



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
1102 Q Street • Suite 3000 • Sacramento, CA 95811  
(916) 322-5660 • Fax (916) 322-0886

August 26, 2019

Phaedra Norton  
City Attorney  
678 W 18th St.  
Merced, CA 95340

Re: Your Request for Informal Assistance  
**Our File No. I-19-115**

Dear Ms. Norton:

This letter responds to your request for advice regarding the campaign disclosure provisions of the Political Reform Act (the "Act").<sup>1</sup> Please note we do not advise on any other laws concerning the use of public resources by government officials for campaign activities such as Government Code sections 8314 and 54964 and Penal Code section 424. Because your questions are general in nature, we are treating your inquiry as a request for informal assistance.<sup>2</sup>

Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

### QUESTION

1. May the City of Merced ("Merced"), using a vendor, conduct a public opinion survey of Merced voters to obtain feedback on key issues facing the community and would payments to the vendor trigger campaign reporting or disclaimer requirements under the Act?
2. May Merced send educational or informational material related to ballot measures mentioned in the public opinion survey by mail using public funds after the results of the public opinion survey are received and would this trigger campaign reporting requirements under the Act?

### CONCLUSION

---

<sup>1</sup> 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.

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

1. Yes. Merced may use a vendor to conduct a public opinion survey of Merced voters to obtain feedback on key issues facing the community without triggering campaign reporting or other disclaimer requirements under the Act so long as the survey does not constitute campaign activity.
2. Merced may send educational or informational materials so long as the materials are truly educational or informational in nature as discussed below.

### **FACTS AS PRESENTED BY REQUESTER**

You are the City Attorney for the City of Merced. Merced has engaged the services of FM3 research and the Lew Edwards Group to conduct a public opinion survey of Merced voters to obtain feedback on key issues facing your community. The surveys may be conducted telephonically or by specific written email request. The draft public opinion survey provided to the Fair Political Practices Commission ("FPPC") contains examples of several possible ballot measures and each example contained positive and negative statements on each measure for the purpose of exploring how the residents of Merced might stand on particular issues. These surveys also include general questions requesting the participant to rate each category on a scale of one to five, with one being extremely serious, four being not too serious, and five being not applicable. These questions ask whether the participant thinks certain issues are serious problems such as "crime, in general," "drug trafficking and drug use," and other related topics. Merced has stated that these questions in the survey are not intended to influence voters, but rather are intended to form as accurate a representation of the electorate as possible.

On May 31, 2019, you provided additional information stating that Merced has established an advisory charter review committee to make recommendations on amendments to the Merced City Charter and that it is possible Merced will put a measure on the ballot to amend the City Charter as well as a parcel tax measure, or a measure seeking to extend a sales tax measure, after receiving the survey results. However, Merced does not intend to use public funds to advocate for the measures and only intends to provide educational information to the electorate regarding the measures after the public opinion survey is conducted. The educational materials sent after receiving the survey results will be sent via regular mail using public funds.

### **ANALYSIS**

#### **Public Opinion Survey Conducted Prior to Placing Measures on the Ballot**

You ask whether Merced making payments to a vendor to conduct a public opinion survey by e-mail and telephone will be considered an independent expenditure and whether it will trigger campaign reporting requirements.<sup>3</sup>

---

<sup>3</sup> With regard the Section 89001 prohibition on mass mailings sent at public expense discussed further in this letter, because Merced plans to conduct the public opinion survey via e-mail or telephone only the public opinion survey is not considered a tangible item and is not a prohibited mass mailing under Section 89001. We have advised that a tangible item is not a publication that was sent only by e-mail or by e-mail hyperlink. (*Goulet Advice Letter, I-12-152*; See also *Spears Advice Letter, I-12-132.*)

Payments made by an individual or entity, other than a candidate or committee, in connection with activities that are exploratory in nature, such as taking a poll of the voters to determine what issues are considered significant, are not considered "expenditures." (*Powell* Advice Letter, No. A-85-241, *Hicks* Advice Letter, No. I-98-007.) A person's obligation to report expenditures in support of or in opposition to a ballot measure does not begin until the matter becomes a measure. (*In re Fontana* (1976) 2 FPPC Ops. 25.) A proposal can become a measure in two different ways. First, an initiative, referendum, or recall becomes a measure when the proponents begin to circulate signature petitions to qualify the measure for the ballot. Second, a constitutional amendment or other proposition submitted to a popular vote by a legislative body becomes a measure when the legislative body places the proposal on the ballot.

The draft survey contains several possible ballot measures with pros and cons provided for each measure for the purpose of exploring how the residents of Merced might stand on particular issues and is exploratory in nature. Accordingly, Merced's payments for the survey will not be reportable campaign expenditures prior to the city council taking action to place a measure on the ballot. However, should Merced decide to use the information gathered through the public opinion survey to conduct campaign related activity for the measurers, the payments for the public opinion survey may constitute campaign expenditures that would have to be reported.

Although a person's obligation to report expenditures in support of or in opposition to a ballot measure does not begin until the matter becomes a measure, payments made to conduct a survey may later become reportable expenditures if the subsequent use is for a political purpose such as influencing the outcome of an election. (*Winkler* Advice Letter, No. A-86-035, *Kaune* Advice Letter, No. I-10-052.)

Accordingly, if Merced uses the information gathered through the public opinion survey to conduct campaign-related activity for the measurers such as an advertising campaign that expressly advocates or when taken as a whole unambiguously urges a particular result with regard to the qualification or passage of a ballot measure, then the cost of conducting the survey, as well as the cost of making the communication, would be a reportable expenditure at the time the communication is distributed. As a result, Merced would have to register as a campaign committee if its activity meets the relevant Section 82013 committee qualification threshold.<sup>4</sup> (*Pessner* Advice Letter, No. A-78-080, *Hicks* Advice Letter, No. I-98-007.)

