Ballot Measures and Public Agencies

The California Constitution reserves to the people the right to make some important local policy decisions through the initiative and referendum process.[1] Determining what role local agencies and their officials may play in the initiative and referendum process can be somewhat complicated, but less so if one keeps in mind the basic concept that public funds may not be used to put government's "thumb on the scale" in trying to influence voters one way or the other.

The following series of questions and answers provide general guidelines and analyses of pertinent issues associated with the use of public resources and ballot measure activities. The purpose of this paper is to provide guidance that represents the Institute's best judgment, based on the law, on how to avoid stepping over the line that divides lawful from unlawful conduct. As a general matter, the Institute believes in not treading too close to any such lines, but instead giving them fairly wide berth.

It is also important to remember that just because a given course of action may be lawful, does not mean it will satisfy the public's or the agency's ideas of what constitutes an appropriate use of public resources. Proper stewardship of public resources is a key accountability issue for public officials. In determining proper use of public resources, it is important to remember the law creates only minimum legal standards. The public may view what is "right" as a much more important standard than what is "legal." In addition, there almost always are potential political implications of walking too close to the line in terms of the public's overall reaction to a ballot measure and where the public's attention should be focused.

This guide is offered for general information only and is not intended as legal advice. Reasonable attorneys can and do disagree on where the boundaries are on these issues; moreover, the specific facts of the situation are an important element of the analysis. Always consult an attorney knowledgeable about this area of the law when analyzing what to do in specific situations.

General Framework

1. **Our agency is interested in a measure that is appearing on an upcoming ballot. We have information that may be helpful to the public in making its decision on how to vote. What do we need to keep in mind as we consider sharing that information with the public?**

   Public agencies play an important and ongoing, **but impartial, educational** role in contributing to the public's information on important issues affecting the community. The flow of factual, unbiased information back and forth between public agencies and constituents, as well as among constituents, is vital to effective decision-making.

   Both statutes and case law define the legal parameters of what public agencies may and may not do to communicate their views on ballot measures with public resources. "Public resources" include not only money, but things paid for with public money, including staff time, agency facilities, materials and equipment and agency communications channels.[2]

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1 Cal. Const. Art. II, §§ 8-11

2 *See Stanson v. Mott*, 17 Cal. 3d 206, 210-11(1976) (referring to expenditure of staff "time and state resources" to promote passage of bond act); *Vargas v. City of Salinas*, 46 Cal. 4th 1, 31-32 (2009). *See also People v. Battin*, 77 Cal. App. 3d 635, 650 (4th Dist. 1978) (county supervisor's diversion of county staff time for improper political purposes constituted criminal misuse of public monies under Penal Code section 424), *cert. denied*, 439 U.S. 862 (1978), *superseded on other grounds by People v. Conner*, 34 Cal. 3d 141 (1983). *But see Bardolph v. Arnold*, 435 S.E. 2d 109, 113 (N.C. App 1993) (local government may expend public funds to create support for qualified ballot measure), *rev. denied*, 439 S.E.2d 141 (1993).

All state and local officials, including appointees, are prohibited from using public funds for personal or campaign purposes, such as supporting or opposing a ballot measure. However, courts, most notably in the case of *Stanson v. Mott*, have clarified there is a difference between a public agency's lawful, impartial, informational activity and unlawful, partisan advocacy for or against a ballot measure. While public agencies may provide accurate, factual and impartial information to the public about a ballot measure, they may **not** expressly advocate for a "Yes" or "No" vote on the measure, or disseminate information in a manner, style, tenor or tone that urges a particular vote.

Local public agency governing bodies **may** take a position at public meetings in favor of or against a particular measure that would affect the agency or its constituents.[3] And public agencies may spend money to encourage constituents to register to vote, and to get out to vote.[4]

It is worth noting that there are additional campaign-related restrictions and transparency requirements that have been adopted by the Fair Political Practices Commission (FPPC) pursuant to the state's Political Reform Act, such as a prohibition on using public resources to mail advocacy materials to voters[5] and transparency requirements intended to ensure that the public has a right to know who is spending what to influence their votes.[6] The best way for an agency to avoid running afoul of the FPPC regulations is to refrain from any communication that could reasonably be construed as advocacy. Since public agencies cannot legally spend public funds for illegal advocacy purposes there should be no reason for public agencies to be reporting campaign expenditures.

