPSC in her official capacity as City Manager, and that she worked directly with The Nest Collective on all educational outreach, but that she did not advocate for the BPSC at any meetings, gatherings, etc. Attached with Ms. Surratt’s affidavit was a copy of the signed, final contract between the City of Bozeman and The Nest Collective, dated June 11, 2018. Ms. Surratt stated she was aware of the existence of the BCFS committee and contributed \$150.00, but had no further involvement or communications with the committee. (Commissioner’s Records.)

Finding of Fact No. 25: An affidavit from Josh Waldo, the Bozeman Fire Chief, was provided. Chief Waldo swore, “In my capacity as Fire Chief, and for educational purposes, I gave public presentations regarding facts and information” pertaining to the BPSC issue. Chief Waldo stated this time was properly tracked and reported on City of Bozeman financial reports. Chief Waldo further stated, “I understood the distinction between education and advocacy regarding bond issues ... I received training on the distinction from the Bozeman City Attorney, Greg Sullivan[.]” and he never advocated for the BPSC while acting in his official capacity. Chief Waldo appeared in an education video prepared by The Nest Collective and stated he assisted with writing the script for the video but had no further involvement with The Nest Collective. Chief Waldo stated he was aware of the existence of the BCFS committee but chose not to make any financial contributions to the committee, and that “I received on my personal email account an email from Terry Cunningham’s personal mail

account discussing the possible production of a video by Bozeman Citizens for Safety, requesting my participation[.]” Chief Waldo stated that he declined to participate in the video and had no further affiliation with BCFS beyond placing two BCFS yard signs on his personal property. (Commissioner’s Records.)

Finding of Fact No. 26: The City of Bozeman’s December 6 response included 57 pages of printed materials (pictures of fliers, buttons, PowerPoint presentations, handouts, banners, t-shirts, and other materials) paid for and distributed by the City as part of its educational efforts regarding the BPSC, as well as a video featuring Chief Crawford and Chief Waldo. The documents included a copy of a Volunteer How-To Guide distributed to volunteers participating on behalf of the City at educational events. The guide reminded these volunteers: “When you’re sitting at this table you are here as a representative of the city[.]” and “what this means is that you cannot ‘advocate’ (i.e. ‘solicit support’). You can only ‘educate’ ... The Q&A included has examples of how to respond to questions that does not cross the line into advocacy[.]” (Commissioner’s Records.)

Finding of Fact No. 27: BCFS emailed a response to this Complaint to COPP on December 7, 2018. This response stated that BCFS designed, purchased, and distributed 150 yard signs as well as produced a thirty second radio ad to support the BPSC issue, both purchased using BCFS-raised funds. These activities, the response stated, were not coordinated in any way with the City, being “acts of advocacy ... created and actuated by Citizens without consultation with the City or its Committee[.]” The response additionally stated that no BCFS materials were ever stored on City of Bozeman property. (Commissioner’s Records.)

Finding of Fact No. 28: On December 18, 2018, BCFS Deputy Treasurer/Bozeman Deputy Mayor Chris Mehl spoke with COPP via telephone. Mr. Mehl clarified that he served as the main point of contact between The Nest Collective and the BCFS ballot issue committee regarding the design of the yard signs supporting the BPSC. Mr. Mehl stated that communications between himself (on behalf of BCFS) and The Nest Collective were almost exclusively carried out via email, using his private Hotmail account. Copies of emails between Mr. Mehl and The Nest Collective were also provided to COPP. Mr. Mehl also stated that he did attend multiple meetings between The Nest Collective and the City of Bozeman regarding the City’s educational BPSC campaign in his capacity as Deputy Mayor. He stated that, to the best of his knowledge, Bozeman City Manager Andrea Surratt was the main point of contact between the City and The Nest Collective, and that she (in consultation with The Nest) is

the one who set the meeting agendas, worked closely with The Nest to develop the educational campaign, etc. (Commissioner's Records.)

Finding of Fact No. 29: On December 18, 2018, BCFS Treasurer Carson Taylor spoke with COPP via telephone. Mr. Taylor stated that, as far as he was aware, BCFS Deputy Treasurer Mehl was the only BCFS officer to communicate with The Nest Collective regarding the design of the pro-BPSC yard signs. Treasurer Taylor also stated that, beyond the yard sign design, he was not aware of BCFS communicating with or approaching The Nest Collective for any reason. Treasurer Taylor stated BCFS' only activities were the purchase and design of yard signs and the radio ads, all reported on C-6 reports as expenditures of the committee. (Commissioner's Records.)

