

MEMORANDUM OF LAW

DATE: April 17, 1992

TO: Tim O'Connell, Assistant to the Mayor

FROM: City Attorney

SUBJECT: Mass Mailing Regulations and SEDC Newsletter "UPTREND"

This is in response to your memorandum of March 2, 1992, which contains several questions about "UPTREND," a newsletter recently published by the Southeast Economic Development Corporation ("SEDC"). You note that this newsletter contains several references to and contains photographs of the Mayor, current Councilmember Stevens, and former Councilmember Pratt. You ask several questions about the newsletter in relation to Proposition 73's mass mailing regulations.

BACKGROUND FACTS

SEDC is a nonprofit public corporation wholly owned by The City of San Diego ("City"). Under the By-laws, SEDC's Board of Directors is appointed by the City Council, however, the Council

Under the City's Charter, the Mayor is one member of the City Council for purposes of voting. San Diego City Charter Section 12.

In this memorandum the term "Councilmembers" includes the Mayor, unless otherwise specified.

does not have supervisory control over SEDC. Although the City itself is a member, in fact the sole member of the Corporation, Councilmembers as individuals are not members of SEDC. Neither are they officers or employees of SEDC.

This winter, SEDC published Volume 1, Issue 1, of an eight page brochure or newsletter (copy attached). It contains several references to Mayor O'Connor and to City Councilmember Stevens and former Councilmember Pratt. Also the Mayor's photograph appears once in the newsletter; Councilmember Steven's photograph appears once; and, former Councilmember Pratt's photograph appears twice.

According to Mark Randolph, Communications Officer for SEDC, approximately 1,200 copies of the newsletter were printed and most were distributed to businesses and residences during the last week of January 1992 and all during the month of February 1992. Some, however, were taken to community meetings at churches and still others were made available to the public at SEDC's offices.

According to Mr. Randolph, earliest preparation of the newsletter started on December 3, 1991. Also, according to Mr. Randolph, neither the Mayor, nor the Councilmembers' knew that their photographs would be used in the publication or that the publication would make reference to

them. As a final matter, we also note that Mr. Pratt left office and Mr. Stevens took office on December 2, 1991.

QUESTIONS

You asked the following four questions:

1. Is SEDC an agency with which the Mayor and/or City Councillors are "affiliated" as defined in the FPPC regulations?
2. Does this newsletter's treatment of the Mayor and/or City Councilors meet the FPPC regulation's definition of "features an elected official"?
3. Do the FPPC regulations and the statutes they implement apply only to elected but not yet seated officials, and/or to individuals who were elected officials but have just vacated the office which is "affiliated" with the applicable agency? (E.g., a City Councillor is elected or appointed to another public office not affiliated with the agency publishing the mass mailing.)
4. How may a public agency report activities similar to those described in the "UPTREND" newsletter without violating the FPPC regulations?

ANALYSIS

The questions presented can be resolved only by examination of the state's mass mailing regulations, which were adopted as part of Proposition 73. Proposition 73 was adopted by the people of California in June 1988; it amended the Political Reform Act of 1974 (Gov't Code Section 81000 et seq.). As adopted, Proposition 73 dealt primarily with campaign financing, but a portion of it contained language prohibiting mass mailings made at public expense.F

Proposition 73 as it relates to fiscal year campaign contributions, bans on intra and inter-candidate transfers and the ban on expenditure of funds raised before 1989 was invalidated by the U.S. Court of Appeals for the 9th Circuit in *Service Employees International Union, AFL-CIO v. Fair Political Practices Commission*, 955 F.2d 1312 (9th Cir. 1992). The mass mailing prohibition embodied in Proposition 73, which is at issue here, is not affected by the 9th Circuit Court of Appeals' ruling.

The mass mailing prohibition as adopted in Proposition 73 reads: "No newsletter or other mass mailings shall be sent at public expense." Gov't Code Section 89001.

Proposition 73 also amended the definition of "mass mailing" to read: "mass mailings' 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 or other inquiry." (Gov't Code Section 82041.5.)

The Fair Political Practices Commission ("FPPC") has adopted an

extensive regulation interpreting these statutes (2 Cal. Code of Regs. Section 18901). A copy of Regulation 18901 is attached for your reference. Subsection (a) of the regulation states that a mailing will be prohibited by Gov't Code Section 89001 if certain criteria are met. This subsection reads in full as follows:

- (a) Except as provided in subdivision (b), 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 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). (Emphasis added.)

Most of your questions can be answered by examining the definitions in the regulation itself.