Agencies should also be aware that there are restrictions on sending mass mailings at public expense that mention or feature an elected official, even if they are non-campaign related. For example, mass mailings at public expense are strictly limited from elected officials who are also candidates for 60 days preceding an election.[7]

In light of the complexity in this area, it is essential to be in close contact with agency counsel regarding agency activities relating to ballot measures and other political activities.

2. What is the underlying theory for restricting public agency activities with respect to ballot measure advocacy? Aren't public information efforts relating to what's best for the community a core function for local agencies?

Public information is one thing; advocacy is another. The reason courts have given for restricting public agency activities with respect to ballot measures is that the use of taxpayer dollars in an election campaign could distort the debate[8] and undermine the fairness of the election.[9] More specifically, courts have worried about public agency communications overwhelming voters[10] and drowning out the views of others.[11] Restrictions also are a way of maintaining the integrity of the electoral process by neutralizing any advantage that those with special access to government resources might possess.[12]

That being said, courts have also recognized that public agencies have a role to play in making sure the public has the factual, impartial information it needs to make informed decisions. One court explained the role this way:

"If government is to secure cooperation in implementing its programs, if it is to be able to maintain a dialogue with its citizens about their needs and the extent to which government can or should meet those needs,

3 *See* 2 Cal. Code Regs. § 18420.1 (defining campaign-related expenditures as either reportable independent expenditures or contributions).
4 *See* 2 Cal. Code Regs. § 18901.1 (prohibiting campaign mailings sent at public expense).
5 *League of Women Voters v. Countywide Criminal Justice Coordination Comm.,* (1988), 203 Cal.App.3d 529, 555.
6 *Schroeder v. City Council of Irvine*, (2002) 97 Cal.App.4th 174, 187.
7 Cal. Gov't Code § 89003.
8 *See Vargas*, 46 Cal. 4th at 31-32.
9 *Vargas,* 46 Cal. 4th at 36-37.
10 *See Vargas,* 46 Cal. 4th at 23-24, 32, citing *Stanson v. Mott*, 17 Cal. 3d 206, 216-217 (explaining that, as a constitutional matter, "the use of the public treasury to mount an election campaign which attempts to influence the resolution of issues which our Constitution leave[s] to the 'free election' of the people (see Cal. Const., art. II, § 2) . . . present[s] a serious threat to the integrity of the electoral process"). *See also Keller v. State Bar*, 47 Cal.3d 1152, 1170-1172, (1989), *reversed on other grounds* 496 U.S. 1 (1990).
11 *Vargas,* 46 Cal. 4th at 46 (concurring opinion).
12 *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Sch. Dist.*, 46 Cal.4th 822, 845 (2009).

government must be able to communicate. An approach that would invalidate all controversial government speech would seriously impair the democratic process."[13]

The court also noted that, if public agencies cannot address issues of public concern and controversy, they cannot govern.[14]

3. What guidelines have the courts provided on using public resources relating to ballot measures?

California courts have, in essence, created three categories of activities:

- Those that are usually **impermissible** campaign activities;
- Those that are usually **permissible** informational activities; and
- Those that may **require further analysis** under the "style, tenor and timing" test.[15]

Usually Impermissible activities include using public funds for campaign activities[16] or communications that expressly advocate a particular result in an election, or purchasing campaign materials such as bumper stickers, posters, advertising "floats," television, and radio and digital advertising spots and billboards.[17] Another improper activity is using public resources to disseminate advocacy materials prepared by others.[18] The production and mailing of "promotional campaign brochures" is also not allowed, even when those documents contain some useful factual information for the public.[19]

Usually Permissible activities include:

- The governing body of the agency taking a position on a ballot measure in an open and public meeting where all perspectives may be shared.[20]
- Preparing impartial staff reports and other analyses to assist decision-makers in determining the impact of the measure and what position to take.[21]
- Responding to inquiries about ballot measures in ways that provide a fair presentation of the facts about the measure and the agency's view of the merits of a ballot measure including, if applicable, the governing body's position on the measure.[22]
- Accepting invitations to present the agency's views before organizations interested in the ballot measure's effects including, if applicable, the governing body's position on the measure.[23]

