



FAIR POLITICAL PRACTICES COMMISSION

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June 4, 2007

Gina M. Ratto
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Legal Office
California Public Employees' Retirement System
P.O. Box 942707
Sacramento, California 94229-2707

**RE: Your Request for Advice
Our File No. A-07-085**

Dear Ms. Ratto:

This letter is in response to your request for advice regarding the mass mailing provisions of the Political Reform Act (the "Act").¹

QUESTION

1. May the California Public Employees' Retirement System ("CalPERS") include in mailings to its members information, including candidate statements and photographs, about candidates, some of whom are incumbents, running for the CalPERS Board?

2. May CalPERS place candidate information on its website?

CONCLUSIONS

1. Mailing information about candidates, including a candidate who is an incumbent, does not violate the mass mailing prohibition of Section 89001 because it falls within the exception of Regulation 18901(b)(7) relating to ballot arguments. In addition, mailing this information does not violate Section 85300's prohibition against use of public moneys in elections. Therefore, the Act does not prohibit CalPERS from mailing information, including candidate statements and photographs, about the candidates.

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

2. Candidate information may be posted on the CalPERS website because a website posting is not a "mass mailing" under Regulation 18901.

FACTS

Six of the 13 members of the Board of Administration ("Board") of the California Public Employees' Retirement System ("CalPERS") are elected under the supervision of the Board. Later this year there will be an election for one such position. CalPERS is considering including information about candidates running for the CalPERS Board in certain of its mailings. The mailings would be paid by CalPERS and more than 200 substantially similar mailings would be distributed in a calendar month.

Your first question contemplates mailings consisting of a list naming the candidates, indicating their employer, job classification at retirement, years of CalPERS covered service, and contact information provided by the candidate. The mailings would include commentary on the importance of the election process and a description of the duties of the Board of Administration. The mailings would encourage eligible individuals to vote and would include anecdotes from CalPERS members attesting to the importance of participating in the election process. Similar information would be posted on the CalPERS website.

Your second question contemplates, in addition to the information provided by CalPERS, the candidates voluntarily submitting materials for publication and distribution. You advise us that every effort would be made to treat all candidates equally.

ANALYSIS

Your inquiries implicate Sections 89001 and 85300 of the Act.

Mass Mailing Prohibition

Section 89001 provides that "no newsletter or other mass mailing shall be sent at public expense." Regulation 18901 provides that a mailing is prohibited by Section 89001 if all of the following criteria are met:

"(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).”

The mailings described in your letter would be tangible items sent to people's residences. They would feature the incumbent candidate, an elected officer affiliated with the agency that produces or sends the mailings. The costs of the mailings would be paid with public funds. Finally, more than 200 copies of the mailings would be sent. Therefore, the proposed mailings would result in a violation of Section 89001 unless an exception under subdivision (b) of Regulation 18901 applies.

Regulation 18901(b)(7) provides a relevant exception to the mass mailing prohibition:

“Any legal notice or other item sent as required by law, court order, or order adopted by an administrative agency pursuant to the Administrative Procedure Act, and in which use of the elected officer's name, office, title, or signature is necessary in the notice or other mailing. For purposes of this subdivision (b)(7), inclusion of an elected officer's name on a ballot as a candidate for elective office, and inclusion of an elected officer's name and signature on a ballot argument, shall be considered necessary to such a notice or other item.”

You indicate that certain members of the Board are elected “under the supervision of the Board.” We assume this means that the CalPERS Board is legally required to mail ballots to its members so that they may vote for candidates for elected positions.² We have previously advised that the exception set forth in Regulation 18901(b)(7) applies not only to ballot arguments but to a mailing of candidate history statements as long as the mailings do not provide incumbents with an unfair advantage but treat all candidates equally. (*Rogers Advice Letter*, No. A-97-205.) The rationale is that the main purpose of Section 89001 is to eliminate the potential unfair advantage that use of public funds might provide to an incumbent during the election period. (*Rogers Advice Letter*, No. A-97-330.)

Accordingly, Section 89001 does not prohibit mailings by CalPERS that provide information about candidates running for the CalPERS Board, including any candidate that is an incumbent. Because the “ballot argument” exception takes the mailing outside the restrictions of the mass mailing rules, photographs may also be included.

Section 85300 Prohibition on Use of Public Moneys in an Election

Section 85300 of the Act provides that: “No public officer shall expend and no candidate shall accept any public moneys for the purpose of seeking elective office.”

While it would appear that Section 85300 may prohibit the any use of public resources for campaign purposes, Regulation 18530 as amended in 1998 clarifies that it only prohibits payments of public moneys for the public financing of elections.³ Accordingly, the mailings you describe would not violate Section 85300.

Website

Candidate information may be placed on the CalPERS website because posting on a website does not amount to delivering an item to a recipient at his or her residence, place of employment or business, or post office box. Moreover, we have previously advised that distribution over the Internet on website pages is not a prohibited mass mailing under the Act because the information being transmitted is not tangible. (*Lovely Advice Letter*, No. A-98-017.)

² If that is not the case, then the exception does not apply and the mailings are prohibited.

³ It states: “(a) Government Code section 85300 prohibits the payment of public moneys, in the form of matching funds or cash subsidies, for the public financing of elections. The prohibition in this subsection does not apply to public officers and candidates in charter cities and counties.”

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in black ink, appearing to read "Valentina Joyce". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl