



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

December 01, 2021

Colin Burns  
Harper & Burns, LLP  
453 S Glassell St.  
Orange, CA 92866

Re: Your Request for Advice  
**Our File No. A-21-152**

Dear Mr. Burns:

This letter responds to your request for advice regarding campaign and behested payment provisions of the Political Reform Act (the “Act”).<sup>1</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.

### QUESTIONS

1. May Council Member Kim Constantine accept communications that include her name, designation, email, and photograph that will be displayed on an electronic reader board viewable only by residents of a senior community and also in a newsletter distributed to residents of a mobile home park?
2. Would Council Member Constantine be required to report the communications as non-monetary contribution?

### CONCLUSIONS

1. Yes. Based on the facts provided, Council Member Constantine may accept the proposed communications.
2. No. The proposed communications are not a contribution to Council Member Constantine. However, if the payments made for the communications are equal to or exceed \$5,000, they must be reported as behested payments.

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<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 18109 through 18998 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.

## FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Fountain Valley (“City”) and would like to know whether the below communication displayed on an electronic reader board viewable only by the residents of the Palm Island senior community, as well as in the Fountain Valley Estates (“FVE”) mobile home park newsletter, is permissible and may be accepted by Council Member Constantine. And if so, whether the communication is a reportable contribution.

Palm Island is a senior community in the City and has 456 units, 99.5% of which are occupied. Palm Island has offered Council Member Constantine a weekly electronic slide on Palm Island’s electronic reader board sign. There are several of these electronic reader board signs within Palm Island’s premises. The Palm Island electronic reader board is only viewable within Palm Island. It is not broadcast outside Palm Island, nor accessible via internet. The electronic reader board advertisements are kept in electronic format and are not printed.

Palm Island is a customer of the City for purposes of sewer, water, and trash. Payments are made for utilities by Palm Island in the usual course of business. The City provides senior citizen discounts for sewer, water, and trash, but those discounts are available citywide. The City has not been able to rule out the possibility that the City has previously provided financial assistance to Palm Island. The City may have provided Palm Island financial assistance in the form of redevelopment funds prior to the dissolution of redevelopment agencies in 2012.

FVE is a mobile home park located in the City of Fountain Valley and contains 193 mobile home spaces. FVE has a monthly newsletter that is prepared and printed using a publishing company, and then hand delivered by FVE’s management team to each mobile home unit. The proposed communication in question would be provided to each mobile home space, but residents may request two copies.

The City does not provide any funding for FVE’s newsletter. FVE is a customer of the City for purposes of water, sewer, and trash. Water, sewer, and trash fees are paid by FVE in the usual course of business. The City does not provide any financial assistance to FVE that is not otherwise available to the general public. Council Member Constantine would like to accept FVE’s offer to provide her with a space for an outreach column in its printed monthly newsletter.

Council Member Constantine will supply Palm Island and FVE with the information to include in the communication and no staff time will be committed to the production or distribution of the communications.

The proposed communication is as follows:

The City of Fountain Valley is updating its General Plan. It is our policy and planning document for meeting the community’s long term vision for the future.

The public is welcome to attend these upcoming meetings at Fountain Valley City Hall and/or send an email:

Tuesday, 12/7 at 6 p.m. – Study Session with City Council.

Wednesday, 12/8 at 6 p.m. – Study Session with Planning Commission.

For more information:  
fountainvalley.org/1282/General-PlanUpdate  
City Hall email: FVProud@fountainvalley.org

**[Insert Council Member Constantine's Photo Here]**

Kim Constantine  
Fountain Valley City Council Member  
Email: Kim.Constantine@fountainvalley.org  
Cell phone: 714-335-2280

## ANALYSIS

### *Mass Mailing Prohibition*

A mailing is prohibited under the Act if the mailing is a tangible item delivered to a person's residence; features an elected officer; the distribution is paid for with public moneys; and more than 200 substantially similar items are sent in a calendar month. (Section 89002.) Since the electronic reader board displayed in the Palm Island senior community is not a tangible item delivered to a person's residence and you have stated that no public moneys will be used, the prohibition does not apply to that communication.

For the newsletter sent by FVE, you have provided that it will be delivered to each of its 193 mobile homes and that residents may request two copies. However, you have also provided that Council Member Constantine herself will supply the information being displayed in the communication and that no staff time or public moneys will be utilized in the production or distribution of the newsletter. Accordingly, based on the facts provided, the mass mailing prohibition does not apply to the newsletter.

