



FAIR POLITICAL PRACTICES COMMISSION

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December 6, 2002

Lawrence E. Dale, Mayor
City of Barstow
220 East Mountain View Street, Suite A
Barstow, CA 92311-2888

**Re: Your Request for Advice
Our File No. A-02-331**

Dear Mayor Dale:

This letter is in response to your request for advice regarding your duties as the mayor of the City of Barstow under the mass mailing provisions of the Political Reform Act (the "Act").¹ Please note, under the provisions of California Code of Regulations 18329(b)(8)(B), unless you are an authorized representative of the other members of the city council, the Fair Political Practices Commission cannot address their responsibilities under the Act. Additionally, please note, nothing in this letter should be construed to apply to past conduct. (Regulation 18329(b)(8)(A) and (c)(4)(A).)

QUESTION

May you author an article to be placed in the city newsletter which will identify you as the author?

CONCLUSION

Any mass mailing, including a newsletter, that is publicly funded and has been prepared or sent in cooperation, consultation, coordination or concert with you may not include a reference to you or your office.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

The City of Barstow has a newsletter (the "Crossroads") which is published quarterly and provides information to your community regarding items of interest and progress in your city. The sample copy² you provided includes messages from several city officials, such as the city manager, the Department of Public Works, and the Police Department.

ANALYSIS

Section 89001, as amended by Proposition 73 in 1988, provides: "No newsletter or other mass mailing shall be sent at public expense." The purpose of this law is to ensure that incumbents do not receive an unfair advantage over challengers in the next election. (Section 81002(e).) In *Watson v. California Fair Political Practices Commission* (1990) 217 Cal.App.3d 1059, the court described the purpose of section 89001.

"The ballot arguments in favor of and in opposition to the enactment of Proposition 73, in addition to the impartial appraisal of the measure by the legislative analyst, makes it clear that the initiative as a whole sought to reform the electoral process, at least in part, by prohibiting the public subsidy of political campaigns by incumbent officeholders and their challengers alike. As a means of implementing that goal, the measure imposed restrictions on campaign contributions (see §§ 85200-85202 and 85301-85305), limited honoraria (see § 85310), prohibited candidates for public office from using state revenues in their election campaigns (see § 85300), and circumscribed the use of mass mailings by elected officials (§ 89001).

"Even a cursory review of these provisions makes it manifest that the majority of the electorate who voted for Proposition 73 intended to control the conduct of both incumbents and those seeking public office by restricting the use of public funds. Section 89001 in particular appears to be directed at removing at least some of the substantial advantages enjoyed by incumbent office holders over their challengers.^[3] This

² In your letter you referred to two sample copies, we received and reviewed only the Fall 2002 issue.

³ "There can be little doubt that an incumbent politician possess [sic] a significant 'edge' over his or her challengers. This point was emphasized in *Common Cause v. Bolger*, *supra*, 574 F.Supp. at p. 677, where the court observed: '[I]t stands to reason that incumbency alone is a valuable asset to the public official who seeks reelection. An incumbent Member of Congress enjoys a certain 'visibility' among his constituents that a challenger may find difficult or impossible to match. It is also beyond argument that any communication with constituents, whether through local meetings or through the mail or mass media, contributes to such visibility and thus may have a direct effect (however slight) in influencing the outcome of an election. To the extent that the effect is positive from the incumbent's standpoint, it is undoubtedly

objective is, of course, in keeping with that portion of the Political Reform Act of 1974 which declares: 'Laws and practices unfairly favoring incumbents should be abolished in order that elections may be conducted more fairly.' (§ 81002, subd. (e).)

"The statute at issue here helps in accomplishing that goal by prohibiting elected officials from using public moneys to perpetuate themselves in public office. The legitimacy of such an objective is made clear by the Supreme Court's observation in *Stanson v. Mott* (1976) 17 Cal.3d 206, 217, [130 Cal.Rptr. 697, 551 P.2d 1]: 'A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office [citations]; *the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process.*' (Emphasis added.)

Regulation 18901(a) clarifies 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

detrimental to his challenger's position. This is so whether the communication is part of an overt campaign effort or made simply in the normal course of a member's representative function.' "

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).”

Transmission

Regulation 18901(a)(1) only restricts items that are mailed or delivered, by any means, to a person's home, office or post office box. If items are set out for the public to pick up on their own, or are handed out in a public area, the restrictions of the regulation do not apply. You have not described how the newsletter is distributed. If the newsletters are mailed or delivered, by any means, to a person's home, office or post office box, this criterion would be met.

