

MEMORANDUM OF LAW

DATE: May 31, 1995

TO: Councilmember Valerie Stallings

FROM: City Attorney

SUBJECT: Community Publications Published With Public Funds

QUESTIONS PRESENTED

By memorandum dated April 17, 1995, you asked whether there was any specific prohibition or limitation on the printing of an elected officer's

You used the term "elected official" in your memorandum, whereas the "mass mailing" statute and regulation at issue in this memorandum use the term "elected officer." For consistency, we use the term "elected officer" throughout this memorandum, even though the terms are virtually interchangeable for the purposes discussed here.

name in the text or title of an article in a community publication which uses public funding for the majority, if not all, of its operating budget. Specifically, you asked whether those community publications may print articles written by "staff"

It is not clear from your memorandum whether the reference to "staff" is to the staff of the publication or the staff of the elected officer who may write an article which is published in the publication. The implications of the distinction are discussed below, at page 6.

that mentioned an

elected officer by name. You also asked whether the limitation, if any exists, varies based upon the proportion of the operating budget which is reliant on the public funding.

Although not asked in your memorandum, your inquiry also brings to mind two other questions, namely: (1) assuming an elected officer is involved in writing articles to be published in the publication, is such writing a violation of recent amendments to the honoraria limitations in the Political Reform Act; and, (2) whether printing an elected officer's name in the text or title of an article in a partially publicly funded community newspaper is a violation of the doctrine prohibiting the use of public funds for political purposes.

SHORT ANSWERS

(1) It is not a violation of the Political Reform Act's "mass

mailing" prohibition for an elected officer's name to appear in articles published by a community publication even if public funding is used for the majority of the publication's operating budget, unless the elected officer cooperated in preparing the article and more than 200 of the publications are distributed per calendar month to residences, businesses or post office boxes.

(2) The prohibition does not vary based upon the proportion of the community publication's operating budget reliant upon the public funding.

(3) The mere fact that a councilmember writes an article for a community publication does not violate the Political Reform Act's honoraria prohibition, unless the councilmember received payment for it.

(4) Mere mention of an elected officer's name in a partially publicly funded community publication does not violate the legal doctrines that limit the purposes for which public funds may be spent, unless the facts surrounding the use of the officer's name establish that it was done for political purposes.

#### ANALYSIS

##### I. Political Reform Act's "Mass Mailing" Prohibition

The law applicable to the questions you have posed is the "mass mailing" prohibition, which is part of the Political Reform Act ("Act"). The Act is codified at Government Code sections 81000 through 91015. The "mass mailing" prohibition is set forth in Government Code section 89011, which provides: "No newsletter or other mass mailing shall be sent at public expense." The term "mass mailing" is defined in the Act to mean "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." Gov't Code Section 82041.5.

This "mass mailing" prohibition is expanded upon in the California Code of Regulations which, in Title 2, Section 18901, sets forth in detail guidelines covering mass mailings sent at public expense. A copy of Section 18901 is enclosed for your review. Unless otherwise stated, this regulation will be cited as Section 18901.

Generally, unless it fits into one of the exceptions listed in Section 18901(b), a "mass mailing" is prohibited if four criteria are met. Those criteria are set forth in Section 18901(a). Because the facts you describe are not covered by any of the specific exceptions in Section 18901(b), the sole determination is whether all the criteria in Section 18901(a) are met. If so, printing the officer's name in the publication would be prohibited.

The facts presented are analyzed under these four criteria, which are discussed separately below.

##### A. Criterion No. 1: Item is "delivered"

Section 18901(a)(1) reads: "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 Section 18901(a)(1), the item delivered to the recipient must be a tangible item, such as a video tape, record, button, or a written document. It is clear that a community publication or newspaper, which is at issue here, is a tangible item.

The next part of Section 18901(a)(1) requires examination of the meaning of the term "delivered" and a determination of the manner and destination of delivery of the item. As used in Section 18901(a)(1), the term "delivered" requires that an item be mailed, sent or otherwise taken to a person's residence, place of business or post office box. The mode of transport does not matter as much as the destination. For this reason, the term "mass mailing" prohibition is a misnomer, because the term implies that the U.S. mail must be used in order to fall within the prohibition. In fact, mailing an item is not required to come within the prohibition. The regulation instead focuses on the particular destination of the item.

We next apply this criterion to the facts presented. If the community publication is transported by any means to one of the listed destinations, the publication would be treated as being "delivered." If, on the other hand, the publication is merely set out in newsracks or other passive delivery devices accessible to the public at large, the publication would not be treated as being "delivered" within the meaning of Section 18901(a)(1).