Any activity or expenditure that doesn't fall into either the "usually **impermissible**" or "usually **permissible**" category must be evaluated by a "style, tenor and timing" standard against the backdrop of the overarching concern for fairness and non-distortion in the electoral process.[24] The safest approach is to deliver the information through regular agency communications channels (for example, the agency's existing website or newsletter), in a way that emphasizes facts and does not use inflammatory language or argumentative rhetoric.[25] Any communications should not encourage the public to adopt the agency's views, vote one way or another, or take any other actions in support of or in opposition to the measure.[26]

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13 *Miller v. Comm'n on the Status of Women,* 151 Cal. App. 3d 693, 701 (1984).
14 *Id.*
15 Vargas, 46 Cal. 4th at 7, citing *Stanson*, 17 Cal. 3d at 222 & n. 8.
16 Government codes section 8314.
17 *Vargas, 46 Cal. 4th at 24, 32, 42.*
18 *Vargas, 46 Cal. 4th at 24, 35.*
19 Vargas, 46 Cal. 4th at 39 n. 20.
20 *Vargas,* 46 Cal. 4th at 37. See also Choice-In-Education League v. Los Angeles Unified Sch. Dist., 17 Cal. App. 4th 415, 429-30 (1993).
21 *Vargas*, 46 Cal. 4th at 36-37.
22 *Vargas,* 46 Cal. 4th at 24-25, 33.
23 *Vargas,* 46 Cal. 4th at 25, 36, *citing Stanson*, 17 Cal. 3d at 221.
24 *Vargas,* 46 Cal. 4th at 7, 30, 40.
25 *Vargas,* 46 Cal. 4th at 34, 40 (compare with the tone of the newsletter described in footnote 20).
26 *Vargas*, 46 Cal. 4th at 40.

4. What are the consequences of stepping over the line dividing permissible from impermissible uses of public resources with respect to ballot measure activities?

The stakes are high for those involved in misuses of public resources. Public officials face personal liability—criminal and civil—for stepping over the line.

Improper use of public resources is a crime.[27] Criminal penalties include a two- to four-year state prison term and permanent disqualification from public office.[28]

Civil penalties include a fine of up to $1,000 for each day the violation occurs, *plus* three times the value of the resource used.[29] Other consequences may include having to reimburse the agency for the value of the resources used.[30] Those charged with improper use of public resources may have to pay not only their own attorney's fees, but also those of any individual who is challenging the use of resources.[31]

In addition, conflicting perspectives on whether there might be a "*de minimus*" defense makes relying on such a defense risky.[32] This includes relying on the defense that one has reimbursed the value of using public resources improperly.

Finally, engaging in such activities gives rise to reporting obligations for public agencies under the Political Reform Act.[33] Failure to comply with these requirements subjects an agency to additional penalties.[34]

There is a political consequence as well. If the public and news media are talking about whether a public agency violated the law in spending public funds to campaign for or against a measure, they're not talking about the merits of the measure. Keeping the focus on the ethics of the public agency instead of the merits of the measure often results in an outcome that is not helpful to the public agency.

5. Are there general strategies a public agency should employ to make sure that it doesn't step over any lines?

The first is to make sure that public agency employee and officials are aware of these restrictions and the significant consequences for violating them.

Another strategy is to review the issues in this guide with agency counsel at the outset of any ballot measure-related activities to be clear on how they interpret the law in this area. In many areas, the law is not clear and an agency is well-advised to understand their attorney's interpretations of what is allowed and what is risky. The next strategy is to have a practice of consulting with agency counsel on the application of these restrictions to specific issues that arise. Agency counsel should review all communications about ballot measures or other elections in advance.

Also, an agency's informational communications regarding a ballot measure should be funded out of the agency's normal communications budget and be consistent with the style, tenor, and timing of typical communications. A special budget appropriation and unusual style of communication regarding a ballot measure could show that the agency's intent is more than impartial communication.