Finding of Fact No. 30: On December 18, 2018, Commissioner Mangan and COPP's Investigator spoke via telephone with Kendra Callantine, Becky Edwards, and Robyn Egloff of The Nest Collective. This discussion focused on several topics regarding The Nest Collective's communications or collaborations with both the City and BCFS. According to Nest employees: Chuck Winn, Andrea Surratt, and Melody Miluer were the primary points of contact between The Nest Collective and the City of Bozeman, and that NEST were the ones in charge of setting the agenda at any meetings; Chris Mehl attended approximately 75% of the meetings held between the City and The Nest Collective, and while he participated by asking questions and providing feedback, he did not organize the meetings, set the agenda for what would be discussed, or serve as a direct point of contact between The Nest Collective and the City; Mr. Mehl did, however, serve as the primary point of contact between the BCFS committee and The Nest Collective when Nest was contracted to handle design of BCFS's pro-BPSC yard signs; all communications between The Nest Collective and Mr. Mehl regarding the BCFS yard signs was handled via email, using Mr. Mehl's personal Hotmail account; and that The Nest Collective treated the City of Bozeman and BCFS as totally separate clients (as per their normal arrangements), with separate client folders to store billings, mockups of potential materials, communications, etc. (Commissioner's Records.)

Finding of Fact No. 31: On December 19, 2018, City Attorney Sullivan emailed COPP regarding use of the BPSC logo. Mr. Sullivan's email stated that "sometime in mid-August of 2018 I [Sullivan] was asked [by Mehl] whether a non-city entity such as a citizens group could use the logo and materials created by the City in the citizens group's effort to support the Bozeman Public Safety Center. I responded the City does not restrict how others use materials produced by the City ... in

light of the fact the materials are in the public domain ... I responded the City does not copyright or trademark its logos and there is, therefore, no limitations on its fair use[.]” (Commissioner’s Records.)

Finding of Fact No. 32: On December 20, 2018, the City provided a signed affidavit from Chuck Winn, Assistant City Manager. Mr. Winn swore, “Based on my thirty-four years in City government, which includes involvement with several ballot issues, and on guidance from Bozeman’s City Attorney, I have a good understanding of the prohibition on advocating for a ballot issue or a candidate while on City property, on City time, or utilizing City resources[.]” Mr. Winn further swore that he worked with The Nest Collective on “implementing” the City’s BPSC educational campaign but did not advocate for the project at any event he attended in his employment or professional capacity. Mr. Winn also stated that he was aware of the existence of the BCFS committee and contributed \$100.00 to the committee but did not otherwise participate in any BPSC advocacy activity. (Commissioner’s Records.)

Finding of Fact No. 33: Bozeman City Controller, Brian LaMeres, also provided an affidavit on December 20, 2018. Mr. LaMeres swore that he helped track all City employee or elected official time spent working on the BPSC educational campaign to ensure this time was included on financial reports filed with COPP. He also swore that he gathered “information on the City’s spending during the applicable reporting period on invoices from The Nest Collective and other outside vendors, including whether those bills were still outstanding or had been paid[.]” (Commissioner’s Records.)

Finding of Fact No. 34: Melody Mileur, the City of Bozeman Communications Coordinator, provided an affidavit as well. Ms. Mileur swore, “Immediately upon starting my job with the City, the City Manager tasked me with working to develop branding and messaging” for the BPSC, and that she “began attending regular team meetings with The Nest Collective ... and other staff members and elected officials of the City who were also working on developing educational presentations and other materials[.]” Ms. Mileur swore she understood the difference between education and advocacy, and that the City attorney advised her and others on the prohibition on advocacy while on City time or property. Ms. Mileur stated she regularly met with The Nest Collective to discuss educational materials, and that she was responsible for posting materials on social media platforms and the City’s website, in consultation with the City Attorney. (Commissioner’s Records.)

Finding of Fact No. 35: On December 19, 2018, BCFS Officer Terry Cunningham emailed COPP a copy of the script used in the committee's radio ads, as well as an audio copy of the ads. Mr. Cunningham also stated all email correspondence pertaining to the ad was carried out on his personal email account (and provided representative emails from that account), and that the script for the ad was typed up on his personal computer. The ad stated (in full):

Why should you vote "yes" for the Bozeman Public Safety Center?

Bozeman's police force is in an unsafe, cramped facility that won't survive a seismic event.

Fire station #1 is also inadequate and overcrowded.

Our municipal courts don't provide proper security for judges and crime victims.

Voting yes for the Bozeman Public Safety Center will allow our first responders to keep the community safe. One facility, built on land the city already owns, is an efficient solution for Bozeman's future.

Paid for by Bozeman Citizens for Safety.

(Commissioner's Records.)

Finding of Fact No. 36: A review of Bozeman City Commission minutes and meeting video establish that the issue of a local public safety center was discussed or options formally adopted on six City of Bozeman City Commission meeting agendas: November 13, 2017; December 15, 2017; January 22, 2018; April 23, 2018; May 7, 2018; and July 23, 2018, when the Commission passed a resolution adopting Resolution 4936, submitting the 36.9 million bond issue to the electorate. (Commissioner's Records.)

Finding of Fact No. 37: The COPP provided a copy of the campaign finance complaint to the parties in the *Koopman* lawsuit and invited them to provide additional information. While the response submitted addressed their position on the campaign finance complaint, no additional evidence or information was provided. (Commissioner's Records.)