### *Contributions*

A "contribution" means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, except to the extent that full and adequate consideration is received or if it is clear from the surrounding circumstances that the payment is not made for political purposes. (Section 82015.) Regulation 18215 provides that a payment is "made for political purposes" if it is: (1) for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or (2) received by or made at the behest of a candidate.

Section 82007 defines "candidate," in pertinent part, as any individual who is listed on the ballot for elective office. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214. Thus, as an elected official, the council member is considered a candidate under Section 82007. Consequently, any payment at the council member's behest is presumed to be for a political purpose and will be considered a contribution absent any exception. (Regulation 18215(a)(2)(A) and *Danner* Advice Letter, A-96-039.) "Made at the behest of" means made "under the control or at the direction of, in

cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of.” (Section 82041.3.)

However, regulation 18215(c)(4) provides that the term “contribution” does not include:

“... [a] payment made at the behest of a candidate, which is for a communication by the candidate or any other person, that meets all of the following:

“(i) Does not contain express advocacy;

“(ii) Does not make reference to the candidate’s candidacy for elective office, the candidate’s election campaign, or the candidate’s or his or her opponent’s qualifications for office; and

“(iii) Does not solicit contributions to the candidate or to third persons for use in support of the candidate or in opposition to the candidate’s opponent.”

Since the information contained in the proposed communication will be supplied by Council Member Constantine and with her express consent, it is made in coordination with her and thus made at her behest. Therefore, the communications would be a contribution to the council member, absent an exception. In this case there is an exception.

As noted in Regulation 18215(c) even if a payment is made at the behest of a candidate, the payment is not a contribution if it does not contain express advocacy; does not make reference to the candidate’s candidacy for elective office, the candidate’s election campaign, or the candidate’s or his or her opponent’s qualifications for office; and does not solicit contributions to the candidate or to third persons for use in support of the candidate or in opposition to the candidate’s opponent.

The proposed communication here provides the community with information relating to upcoming study sessions with the City Council and Planning Commission, and although it mentions Council Member Constantine, it does not include the information listed in Regulation 18215(c)(4) above. Accordingly, the communication falls within the exception and is therefore not a contribution to Council Member Constantine.

### *Behested Payments*

Where a payment is not a contribution to an official under the Act, it may still be considered a reportable behested payment to the official.

Pertinent to these facts, a behested payment is one that is made at the behest of an elected officer where it is clear from the “surrounding circumstances that the payment was made for purposes unrelated to the officer’s seeking or holding of elective office.” (Section 82004.5.) Payments made principally for legislative or governmental purposes by a person other than a state, local, or federal governmental agency are presumed to be unrelated to an elected officer’s seeking or holding of elective office. (Section 82004.5(c)(5).)

Where a behested payment is made principally for a legislative, governmental, or charitable purpose by a person other than a state, local, or federal governmental agency the behesting officer

must file a Behested Payment Report (Form 803) for payments that equal or exceed \$5,000. (Section 84224.)<sup>2</sup>

As noted above, since the information contained in the proposed communication will be supplied by Council Member Constantine and with her express consent, it is made in coordination with her and thus made at her behest. Therefore, any payments made for the proposed communications equaling or exceeding \$5,000 are presumed reportable behested payments.<sup>3</sup>

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

Sincerely,

Dave Bainbridge  
General Counsel

*Katelyn L. Greene*

By: Katelyn L. Greene  
Counsel, Legal Division

KG:dkv

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<sup>2</sup> Note that the general rule for reporting the payment for the communications are to report the fair market value of the payment. Under Section 82025.5, “[w]henever the amount of goods, services, facilities, or anything of value other than money is required to be reported under this title, the amount reported shall be the fair market value, and a description of the goods, services, facilities, or other thing of value shall be appended to the report or statement.”

<sup>3</sup> Where a payment is not a contribution, it may in some circumstances be considered a gift under the Act. “Gift” is defined in Section 82028 as any payment that confers a personal benefit to the extent that consideration of equal or greater value is not received. In this instance, the communications will serve to inform the public of public meetings and there is no indication that the communications provide a personal benefit to Council Member Constantine. However, we caution that this determination is based on the communications identified and that in some instances the use of a billboard or space in a newsletter may constitute a gift to the official.