

MEMORANDUM OF LAW

DATE: March 22, 1990

TO: Raquel Beltran, Chief of Staff, Councilmember
Hartley's Office

FROM: City Attorney

SUBJECT: Mass Mailing Restrictions and Use of Public
Funds for an Open House

This is in response to your memorandum of February 21, 1990, to City Attorney John Witt, which we received on February 26th. In it you ask the City Attorney to review and advise you on three matters:

1. A proposed "Community Input Form" to be distributed to residents and business owners in District 3 (copy attached as Exhibit A).
2. A proposed standardized letter regarding establishment of Neighborhood Watch groups and a "Safe Neighborhood" nonprofit corporation (copy attached as Exhibit B).
3. Use of City staff and facilities to host a District 3 open house to be held in the City Administration Building.

We will address these matters in the order presented:

BACKGROUND FACTS

"Community Input Form"

In a telephone conversation on March 6th, you stated that the form (Exhibit A) was prepared by City staff on City time and with the use of City facilities. The plan is for the Councilmember to distribute the form personally during his walks through District 3.

The form invites the public to contact the Councilmember about one or more issues and also invites the public to request a

response from the Councilmember about their concerns. The form states that it is not printed at public expense. The form contains Councilmember Hartley's name in two separate places. It will not be printed on standard letterhead City stationery.

"Safe Neighborhood" Letter

In telephone conversations with you, we learned that the draft letter (Exhibit B) will be addressed to District 3 constituents using voter registration lists or Monarch System1

lists. The letter contains Councilmember Hartley's typewritten name in the signature block; the letter will be printed on District 3 stationery containing Councilmember Hartley's name; and, it will be signed by Councilmember Hartley. This letter will be delivered to over 200 persons in District 3. This letter has not been requested by District 3 constituents, but rather is being initiated by the Councilmember.

Open House

From prior telephone conversations with you, we learned that Councilmember Hartley would like to hold an open house for District 3 residents to meet their new Councilmember. Non-city monies would be used to pay for food, beverages and invitations. You would like to know, however, whether the event could be held on the 10th floor of the City Administration Building, using City staff, equipment and supplies (tables, etc.), during regular City work hours.

LEGAL ANALYSIS

The "Community Input Form" and the proposed "Safe Neighborhood" letter raise legal questions under Proposition 73 "mass mailing" regulations (Government Code section 89001 and 2 Cal. Code of Regulations 18901). The proposed open house raises questions under the "public purpose" doctrine as articulated in Council Policy 000-4.

A. Proposition 73/"Mass Mailing" Regulations

Proposition 73 was an initiative measure that amended the Political Reform Act of 1974. It was adopted by the people of the State of California in June 1988 and, among other things, it

¹See City Attorney Report to Mayor and Council of December 6, 1989, regarding the Monarch System.

prohibited certain mass mailings by elected officials. It states in relevant part: "No newsletter or other mass mailing shall be sent at public expense." "Mass mailing" is defined by Proposition 73 to include two hundred (200) or more "substantially similar pieces of mail," but does not include "form letters or other mail which is sent in response to an unsolicited request, letter, or other inquiry." (Government Code section 82041.5.)

The Fair Political Practices Commission (FPPC) has adopted a regulation interpreting this portion of Proposition 73 (2 Cal. Code of Regulations section 18901, hereafter called "regulation"). The regulation was amended in significant ways in December 1989. A copy of the most recent regulation is attached for your reference. Structurally, the regulation has three parts: the first part states the prohibitions; the second part

sets forth the exceptions; and, the third part provides the definitions. Since the regulation is attached, we will not summarize it here, but rather will focus on issues raised by the community input form and "Safe Neighborhood" letter.

Assuming the cost of its design, production and distribution are paid out of public monies and exceed \$50 and assuming the "community input form" will be distributed to 200 or more people per month, its distribution would violate the "mass mailing" prohibition, because the form features Councilmember Hartley's name. Regulation 18901(a). This is true even though it is not printed at public expense. It is true also even if the form is hand-delivered and not mailed. No exception under Regulation 18901(b) appears to apply here.

Distribution of the proposed "Safe Neighborhood" letter would also appear to violate the regulation since the intent is to send or distribute it to 200 or more persons per month. The letter is designed to "feature" the name of the Councilmember by virtue of the typewritten signature block and the signature itself (Regulation 18901(c)(2)). (Appearance of the Councilmember's name on standard letterhead stationery would not violate the rule, however. See Regulation 18901(b)(1).)

Also, the letter was not solicited by the residents of District 3, but rather is being initiated by the Councilmember himself. Therefore, to comply with the law, the Councilmember may send or distribute no more than 199 copies of this letter or substantially similar letter per month.

"Public Purpose" Doctrine and Council Policy 000-4

The "public purpose" doctrine is articulated in the Council's Code of Ethics (Council Policy 000-4, copy attached), as follows:

No elected official, officer, . . . or employee shall engage in any activity which shall result in any of the following:

(a)

(b) Using time, facilities, equipment or supplies of The City of San Diego for the private gain or advantage of himself or another.

The "public purpose" doctrine is a body of law developed to establish the boundaries for which public monies may be used. The doctrine has been discussed in several prior memoranda of law and opinions issued by this office. The precise issue you pose, whether a Councilmember may use City facilities and staff to host an open house for his constituents to meet him, has never been raised formally. However, similar issues have been raised and resolved in writing. Copies of relevant prior memoranda are

therefore attached for your convenience, including:

1. Memorandum of Law dated December 19, 1988, regarding the Use of City Facilities to Print Council Newsletters/Proposition 73 and Council Policy 000-4 (without attachments).
2. Memorandum of Law dated October 26, 1988, regarding Expenditure of Public Funds by Economic Development Corporation a partially City-funded non-profit corporation to Promote Ballot Initiatives (without attachments).
3. Memorandum of Law dated September 29, 1986, regarding Political Activities of Police Chief in Support of Ballot Measures (with attached memoranda dated August 20, 1985; February 20, 1985; August 7, 1981; June 20, 1975; and, August 1, 1967).
4. Memorandum of Law dated January 5, 1979, regarding Use of Public Funds for Council Newsletter (without attachments).
5. Opinion 74-5 dated May 28, 1974, regarding the Propriety of Using City Facilities for Soliciting Complaints in a Council District.

Perusal of the above-cited memoranda and opinion reveals that public funds may be spent for "public purposes," but not for the private gain or advantage, including political advantage, of a person or entity. Essentially that doctrine is embraced by the portion of the Council Policy quoted above.

The issue presented by your question is whether the proposed open house would be for an allowable "public" purpose, or for a prohibited "private" purpose. If the proposed open house will be held using City facilities and staff solely to further the personal or political advantage of the Councilmember, the open house would clearly be prohibited by law and would violate the Council Policy. To the extent that it will be held to give the residents of District 3 a chance to meet and express their concerns to the Councilmember of District 3, the open house would appear to serve a lawful public purpose. Determination of the true purpose of the open house can be made only by the Councilmember. We caution you, however, that occasions that are perceived as an inappropriate use of City staff or facilities should be avoided.

In conclusion, based on the facts as presented in this memorandum, we find a legitimate public purpose may be served by Councilmember Hartley hosting an open house using City time, facilities and equipment. Therefore, the open house would not violate the "public purpose" doctrine or Council Policy 000-4.

JOHN W. WITT, City Attorney
Cristie C. McGuire
Deputy City Attorney

CCM:jrl:048(x043.2)

Attachments

ML-90-41