BACKGROUND

Following a public presentation of Gallatin's County's Law and Justice Center feasibility study at the November 13, 2017 City of Bozeman Commission meeting, the Bozeman City Commission set into motion a series of public

meetings that would ultimately lead to a July 23, 2018 adoption of a resolution formally “submitting to the qualified electors of the [City] the question of issuing general obligation bonds for [the BPSC]” (FOF Nos. 2, 36).

Meanwhile, Commissioner Mangan participated in a May 10, 2018, presentation to the Montana League of Cities and Towns focusing on requirements that may be placed on local governments by the 2015 Montana Disclose Act. COPP routinely provides guidance and educational materials to all candidates, committees, and the public upon request and the League had invited the Commissioner to present as part of a panel that included Bozeman City Attorney Greg Sullivan and a Deputy City Attorney from Great Falls.³ Following the presentation, Mr. Sullivan sought guidance from Commissioner Mangan and COPP regarding a potential bond measure that was expected to be placed on the November 2018 general election ballot. COPP provided information to Mr. Sullivan that including filing as an incidental committee, guidance on electioneering communications and election communications, recommendations on the maintenance and reporting of staff time records involved in the development and presentation of electioneering communications and related reportable expenses.

The *Koopman* lawsuit, filed November 19, 2018,⁴ asserts that, absent advocacy activity, the City of Bozeman would not have been required to file as a political committee with COPP. This district court complaint contends, amongst

³ The presentation was held in Billings, MT.

⁴ As noted above, the City’s COPP complaint incorporated, and attached, a copy of the *Koopman* district court complaint.

various allegations, “[t]he fact that the City filed as a political committee is one example demonstrating that they were actively urging voters to support the bond[,]” and “political committees support (or oppose) elections, by legal definition (MCA § 13-1-101(7), (23) (31)(a)).” (Cmplt., at 5.)

That contention is only partially correct. The Commissioner examines Mont. Code Ann § 13-1-101(31), where a definition of a political committee is found:

- (a) "Political committee" means a combination of two or more individuals or a person other than an individual who receives a contribution or makes an expenditure:
 - (i) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination;
 - (ii) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or
 - (iii) to prepare or disseminate an election communication, an electioneering communication, or an independent expenditure.
- (b) Political committees include ballot issue committees, incidental committees, independent committees, and political party committees.
- (c) A candidate and the candidate's treasurer do not constitute a political committee.
- (d) A political committee is not formed when a combination of two or more individuals or a person other than an individual makes an election communication, an electioneering communication, or an independent expenditure of \$250 or less.

Of the four distinct types of political committees (*id.*, (b)), three types (independent, ballot issue, and political party) are clearly defined as inherently “supporting” or “opposing” candidates or ballot issues up for election (*id.*, (a)). Incidental committees, however, are separate and distinct in this regard. Defined under Mont. Code Ann. §13-1-101(23)(a), incidental committees are not formed exclusively to support or oppose candidates or ballot issues, but rather become “incidentally” involved in an election by receiving a contribution or making an

expenditure. Incidental committees may support or oppose candidates or ballot issues; however, a group may become an incidental committee under Montana law without supporting or opposing anything.

By definition, support or opposition by itself is not the only trigger for required registration with COPP. The preparation and/or dissemination of electioneering communications meeting or exceeding a threshold of \$250.00 by a person other than an individual would qualify as an incidental political committee, including local governments. *Id.*, at (31)(d). As defined by Mont. Code Ann. § 13-1-101(16):

(a) "Electioneering communication" means a paid communication that is publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials, that is made within 60 days of the initiation of voting in an election, that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue, and that:

- (i) refers to one or more clearly identified candidates in that election;
- (ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or
- (iii) refers to a political party, ballot issue, or other question submitted to the voters in that election

(Emphasis supplied.) In this matter, absentee ballots were first mailed out in Gallatin County on October 12, 2018 (FOF No. 1). Any City of Bozeman paid public material or advertisements (including the costs of producing the communication) clearly mentioning the BPSC ballot issue which were produced or distributed after August 13, 2018 (*id.*) would have qualified as electioneering communication expenditures.

The record demonstrates that just such electioneering communications existed: The City of Bozeman produced materials specifically referencing the BPSC ballot issue after August 13, 2018 that fall under the definition quoted above which, cumulatively, cost \$250.00 or more to produce and distribute.⁵ The electioneering communications meant the City was required to file as an incidental committee. Mont. Code Ann. §§ 13-1-101(16), (23), (31)(d). The City of Bozeman did so on June 22, 2018, stating as its purpose to “inform public of impact of passage or failure of Bozeman Public Safety Center ballot issue on City operations” (FOF No. 3), and then filed its initial committee finance report on August 8, 2018 (FOF No. 4). The City subsequently filed C-4 committee finance reports disclosing the City’s expenditure activities on October 2, October 25, and November 21, 2018 (FOF Nos. 7, 10, 11, 15).

The City recognized that its activity, while educational in nature, would require registration with COPP as an incidental political committee, and filed all necessary registration and financial reports. Registration as an incidental committee was proper as the City became “involved” in an election but was not a committee formed to support or oppose any specific candidates or ballot issues. In other words, the contention in the *Koopman* lawsuit that political committees “support (or oppose) elections, by legal definition[,]” is only partially true.

