California Fair Political Practices Commission

May 23, 1989

Bob Connelly
Chief Administrative Officer
Assembly Rules Committee
State Capitol, Room 3016
Sacramento, CA 94249-0001

Re: Your Request for Advice
Our File No. I-89-244

Dear Mr. Connelly:

You have written requesting that we reconsider our advice letter to you (No. A-89-107) dealing with the mass mailing provisions of the Political Reform Act (the "Act".)[1/]

QUESTION

Assemblymember Isenberg has submitted three sets of letters to the Assembly Rules Committee. Are the letters "substantially similar" within the meaning of the mass mailing limitations of the Act?

CONCLUSION

The three sets of letters are substantially similar.

FACTS

The Assembly Rules Committee has the responsibility of approving mass mailings sent out at public expense by members of the Assembly. Assemblymember Isenberg has submitted to the Assembly Rules Committee three sets of letters which he wishes to send at public expense to his constituents. We previously concluded that each set of letters is "substantially similar" within the meaning of the mass mailing limitations of the Act.

1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

ANALYSIS

Section 89001 provides that no newsletter or mass mailing shall be sent at public expense. Regulation 18901 clarifies that the prohibition applies to mass mailings which include references to elected officers. A "mass mailing" is more than two hundred substantially similar pieces of mail sent in a calendar month. (Section 82041.5.)

Regulation 18901(i) provides guidance on when pieces of mail are considered "substantially similar." It provides in pertinent part:

> (1) Pieces of mail are "substantially similar" if their text is substantially the same, with only minor changes or alterations for the purpose of personalizing the piece of mail.

As noted in your letter, the words "or content," which followed the word "text" in the noticed version of the regulation, were eliminated from the final version of the regulation adopted by the Commission. Elimination of the "or content" language merely clarified that a letter with text that bears no resemblance to another letter will not be considered "substantially similar" merely because the letters seem to address the same concept or idea. Nonetheless, we must still consider whether the text of letters are substantially the same as provided for in the regulation.

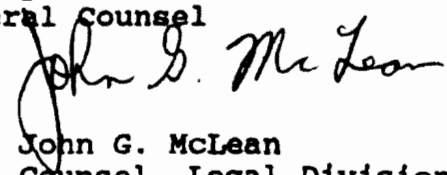
In determining whether the text of documents are substantially similar, we do not believe that there can be a mechanical test. In our previous letter, we noted that neither the Act nor Commission Regulations provided further definition of the terms "substantially the same" or "substantially similar." Accordingly, we relied upon dictionary definitions of these terms and concluded that the texts of mailings are substantially similar where the substance of the letters has a general likeness or resemblance, or the same fundamental essence or purpose. While the test is not exact, we believe it appropriately interprets and implements Section 89001.[2/] As indicated in our previous letter, we believe that under the test, the three sets of letters submitted by Assemblymember Isenberg are substantially similar.

[2/] Your request for reconsideration has caused us to look for other areas of law which might provide guidance on the issue of substantial similarity. One area of law to which we have looked is copyright law. Like the mass mailing prohibition, copyright law requires a determination of when documents are "substantially similar." Specifically, one element which must be proven to establish a copyright infringement is "whether an ordinary lay person would detect a substantial similarity between the works." United Athletic Sales Co. v. Salkeld (1975) 511 F.2d 904.

If you have any further questions, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel



By: John G. McLean
Counsel, Legal Division

KED:JGM:aa

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April 20, 1989

Diane Griffiths
General Counsel
428 J Street, Suite 800
P.O. Box 807
Sacramento, California 95804-0807

Dear Ms. Griffiths:

I am writing to request that you reconsider your advice letter dated March 23, 1989 (A-89-107) relating to the restrictions of Proposition 73 on mailings of 200 or more "substantially similar" pieces of mail. In that letter you advised me a letter is "substantially similar" to another letter if it "has the same fundamental purpose" as the other letter, or if the letters have "a general likeness or resemblance, or the same fundamental essence or purpose."

I believe that the definition of substantially similar in your advice letter presents several problems. First, it is inconsistent with regulation 18901, adopted by the Commission on December 6, 1989. Second, it raises very serious practical problems for both the FPPC and for public officials. Third, it raises constitutional problems.