We have not been provided sufficient facts to determine conclusively whether the publication will be "delivered" within the meaning of Section 18901(a). The answer to the first question presented in this memorandum will depend in part on the answer to this question.

B. Criterion No. 2: Item features, or is made in cooperation with, an elected officer

The second criterion is satisfied by meeting one of two alternative criteria. This portion of the regulation reads as follows: "The item sent either:

(A) Features an elected officer affiliated with the public agency which produces or sends the mailing; or

(B) Includes the name, office, photograph or other reference to the elected officer and is prepared in cooperation, consultation, coordination or concert with the elected officer."

Section 18901(a)(2) (emphasis added).

Although not explicitly set forth, this criterion has a general overriding consideration: is the publication independently produced, prepared, edited and sent? Thus, Section 18901(a)(2)(A) requires the publication to be produced or sent by the officer's agency for the prohibition to apply. Similarly, Section 18901(a)(2)(B) requires not only that the publication be produced or sent but that the publication

be produced or sent in cooperation, consultation, coordination, or concert with the elected officer.F

The consideration of whether the public agency "produces" or "sends" the publication is separate from the issue of the source of funds, dealt with at page 6 of this memorandum.

Generally this criterion addresses the level of control either the public agency or elected officer has over the content of the publication. Certainly, the intent of the statute is to prohibit public officials from exercising de-facto control over otherwise independent publications produced or sent at public expense.

With that overriding consideration in mind, we next examine more closely the precise language of the two subcriteria in Section 18901(a)(2) and analyze how they apply to the facts presented. We analyze these two subcriteria separately below.

1. Features an elected officer affiliated with agency.

The first subcriterion contains two key phrases, which are defined in the regulation and which are critical to the ultimate determination. The phrase "features an elected officer" is defined in Section 18901(c)(2) to mean "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." Section 18901(c)(2).

The phrase "elected officer affiliated with the 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." Section 18901(c)(1).

According to the facts presented, the councilmember's name will merely be mentioned in an article. There appears to be no intention to publish the councilmember's signature or photograph or otherwise display the name in outsized print or headlines. Although the publication is produced with public funds (presumably including some City funds), to meet the criterion "affiliated with agency" requires that the councilmember be a member of the publishing team, or exert supervisory control over the publisher, or appoint the publisher. The facts you provided on this issue are incomplete and, therefore, we are unable to make a finding on this issue. Assuming, however, that the councilmember does not play any of those three roles, this portion of the regulation does not appear to be met.

As pointed out above, however, Section 18901(a)(2) is met by satisfying one of two subcriteria. Thus far we have dealt only with the first. The second also requires analysis, which is set forth below.

2. Item is prepared in cooperation with the elected officer.

This second subcriterion requires that an elected officer's name, office, photograph or other reference to the elected officer appear in the publication and that the publication be prepared in cooperation, consultation, coordination or concert with the elected officer. From the facts given, the councilmember's name will appear in articles in the community publication. Therefore, the first part of this subcriterion is met.

It is not clear, however, whether the second part will be met. The answer will depend on what "staff" will be writing the articles. As pointed out in footnote two (2) to this memorandum, it is not clear whether the reference to "staff" writing the article is to the staff of the publication or to the staff of the elected officer. If, on the one hand, the councilmember's staff writes the article, the article would obviously be written in cooperation, consultation, coordination or concert with the councilmember, and the second subcriterion would be met. If, on the other hand, the article were written by the publisher's staff, the second subcriterion would not be met, unless there were facts to show that the article was done with the cooperation of, or in consultation with, the councilmember.

Assuming that the reference to "staff" refers to the councilmember's staff, then the second criterion of the four part test is met, and we must next examine the third criterion.

C. Criterion No. 3: Any public money pays for the item's distribution or more than \$50 of public money is used to prepare the item

This criterion again has two parts. Section 18901(a)(3) reads:

- (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 (emphasis added).

In order to meet this criterion it is necessary to satisfy either part (A) or (B). Part (A) is broadly written, and expressly states that any public money used to distribute the publication is sufficient to satisfy this subcriterion. From the facts presented, we know that the majority of the money used to publish and distribute the community publication is public money. Therefore, part (A) is met. Since part (A) is met, the third criterion is met. Therefore, it is unnecessary to reach the issues presented in part (B).

The fourth and last criterion is discussed and the facts analyzed under the next section.

