



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 13, 2016

Kathrine Pittard
District Counsel
Sacramento Metropolitan Air Quality
Management District
777 12th Street, 3rd Floor
Sacramento, CA 95814-1908

Re: Your Request for Advice
Our File No. A-16-107

Dear Ms. Pittard:

This letter responds to your request for advice regarding the mass mailing provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that we are providing advice only under the provisions of the Act. The Commission does not provide advice on bodies of law outside of the Act including any other laws limiting the use of public funds.

QUESTION

Under the mass mailing provisions of the Act, may the Sacramento Metropolitan Air Quality Management District (the "District") pay for an insert in the Sacramento News and Review that includes an interview with, and photographs of, two elected officials serving on the District's board?

CONCLUSION

For copies of the insert published and distributed by the newspaper as described, the mass mailing provisions do not prohibit the District from paying for the insert. However, in regard to the copies of the insert the District will receive from the newspaper and distribute separately, the District may not send more than 200 copies of the insert to a person's residence, place of business, or post office box including copies mailed to organizations or governmental agencies that the District coordinates or cooperates with.

¹ 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 18110 through 18997 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

You are the District Counsel for the Sacramento Metropolitan Air Quality Management District (the "District") and requesting advice on behalf of the District's governing board members, Steve Hansen and Phil Serna. Neither member is currently running for office.

The District's governing board is a 14-member board of elected officials, consisting of all five members of the Sacramento County Board of Supervisors and representatives from the city councils within Sacramento County. Member Hansen represents the City of Sacramento, and currently serves as the Chair of the District Board. Member Serna represents the County of Sacramento, is a past Chair of the District Board, and was appointed by the Governor (confirmed by the Senate) to represent the Sacramento region on the California Air Resources Board. The region includes the Sacramento, Placer, Yolo-Solano, Feather River and El Dorado air districts.

The District's public relations staff is preparing an eight-page advertising tabloid for insertion in the Sacramento News & Review. The insert will highlight clean air programs and educate the public on clean air issues and success stories. Staff would like to interview Members Hansen and Serna for articles in the insert. The articles would identify both by name, office and title, and may include photographs. As pertinent to this request you have provided the following information:

- Copies of the eight-page advertising tabloid will be inserted into each of the 77,850 Sacramento News & Review publications set to be published in July or August, 2016.
- The District is paying \$15,500 for this insert.
- The costs will be paid for by using Department of Motor Vehicle fees the District is authorized to collect.
- The District will also receive approximately 1,000 copies for its own distribution.
- The District will distribute the 1,000 copies as part of its general public outreach, including placing copies at the District's front counter, passing out copies at community events that may or may not be attended by District staff, mailing copies to organizations and government agencies that the District coordinates or cooperates with, and handing out during public or private meetings involving the District Executive Officer.
- The District will receive a PDF of the insert for its use in social media and other electronic outreach efforts, including the posting of the PDF on its website.
- The Sacramento News & Review's current circulation includes 1,826 retail/office accounts, at which 51,362 copies are available to the public; 796 vending box accounts, at which 26,465 copies are available to the public; and 23 mail subscriptions.

- The Sacramento News & Review also maintains its own electronic publication lists, but the District's insert will not be attached to any of them.

ANALYSIS

Section 89001 states that "no newsletter or other mass mailing shall be sent at public expense." Regulation 18901(a) states that "except as provided in subdivision (b), a mailing is prohibited by section 89001 if 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...

"(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)."

If all four of the enumerated criteria listed above are met, the mass mailing is prohibited barring the application of any exceptions. (See Regulation 18901(b)(1) - (b)(11).)²

In this case, it is uncontested that (1) the insert will feature or reference 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 official; and (2) costs of distribution will be paid for with public moneys including costs of design, production, and printing exceeding \$50. Based upon the information provided, the determinative question is whether more than two hundred substantially similar items will be sent or delivered to recipients at their

² We note that certain campaign related mailers are also prohibited under Section 89001. Under Regulation 18901.1, a mass mailing may be prohibited if the mailing either "expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure" or "when taken as a whole and in context, unambiguously urges a particular result in an election." However, based upon the subject of the insert as you have described it and the fact that neither board member is currently running for officer, it does not appear that Regulation 18901.1 is applicable to the facts provided.

residence, business address, or post office box if the District pays to place the insert in the Sacramento News and Review and distributes the 1,000 copies provided to the District as planned.