(1) <u>The definition is inconsistent with regulation 18901</u>

When it was originally noticed for the commission meeting, the regulation defined "substantially similar" as follows:

> Pieces of mail are "substantially similar" if their text <u>or content</u> is substantially the same, with only minor changes or alterations for purposes of personalizing the piece of mail . . . . (Emphasis added.)

On the advice of the staff, the words "or content" were deleted from the regulation as it was finally adopted. The reason for

this change from the originally noticed version of the regulation was to avoid a test for the mass mailing prohibition that would require public officials or FPPC staff to make a judgment on the content of a mailing to determine whether it violated Proposition 73.

The advice given in your letter goes back to the type of content test that was rejected when the Commission adopted the regulation. As a result, the advice is inconsistent with the regulation.

(2) The advice poses serious practical problems for both the FPPC and for public officials

The reason that the staff recommended deletion of the content test from the regulation was that a content test was likely to result in innumerable requests for advice about mass mailings from public officials. Any content test is likely to produce this result. Public officials generally want to be sure that they are acting legally when they send out mail. Because a content test is subjective it is extremely difficult for a public official to be certain that two pieces of mail are not substantially similar. The only way that an official can be sure of acting legally is to ask for advice from the FPPC before sending a letter.

The standards in your advice letter illustrate this problem very well. Reasonable people might often disagree as to what the "fundamental essence" of a letter is. Disagreement is equally likely on the "purpose" of a letter, or on whether there is a "general likeness or resemblance." No public official can be sure that his or her own judgment on such a question will be the same as the judgment of the FPPC. Therefore, this advice almost forces an official to check with the FPPC before mailing more than 200 letters in a calendar month.

If a large number of public officials start to ask for advice on whether their letters are substantially similar, the FPPC could well be faced with more requests than it can handle. The Commission already has a heavier than usual load of advice requests due to Proposition 73. Your advice could make what is now a difficult situation almost impossible.

The subjective nature of the test you set forth in your advice letter will also make it difficult for the FPPC staff to keep its advice consistent. I am sure that the Commission does not want a situation where the legality of a letter will depend on the particular staff person who is asked for advice. On the other hand, if all advice on mass mailings has to be reviewed and compared for consistency, that will impose even more of a burden on an already burdened staff.

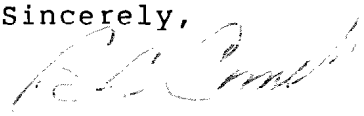
(3) The advice raises constitutional problems

I am aware that the constitutionality of the mass mailing provision is presently being challenged in the courts. In addition, I realize that the FPPC is required by Article III, Section 3.5 of the California Constitution to enforce this provision unless there has been an appellate court ruling that it is unconstitutional. Therefore, although I share the view of the plaintiffs in the lawsuit that the provision is unconstitutional, I will not address that issue in this letter. Instead, I will only address the question of whether the advice on the term "substantially similar" raises more constitutional problems than are necessitated by the language of the statute itself.

In general, the courts have held that content-based restrictions on speech are unconstitutional, and have upheld only place, time and manner restrictions on speech. It is clear that the test of substantial similarity in your advice letter is a content-based test. Therefore, your advice creates more constitutional problems than would a definition of substantially similar which was not content-based.

I realize that in asking you to reconsider the advice on the definition of substantially similar, I am, in effect, asking you to come up with a definition that is consistent with the statute and the regulation, and which is not content based. I know this is not a easy task. Nevertheless, I urge you to give it serious consideration.

Sincerely,



BOB CONNELLY
Chief Administrative Officer

BC:tfw

cc: Bill Cavala
Barbara Millman

California
Fair Political
Practices Commission

April 27, 1989

Bob Connelly
Assembly Rules Committee
State Capitol, Room 3016
P.O. Box 942849
Sacramento, CA 94249-0001

Re: Letter No. 89-244

Dear Mr. Connelly:

Your letter requesting advice under the Political Reform Act was received on April 24, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John McLean an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan

Kathryn E. Donovan
General Counsel

KED:plh

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