The *Koopman* district court complaint also references a ballot issue committee, Bozeman Citizens for Safety (BCFS). BCFS is a separate entity not

⁵ As evidenced by the City of Bozeman incidental committee’s first reported debt to “The Nest Collective” on June 30, 2018. (See City of Bozeman C-4 (Aug. 8, 2018) (summarized in FOF No. 4).)

associated with the City of Bozeman; BCFS filed with COPP as a ballot issue committee on October 5, 2018 and filed its initial committee finance report on the same day (FOF Nos. 8, 10).

DISCUSSION

The campaign finance complaint alleges⁶ the City of Bozeman advocated (supported) the passage of the Bozeman Public Safety Center ballot issue, that city officials, elected officials, and city employees used public time and resources to support the measure, and that the City coordinated with a ballot issue committee to support the passage of the ballot measure. The Commissioner examines each of these allegations.

#1. Did the City of Bozeman’s “Educational Campaign” and all associated “educational” materials actually advocate for the passage of the BPSC bond issue?

Within the *Koopman* district court complaint are allegations that the City of Bozeman, through its employees and elected officials, violated state law by waging a promotional campaign disguised as educational activities. In particular, *Koopman* and *Johnson* contend that materials produced and distributed by the City regarding the BPSC “were the functional equivalent of advocacy.... Any person reading, or hearing, the message would clearly know they were being urged to vote in favor of the bond[.]” (Cmplt., at 6.) By using key phrases such as “Bozeman is Safe. Let’s Keep it that way[.]” and “Vote November 6th” on its materials, the *Koopman* complaint asserts that the City

⁶ As noted in the opening, the City incorporated by reference the “entirety the Complaint filed in the referenced civil action, for the Commissioner’s review[.]”

crossed the line from educational or informational activity into issue advocacy, activity that is prohibited under Mont. Code Ann. § 13-35-226(4).

Section 13-35-226(4), Mont. Code Ann., prohibits public employees from supporting or opposing candidates or ballot issues up for election while at their place of employment or on the job, stating in relevant part, “A public employee may not solicit support for or opposition to any political committee, ..., or the passage of a ballot issue while on the job or at the place of employment.” This statute makes clear that the City’s employees could not use City time, resources, or equipment to advocate for passage of the BPSC bond issue.

To determine if the City’s materials crossed the line from education to advocacy, they must be reviewed, and their content scrutinized. While Montana law does not define advocacy, it does define “support” and “oppose”:

"Support or oppose", including any variations of the term, means:

(a) using express words, including but not limited to "vote", "oppose", "support", "elect", "defeat", or "reject", that call for the nomination, election, or defeat of one or more clearly identified candidates, the election or defeat of one or more political parties, or the passage or defeat of one or more ballot issues submitted to voters in an election; or

(b) otherwise referring to or depicting one or more clearly identified candidates, political parties, or ballot issues in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election, or defeat of the candidate in an election, the election or defeat of the political party, or the passage or defeat of the ballot issue or other question submitted to the voters in an election.

Mont. Code Ann. §13-1-101(50). As presented or otherwise produced, no official City of Bozeman material (see FOF No. 26) used the language set out in subsection (a) in reference to the BPSC ballot issue. Thus, the question is

whether the content of the City's materials can be reasonably interpreted as anything other than a call for passage of the BPSC?

In response to direct queries from the City of Bozeman (FOF No. 23), this test has already been applied on three occasions by the Commissioner. In each query, the City sought guidance from COPP in the determination of whether or not material presented would be considered an electioneering communication and if, in the estimation of the Commissioner, it would advocate for passage of the BPSC. These reviews suggested that, in the Commissioner's estimation, the proposed materials were indeed potential electioneering communications (*id.*) as they did not appear to support the BPSC ballot issue though they clearly referred to it. Mont. Code Ann. § 13-1-101(16)(a)(iii). If the materials had appeared to support the ballot issue, the Commissioner would have provided additional guidance to Mr. Sullivan.

As part of the investigation, COPP reviewed all of the documentary materials provided with the City's official response (FOF. No. 26), as well as viewed a provided YouTube video. The *Koopman* district court complaint suggested the material provided to the public by the City was advocacy, claiming terms such as "keep," "solution," "needs," "now," and "vote on November 6" were indicative of an advocacy campaign. (Cmplt., p. 20 ¶¶58-60.) The district court complaint also cited the directional use of an "arrow pointing" to "Bozeman Public Safety Center" along with the use of the word "Vote" constituted expressed advocacy. (Cmplt., pp. 13, 18, ¶¶60,98.) In its response to the campaign finance complaint, the City contends the "information contained in the materials is

susceptible to more than one interpretation, and therefore is not the functional equivalent of express advocacy[.]” The Commissioner further examined the communications to determine if, in the view of COPP, they met the definition of an election communication or electioneering communication.⁷

While Montana’s Disclose Act was not in effect until October of 2015,⁸ the issue of advocacy has been addressed by numerous prior COPP decisions. *See e.g., Juve v. Roosevelt County Commissioners*, COPP 2014-CFP-063; *In Re Griffin and Lewis and Clark County*, Nov. 19, 2009 (Commissioner Unsworth). The *Griffin* decision reviewed two advertisements where a county encouraged a vote on a bond issue: the “narrative ad” which “urged the reader to ‘vote November 7 on the Road Improvement Mill Levy[,]” and a so-called “block ad” which “concluded with two statements: ‘Your vote is your voice! Vote November 7, 2006.’” *Griffin*, at 6. The Commissioner held:

Although each ad explained and provided justification for the county’s request for the mill levy, neither ad expressly advocated for the passage of the mill levy.

