



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 17, 2020

Phaedra A. Norton
Merced City Attorney
678 West 18th Street
Merced, CA 95340

Re: Your Request for Advice
Our File No. A-20-047

Dear Ms. Norton:

This letter responds to your request for advice on behalf of the City of Merced regarding the mass mailing provisions of the Political Reform Act (the “Act”).¹ Please note that we do not advise on any other laws concerning the use of public resources by government officials for campaign activities such as Section 8314, Section 54964, and Penal Code Section 424. Also 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

Do the Act’s mass mailing provisions prohibit the City of Merced from sending a proposed mailer, containing a survey regarding City residents’ priorities for the future use of Measure C sales tax funds, to more than 200 City residences at public expense?

CONCLUSION

No. The Act’s mass mailing provisions do not prohibit the City from sending the proposed mailer because the mailer does not expressly advocate for a candidate or measure or unambiguously urge a particular result in an election.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Merced. In 2006, Merced voters approved a general sales tax commonly referred to as “Measure C.” Due to changes in local needs over the 14 years since Measure C’s approval, the City is seeking the community’s input about how Measure C sales tax funds should be spent in the future. Toward that end, the City has prepared a proposed mailer which contains a “Measure C Community Priorities Survey” and requests that the recipient

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.

complete the survey and return his or her response. The City plans to send the mailer to more than 200 City residences at public expense. You provided the mailer for our review and asked whether the Act's mass mailing provisions would prohibit the City from sending the mailer as planned. The mailer is one page with text and photos on both sides, folded in half longways, with a cover, two inside pages, and a back cover. The mailer contains the following text and photos:

- On its cover, the text "Your Measure C Tax Dollars at Work" next to the City's logo, above photos of a fire truck, police vehicles, and road maintenance work, with an invitation to "Join the Conversation!" below the photos.
- On the first inside page, the title "A Community Update from the City of Merced City Manager's Office" next to the City's Logo, above the following text:

DEAR NEIGHBOR:

In 2006 Merced Voters enacted Measure C to provide local funds to address Merced's local needs. For 14 years, these tax dollars have been used to maintain your services.

But much has changed since 2006, including millions of dollars in State takeaways of local funds, and the City has new challenges. That's why we recently asked the community to identify current priorities. Needs your neighbors have recently identified include:

- Continuing to ensure your taxpayer dollars stay local to maintain our services
- Protecting and maintaining 911 fire/police response times
- Addressing homelessness
- Responding quickly to neighborhood fires and maintaining fire protection
- Preventing gang activity and maintaining neighborhood policing
- Improving safety at our schools and parks
- Maintaining park facilities, including clean and safe restrooms

That's why we want to hear from YOU. Please Join the Conversation and let us know your priorities, by completing the attached survey.

Thank you for your interest in keeping our community a great place to live, work, and raise a family.

Sincerely,

[Signed by:]

Steve Carrigan, City of Merced City Manager

Chief Billy P. Alcorn, City of Merced Fire Chief

Tom Cavallero, City of Merced Interim Police Chief

Join the Conversation!

Please fill out the attached community survey today or visit us online at www.cityofmerced.org/MeasureC.

- On the second inside page, the title “Merced Police & Fire Facts,” with a photo directly below of two Merced police officers, a police dog, and a young boy dressed in police garb in front of a police vehicle, and with the following text below that photo:
 - Our residents remain concerned about the crime, gang activity, and illegal drugs that filter into Merced.
 - Current local funding provides police officers the technology they need to keep our children out of gangs.
- On the second inside page, below the text above, a photo of Merced firefighters fighting a fire using a fire truck, with the following text directly below:
 - In the last 10 years, the Merced Fire Department has seen a 114% increase in calls.
 - Our Fire Department has responded to over 10,000 calls in the last year alone.
- On the second inside page, to the right of the photos and text described above, oriented horizontally rather than vertically, the address of the City Manager’s Office for return mailing, with spaces provided for a stamp and the return-mailing address of the survey participant.
- On the back cover, which is also oriented horizontally, at the top of the page, the City’s return mailing address and space for a stamp, and below them, the following text:

Join the Conversation – Complete This Community Priorities Survey Today!
 You can also take the Measure C Community Priorities Survey online by
 visiting www.cityofmerced.org/MeasureC.

Please give us your feedback by noting your top three priorities—thank you!

- ___ Local control over local taxpayer dollars
- ___ 911 fire or police response
- ___ Addressing homelessness
- ___ Responding quickly to neighborhood fires
- ___ Preventing gang activity in the city
- ___ Maintaining fire protection services
- ___ Maintaining neighborhood-based policing
- ___ Improving safety at our schools and parks

Question/comments: [space for response.]

- On the back cover, to the right of the survey, spaces provided for the survey participant to provide his or her name, title, street address, phone, fax, and email, and a checkbox allowing the participant to indicate he or she would like to be informed of Measure C Community Priorities Survey developments.

ANALYSIS

Section 89001 of the Act prohibits sending a newsletter or other mass mailing at public expense if the mailing contains campaign materials. Specifically, a newsletter or other mass mailing is prohibited if all the following criteria are met: (1) the item sent is a tangible item; (2) the item either expressly advocates for a clearly identified candidate or measure or unambiguously urges a particular result in an election; (3) public moneys are paid for the costs of distributing the item or the costs, exceeding \$50, reasonably related to preparing the item; and (4) more than 200 substantially similar items are sent during the course of an election. (Regulation 18901.1(a).) This prohibition limits public moneys from being used for political campaigns in order to prevent agencies and public officials from taking unfair advantage of the public purse in pursuit of favorable election results.

The City plans to send the proposed mailer, a tangible item, to more than 200 City residences at public expense. Therefore, Section 89001 and Regulation 18901.1 would prohibit the City from sending the mailer if it either expressly advocates for a clearly identified candidate or measure or unambiguously urges a particular result in an election.

Pursuant to Regulation 18901.1(a)(2), a mailer is potentially prohibited if it 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 Section 82025(c)(1).

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

The Merced City Manager, Fire Chief, and Police Chief are all appointed, rather than elected, pursuant to the City Charter.² Merced voters approved Measure C in 2006, and the facts presented provide no indication that Measure C is subject to further voter ratification at this time. The proposed mailer solely requests that Merced residents provide their opinion regarding priorities for spending Measure C sales tax funds in the future. The mailer neither contains “express words of advocacy” for any clearly identified candidate or measure in an upcoming election nor “unambiguously urges a particular result in an election.” Thus, Section 89001 and Regulation 18901.1 do not prohibit the City from sending the proposed mailer to more than 200 City residents at public expense.

² Section 500 of the Merced City Charter requires the City Council to appoint the City Manager, and Section 501(A) of the Charter provides that the City Manager shall have the power to appoint all City department heads and officers not appointed by the City Council, including the Fire Chief and Police Chief. While Section 89002 also prohibits certain mass mailings featuring or referencing an elected official, there is no indication that Section 89002 applies to the proposed mailer.

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

Sincerely,

Dave Bainbridge
General Counsel

Matthew F. Christy

By: Matthew F. Christy
Counsel, Legal Division

MFC:aja