



# California Fair Political Practices Commission

SUPERSEDED IN PART  
BY 1998 AMENDMENTS TO  
REGULATION 18530

August 26, 1992

Dana S. Appling  
Senior Attorney  
Sacramento Municipal Utility District  
P.O. Box 15830  
Sacramento, CA 95852-1830

Re: Your Request for Advice  
Our File No. A-92-179

Dear Ms. Appling:

This letter is in response to your request for advice on behalf of the Sacramento Municipal Utility District (hereinafter "SMUD") and its board of directors and confirms the advice I provided to you by telephone on June 17, 1992, concerning SMUD's duties under the mass mailing provisions of the Political Reform Act (the "Act").<sup>1</sup>

#### QUESTION

Do the mass mailing provisions of the Act prohibit the mailing of a SMUD produced information letter advising presidents of community groups about the availability of speakers, solely because in their presentations the speakers will use videotapes which "single out" elected officials?

#### CONCLUSION

Under Regulation 18901, SMUD's contemplated mailing using standard agency letterhead is not prohibited, because it would not include any other use of the name, office, photograph, or any other reference to an elected officer affiliated with SMUD.

#### FACTS

SMUD plans to mail information letters to presidents of community groups at their business or residential addresses advising them about the availability of speakers. There may be

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<sup>1</sup> 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.

more than 200 of these letters per calendar month mailed to the public. Except for standard letterhead, the information letter will not mention any elected official by name or by office; nor will the letter be signed by any elected official.

At the specific request of a community group, SMUD staff would provide a presentation that would include the use of a series of videotapes. These videotapes, in turn, would include, in addition to the depiction of various topics related to the provision of electrical services, quotes of elected officials who attend SMUD functions and support SMUD programs. On these tapes, SMUD intends to single out, among others, Congressman Vic Fazio and the president of the SMUD board of directors. SMUD estimates that less than 200 of these presentations will be given in response to customer requests in a calendar month.

#### ANALYSIS

##### Information Letter

Section 89001 of the Act provides:

No newsletter or other mass mailing shall be sent at public expense.

Section 82041.5 states:

"Mass mailing" means over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry.

(Emphasis added.)

A literal reading of this section would suggest that all mass mailings (i.e., a mailing of over two hundred pieces) 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 to clarify which mailings were permissible and which were prohibited under the Act.<sup>2</sup>

<sup>2</sup> 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.

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)(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);

Regulation 18901(a).

Thus, under Regulation 18901, SMUD's contemplated mailing could only be a prohibited mass mailing if it "featured" or included the name, office, photograph, or other reference to an elected officer affiliated with SMUD. According to the facts you have provided, other than standard letterhead the information letter will not mention any elected official by name or office;

nor will the letter be signed by an elected official. Presuming that the stationery and envelope used for the mailing are the standard stationery and envelope of the agency, it would appear that the information letter produced by SMUD is not a prohibited mass mailing.<sup>3</sup>

#### Videotapes

As stated above, Regulation 18901 provides that an otherwise prohibited newsletter or mass mailing is exempted from the restrictions of Section 89001 and Regulation 18901, if it contains only information or material sent in response to an unsolicited specific request and therefore is not counted toward the 201 that equate to a mass mailing. As used in this regulation, a request is unsolicited if it is not requested or induced by the elected officer or any other person acting at his or her behest. (Regulation 18901(c)(4)(A); Alquist Advice Letter, No. I-89-109.)<sup>4</sup>

Under your facts, the videotapes are being distributed solely at the request and inducement of SMUD. Thus, the videotapes do not come within the unsolicited specific request exception. Therefore, in our telephone conversation of June 17, 1992, I recommended that SMUD should not distribute more than 200 videotapes in a calendar month prior to requesting written advice from the Commission as to whether the videotapes would be deemed to be a prohibited mass mailing.

#### Expenditures for the Purpose of Seeking Elective Office

Since public funds will be used to "single out" elected officials on the videotapes, another issue was raised by your query. Would SMUD's production of the contemplated videotapes be a violation of Section 85300 which provides:

No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office.

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<sup>3</sup> This shall also serve to confirm the advice that was provided to you by FPPC staff attorney, Blanca Breeze, on March 10 and 11, 1992.

<sup>4</sup> A person who subscribes to newspapers or other periodicals published by persons other than elected officers shall be deemed to have made unsolicited requests for materials published in those subscription publications. (Regulation 18901(c)(4)(E).)

All moneys held by SMUD are public money and, according to Section 85300 of the Act, may not be used for the purpose of seeking elective office. Prior to the enactment of Proposition 73, the Commission was never confronted directly with the issue of when payments are for "the purpose of seeking elective office." The Commission has, however, dealt with issues concerning disclosure of campaign expenditures. Under the Act, a disclosable campaign expenditure is defined as a "payment made for political purposes." (Regulation 18225.)

Prior to the enactment of Proposition 73, the Commission adopted Regulation 18420, which addresses the question of whether payments by a government agency might be campaign expenditures. If a payment is determined to be a campaign expenditure, the Act requires the disclosure of the payment by the beneficiary of the payment or by the local government agency that made the payment.

In light of this existing authority, we do not believe that Section 85300 was intended to prohibit every activity that might indirectly benefit an elected official's chances for reelection. Arguably, all the activities of incumbent elected officers in the performance of their governmental duties indirectly benefit their reelection. Instead, we conclude that Section 85300 was intended to prohibit the public financing of election campaigns.<sup>5</sup>

Consistent with this intent, where public moneys are spent to advocate or promote a candidate's election to public office, Section 85300 has been violated. We believe it is appropriate to consider "campaign activities" as defined in Regulation 18420 as being among the types of activities for which Section 85300 prohibits the expenditure of public moneys. This approach is consistent with the approach taken by the courts concerning use of public funds in election campaigns. The courts have distinguished between the appropriate use of public funds to give the public a balanced informational presentation of issues surrounding an election campaign, and the unlawful use of public funds by a government agency to take sides in an election campaign. (Stanson v. Mott, supra; League of Women Voters v. Countywide Crim. Justice Coordination Com. (1988) 203 Cal.App.3d 529.)

Based on the information you have provided, it does not appear that the videotapes fall within those activities listed in Regulation 18420 or are otherwise within the prohibition of Section 85300. We assume there are no references expressly advocating the nomination, election, or defeat of the elected officials singled out on the tapes, nor to those of other

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<sup>5</sup> The language in the ballot arguments of Proposition 73 and Proposition 68 indicates that the provision appears as a rebuttal to the public financing of election campaigns proposed in Proposition 68.

candidates appearing on the tapes. Thus, the use of public funds in the production of the programs does not appear to violate Section 85300. However, as we discussed above, please note that our advice applies only to the provisions of the Act. Other areas of the law that may apply, such as Penal Code Section 424, which deals with the misuse of public moneys, are not within the jurisdiction of the Commission.<sup>6</sup>

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.<sup>7</sup>

Sincerely,

Scott Hallabrin  
Acting General Counsel

- *Deanne Stone*

By: Deanne Stone  
Counsel, Legal Division

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Enclosures: Regulations 18420  
and 18901

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<sup>6</sup> Penal Code Section 424 is interpreted and enforced by the district attorney and the Attorney General.

<sup>7</sup> Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.