Like the City of Bozeman’s materials, the ads in *Griffin* used “vote” language or highlighted the importance of voter participation (“your vote is your voice”). The City’s communications also contain common elements such as identification of the BPSC and the BPSC logo, utilized a voter participation call to action (such as “make your voice heard”) or contained a statement of need or concern (such as

⁷ Regardless of classification as either an election or electioneering communication, the City of Bozeman would still be responsible for reporting the expenditure. Mont. Code Ann. §§ 13-1-101(18), 13-37-225, 13-37-232.

⁸ The 2015 Montana Disclose Act added the definition of an “electioneering communication.” Mont. Code Ann. § 13-1-101, Compiler’s Comments.

“keep Bozeman safe”), and included the city website, bozeman.net, where additional information was available to assist a voter in making an informed decision. The Commissioner’s investigation did not reveal any communication or material from the City of Bozeman which called for the election or defeat of the ballot issue.

Asking a citizen to “vote” is neither a call to support or oppose, but rather a call to participate by casting a vote. The citizen can also choose not to vote or participate in the election. The same can be applied to other terms identified by the *Koopman* district court complaint: a voter can choose to keep or not keep; can determine if an issue is a solution, or not a solution; determine if an issue is a need or is not a need; and so on. Statements such as “Let’s Keep Bozeman Safe” encourage discussion and debate on a local issue; for example, Gallatin County Attorney Marty Lambert and Gallatin County Sheriff Brian Gootkin both publicly provided an alternate viewpoint, stating “safety is not going to be enhanced. It’s going to be harmed[,]”⁹ and that “separating police officers ... does not make you safer; it actually does the opposite[.]”¹⁰

Finally, the *Koopman* district court complaint alleged the use of an arrow was a directional symbol pointing to “Vote Nov. 6,” and therefore constituted express advocacy. (Cmplt., at 13, ¶60.) In reviewing the materials, the *Koopman* allegation appears to be referring to the design of the background/s that is

⁹ Gallatin County Attorney Marty Lambert, *Letter to the Editor*, Bozeman Daily Chronicle, October 18, 2018.

¹⁰ Gallatin County Sheriff Brian Gootkin, *Letter to the Editor*, Bozeman Daily Chronicle, October 15, 2018.

consistent across numerous City of Bozeman materials and communications, including the background design of the City of Bozeman’s website, including the site’s homepage.¹¹ Even assuming the background was indeed meant as an arrow, the act of pointing to “vote” does not in itself indicate anything other than the act to vote. If the *Koopman* district court complaint is suggesting a form of subliminal messaging, the majority, if not all, of the “arrows” appear to be pointing downward. One could just as easily suggest it was meant to “vote down” the measure.

In reviewing all of the included material, the *Koopman* district court complaint, the response by the City, and all of the available records, the Commissioner determines that no City of Bozeman BPSC materials had content materially different from those previously reviewed at the request of Mr. Sullivan. The reviewed BPSC materials are classified as electioneering communications, assuming they met the reach (received by more than 100 recipients in the district), were utilized after August 13, 2018, and were paid (FOF No. 26). As electioneering communications, these materials cannot be interpreted as advocating for the BPSC measure but instead serve as educational material meant to inform Bozeman voters.

The City made a large scale, good-faith effort to ensure all materials did not elicit support or opposition. Subsequent COPP reviews of all BPSC materials produced by the City have determined those materials would be considered electioneering communications that did not advocate for or against the BPSC.

¹¹ <https://www.bozeman.net/home>.

Additionally, numerous affidavits referenced City Attorney Sullivan's training for employee and elected official to ensure such persons did not use public time, facilities, equipment, or resources to support or oppose the measure (FOF Nos. 17-25, 32-34).

There is insufficient evidence to conclude the City engaged in an advocacy program urging support for the BPSC issue using public time, resources, or equipment to produce and distribute election communications. The allegation is hereby dismissed.

#2. Did the City of Bozeman, its elected officials, or employees utilize public time, resources, or other materials to advocate for passage of the BPSC beyond the City-sanctioned educational campaign?

The *Koopman* district court complaint also alleges the City of Bozeman, again through its elected officials and employees, utilized public time, resources, and other materials to urge support for the BPSC.