Analysis of Question No. 1:

Your first question essentially asks whether SEDC is "affiliated" with the Mayor or two Councilmembers within the meaning of the statute and regulations. Although the answer is not certain, we believe the answer is "yes." The phrase "elected officer affiliated with an agency" is defined as "an elected officer who is a member, officer, or employee of the agency, or of a subunit thereof such as a committee, or who has

supervisory control over the agency, or who appoints one or more members of the agency. 2 Cal. Code of Regs. 18901(c)(1).

In the present case, SEDC is clearly an "agency" within the meaning of the regulation, since SEDC is the one who produced the publication. It is less clear whether the Mayor and Councilmembers are "affiliated with the agency" (SEDC) within the meaning of the regulation. We say it is not clear because, although the Council has appointment power over SEDC's Board of Directors, they do not as individuals have sole appointment power over SEDC's Board, but rather share that power with others (that is, with other Councilmembers who are clearly not featured or even mentioned in the publication). Our research yielded no formal FPPC opinion clarifying this ambiguity and a brief review of private advice letters the FPPC has issued on "mass mailings" that are available to us yielded nothing to clarify the question.

Also, we note that the Mayor and Councilmembers do not have supervisory control over SEDC. Also, although the City itself is a member of the Corporation of SEDC, the Councilmembers as individuals are not members of SEDC. Neither are they officers or employees of SEDC. Therefore, only because they share appointment power over SEDC's Board of Directors may the Mayor and Councilmembers whose photographs and names appeared in UPTREND, possibly be "affiliated" with SEDC within the meaning of the regulations.

Analysis of Question No. 2:

Your second question asks whether the publication "features" the Mayor as well as a current and a former Councilmember. The phrase "feature an elected officer" is defined in the Regulation as follows:

"Features an elected officer" means that the item mailed includes the elected officer's photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color.

2 Cal. Code of Regs. Section 18901 (c)(2)

Although under this definition the Mayor and two Councilmembers appear to have been "featured" in the publication, because their photographs appeared in the publication, whether they are "featured" in violation of the regulation is much less clear. Although under Regulation 18901(a)(2)(A) an elected officer's photograph in an affiliated agency's publication appears to be sufficient to trigger a possible violation of the regulation, that interpretation may not be true in light of subsection (a)(2)(B) of that regulation (which is quoted at page 3 above). Under Regulation 18901(a)(2)(B), a photograph of an elected officer in an affiliated agency's publication violates the regulation only if it "is prepared or sent in cooperation, consultation,

coordination, or concert with the elected officer." In the present case, we are informed that the use of the Mayor's and Councilmembers' photographs and references to their names was done without their knowledge. Necessarily, then, the publication's use of their photographs and reference to their names was done without their consent or cooperation. Therefore, we believe there was no violation of the Regulation.

Analysis of Question No. 3:

Your third question asks whether the phrase "elected officers affiliated with an agency" applies only to current elected officials or also to former elected officials. Although the regulations do not make the distinction, we think the regulation makes sense when interpreted to include only current Councilmembers. After all, former Councilmembers do not have appointment powers or supervisory control over their affiliated agencies after they leave office.

However, sometimes a publication may be printed during one Councilmember's term and distributed during the next Councilmember's term. If the rest of the regulation's criteria are met, violations of the statute and regulation may partially occur during both Councilmembers' terms, even though one Councilmember is no longer in office.

In the present case, according to the facts provided by Mr. Randolph, preparation of the SEDC newsletter began in December 3, 1991, printing occurred in early January 1992 and distribution occurred in late January and during February 1992. Well over 200 have been distributed to businesses during that time period of approximately six weeks. Since Mr. Stevens took office on December 2, 1991, we find that Mr. Stevens was an elected officer within the meaning of this regulation during the preparation, printing and distribution of the newsletter. Because preparation of the newsletter started one day after Mr. Pratt left office, we find that Mr. Pratt was not an "elected officer" within the meaning of the regulation.

Analysis of Question No. 4:

Your last question asks how a public agency may report activities similar to those described in the SEDC publication without violating the FPPC regulation. To answer, we can only suggest that agency officials read and become familiar with the statute and regulations. If they have further questions, they can ask their own attorney, or call the FPPC's Legal Division at (916) 322-5901.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

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Attachments

cc Jerry Grooms, President, SEDC
Robert Pearman. Attorney for SEDC
Mark Randolph. Communications Officer, SEDC
Allisyn Thomas, Deputy City Attorney
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