BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	
Opinions requested by: Ralph Juvinall, Assembly Republican Consultants	No. 75-018-A
State Senator John Stull	No. 75-049
John Meyers, Executive Director, Republican Central Committee of Orange County; and	No. 75-059
John Tuteur, Supervisor, Napa County	No. 75-071 August 3, 1976

BY THE COMMISSION: We have been asked the following questions by the persons listed above:

(1) John Meyers asked if the "Orange County Observer," the official newsletter of the Republican Central Committee of Orange County, is a mass mailing within the meaning of Government Code Section 82041.5, and thereby subject to the provisions of Government Code Section 84305.

(2) Ralph Juvinall and Senator John Stull asked if Government Code Section 84305 applies to incumbent legislators only after their declaration of candidacy.

(3) Ralph Juvinall also asked if a candidate may delay his declaration of candidacy in order to avoid, as long as possible, the prohibitions of Government Code Section 89001.

(4) Napa County supervisor John Tuteur asked if his privately financed newsletter is an expenditure and therefore subject to Government Code Section 84305.

CONCLUSION

(1) Since the "Orange County Observer" is sent only to subscribers, it has been "requested" within the meaning of Government Code Section 82041.5. Consequently, it is not a mass mailing and is not subject to the provisions of Government Code Section 84305.

(2) Once a person is a candidate within the meaning of Government Code Section 82007, he is subject to Government Code Section 84305, regardless of whether he has officially declared his candidacy.

(3) Nothing in the Political Reform Act prevents a candidate from delaying his declaration of candidacy to the 83rd day prior to the primary election, the last possible day on which a declaration must be filed. Elections Code Section 6490.

(4) Pursuant to Government Code Section 82025 and 2 Cal. Adm. Code Section 18225, payments made in connection with Mr. Tuteur's newsletter are not expenditures. Consequently, the provisions of Government Code Section 84305 are not applicable.

ANALYSIS

(1) We have been asked whether the "Orange County Observer," the official newsletter for the Republican Central Committee of Orange County, is a mass mailing subject to the provisions of Government Code Section 84305.[1] We conclude that it is not.

Section 82041.5 defines the term mass mailing to mean:

> ... two hundred or more identical or nearly identical pieces of mail, but does not include a form letter or other mail which is sent in response to a <u>request</u>, letter or other inquiry.
>
> (Emphasis added.)

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[1] All statutory references are to the Government Code unless otherwise noted.

We have been informed that the "Orange County Observer" is sent only pursuant to a subscription.[2/] We think that persons who submit their address to the sender in connection with a subscription have "requested" the mailing within the meaning of Section 82041.5. Accordingly, subscription mailings are not mass mailings and are not subject to the provisions of Section 84305.

(2) Ralph Juvinall and Senator John Stull have asked if an elected state officer is subject to the provisions of Section 84305 prior to the filing of a declaration of candidacy.

Section 84305 provides:

> No person shall make an expenditure for the purpose of sending a mass mailing the cost of which is reportable pursuant to this chapter unless the postage is paid by postage meter, the mail is sent by bulk rate mail or the sender shows on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of such mailing the sender's name, street address and city in no less than 6-point type. The bulk rate number or meter number shall be stated in a campaign statement, and a copy of every mass mailing in support of or in opposition to a state candidate or state measure shall be sent to the commission on the same day on which it is mailed to the public generally. Such copies sent to the commission shall be public records.

An examination of the language in Section 84305 reveals three distinct requirements. First, mass mailings, the cost of which are reportable pursuant to Chapter 4, must be sent according to specified procedures. Second, and not in issue here, is the

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2/ A staff member of the Republican Central Committee of Orange County informed a staff member of the Fair Political Practices Commission that the Orange County Observer is a subscription newsletter.

requirement that the bulk rate or postage meter number be stated in a campaign statement. Third, a copy of every mass mailing in support of or in opposition to a state candidate or state measure must be sent to the Commission.

The question posed by this opinion request is whether payments made by elected state officers prior to the filing of their declarations of candidacy may be "reportable expenditures" under Chapter 4, and thereby activate the requirements of Section 84305. To determine whether a payment is an "expenditure," reference should be made to Section 82025 and 2 Cal. Adm. Code Section 18225. To determine whether an expenditure is "reportable" pursuant to Chapter 4, reference should be made to Sections 84200, et seq. These provisions make it clear that a person may incur reportable expenditures prior to filing a declaration of candidacy.

Specifically, Section 84206 requires "elected officers" to report semianually all contributions received and all expenditures made, regardless of whether the officer has filed a declaration of candidacy. In addition, Sections 84200 and 84201 require "candidates" to report all contributions received and all expenditures made in connection with elections.

The term "candidate" is defined in Section 82007 as:

> ... an individual who is listed on the ballot or who has qualified to have write-in votes on his behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his consent for any other person to receive a contribution or make an expenditure with a view to bringing about his nomination or election to any elective office, whether or not the specific elective office for which he will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he has announced his candidacy or filed a declaration of candidacy at such time....

