



California Fair Political Practices Commission

October 3, 1990

Honorable Kay Cenicerros
Supervisor, Third District
County of Riverside
4080 Lemon Street, Fourteenth Floor
Riverside, CA 92501

Re: Your Request for Advice
Our File No. A-90-570

Dear Ms. Cenicerros:

You have requested advice concerning your responsibilities under the campaign provisions of the Political Reform Act (the "Act").¹ Pursuant to the telephone conversation with your office of September 19, 1990, we are treating your request as one for formal written advice.

Please note, that since your letter requesting advice was received, the United States District Court issued an order in Service Employees International Union, AFL-CIO, et al. v. Fair Political Practices Commission, United States District Court, Eastern District of California, Case No. CIVS-89-0433, LKK-JFM (hereafter, "SEIU") which invalidates portions of the Act which were added by Proposition 73 in June of 1988.^{2/} This letter has been drafted in light of the changes caused by the SEIU decision.

QUESTIONS

1. May you use public funds to produce a letter which will welcome new residents to your jurisdiction, and which will be distributed by a private entity?

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.

^{2/} The court invalidated the contribution limitations of the Act with respect to all candidates other than legislative candidates. In addition, the court invalidated the transfer ban of Section 85304 except as applied to valid local or legislative per election contribution limitations. (Commission Memorandum on the Decision in Service Employees International Union, AFL-CIO, et al. v. Fair Political Practices Commission, copy enclosed.)

2. In the alternative, may you use campaign funds to produce a letter which will welcome new residents to your jurisdiction, and which will be distributed by a private entity?

3. Under the two scenarios above, will the private entity's payments for distribution of a packet of material which includes your letter be construed as a contribution to you?

CONCLUSIONS

1. Use of public funds for the letter is permissible provided the cost of producing the letter is less than \$50. Where the cost of producing the letter is greater than \$50, use of public funds is permissible if the use of your name is limited to the letterhead of the letter and no other reference to you appears in the text of the letter.

2. Campaign funds may be used for the letter. However, if the letter makes reference to your future election or status as a candidate, or if the letter is circulated within three months prior to an election for which you have filed election documents, you must make the expenditure from the appropriate campaign bank account for the future election. Irrespective of which account the expenditure is made from, the expenditure is reportable.

3. Since you are two years from your next election, it does not appear that the payment for the circulation of the letter will be made for political purposes at this time. Thus, the cost of circulating your letter paid by the private entity would not be a contribution. However, as your reelection approaches you may want to consider paying the portion of the mailing costs attributable to your letter with campaign funds to avoid characterization of the payment as a contribution to you.

FACTS

You are a member of the Riverside County Board of Supervisors. Your next election is in 1992. You have been given the opportunity to include a letter in a welcoming packet to be sent to new residents in the Hemet area of your district. The purpose of the letter would be to make newcomers aware of county services, facilities and opportunities for community involvement. The packet will be sent to about 1,200 new residents each quarter at the expense of a private entity. Generally, participating merchants pay for having information included in the packet. However, you will not be charged to have your letter included. You would like to participate in the project.

You have proposed two alternative methods of financing the cost of the letter:

1. You will pay the cost of producing the letter with county funds, while the private entity will pay the mailing costs of the entire packet, including your letter.

2. You will pay the cost of producing the letter with campaign funds, while the private entity will pay the mailing costs of the entire packet, including your letter.

Under both scenarios, you have specifically asked whether the payments by the private entity for distribution of the packet will be construed to be a contribution to you.

ANALYSIS

1. Publicly Funded Mass Mailing

In June 1988 Proposition 73 amended Section 89001 of the Act to provide: "No newsletter or other mass mailing shall be sent at public expense." A literal reading of this section led to the conclusion that all mass mailings involving public funds, irrespective of content or purpose, were prohibited by Section 89001. In response to a variety of questions concerning the distribution of tax notices, tax refund checks, community college schedules, sample ballots, and other mass mailings customarily sent by government agencies, the Commission adopted Regulation 18901 (copy enclosed) to clarify which mailings were permissible and which were prohibited under the Act.³

Regulation 18901(a) provides that a mailing is prohibited only if all of the following apply:

(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. For purposes of this subdivision (a)(1), the item delivered to the recipient must be a tangible item, such as a videotape, record, or button, or a written document.

