

MEMORANDUM OF LAW

DATE: January 17, 1992
TO: Councilmember Judy McCarty
FROM: City Attorney
SUBJECT: "Mass Mailing" Limits in Proposed Distribution of Tornado
Materials

This is in response to your memorandum of January 9, 1991, to City Attorney John W. Witt, in which you ask whether printed materials pertaining to tornado safety tips may be distributed to residents of the Mission Gorge/San Carlos area under Proposition 73 (the "mass mailing" restrictions). You attach two items: a brochure entitled "Tornado Safety Tips" prepared by the Federal Emergency Management Agency, and a flyer prepared by The City of San Diego's Emergency Management Office. Copies of the brochure and flyer are attached to this memorandum. It is anticipated that over 200 of the brochures and flyers will be distributed. The brochure was prepared and printed with non-City (presumably federal) monies. The flyer would be prepared, printed and distributed at the City's expense.

ANALYSIS

As adopted by the voters in June 1988, the "mass mailing" restrictions of Proposition 73 state: "No newsletter or other mass mailing shall be sent at public expense." Government Code section 89001. As amended by Proposition 73 in June 1988, the term "mass mailing" 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, letter or other inquiry." Government Code section 82041.5.

The Fair Political Practices Commission ("FPPC"), which is charged with adopting rules interpreting the Political Reform Act, including Proposition 73, has adopted Regulation 18901 interpreting the "mass mailing" restrictions in Government Code section 89001. 2 Cal. Code of Regs. 18901. It reads in relevant part, as follows:

18901. Mass Mailings Sent at Public Expense.

(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).

....

For purposes of this regulation the FPPC has defined certain key terms. The terms that are defined and are relevant to the present question are set forth below:

(c) The following definitions shall govern the interpretation of this regulation.

(1) "Elected officer affiliated with an agency" means 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) "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 headlines, captions, type size, typeface, or type color.

....

Under the present facts, it is clear that the brochure on Tornado Safety Tips prepared by the Federal Emergency Management Agency does not fall within the statute or rule. It nowhere features an elected City official nor does it contain the name, office, photograph or other reference to a City official. It therefore may be distributed using City

monies.

The flyer, however, poses problems under the statute and regulation.

First, it is anticipated that more than 200 of the flyers will be distributed to residents of the Mission Gorge/San Carlos area. Also it is anticipated that over \$50.00 in City money will be necessary to prepare and print the flyer, and some City money will be used to distribute them.

The problem arises because your name and office appear in the flyer and it was prepared by the City's Emergency Management Office, a City Agency. Since the flyer is being reviewed by your office, it was clearly prepared with your cooperation. Thus, the elements of this rule are met and the flyer as drafted may not be printed and distributed at City's expense. Also, the exceptions to the rule do not apply to permit distribution of the flyer at the City's expense. If you have further questions, please feel free to call me.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

CCM:jrl:011(x043.2)

cc Bill Wolf

ML-92-7