D. Criterion No. 4: More than two hundred substantially similar items are sent

The fourth criterion essentially repeats the definition of the term "mass mailing." This fourth criterion reads: "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)."

Section 18901(a)(4).

Unless the item in question falls within one of the express exceptions listed in Section 18901(b), this criterion merely requires that more than two hundred items be sent within a calendar month to meet the test. We have already determined that, under the facts presented, the article bearing the councilmember's name to be written for the community publication does not fall within one of the exceptions. Therefore, we must apply this fourth criterion.

Although not explicit in your memorandum, given that this is a community publication, it is reasonable to assume there will be more than 200 copies of the publication, including the article, distributed in one calendar month. Assuming this is true, the fourth criterion will be met.

E. Summary of conclusions under the four criteria of Section 18901(a)

We remind you that a "mass mailing" is prohibited only if all four criteria of Section 18901(a) are met. We have insufficient facts to determine whether the first criterion will be met, that is, we do not know whether the community publication will be "delivered" within the meaning of the "mass mailing" prohibition. Since the councilmember's name will be mentioned in an article in the community publication, the second criterion will be met if the councilmember's staff had a role in writing or editing the article. Since the majority of funding for the community publication is from public moneys, it is reasonable to conclude that the publication is produced and distributed with public funds, thereby meeting the third criterion. Assuming more than 200 copies of the community publication are distributed per calendar month, the fourth and last criterion is met.

F. Does the above conclusion vary depending on the amount of public funds received by the publisher?

The second question you raised explicitly in your memorandum is whether the limitation, if any exists, varies based upon the proportion of the community publication's operating budget which is reliant on the public funding. The short answer is "no," for the reasons set forth below.

The issue of the amount of public money necessary to trigger a prohibited "mass mailing" was dealt with above, at page 6, under the discussion of the third criterion, Section 18901(a)(3). To recapitulate briefly, this portion of Section 18901 is satisfied if: (1) any public money at all is used to distribute a qualifying item to a person's

residence, business or post office box, or (2) more than \$50.00 of public money is used to design, produce or print the qualifying item (if those acts are done with the intent of delivering more than 200 of the items to one or more of those three destinations).

The regulation makes no distinction as to the proportionate amount of government money versus private money used to prepare or distribute an otherwise prohibited "mass mailing." If the monetary thresholds are met, the third criterion is met. Therefore, the answer to your first question presented does not vary with the proportionate amounts of public and private moneys used to prepare and distribute the community publication.

## II. Political Reform Act's Honoraria Prohibition

Effective January 1, 1995, the Act prohibits local elected officials from receiving honoraria in any amount in exchange for giving speeches, writing articles or attending certain private or public meetings. Gov't Code Section 89502. In relevant part, the definition of "honorarium" means "any payment in consideration for any . . . article published . . . ." Gov't Code Section 89502; 2 Cal. Code of Regs. Section 18931. Just in case you have not seen a copy, we attach a very helpful "Fact Sheet for Local Officials on Gifts, Honoraria and Travel," which was published and distributed by the Fair Political Practices Commission in January of this year.

Although there were no facts presented in your memorandum to indicate that the councilmember whose name will be mentioned in the community publication will write the article or receive any honorarium for writing it, we wanted to take this opportunity to caution you of the recent change in the law that imposes severe limitations on local officials' receipt of honoraria.F

The recent United States Supreme Court case, *U.S. v Treasury Employees*, U.S. , 130 L.Ed 2d 964 (1995), striking down federal restrictions on receipt of honoraria by federal employees raises serious questions about the validity of California's law restricting receipt of honoraria. We will keep you informed as to the status of California honoraria limits.

## III. Permissible and Impermissible Purposes for Expenditure of Public Funds

Because some fundamental legal issues are raised by the questions posed in your memorandum, as a final matter we take this opportunity to alert you to some of the key elements in the legal doctrines governing the expenditure of public funds. In California, under these doctrines, public funds may not be used for political purposes absent clear and explicit statutory or constitutional authority. *Stanson v. Mott*, 17 Cal. 3d 206 (1976). Whether something is done for political purposes or not is a question of fact.

The doctrines as applied to expenditures made by a partially publicly funded non-profit entity were treated at length in a Memorandum

of Law issued by the City Attorney on October 26, 1988. In lieu of repeating the material in that memorandum, we attach a copy here (without its attachments). Again, we have no indication that mention of the councilmember's name in a partially publicly funded community publication will be done for political purposes. We alert you to these doctrines simply out of an abundance of caution.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire

Deputy City Attorney

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Attachments

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