(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 The Commission's authority to interpret Section 89001 to avoid the absurd results of its literal application was upheld in Watson v. Fair Political Practices Com. (1990) 217 Cal.App.3d 1059.

(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 single calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b).

According to your facts the mailing will be delivered to persons at their homes and will include references to your status as an officeholder. You also stated that more than 200 would be mailed in a calendar year. You have asked if Section 89001 permits the use of public funds to produce the letter.

Regulation 18901(a)(3) specifies that 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 moneys⁴ or more than \$50 in public money is paid for design or production of the item, and the design or printing is done with the intent of sending the item. Thus, if the cost of producing the letter is less than \$50,⁵ your mailing will not be a publicly funded mass mailing as defined in the Act. Moreover, items which are produced and distributed at private expense are not subject to the restrictions of Regulation 18901.

Even where the costs of producing your letter is greater than \$50, Regulation 18901 sets forth a series of limited exceptions to the prohibition. Regulation 18901(b)(1) provides an exception for the inclusion of the elected official's name in the forms and envelopes of the agency:

(b) Notwithstanding subdivision (a), mass mailing of the following items is not prohibited by Section 89001:

(1) Any item in which the elected officer's name appears only in the letterhead

⁴ You stated that you will not be paying costs of distribution.

⁵ The cost of production would include the cost of providing the stationery, costs of the design and reproduction and staff time.

or logotype of the stationery, forms (including "For Your Information" or "Compliments of" cards), and envelopes of the agency sending the mailing, or of a committee of the agency, or of the elected officer, or in a roster listing containing the names of all elected officers of the agency. In any such item, the names of all elected officers must appear in the same type size, typeface, type color, and location. Such item may not include the elected officer's photograph, signature, or any other reference to the elected officer, except as specifically permitted in this subdivision (b)(1) or elsewhere in this regulation.

Thus, if use of your name is limited to the letterhead of the letter and no other references to you appear in the text itself, the letter is permissible despite the amount of public funds used or the number circulated. However, absent some express exception in Regulation 18901(b), use of public funds for the mass mailing is prohibited.

2. Campaign Funds and Officeholder Expenditures

You may also use campaign funds to pay for the letter. Section 82025 defines "expenditure" as any payment, forgiveness of a loan, payment of a loan by a third party, or any enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes. For purposes of determining whether a payment is an "expenditure" as defined in the Act, Regulation 18225 presumes that payments made by candidates have been made for political purposes. The candidate can only rebut this presumption by showing clearly from the surrounding circumstances that the payment was made or received for personal purposes unrelated to his or her candidacy. (Regulation 18215; Regulation 18225, copies enclosed.)

Thus, the Act presumes that payments made by candidates and officeholders⁶ are disclosable expenditures. Section 85201 provides:

(a) Upon the filing of the statement of intention pursuant to Section 85200, the individual shall establish one campaign contribution account at an office of a financial institution located in the state.

⁶ For purposes of the Act, an incumbent elected officer is considered a candidate. (Section 82007.) Thus, officeholders are not distinguished from other candidates for most purposes.

(b) Upon the establishment of an account, the name of the financial institution, the specific location, and the account number shall be filed with the commission within 24 hours.

(c) All contributions or loans made to the candidate, to a person on behalf of the candidate, or to the candidate's controlled committee shall be deposited in the account.

(d) Any personal funds which will be utilized to promote the election of the candidate shall be deposited in the account prior to expenditure.

(e) All campaign expenditures shall be made from the account.

(Emphasis added.)

