

New Rules for Campaign Related Communications by a Governmental Agency

Provisions outside of the Political Reform Act, not summarized here, also restrict the use of public resources for campaign or private purposes. (See Cal. Const., art. XVI, § 6; Gov. Code §§ 3207 and 8314; Ed. Code §§ 7054 et seq.; Pen. Code §§ 424, 503, and 504; Stanson v. Mott (1976) 17 Cal. 3d 206; and Vargas v. City of Salinas (2009) 46 Cal.4th 1.)

In addition to the new rules summarized below, the Political Reform Act also prohibits an agency from sending, at public expense, a mass mailing that features an elected officer. (See Section 89001 and Regulation 18901.)

Regulation 18420.1.

The Political Reform Act requires a person to report campaign expenditures if the person qualifies as a committee. A person, including a state or local governmental agency, qualifies as a committee if it does any of the following:

- Accepts contributions of \$1,000 or more.
- Makes independent expenditures of \$1,000 or more.
- Makes contributions of \$10,000 or more.

A state or local agency making payments for campaign related communications may become a committee subject to reporting if the payments qualify as contributions or independent expenditures. (See Regulation 18420.) Regulation 18420.1 provides the Commission's rules for determining when a payment for a communication by a state or local agency is a contribution or independent expenditure.

In short, a payment of public moneys for a communication by a state or local agency is a contribution or independent expenditure if the communication (1) expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure **or** (2) unambiguously urges a particular result in an election. If the payment is made at the behest of the affected candidate or committee, the payment is a contribution. Otherwise, the payment is an independent expenditure.

Under this test, the determination of whether a communication "expressly advocates" is relatively straightforward and requires only an analysis of whether the communication contains so called "magic words" of advocacy such as the following words or phrases:

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| • "Vote For" | • "Vote Against" |
| • "Elect" | • "Defeat" |
| • "Support" | • "Reject" |
| • "Cast Your Ballot" | • "Sign Petitions For" |

A communication "unambiguously urges a particular result in an election" if it (1) is clearly campaign material or activity **or** (2) can be reasonably characterized as campaign material or activity and is not a fair presentation of facts serving only an informational purpose.

If related to an election, payments of public moneys by a state or local agency for the following materials or activities are clearly campaign materials or activities:

- Bumper stickers.
- Billboards.
- Door-to-door canvassing.
- Mass Media Advertising including, but not limited to, television and radio spots.

For other communications, the determination of whether the material or activity can be reasonably characterized as campaign material or activity requires a case-by-case analysis of the planned communication and the context in which it is made. The style, tenor, and timing of a communication are critical for making this determination. Other factors that assist in determining whether any specific communication can be reasonably characterized as campaign material or activity include, but are not limited to, whether the communication is any of the following:

- Funded from a special appropriation related to the measure as opposed to a general appropriation.
- Is consistent with the normal communication pattern for the agency.
- Is consistent with the style of other communications issued by the agency.
- Uses inflammatory or argumentative language.

Regulation 18901.1.

The Political Reform Act states the general rule, “No newsletter or other mass mailing shall be sent at public expense. The Act further defines “mass mailing” as “over two hundred substantially similar pieces of mail” not including a “form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry.” Regulations 18901 and 18901.1 interpret the Act’s prohibition on mass mailings narrowing the prohibition to mailings that (1) feature or include the name, office, photograph, or other reference to an elected official affiliated with the agency producing or sending the mailer and (2) campaign related mailings by governmental agencies paid for with public moneys. For campaign related mailings, Regulation 18901.1 prohibits a mailing if all of the following criteria are met:

- The item sent is a “tangible” item such as a written document, video tape, record, or button and is delivered to the recipient at his or her residence, place of employment or business, or post office box.
- The item sent (1) expressly advocates or (2) unambiguously urges a particular result in an election.
- The agency (1) pays to distribute the item or (2) pays costs, exceeding \$50, reasonably related to designing, producing, printing, or formulating the content of the item including, but not limited to, payments for polling or research and payments for the salary, expenses, or fees of the agency’s employees, agents, vendors, or consultants with the intention of sending the item.
- More than two hundred substantially similar items are sent during the course of the election including items sent during the qualification drive or in anticipation of an upcoming election.

As with Regulation 18420.1, a mailing “unambiguously urges a particular result in an election” if the communication (1) can be reasonably characterized as campaign material or activity and (2) is not a fair presentation of facts serving only an informational purpose when taking into account the style, tenor, and timing of the communication.

Example.

City Council, facing a substantial reduction in revenue should a local measure be approved by the City’s voters in an upcoming election, votes to cut numerous services if the measure is adopted. In an effort to inform the City’s residents of the council’s decision, the City may:

- *Post on its website the detailed minutes of all council meetings relating to the council’s action, with the detailed and analytical reports prepared by the various municipal departments and presented by department officials during the meetings.*
- *Provide copies of a document merely listing the services and program reductions the city council had voted to implement in a public location.*

Should the city mail materials related to the measure to potential voters, the materials may be campaign material or activity and may be prohibited if more than two hundred items are mailed in the course of the

election, although a mailing is not campaign material or activity if the mailing is a fair presentation of facts serving only an informational purpose.

For instance, the city may publish and mail a regular edition of its newsletter containing various articles describing the proposed reductions in city services that the council had voted to implement, if the measure is adopted. However, the articles should be objective and nonpartisan. Articles that convey a city department's views regarding the importance of a specific service must be moderate in tone and may not exhort the voters with regard to how they should vote. (See Vargas v. City of Salinas, supra, 46 Cal.4th 1.)

On the other hand, a specially funded flyer, inconsistent with regular mailings by the City unrelated to an election matter, that list the benefits of the measure in an argumentative or inflammatory manner would be considered campaign materials or activity, may subject the City to reporting under the Act's campaign reporting provisions, and may be prohibited as an illegal mass mailing.

As stated above, the style, tenor, and timing of a communication assist in determining whether any particular communication is campaign material or activity. For example, the following bumper sticker distributed by a school district would not be campaign material or activity if had no relationship to an upcoming election or ballot measure:



The bumper sticker, however, is campaign material or activity if the circumstances in which it is distributed indicate that the bumper sticker is related to an election. For example, the bumper sticker above would be considered campaign material or activity if distributed by the school district simultaneously with the distribution of the following campaign flyer, using the same logotype, by a political campaign:



Finally, it is important to remember that the entirety of the communication and the factual circumstances under which the communication was made must be considered in determining whether any particular communication is campaign material or activity. Merely labeling a communication as "informational" is not determinative as to whether a communication is informational material or campaign material or activity.