The complaint referenced the City's inclusion of "staff time" on C-4 financial reports filed with COPP to conclude that "the Defendants...used public funds and public resources to support passing the bond[.]" (Cmplt., at 8, ¶30.) The materials produced and distributed by the City were electioneering communications that do not support or oppose the ballot issue (*supra*, at Issue #1), and the costs of such electioneering communications are required to be reported to COPP. Mont. Code Ann. § 13-37-225. Such costs include "expenditure[s] for ... salaries[.]" *Id.*, § 13-37-232(2)(b); *see also* Admin. R. Mont. 44.11.202(6), 203(2)(b). The requirement for political committees to report staff time on financial reports is well established. *Daubert v. Montanans for Clean*

Water, February 27, 1997 (Commissioner Argenbright); *Heffernan v. Montana Chamber of Commerce*, June 2000 (Commissioner Argenbright); *Harrington v. Cap the Rate*, July 3, 2012 (Commissioner Murray); *Fisher v. MT Assoc. Realtors/Realtors for Better Gov't*, COPP 2017-CFP-002, at 3-4. The City of Bozeman followed Montana campaign finance reporting requirements by timely, properly, and thoroughly reporting expenditures, including time of City personnel involved in those activities.

The Commissioner now examines the particular actions and activities of City of Bozeman employees.¹² As noted above, any use of public time, resources, or other, related materials by City employees while on the job, or otherwise acting in their official capacity, meant to promote the BPSC could be a violation of Mont. Code Ann. § 13-35-226(4).

The City of Bozeman made it clear to its employees the prohibitions on advocating for the success or failure of the BPSC ballot issue (FOF Nos. 17-22, 24-25, 32-34). The City took these prohibitions seriously (*id.*). Bozeman City Attorney Greg Sullivan provided trainings touching on educational versus advocacy efforts, and what activity was and was not allowed, to all City of Bozeman officials or employees involved with the BPSC effort (FOF No. 23). Additionally, the City provided a "Volunteer How-To" form to individuals volunteering for the City at educational gatherings (FOF No. 26). The form explained that all volunteers were serving as representatives of the City of

¹² The analysis here is focused on the alleged conduct of the City employees (and not elected City officials) as the prohibitions of Mont. Code Ann. § 13-35-226(4) applies only to public employees. (*See also infra*, at "1. Areas of Limitation" (further explaining distinction).)

Bozeman and were limited to providing educational materials or other information regarding the BPSC and repeatedly stated that advocating for the BPSC was not allowable in such a setting, and reminding that all outreach was to be educational only (*id.*). The City also provided affidavits from several City employees involved, or alleged to have been involved in key aspects of the bond matter, and each employee attested that they did not promote, support, or advocate for the BPSC while acting in their official capacity (FOF Nos. 17-22, 24-25). Statements from additional employees expressly denied that any advocacy activity occurred while on City time or on City property (FOF No. 32-34).

While City employees may have personally supported or advocated for passage of the BPSC in some fashion, in each instance the employee attested that their efforts were limited to and carried out in their capacity as citizens, not employees, and any advocacy activities were carried out off work hours, using their own time, money, or equipment (FOF Nos. 24, 25, 32). This distinction is important because Mont. Code Ann. § 13-35-226(4) “does not restrict the right of a public employee to...express personal political views[.]” As long as the employee was not operating in an official employment capacity, officially representing the City of Bozeman, or otherwise utilizing City time or resources, the individuals were free to express their personal opinion or position regarding the BPSC and advocate for its passage or failure as they saw fit. The *Koopman* district court complaint contains neither factual evidence nor specific examples refuting the sworn statements of these employees; neither was any such evidence uncovered as a result of COPP’s investigation. The Commissioner therefore

determines the employee's BPSC advocacy activities occurred solely in individuals' personal capacities and were allowable under Mont. Code Ann. § 13-35-226(4).

Taken together, it becomes clear that the City of Bozeman and its employees engaged in a collective effort to limit official BPSC activities to educational only. Any advocacy efforts undertaken by individuals who were also employed by the City of Bozeman were done on their own time, utilizing their own private resources, and carried out in their personal, not professional, capacity. The allegations of City employees using public time, resources, or other materials to advocate for the BPSC issue are hereby dismissed.

1. Areas of Limitation

Within the *Koopman* district court complaint, there are repeated references to Mont. Code Ann. § 2-2-121, the statute regarding the rules of conduct for public officers and public employees. *Koopman* and *Johnson* argue the law was routinely violated by the City of Bozeman, its employees, and elected officials to advocate for passage of the BPSC. (*See e.g.*, Cmplt., at 14.)

While Mont. Code Ann. § 2-2-121(3) does prevent elected officials or public employees from using public time, resources, or other materials to advocate for or against the election or nomination of a candidate or ballot issue, the specific statute referenced falls under Montana's Code of Ethics rather than campaign financial law (as does all of Chapter 2). As the City of Bozeman is a local government entity, Mont. Code Ann. § 2-2-144 clearly assigns the enforcement of these prohibitions to the City of Bozeman's Board of Ethics, not the

Commissioner of Political Practices. *Compare id. with* Mont. Code Ann. § 2-2-136 (enforcement for state officers, legislators, and state employees). Any alleged breaches of Montana’s Code of Ethics by the City’s elected officials or employees would need to be presented to the City of Bozeman’s Board of Ethics.