Section 85201 requires candidates for elective office to establish one campaign bank account for contributions received for each specific office sought at each particular election. In addition, the Act requires that all campaign expenditures be made from the appropriate campaign bank account established for the office. Thus, expenditures which are clearly in connection with a future election must be paid from an account established for that future election.⁷ Other expenditures may be made from the campaign bank account for either your current term of office or your future election.

Regulation 18525 provides that an incumbent elected officer shall make certain expenditures from the appropriate campaign bank account for election to a future term of office. These expenditures include mass mailings and other communications which make reference to the officer's future election or status as a candidate, or are circulated within three months prior to an election for which the officeholder has filed a statement of intention to be a candidate, pursuant to Section 85200, a declaration of candidacy or nomination papers, or any other documents necessary to be listed on the ballot as a candidate for any state or local office.

Since your letter does not refer to your candidacy, you are not three months from your reelection and have not filed any forms for your future election, we would presume the payment for your letter is an officeholder expenditure which may be made from your

⁷ This would be your campaign bank account for your 1992 election, or any campaign bank account established for other future elections.

campaign account for your current term of office.⁸ At the time you file forms for your future election or when you are within three months of your reelection, you may no longer use your officeholder account for the expenditure. The expenditure for the mailer is not prohibited, it just must be paid from your future campaign account.

Please note that the definition of disclosable "expenditures" does not distinguish between officeholders and other candidates. Thus, no matter which account the expenditure is made from, the expenditure will be reportable.

3. Third Party Payment of Costs

A contribution is any monetary or nonmonetary payment made for political purposes without full and adequate consideration. (Section 82015; Regulation 18215, copy enclosed.) As discussed above, a payment is made for political purposes if it is received by or made at the behest of a candidate, unless it is clear from the surrounding circumstances that the payment was received or made for personal purposes unrelated to his or her status as a candidate or elected officer. (Regulation 18215(a)(2).) A payment is made at the behest of a candidate if it is made in cooperation, consultation, coordination, or concert with the candidate. (Regulation 18215(b).)

According to your facts, under either option a private entity will be paying the cost to disseminate the entire packet. We have previously advised that a crime prevention brochure which included the photograph, name and title of an elected officer and which was to be distributed in the elected officer's district constituted an in-kind contribution to the elected officer. (Roos Advice Letter, No. A-85-057, copy enclosed.) In addition, where an advertisement was produced at an officeholder's behest which included the officeholder's photograph, name and title, and the officeholder was within three months of the primary election in which he was seeking reelection, we concluded that the payment for the advertisement may have been an in-kind contribution to the officeholder. (McCarthy Advice Letter, No. A-90-163, copy enclosed.)

Since you are two years from your next election, it does not appear that the payment for the circulation of your letter will be made for political purposes. Thus, the cost of circulating your letter paid by the private entity would not be a contribution. However, as your reelection approaches you may want to consider

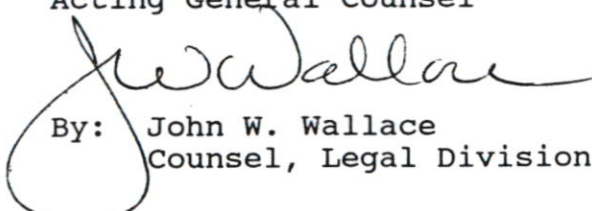
⁸ If you have closed your 1988 campaign account you may either open an officeholder account by filing the appropriate forms or use your future campaign account. Expenditures for your current term of office are permitted from either account. (Regulation 18525.)

paying the portion of the mailing costs attributable to your letter⁹ with campaign funds to avoid characterization of the payment of the cost of mailing as a contribution to you.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel



By: John W. Wallace
Counsel, Legal Division

SH:JWW:plh

Enclosures

⁹ The costs of the production and dissemination of the other material in the packet would not be attributable to you. Thus, your share of the mailing cost would be merely the price you would have to pay to circulate your letter, presumably 25 cents per letter.