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27 *See* Cal. Penal Code §§ 72.5(b) (use of public funds to attend a political function to support or oppose a ballot measure); 424 (misappropriation of public funds); 484-87 (theft). *See also People v. Battin*, 77 Cal. App. 3d 635 (1978) (prosecution of county supervisor for engaging campaign activities during county business hours using county facilities), *superseded on other grounds by People v. Conner*, 34 Cal. 3d 141 (1983).

28 Cal. Penal Code § 424.

29 Cal. Gov't Code § 8314(c)(1).

30 *Stanson*, 17 Cal. 3d at 226-227 (finding that "public officials must use due care, *i.e.*, reasonable diligence in authorizing the expenditure of public funds, and may be subject to personal liability for improper expenditures made in the absence of due care"). *See also Harvey v. County of Butte*, 203 Cal. App. 3d 714, 719 (1988).

31 *See generally Tenwolde v. County of San Diego*, 14 Cal. App. 4th 1083 (4th Dist. 1993), *rev. denied*.

32 *See People v. Battin*, 77 Cal. App. 3d at 65 (1978) (Penal Code section 424's "proscription is not limited to the misuse of public funds in a particular monetary amount. Rather it proscribes *any* misuse, no matter how small." [emphasis in original]). *See also People v. Bishop,* A081989 (1st Dist. 2000) (this unpublished opinion follows *People v. Battin* and holds that reimbursement is not a defense). *But see DiQuisto v. County of Santa Clara*, 181 Cal. App. 4th 236 (2010) (majority found that sending an editorial against a ballot measure via email on one's lunch hour constituted advocacy, but involved a minimal use of public resources—note dissenting opinion disagreeing with majority's minimal-use-of-public-resources conclusion).

33 Cal. Gov't Code § 84203.5 (requiring independent expenditure reports by committees spending more than $500 each year in support or opposition to a ballot measure).

34 *See, for example,* Cal. Gov't Code §§ 83116, 91001(b), 91000(a), 91001.5, 91002, 91004, 91005, 91012.

Finally, documenting an agency's respect for these restrictions is another important strategy. Attorneys refer to this as creating a *record.* Potential challengers to an agency's activities will review the record and other materials (including emails, for example) to determine whether to file a lawsuit. A court will examine the record in deciding whether any missteps occurred. The agency will want to be able to point to documentation that demonstrates that all actions were well within the boundaries dividing lawful from unlawful conduct.

Before a Measure is Put on the Ballot

1. If a public agency wants to draft a measure on the ballot, may public resources be used?

Under both the California Elections Code and case law, local agencies may use public resources to draft a measure for the ballot.[35] The theory is that, prior to and through the drafting stage of a proposed ballot measure, the activities do not involve attempting to either persuade the voters or otherwise influence the vote.[36]

2. What about other activities a local agency may wish to engage in prior to placing a measure on the ballot?

Local agencies do not have specific guidance from a majority of the California Supreme Court on this issue, although there are general principles that can be applied. The Court seems to use a two-part analysis in evaluating public agency activities *vis-à-vis* ballot measures. One part goes to the issue of whether a particular public agency has the legal authority to spend public funds on ballot measure activities. The other is whether the use of that legal authority oversteps what the courts may perceive as constitutional restrictions on what may be done with public resources.[37]

When drafting and placing a measure on the ballot, the California Elections Code provides the legal authority for cities and counties.[38] The remaining question is whether certain kinds of activities are appropriate as part of that effort?

In a case involving a local transportation agency, a court of appeal found the agency had authority under state law to find additional sources of funding for transportation[39] and the agency was following the prescribed steps for putting a measure before the voters (which included such activities as preparing a transportation plan).[40] The court noted that the activities the agency engaged in occurred before the transportation expenditure plan was approved or the ordinance placing a measure on the ballot was finalized.[41]

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35 *Vargas v. City of Salinas*, 46 Cal. 4th 1, 36 (2009); *League of Women Voters of California. v. Countywide Criminal Justice Coordination Comm.,* 203 Cal. App. 3d 529 (1988); *Santa Barbara County Coal. Against Auto. Subsidies v. Santa Barbara County Ass'n of Governments,* 167 Cal. App. 4th 1229 (2008). *See also* Cal. Elect. Code §§ 9140 [county board of supervisors], 9222 [legislative body of municipality]; FPPC Advice Letter to Hicks, No. I-98-007 (02/20/98); FPPC Advice Letter to Roberts, No. A-98- 125(06/01/98).