Further, COPP’s jurisdiction under Mont. Code Ann. § 13-35-226(4) is limited to City of Bozeman employees, not its elected officials. The statute clearly references “a public employee” but makes no mention of “public officers,” such as an elected official. These terms are separately defined: a “public employee” is “any temporary or permanent employee of a local government,” as distinguished from a “public officer” which is “any elected officer of a local government.” *Id.*, at § 2-2-102(7)(b), (8)(a). Thus, the Commissioner finds the provisions of Mont. Code Ann. §13-35-226(4) do not apply to any City of Bozeman elected officials identified by the *Koopman* complaint.

#3. Did Bozeman Citizens for Safety coordinate its BPSC advocacy activities with the City of Bozeman?

A third allegation made by the *Koopman* district court complaint contends that the City of Bozeman, through its employees and elected officials, coordinated activities with a ballot issue committee, Bozeman Citizens for Safety (BCFS), in an effort to support the passage of the bond. *Koopman* and Johnson contend that the City, by default, coordinated with BCFS to support the City’s education campaign because the City and BCFS engaged a common vendor to provide services and because City elected officials were listed as officers of BCFS. “To illustrate[,]” the complainants write, “the City paid Nest Collective (Nest) thousands of dollars for messaging, a logo and graphic design. BCFS paid Nest

just over \$100.00. This alone establishes that the City supported BCFS[.]” (Cmplt., at 3.)

As an initial matter it must be remembered that coordination between political committees is not prohibited; rather, if coordination occurs it must be reported. There must first, though, be coordination which means:

made in cooperation with, in consultation with, at the request of, or with the express prior consent of a candidate or political committee or an agent of a candidate or political committee.

Mont. Code Ann. § 13-1-101(10). Simply put, activities must be discussed, planned, or otherwise authorized between two or more individual candidates or committees to be considered coordination. Rule 44.11.602, ARM provides additional guidance when examining this allegation.

The fact that Mehl and Cunningham were elected City officials who were also, privately, officers of a ballot issue committee does not inherently prove that BCFS (or the ballot issue itself) was supported by the City, nor that any coordination or coordinated activities occurred.

BCFS filed a C-2 Statement of Organization with COPP as a ballot issue committee with the stated purpose to support the BPSC (FOF No. 8). BCFS listed Bozeman elected officials Chris Mehl and Terry Cunningham as committee officers (*id.*). While communications made by or through an agent in the course of their involvement in a committee is one factor that can indicate coordination, the existence of “personal or professional relationships” does not itself establish coordination. Admin. R. Mont. 44.11.601(2)(b), (4)(a).

The City of Bozeman reported expenses in total of \$99,648.00, both expenditures and in-kind contributions towards its efforts¹³. By comparison BCFS spent a total of \$1,455.04 on its efforts,¹⁴ which included expenditures for two separate election communications: 150 yard signs and 11 radio ads (FOF Nos. 27, 29). As to the yard signs, the reports reflect payment of about \$100 to The Nest Collective as a paid vendor for the design of yard signs on October 10, 2018 (FOF No. 12). The Nest Collective, meanwhile, entered into a Professional Services Agreement with the City of Bozeman (FOF No. 6), which lasted from June 11 through November 6, 2018. Retaining the aid services of the same vendor (here, The Nest Collective) is one factor that can reflect coordination. Admin. R. Mont. 44.11.602(2)(c).

The City's representative for any authorization or approvals under its Agreement with Nest was Chuck Winn, Assistant City Manager, who could designate that authority as needed. The City also identified 16 city employees and officials who worked with Nest in some capacity on the education effort (FOF No. 16). Of these, only three provided authorizations of work and work product for the City's education effort: Mr. Winn, Andrea Surratt, City Manager, and Melody Mileur, Communication Coordinator (FOF No. 30). In other words, neither Mehl nor Cunningham were Nest's points of contact for the City, nor did either official have authority to approve Nest's work for the City. The remaining

¹³ Total of City of Bozeman incidental committee reported expenditures and in-kind contributions on its 2018 campaign finance reports

¹⁴ See Bozeman Citizens for Safety ballot issue committee's total reported expenditures per 2018 campaign finance reports.

13 employees and officials would attend meetings, discuss ideas, messaging, etc.; officials among this group of 13 was Deputy Mayor Mehl, and Mehl apparently attended 75% of such meetings. Thus, while Mr. Mehl participated in City meetings with Nest, he had no authority to influence the City's decisions the way an agent would—ultimately, this fact weighs neither for or against coordination. Admin. R. Mont. 44.11.602(2)(a), (e).