Inclusion of a Reference to an Elected Officer

A mass mailing which *does not* include the name, photograph or any reference to an elected officer who is affiliated with the agency that produces or distributes the mailing is not subject to the restrictions of the regulation. (Regulation 18901(a)(2).) An elected officer is “affiliated” with an agency if the officer is a member, officer or employee of the agency or a subunit (such as a committee) of that agency; has supervisory control over the agency; or appoints any of the members of the agency. (Regulation 18901(c)(1).) As mayor, you are an elected official affiliated with the agency producing the newsletter.

Moreover, if the mailing has been prepared or sent in “cooperation, consultation, coordination, or concert” with the elected officer, *any use* of the elected officer's name, photograph or office, or any reference to the officer is prohibited. (Regulation 18901(a)(2)(B).)

You wish to include articles with your byline in the newsletter. Under such circumstances, the content of the city newsletter will be prepared in “cooperation, consultation, coordination, or concert” with you, an elected official. Accordingly, the newsletter *may not* include your name or photograph or any reference to you or your office unless a specific exception applies.

Public Moneys

Pursuant to regulation 18901(a)(3)(A)(B), if any of the costs of distribution are paid for with public moneys, or the costs of design, production, and printing exceed \$50.00 (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, this criterion will be met. You note that the newsletter is produced, in part, by the City of Barstow. We assume for purposes of this letter that the threshold in regulation 18901(a)(3)(B) is met.

Number Distributed

We assume again for purposes of providing advice that more than 200 substantially similar newsletters are sent in a single calendar month, excluding any item sent in response to an unsolicited request or falling under some other express exception. Regulation 18901(c)(4) provides that mailings that contain only information or material sent in response to an unsolicited specific request are not counted toward the 201 that equate to a mass mailing. As used in the 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, *supra*.) This would apply to copies picked up at city offices or passed out at meetings, and would include copies sent to persons who make an unsolicited specific request for the material (such as subscribers).

Exceptions

While regulation 18901 provides a variety of exceptions to the prohibition, none fit the circumstances you describe.

Constitutionality

You also suggest that section 89001, as implemented by regulation 18901, is somehow constitutionally infirm. However, the constitutionality of these provisions has already been addressed and the provisions upheld by the Court of Appeal, Second District, Division 2, in *Watson*, *supra*. In that case the court stated:

“Citing a vast array of state and federal cases, plaintiffs next assert that section 89001 violates numerous fundamental constitutional rights held by them as both elected representatives and as members of the electorate. Despite their broad assertion of such rights, plaintiffs have failed to identify any constitutional right to send newsletters and other mass mailings at public expense.

¶...¶

“The ‘Bill of Rights,’ as established in the first 10 amendments to the Constitution, simply bars governmental interference with those rights. It contains no guaranty that the government will monetarily subsidize the exercise of that right.

“The statute in question neither seeks to ‘muzzle’ elected officials nor impede the free flow of ideas between the electorate and the Legislature. It in no way diminishes the ability of any class of voters from exercising their right to vote, from petitioning the government, or from otherwise making their beliefs known to their elected representatives.

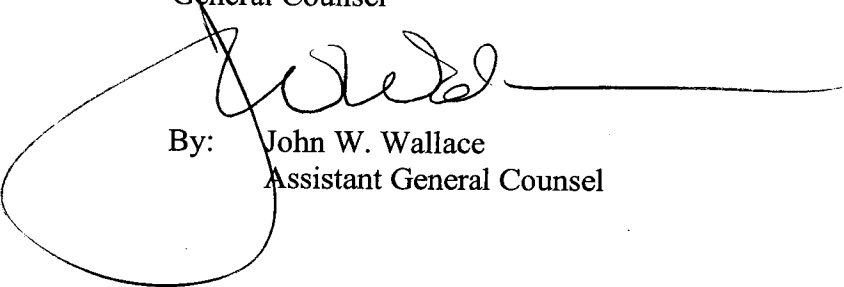
¶...¶

“We are convinced that section 89001, by denying elected officials of all political persuasions the advantage of using public funds to put or keep their name before the voters, advances the legitimate state interest in avoiding ‘arbitrary preferment of one candidate over another by reason of incumbency.’ [Citations] We also think it clear that the initiative serves the very legitimate aim of conserving limited state revenues by prohibiting the use of public funds for essentially political purposes. These twin goals of the statute constitute a permissible if not significant, governmental interest.”

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

Sincerely,

Luisa Menchaca
General Counsel


By: John W. Wallace
Assistant General Counsel

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