36 *League of Women Voters,* 203 Cal. App. 3d at 550 ("The audience at which these activities are directed is not the electorate per se, but only potentially interested private citizens; there is no attempt to persuade or influence *any* vote."), citing *Miller v. Miller* 87 Cal. App. 3d 762, 768 (1978).

37 *See Vargas*, 46 Cal. 4th at 29: As we have seen, in *Stanson, supra*, 17 Cal.3d 206, this court, after explaining that a "serious constitutional question . . . would be posed by an explicit legislative authorization of the use of public funds for partisan campaigning" (*id.* at p. 219, italics added), reaffirmed our earlier holding in *Mines, supra*, 201 Cal. 273, that the use of public funds for campaign activities or materials unquestionably is impermissible in the absence of " 'clear and unmistakable language' " authorizing such expenditures. (*Stanson*, at pp. 219-220.) Section 54964 does not clearly and unmistakably authorize local agencies to use public funds for campaign materials or activities so long as those materials or activities avoid using language that expressly advocates approval or rejection of a ballot measure. Instead, the provision prohibits the expenditure of public funds for communications that contain such express advocacy, even if such expenditures have been affirmatively authorized, clearly and unmistakably, by a local agency itself. Although section 54964, subdivision (c) creates an exception to the statutory prohibition for communications that satisfy the two conditions set forth in that subdivision, subdivision (c) (like the other provisions of section 54964) does not purport affirmatively.

38 *See* Cal. Elect. Code §§ 9140 (authorizing boards of supervisors to place measures on the ballot); 9222 (authorizing city councils to place measures on the ballot).

39 *See Santa Barbara County Coal. Against Auto. Subsidies,* 167 Cal. App. 4th at 1239-40, (The Local Transportation Authority and Improvement Act (Act), which the court described as "a comprehensive statutory scheme to 'raise additional local revenues to provide highway capital improvements and maintenance and to meet local transportation needs in a timely manner'" citing Cal. Pub. Util. Code, § 180000-180003).

40 *See Santa Barbara County Coal. Against Auto. Subsidies,* 167 Cal. App. 4th at 1234. (The agency had retained a private consultant to survey voter support for an extension of the sales tax. The consultant determined the arguments in favor of extension that were received most favorably by the voters polled, potential arguments in opposition, and the best strategy to maximize voter support. In addition, agency staff and committee members attended public meetings with civic groups during which staff presented information regarding the transportation expenditure plan, and the importance of extending an earlier sales tax to satisfying the county's transportation needs).

41 *See Santa Barbara County Coal. Against Auto. Subsidies,* 167 Cal. App. 4th at 1240.

The fact that the agency's challenged activities occurred well before the measure was put on the ballot was enough for the court. In this regard, the court drew a distinction between activities involving the expenditure of public funds for *governing* and the expenditure of funds for election *campaigning.*[42]

The court in the transportation agency case relied heavily on the analysis of an earlier court of appeal decision. In that case, which involved a county, the court suggested that putting a measure on the ballot was okay, but other activities may be a closer call.[43] The court concluded that:

"On balance, we conclude the power to draft the proposed initiative necessarily implies the power to seek out a willing proponent. We do not perceive the activities of identifying and securing such a proponent for a draft initiative as entailing any degree of public advocacy or promotion, directed at the electorate, of the single viewpoint embodied in the measure."[44]

The California Supreme Court agrees with this case to the extent that the case interpreted earlier Supreme Court decisions as allowing public agencies to express opinions on the merits of a proposed ballot measure, so long as agencies do not spend public funds to mount a campaign in favor of the measure.[45] Generally summarized, it appears that public agencies may spend public funds to research potential provisions of a ballot measure, draft the measure itself, take the procedural steps necessary to get it on the ballot, have the governing body take a position on the measure, and inform voters about the provisions of the measure in a factual, impartial way.

3. Before we put a measure on the ballot, we want to evaluate its likelihood of success by engaging in various forms of public opinion research (for example, polling and focus groups) to understand how the community might feel about such a measure. May we use public resources for that kind of activity?