Mr. Mehl was, however, also an Officer of the BCFS ballot issue committee (FOF No. 8), and he was the main contact with regard to Nest's design of a yard sign for the BCFS ballot issue committee, which contact occurred almost exclusively by email (FOF No. 30). So while Mr. Mehl was not an agent of the City with regard to Nest's work, he was certainly BCFS's agent. *Id.* COPP thus carefully reviewed these email discussions from Mr. Mehl's private Hotmail email account (FOF No. 21, 28, 30). That review yielded no evidence of coordination such as the sharing of information, content, timing, etc. Admin. R. Mont. 44.11.602(1), (2)(a)-(b). Nor is there evidence that Mehl received or gave any information to the City or Nest regarding BCFS's yard sign or radio ad (FOF Nos. 28, 30). *Id.* These facts thus weigh significantly against coordination. Further, while the City and BCFS both used Nest for design, BCFS stated it "engaged in no communications with the City about either of these decisions or expenses[.]" Rather, the committee asserted that BCFS, and BCFS alone, was responsible for engaging Nest, and that this activity was carried out independent of the City, the City's personnel, or the City's educational efforts. Neither Mehl nor Cunningham had the authority to bind or act on behalf of the City of Bozeman either

individually or together. Thus, in this instance, the fact of having used the same vendor, in the absence of any other indicia of coordination, is insufficient to find a violation.

The *Koopman* district court complaint specifically alleges the use of the Bozeman Public Safety Center logo on yard signs by the ballot issue committee also provides evidence of coordination. (Cmplt., at 3, 10.) City Attorney Greg Sullivan responded, in August 2018, to questions from Mehl about the use of City of Bozeman education materials by outside entities and the use of the BPSC logo (FOF No. 31). Mr. Sullivan explained that such materials, including the logo, were in the public domain and the City does not copyright or trademark its logos and there was no limitation on fair use (*id.*). While communications which “replicate[d], reproduce[d], republish[ed]... in whole or in substantial part, any material designed, produced and paid for” by the City may indicate coordination (Admin. R. Mont. 44.11.602(2)(d)), there is a specific exception for “statements, images, or other information that is appropriated from a public source” (*id.*, at (3)(e)). Thus, the use of an uncopyrighted logo, available in the public domain by the ballot issue committee is expressly not evidence of coordination. *Id.*, at (3)(e).

The second election communication of BCFS were the radio ads. While Terry Cunningham was not among the City staff who met with Nest regarding the City’s BPSC educational campaign, he was involved in conceiving of, recording, and distributing the BCFS’ pro-BPSC radio ad (FOF Nos. 19, 35). The radio ad did not reference Mr. Cunningham’s elected title nor those of any other

City of Bozeman elected officials who participated,¹⁵ nor did it reference the City Commission (*id.*, 35). In short, the script and other evidence fail to reveal any information which might indicate coordination between BCFS and the City. Admin. R. Mont. 44.11.602.

Having considered the various factors which might reflect coordination (Admin. R. Mont. 44.11.602), the Commissioner finds no evidence to suggest either Mehl or Cunningham coordinated the City's educational campaign with BCFS' advocacy activities to enhance the ballot committee's pro-BPSC message. To the contrary, all evidence suggests Mehl and Cunningham carried out BCFS activities using personal accounts, time, and facilities, and that not only did BCFS acted interpedently in its election communications, but the City also acted independently in its electioneering communications. A review of 2018 City of Bozeman commission meeting minutes could find no City vote or authorization of support for the BCFS ballot issue committee, including sign or radio ad expenditures. Affidavits provided by City personnel identified as primary contacts for Nest expressly stated they did not coordinate with the BCFS. Nest personnel maintained separate communications, design, and billing records, and separate files were kept for both the City of Bozeman and the BCFS committee (FOF No. 30). Affidavits of Mehl and Cunningham similarly attest they did not coordination with the City (FOF Nos. 19, 21).

¹⁵ While not at issue in the radio ad, referencing ones official title in itself is not improper. 51 A.G. Op. 1 (2005, McGrath).

Where evidence has been provided to corroborate the arguments made by both the City of Bozeman and BCFS disputing coordination, the *Koopman* district court complaint provided no such evidence to support its allegations, nor did it provide additional material to support the allegations in response to this COPP Complaint (FOF No. 37). These allegations thus rely on only the associations between the City and BCFS. As established from the above analysis, the associations mentioned do not themselves rise to the level of coordination, and no evidence points to any coordinated activities occurring, and therefore the allegation of coordination between the City of Bozeman and BCFS are hereby dismissed.

CONCLUSION

The COPP Complaint contained three main allegations concerning the City of Bozeman: that all BPSC materials produced and distributed by the City clearly advocated for passage of the bond issue, that City employees used public time and resources to advocate for passage of the BPSC, and that the City coordinated activities with the BCFS ballot issue committee to advocate for the BPSC. From the investigation into this matter, and as set out above, the Commissioner has determined that the City's BPSC materials were electioneering communications, not election communications, that no City employees used public time or resources to advocate for the BPSC, and that the City did not coordinate any BPSC activities with the BCFS group. Based on the totality of available documents, emails, interviews, committee financial reports, and other evidence, the allegations are hereby dismissed.

DATED this 28th day of January 2019.



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