

March 21, 2013

Michael Derr
Councilman City of Selma
2063 W Front Street
Selma, CA 93662

Re: Your Request for Informal Assistance
Our File No. I-13-011

Dear Mr. Derr:

This letter responds to your request for advice regarding the mass mailing and campaign disclosure provisions of the Political Reform Act (the “Act”).¹ Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because your question is general in nature, 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 regarding the use of public funds, including but not limited to, Government Code Sections 8314 and 54964 and Penal Code Section 424 (*See also Vargas v. City of Salinas* (2009) 46 Cal.4th 1 and *Stanson v. Mott* (1976) 17 Cal.3d 206.) Likewise, we offer no opinion on the application of other laws regarding paid political advertisements, such as Elections Code Section 20008.

QUESTIONS

1. Do the Act’s prohibitions against mass mailings at public expense apply if you place an advertisement for your business in a Chamber of Commerce newsletter, when the Chamber is funded in part by public funds?

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).)

2. Do the Act's campaign disclosure rules apply to advertisements you place for your business as a State Farm agent?

CONCLUSIONS

1. So long as the newsletter is not expressly funded by the City, and the City has no other involvement in the production or distribution of the newsletter, the newsletter is not a prohibited mass mailing under Section 89001.

2. Advertisements for your business merely containing your name and photograph are for personal purposes and payments for the advertisements are neither an "expenditure" nor a "contribution" reportable under the Act.

FACTS

You are a member of the city council for the City of Selma ("the City"). You are also an insurance agent with State Farm Insurance in Selma.

The Selma Chamber of Commerce ("the Chamber") puts out a monthly newsletter. The Chamber allows each member, including you, to place two advertisements per year in the newsletter free of charge, and for \$15.00 monthly. The Chamber is funded primarily through member contributions, though it does receive some financial support from the City. The funds the Chamber receives from the City and other Chamber funds are commingled. There is not a contract between the City and Chamber for the newsletter to provide promotional services or advertising for the City. Rather, the newsletter is a publication for the businesses in the area.

You would like to place an advertisement for your business as a State Farm agent in this newsletter. Your advertisement includes your name, phone number, and picture; your advertisement does not make any mention of your official position as a councilman. You would also like to place advertisements in various other community resources, including church bulletins, baseball programs, radio, and summer concerts.

ANALYSIS

1. Do the Act's prohibitions against mass mailings at public expense apply if you place an advertisement for your business in a Chamber newsletter, when the Chamber is funded in part by public funds?

Section 89001 states that "[n]o newsletter or other mass mailing shall be sent at public expense." Section 82041.5 defines a "mass mailing" as "over two hundred substantially similar pieces of mail, but does not include a form letter or other mail sent in response to an unsolicited request, letter or other inquiry."

Regulation 18901(a) states that “[e]xcept as provided in subdivision (b), a mailing is prohibited by 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

“(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).” (Emphasis added.)

For the purposes of this analysis, we will presume that the Chamber’s newsletter is sent to more than 200 recipients at their residences, places of business, or post office boxes. Therefore, the advertisement for your business including your name and photograph is prohibited if it is sent at the public expense. (Section 89001.)

Under Regulation 18901(a)(3) a mass mailing is “sent at public expense” within the meaning of Section 89001 if, either the costs of distribution are paid for with public moneys, or more than \$50 in public money are used to pay for the costs of design, production, and printing, and the design, production, or printing is done with the intent of sending the item other than as permitted under the regulation.

Previously, we have advised that a newsletter that is circulated and produced in part with public funds must comply with Section 89001. (*Battersby* Advice Letter, No. A-94-303; *Moore* Advice Letter, No. A-99-234.) However, we have also advised that “a mailing sent by a chamber of commerce is not ‘sent at the public expense’ for the purposes of Section 89001 merely because the chamber receives some public moneys from a city, unless the public entity

expressly funds the production and distribution of the mailing sent by the chamber.” (See *Curtis* Advice Letter, No. A-94-053; *Warner* Advice Letter, No. I-88-392; *Leslie* Advice Letter, No. A-89-521.)

You have stated that the funds the Chamber receives from the City are commingled with other Chamber funds. However, you have also stated that the Chamber is primarily funded by member contributions and does not contract with the City to produce the newsletter. Based on these facts, the newsletter does not appear to be expressly funded by the City. To the extent that the newsletter is not expressly funded by the City and the City has no other involvement in the production or distribution of the newsletter, the newsletter is not a prohibited mass mailing under Section 89001.

2. Do the Act’s campaign disclosure rules apply to advertisements you place for your business as a State Farm agent?

In addition to the mass mailing provisions, you have asked about other obligations under the Act that may arise from your advertisements in the Chamber newsletter, or other places.

You should be aware that when you pay for an advertisement you may be making an expenditure within the meaning of the Act. (Section 82025.) To the extent that you are provided a free advertisement or an advertisement at less than the fair market rate by the Chamber, or anyone else, the free or discounted portion of the advertisement could be considered a contribution to you under Section 82015.³ Both contributions and expenditures must be reported in campaign statements under Chapter 4 of the Act.

Nonetheless, an expenditure under the Act is limited to a payment made for political purposes. (Regulation 18225(a).) A payment is for political purposes if it is made for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate. (Regulation 18225(a)(1).) A payment by a candidate is for political purposes unless it is clear from the surrounding circumstances that the payment was made for personal purposes unrelated to his or her candidacy or status as an office holder. (Regulation 18225(a)(2)(B).) Likewise, a contribution is limited to a “payment made for political purposes for which full and adequate consideration is not made to the donor.” (Regulation 18215(a).)

Based upon the facts provided, advertisements for your business will include your name and photograph, and will not make reference to your status as an office holder or candidacy for office. To the extent that the advertisements do not personally refer to you, other than your name

³ You should be aware that anytime you are provided with a free or discounted advertisement that the free or discounted portion could be a gift within the meaning of the Act, and therefore subject to the gift limit (Regulation 18940.2) and reportable under Section 87200. (See Regulation 18940, Guide to the Gift Regulations.) Based on the facts provided it appears that the two free advertisements you, as well as all other members, receive as part of membership in the Chamber of Commerce is a “rebate or discount” made in the regular course of business without regard to official status and therefore is not a gift. (Section 82028; Regulation 18940.1)

and photograph, advertisements for your business are for personal purposes and payments for the advertisements are neither an “expenditure” nor a “contribution” reportable under the Act. We caution, however, that this general conclusion does not apply if facts exist or emerge that indicate the advertisements are for political purposes. For example, advertisements may be for political purposes if the advertisements reference personal characteristics relating to your qualifications for office. (See Regulation 18215(c)(4)(ii).) If you need further assistance determining whether any particular advertisement may be construed to be for political purposes, you should seek additional advice and provide a copy of the proposed advertisement.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Whitney Prout
Legal Intern, Legal Division

WLP:jgl