Providing survey data to a committee which either requests the information or uses the information for political purposes results in a nonmonetary contribution to a committee. (*Hoffman* Advice Letter, No. A-00-074.) The value of the contribution is the fair market value of the survey. The fair market value of the survey is the cost the committee would otherwise have to pay to purchase the information on the open market. (Section 82025.5.) If Merced were to provide survey data to a committee supporting a ballot measure, it may qualify as a major donor committee under Section 82013, depending on the value of the contribution.

---

<sup>4</sup> A person, including a state or local governmental agency, qualifies as a committee if the person (1) accepts contributions of \$ 2,000 or more, (2) makes independent expenditures of \$ 1,000 or more, or (3) makes contributions of \$ 10,000 or more. (Section 82013.)

On the other hand, if Merced conducts a survey and makes the results of the survey available to the public, either by presenting the information at a public meeting of the city council or by providing the data to a newspaper, such action would not result in a contribution. (*Winkler* Advice Letter, *supra*.)

### **Use of Information Collected from Public Opinion Survey for Educational Materials**

You ask whether educational materials to be sent by Merced after collecting information from the public opinion survey constitute campaign expenditures under the Act.

Restricting the mass mailing of campaign materials, Section 89001 broadly states that “[n]o newsletter or other mass mailing shall be sent at public expense.” Interpreting this broad prohibition and limiting its scope, the Commission has adopted Regulation 18901.1, prohibiting the use of public moneys for certain campaign related mailings.

Apart from exceptions specified 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 82025(c)(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).”

A communication “unambiguously urges a particular result in an election” pursuant to Regulation 18901.1(a)(2)(B), if the communication meets either of the following criteria:

“(1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television or radio spots.

“(2) When considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.” (Regulation 18901.1(c).)

Turning to campaign reporting and committee qualification requirements, a payment of public funds by a state or local governmental agency in connection with a communication to the public that 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 taken as a whole and in context, unambiguously urges a particular result in an election” is either a contribution, if made at the behest of the effective candidate or committee, or an independent expenditure. (Regulation 18420.1.)

Identical to the test articulated under the mass mailing provisions, a communication “unambiguously urges a particular result in an election” if the communication (1) is clearly campaign material or campaign activity or (2) when considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose. (Regulation 18420.1(b).) Payments qualifying as a contribution or an independent expenditure will qualify a state or local governmental agency as a committee subject to the Act’s reporting provisions if the payments exceed the thresholds of Section 82013.

However, the determination of whether a mailing is an illegal mass mailing and a contribution or independent expenditure potentially qualifying Merced as a campaign committee subject to reporting is dependent on the content and context of a particular mailing. Accordingly, we cannot reach a conclusion regarding any particular mailing based upon the general conditions you have described. Nonetheless, we can offer the following general assistance regarding Merced’s anticipated mailing and note that both Regulation 18901.1 and 18420.1 distinguish campaign material from informational material.

The facts provided state that Merced intends to mail out hard copy educational materials relating to the measures that will be placed on the ballot once the survey is complete. Merced intends to use public funds to mail these educational materials, but only plans to send out educational materials that are not expressly advocating for the election or for the qualification, passage, or defeat of a clearly identified measure. However, we must strongly caution that materials sent at public expense are not permissible informational or educational materials merely because they avoid expressly advocating for the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure. The entirety of the materials must be examined in determining whether any particular communication may also “unambiguously urge a particular result in an election” under the provisions of Regulations 18901.1 and 18420.1, including whether the communication is clearly campaign material based upon the nature of the

communication or whether the communication can be reasonably characterized as campaign material and not a fair presentation of facts serving an informational purposes considering the style, tenor, and timing of the communication. If this is the case, the material would be prohibited.

If you have specific questions related to a future mailing, we recommend seeking further assistance regarding the actual mailing and providing the factual circumstances in which the mailing is made.<sup>5</sup>

### **Applicability of the *Kaufman* Opinion**

You have also inquired about the applicability of the *Kaufman* Opinion, No. O-18-001 to Merced's public opinion survey. In *Kaufman*, the Commission concluded that the electronic mass mailing disclosure requirements under Section 84305 and Regulation 18435 do not apply to legitimate polls conducted by professional polling firms via e-mail that are not intended to influence voters. (*In Re Kaufman* Opinion, No. O-18-001.) The *Kaufman* Opinion was considered in the context of an existing campaign committee making payments for a public opinion poll and whether that poll should contain disclaimers identifying the committee paying for the poll. Under the facts you have provided, Merced has not currently conducted activity that would qualify it as a campaign committee and as noted above because the public opinion survey is only exploratory in nature it would not qualify as a contribution or expenditure. To the extent that Merced does not qualify as a committee, the Act's disclosure requirements do not apply. Should Merced qualify as a campaign committee, you may wish to seek further assistance.

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

Sincerely,

Dave Bainbridge  
General Counsel



By: Katelyn Greene  
Counsel, Legal Division

KG:aja

---

<sup>5</sup> Because the entirety of the informational or educational material must be assessed in determining whether it is campaign material, we reach no conclusion regarding the informational or educational material Merced intends to send. In this regard Regulations 18420.1(d) and 18901.1(e) provide the following factors for assistance in making this determination:

- (1) Whether the communication is funded from a special appropriation related to the measure as opposed to a general appropriation.
- (2) Whether the communication is consistent with the normal communication pattern of the agency.
- (3) Whether the communication is consistent with the style of other communications issued by the agency.
- (4) Whether the communication uses inflammatory or argumentative language.