Copies distributed by the Sacramento News and Review.

Under Regulation 18901(a)(4), copies of an item distributed in response to an “unsolicited request” do not count against the 200-item per month limit. An “unsolicited request” is defined in Regulation 18901(c)(4) as one of the following: (A) communications, such as petitions, requesting a response to someone other than an elected officer or that officer’s agent; (B) a request for continuing information for a period not longer than two years; (C) a mass mailing recipient’s response to certain agency notices which indicate that, in the absence of a response, the recipient’s name will be purged from the mailing list for that mass mailing; (D) a communication sent in response to an elected officer’s participation at a public forum, press conference, or issuance of a press release; and, (E) a request for a subscription to a newspaper or other periodical published by non-elected officers.

For newspapers, we have previously advised that “any item published by a non-elected officer and received by a subscriber” and any item received at some location other than a non-subscribing recipient’s residence, place of employment or business, or post office box will not count towards the 200-item per month limit. (*Martin* Advice Letter, No. I-05-252.) Moreover, we have advised agencies on multiple occasions that an agency may pay to include inserts in a newspaper of general circulation as copies of the newspapers are items sent in response to unsolicited requests. (See *Warren* Advice Letter, No. A-93-152; *Sluder* Advice letter, No. A-93-089; *Lipton* Advice Letter, No. A-92-476; *Weckerle* Advice Letter, No. A-92-464; and *Geiogue* Advice Letter, No. A-91-193.)

Based upon the facts provided, copies of the insert paid for by the District but published and distributed by the Sacramento News and Review, including copies sent to subscribers as well as copies delivered to retail/office accounts that have granted the Sacramento News and Review permission to distribute copies at their retail/office locations, are items sent in response to unsolicited request and do not count towards the 200-item per month limit. Accordingly, the Act does not prohibit the District from paying for the insert.

Copies distributed by the District.

In addition to the copies distributed the Sacramento News and Review, you have also indicated that the District will receive and distribute an additional 1,000 copies of the insert. You have indicated that these copies may be placed at the District’s front counter, passed out at community events, mailed to organizations and government agencies that the District coordinates or cooperates with, or handed out during public or private meetings involving the District Executive Officer. Previously we have advised, that an item is not “sent” and does not count against the 200-item per month limit if the item is made available for members of the public to take, handed out in a public area, or handed out to the public in a private area open to the public. (See *Mount* Advice Letter, No. A-95-225; *Gladwell* Advice Letter, No. A-95-162; *Chaplin* Advice Letter, No. 93-034; *Waggoner* Advice Letter, No. A-92-247; and *Anaya* Advice Letter, No. A-91-215)

As proposed, copies of the insert distributed to the public by the District will not count towards the 200-item per month limit if placed on the District's front counter, passed out at community events, handed out during public meetings, or handed out at private meetings (provided the meeting is not held at the recipient's home or place of business). However, items mailed to organizations and government agencies or handed out at a private meeting in the recipient's home or place of business will count against the 200-item per month limit. Accordingly, the District may not mail more than 200 inserts in a month even if mailed to an organization or governmental agency that the District coordinates or cooperates with.³

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

Sincerely,

Hyla P. Wagner
General Counsel



By: Brian G. Lau
Senior Counsel, Legal Division

BGL:jgl

³ While Regulation 18901(b)(3) excludes items sent in the normal course of business to another governmental agency from the mass mailing restrictions, and Regulation 18901(b)(7) excludes items essential to a program sent to person subject to the program so long as the item does not include a photograph of the official, the facts provided do not indicate that the insert meets the criteria for either of these exceptions.