(Emphasis added.)

Thus, Section 82007 expressly provides that a person may become a candidate by making and receiving contributions and expenditures prior to filing his declaration of candidacy.

Accordingly, an elected state officer may make "reportable expenditures" prior to the time he files a declaration of candidacy. If these expenditures are made for the purpose of sending a mass mailing, the mailing procedure set forth in Section 84305 must be observed.

The second sentence of Section 84305 requires that "... a copy of every mass mailing in support of or in opposition to a state candidate or state measure shall be sent to the Commission on the same day on which it is mailed to the public generally." (Emphasis added.) This sentence differs from the first sentence in that it refers to "every mass mailing in support of or in opposition to a state candidate or state measure" rather than to any mass mailing "the cost of which is reportable pursuant to this chapter." Thus, it is the content of the mailing that triggers the requirement to send a copy to the Commission.

We think the difference in language between the two sentences reflects a difference in purpose. The requirement in the first sentence is designed to provide readers and auditors with information about the identity of the sender. The requirement in the second sentence, on the other hand, is designed to deter dishonest or malicious allegations from being included in political mailings and generally to expose this form of political advertising to public scrutiny. See opinion requested by Joyce Valdez, 2 FPPC Opinions 21 (No. 75-167, Feb. 3, 1976).

In light of this purpose, we conclude that the phrase "every mass mailing in support of or in opposition to a state candidate or state measure" need not include every mass mailing sent by a candidate or committee. It will be sufficient, for purposes of subjecting to public scrutiny those mailings which could contain material that maligns an opponent or falsely trumpets one's own candidacy, if the scope of the provision is limited to the types of communications described in 2 Cal. Adm. Code Section 18225(c). This means those communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates or the qualification, passage or defeat of a clearly identified state measure or measures, or which taken as a whole unambiguously urge such a result.[3/] We think that this standard will provide the Commission and the public with the information which the statute

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3/ 2 Cal. Adm. Code Section 18225 provides in pertinent part:

> (c) "Expenditure" includes any monetary or nonmonetary payment made by any person, other than those persons or organizations described in subsection (b), that is used for communications which expressly advocate the nomination, election or defeat of a clearly identi-

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contemplates and will accomplish its salutary purpose. A broader standard would greatly increase the volume of mailings sent to the Commission, thereby imposing a proportionately heavier burden on candidates and the public alike.

To recapitulate, whether a copy of a mass mailing must be forwarded to the Commission depends upon its content. Accordingly, an elected officer, if he sends a mass mailing which contains a communication of the type described in 2 Cal.

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fied candidate or candidates, or the qualification, passage or defeat of a clearly identified ballot measure.

(1) "Clearly identified" has the following meaning:

(A) A candidate is clearly identified if the communication states his name, makes unambiguous reference to his office or status as a candidate, or unambiguously describes him in any manner.

(B) A group of candidates is clearly identified if the communication makes unambiguous reference to some well-defined characteristic of the group, even if the communication does not name each candidate. A communication that clearly identifies a group of candidates and expressly advocates their election or defeat is reportable as an expenditure, but the expenditure need not be allocated among all members of the class or group on the campaign statement reporting the expenditure.

(C) A measure that has qualified to be placed on the ballot is clearly identified if the communication states a proposition number, official title or popular name associated with the measure. In addition, the measure is clearly identified if the communication refers to the subject matter of the measure and either states that the measure is before the people for a vote or, taken as a whole and in context, unambiguously refers to the measure.

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Adm. Code Section 18225(c), will be required to send a copy to the Commission regardless of whether he has filed a declaration of candidacy for an elective office.[4/]

(3) Section 89001 provides:

> No legislative newsletter or other mass mailing shall be sent at public expense by or on behalf of any elected state officer after the elected state officer has filed a declaration of candidacy for any office.
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> (Emphasis added.)

Elections Code Section 6490 states that a person seeking election to the Legislature must file a declaration of candidacy between 113 and 83 days prior to the primary. We have been asked by Ralph Juvinall whether a person may delay until the 83rd day prior to the primary the filing of his declaration of candidacy in order to avoid, as long as possible, the provisions of Section 89001.

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> (D) A measure that has not qualified to be placed on the ballot is clearly identified if the communication refers to the subject matter of the measure and to the qualification drive.
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> (2) A communication "expressly advocates" the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as "vote for," "elect," "support," "cast your ballot," "vote against," "defeat," "reject," "sign petitions for" or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.

We observe that the standard adopted herein relative to which mass mailings are "in support of or in opposition to a state candidate or state measure" modifies our holding on this point in the opinion requested by Joyce Valdez, 2 FPPC Opinions 21 (No. 75-167, Feb. 3, 1976).

4/ Section 89001, which prohibits an elected state officer from sending publicly financed mass mailings after he has filed a declaration of candidacy for any office, is unrelated to the disclosure requirements set forth in Section 84305.

Nothing in the Political Reform Act affects the time at which a person is required to file his declaration of candidacy. Accordingly, an elected state officer may delay the filing of his declaration of candidacy until the 83rd day prior to the primary.

(4) John Tuteur, a member of the Napa County Board of Supervisors, has asked whether a newsletter to his constituents financed from personal funds is subject to the posting requirements of Section 84305.[5/] As discussed supra, Section 84305 provides, in pertinent part, that "no person shall make an expenditure for the purpose of sending a mass mailing, the cost of which is reportable pursuant to this chapter ..." unless certain posting procedures are observed. 2 Cal. Adm. Code Section 18225 defines an "expenditure" as including "any monetary or nonmonetary payment made by ... a candidate unless it is clear from surrounding circumstances that the payment was made for personal purposes unrelated to his candidacy or status as an officeholder...." A "candidate," as we also have discussed supra, is a person who will be listed on the ballot, has qualified to have write-in votes counted on his behalf, or receives contributions or makes expenditures with a view to seeking nomination or election to an elective office, or authorizes another to receive contributions or make expenditures on his behalf. Section 82007. Costs incurred by candidates are "reportable" pursuant to Sections 84200, et seq.

In the instant case, Mr. Tuteur has informed the Commission staff that he intends to mail his newsletter approximately one year prior to the next supervisorial primary election. At that time, Mr. Tuteur's name will not be listed on any ballot and he will not have qualified to have write-in votes counted on his behalf. Mr. Tuteur also informed the Commission staff that prior to the mailing, he does not anticipate receiving contributions or making expenditures with a view to seeking nomination or election to an elective office. Thus, Mr. Tuteur does not appear to be a candidate and, consequently, the payments made in connection with the newsletter are not expenditures by virtue of having been made by a candidate.

2 Cal. Adm. Code Section 18225(c) sets forth a second standard for determining when a payment is an expenditure:

> "Expenditure" includes any monetary or non-monetary payment made by any person, other than those persons or organizations

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5/ The requirement that a copy of every mass mailing which is in support of or in opposition to a state candidate or state measure be sent to the Commission is inapplicable in the instant case since the newsletter, if it supports any candidacy, supports the candidacy of Mr. Tuteur, and he is not a state candidate.

> described in subsection (b), that is used for communications which expressly advocate the nomination, election or defeat of a clearly identified candidate or candidates, or the qualification, passage or defeat of a clearly identified ballot measure.

The newsletter which Mr. Tuteur intends to send makes no reference to an up-coming election nor to Mr. Tuteur as a candidate. Thus, it falls short of the above standard. Subsection (c)(2) of the regulation further defines the standard to include payments made in connection with a communication which "taken as a whole, unambiguously urges a particular result in an election." However, the newsletter in question here also fails to meet this standard. Thus, payments made in connection with the newsletter are not expenditures by virtue of the newsletter's content.

We conclude, therefore, that payments made in connection with Mr. Tuteur's newsletter are not expenditures pursuant to Section 82025 and 2 Cal. Adm. Code Section 18225 and, hence, the provisions of Section 84305 are not applicable in the instant case.

Adopted by the Commission on August 3, 1976. Concurring: Brosnahan, Carpenter, Lapan, Lowenstein and Quinn. Commissioners Brosnahan and Quinn dissented in part.

Daniel H. Lowenstein
Chairman

QUINN, COMMISSIONER, DISSENTING IN PART:

This dissenting opinion does not question the basic soundness nor direction of most of the majority opinion. I disagree only with the majority's conclusion in part (2) that a mass mailing which comes under the requirements of the first sentence of Government Code Section 84305 need not in every case have a copy sent to the Commission. I believe that Section 84305 must be taken as a whole. It is a single paragraph and establishes a single standard. Each time a mass mailing comes under its requirements a copy must be sent to the Commission.

A mass mailing which is a "reportable expenditure" must be mailed according to the specified procedures of Section 84305. I believe that a copy of any such mailing also must be sent to the Commission at the time it is mailed. To read the language "in support of or in opposition to a state candidate" as setting up a separate standard misinterprets Section 84305.

The majority opinion is particularly anomalous when applied to candidates or their controlled committees. I believe the Political Reform Act intended all political mass mailings sent by candidates or their controlled committees to come under the provisions of Section 84305 uniformly; and recognized that most mass mailings sent by a candidate[1/] or his controlled committee are sent for a political purpose, regardless of whether or not on their face they encourage a particular electoral result. I believe that copies of all such mailings should be forwarded to the Commission.

T. Anthony Quinn
Commissioner

Commissioner Brosnahan joins in this dissent.

1/ By regulation the Commission has recognized that any monetary payment made by a candidate is an "expenditure" unless it is clear from the surrounding circumstances that "the payment was made for personal purposes unrelated to his candidacy or status as an officeholder." See 2 Cal. Adm. Code Section 18225(b).