



FAIR POLITICAL PRACTICES COMMISSION

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February 24, 2010

Susan C. Parks, Ed.D.
Superintendent
San Gabriel Unified School District
408 Junipero Sierra Drive
San Gabriel, CA 91776

Re: Your Request for Informal Assistance
Our File No. I-10-013

Dear Dr. Parks:

This letter responds to your request for advice regarding the provisions of the Political Reform Act (the "Act").¹ Nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question seeks general guidance, we are treating your request as one for informal assistance.²

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other bodies of law including, but not limited to, Government Code Sections 8314 and 54964, Education Code Section 7054, and Penal Code Section 424.

QUESTION

Does the Act restrict automated electronic calls via telephone messages, text messaging, and electronic mail from the San Gabriel School District (the "District") to

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

the District's employees and/or the members of the community including the families of the District's students?

CONCLUSION

While the Act's mass mailing provisions do not apply to telephone messages, text messaging, and electronic mail, a payment of public funds by a state or local governmental agency in connection with a campaign related communication may qualify the agency as a committee subject to the Act's reporting requirements. However, telephone messages, text messages, and electronic mail limited to factual information regarding a traffic accident or a vaccination program are not considered campaign related communications. Additionally, telephone messages, text messages, and electronic mail in which an elected official identifies him or herself to the recipient of the message would not typically be considered campaign related communications barring additional information indicating a relationship to a campaign other than the mere fact that the official is an elected official.

FACTS

The District works with the NTI Connect-Ed (the "Blackboard System") for rapid response communications purposes. The Blackboard system delivers automated electronic calls, or "robo-calls," via telephone messages, text messaging, and electronic mail to families of the District's students. Recent examples of these so called "robo-calls" include a message to alert parents of a train accident, which may have impacted parents picking up their children, and a message regarding the District's H1N1 immunization effort. A district wide message is delivered to approximately 5,500 student families.

The District would like to know whether the Act places any limitations upon the District's use of the Blackboard System. For example, because of concerns about complying with the Act, the District has previously decided not to send a message in which the District's Board President identified himself as the Board President. In addition to the Blackboard System, the District would like assistance as to the Act's limitations on electronic mail from the District to the District's employees and/or members of the community.

ANALYSIS

Section 89001 states that "[n]o newsletter or other mass mailing shall be sent at public expense." Further interpreting this restriction and notwithstanding exceptions provided in Regulation 18901(b), Regulation 18901(a) prohibits mailings under Section 89001 if all of the following criteria are met:

"(1) Any item sent is delivered, by any means, to the recipient at

his or her residence, place of employment or business, or post office box. For purposes of this subdivision (a)(1), the item sent must be a tangible item, such as a videotape, record, or button, or a written document.

“(2) The item sent either:

“(A) Features an elected officer affiliated with the agency which produces or sends the mailing, or

“(B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

“(3)(A) Any of the costs of distribution is paid for with public moneys; or

“(B) Costs of design, production, and printing exceeding \$50.00 are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

“(4) More than two hundred substantially similar items are sent, in a singular calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b).”

Additionally and notwithstanding exceptions in Regulation 18901.1(b), Regulation 18901.1(a) prohibits mailings under Section 89001 if all of the following criteria are met:

“(1) The item sent is a tangible item, such as a written document, videotape, record, or button and is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box.

“(2) The item sent either:

“(A) Expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, as defined in Regulation 18225(b)(1).

“(B) When taken as a whole and in context, unambiguously urges a particular result in an election.

“(3) Public moneys are paid for either of the following:

“(A) The costs of distributing the item.

“(B) Costs, exceeding \$50, that are reasonably related to designing, producing, printing, or formulating the content of, the item including, but not limited to, payments for polling or research and payments for the salary, expenses, or fees of the agency’s employees, agents, vendors, and consultants, and the costs are paid by the agency with the intent of sending the item other than as permitted by this regulation.

“(4) More than two hundred substantially similar items are sent during the course of an election, including items sent during the qualification drive or in anticipation of an upcoming election, but excluding any item described in subdivision (b).”

However, as interpreted by Regulations 18901(a)(1) and 18901.1(a)(1), Section 89001 applies only to *tangible* items. Because telephone messages, text messages, and electronic mail are not considered *tangible* items, the Act’s mass mailing restrictions under Section 89001 do not apply to these communications. (See *Chernabaeff* Advice Letter, No. I-09-022 and *Jacobs* Advice Letter, No. A-06-076.)

Notwithstanding our conclusion that the Act’s mass mailing provisions do not apply to telephone messages, text messaging, and electronic mail, we must caution that a payment of public funds by a state or local governmental agency in connection with a campaign related communication is either a contribution or an independent expenditure, which may qualify the agency as a committee subject to the Act’s reporting provision. (See Regulation 18420.1.)³ A communication is campaign related, under the Act and Commission regulations, if the communication either (1) “expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified ballot measure” or (2) “when taking as a whole and in context, unambiguously urges a particular result in an election.” (*Ibid.*) For a communication by a state or local governmental agency, a communication “unambiguously urges a particular result” if the communication “can be reasonably characterized as campaign material or activity” and “is not a fair presentation of facts serving only an informational purpose.” (*Ibid.*)

Based upon the previous examples you have provided, telephone messages, text messages, and electronic mail limited to factual information regarding a traffic accident

³ Note that an agency qualifying as a committee may not expend campaign funds to place certain telephone calls aggregating to 500 or more in number advocating support of, or opposition to, a candidate or ballot measure unless the name of the organization that authorized or paid for the call is disclosed. (Section 84310; Regulation 18440.)

or a vaccination program are not considered campaign related communications. Additionally, telephone messages, text messages, and electronic mail in which an elected official identifies him or herself to the recipient of the message would not typically be considered campaign related communications barring additional information indicating a relationship to a campaign other than the mere fact that the official is an elected official. Note, however, that each communication must be assessed on a case-by-case basis considering the entirety of the message and the factual context in which the communication is made, including the "style, tenor, and timing" of the communication. (Regulation 18420.1(b)(2).) If you need additional assistance in determining whether any particular communication is campaign related, you may seek further advice providing all relevant information.⁴

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel



By: Brian G. Lau
Counsel, Legal Division

BGL:jgl

⁴ Please note that there are other bodies of law, separate and apart from the Act's provisions, that may apply to telephone messages, text messaging, and electronic mail by the District if the messages relate to a campaign including, but not limited to Government Code Sections 8314 and 54964, Education Code Section 7054, and Penal Code Section 424, which proscribe the use of public moneys for campaign-related activities by state and local governmental entities. (See also *Vargas v. Salinas* (2009) 92 Cal.4th 1 and *Stanson v. Mott* (1976) 17 Cal.3d 206.)