Although no court has specifically addressed this, the Attorney General has said that public agencies may spend money for polling and research as long as those resources are not being used to promote a single view in an effort to influence the electorate. For example, the Attorney General has determined that, in preparation for submitting a bond measure to the electorate for approval, a community college district may use district funds to hire a consultant to conduct surveys and establish focus groups to assess the potential support and opposition to the measure, the public's awareness of the district's financial needs, and the overall feasibility of developing a bond measure that could win voter approval.[46] The Attorney General based his analysis on a court of appeal case that allowed pre-qualification activities,[47] noting that the audience for such activities is not the electorate.[48]

4. May this research be used by advocacy or opposition groups to inform their strategies?

In the Attorney General opinion on the community college bond measure, the Attorney General noted that the fact that early focus group and polling information might prove to be of use in an ensuing campaign does not, in itself, necessitate the conclusion that public funds were expended improperly.[49] The Attorney General did note that donating or providing this information to a political campaign may give rise to campaign reporting obligations under the Political Reform Act.[50] Furthermore, the poll results and the polling consultant's report on the research will undoubtedly be considered to be public records.

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42 *See Santa Barbara County Coal. Against Auto. Subsidies,* 167 Cal. App. 4th at 1241.
43 *League of Women Voters*, 203 Cal. App. 3d at 553 ("Whether CCJCC legitimately could direct the task force to identify and secure a willing sponsor is somewhat more problematical.")
44 *League of Women Voters*, 203 Cal. App. 3d at 554.
45 *Vargas*, 46 Cal. 4th at 36.
46 88 Ops. Cal. Att'y Gen. 46 (2005).
47 *League of Women Voters,* 203 Cal. App. 3d at 552-54.
48 88 Ops. Cal. Att'y Gen. at 49-50 (noting that "not every activity in connection with a bond measure will necessarily be proper if taken before the measure is placed on the ballot. Activities directed at swaying voters' opinions are improper, even pre-filing.")
49 88 Ops. Cal. Att'y Gen. at 50, citing *League of Women Voters,* 203 Cal. App. 3d at 554.
50 88 Ops. Cal. Att'y Gen. at 50, citing Cal. Gov't Code, § 81000 and following, 2 Cal. Code Regs. § 18215; *Hoffman Advice Letter*, No. A-00-074 (Cal. Fair Political Practices Comm'n March 28, 2000); *Fair Political Practices Comm'n. v. Suitt*, 90 Cal. App. 3d 125, 128-132 (1979).

NOTE ON PUBLIC RECORDS

A factor to keep in mind is the degree to which the consultant's research and communications about that research are likely to constitute a public record[51] subject to disclosure upon request to anyone under California's Public Records Act.[52]

5. May a public agency use public resources to hire a communications strategist (consultant) to advise the agency on an effort to place a matter on the ballot? Some of the issues the consultant would advise on include:

- Interpreting and applying the public opinion research and advising on such issues as timing of the election;
- What kind of balloting method to use;
- Effective themes and messages to use in describing the measure to the community;
- Areas where the public may need more information;
- Communications planning;
- Community outreach activities;
- Informational direct mail program;
- Creating an informational speakers bureau; and
- Interpreting "tracking poll" data after an outreach program to re-assess community support for the measure.

Some public agencies have ongoing and robust communications and engagement efforts with their communities as part of their philosophy of governance. In such communities, hiring help on community outreach activities and communications planning (or having such capacity in-house) is part of how the agency generally operates. Consistency with a public agency's established practices is one of the factors the courts look for in assessing whether a particular use of public resources with respect to ballot measure communications is okay.[53]

The key distinction to keep in mind under the current state of appellate guidance is whether a given use of public resources relates to *governing* as opposed to election *campaigning.*[54] Understanding community sentiment and needs and then developing measures to meet those needs can be part of an agency's ongoing governance and communications practices. So can maintaining regular lines of communications between decision-makers and the community.

However, if these activities are not typically part of the agency's philosophy of governance and regular communications practices, then using public resources for these purposes can be riskier. For example, the Attorney General has concluded that it would be unlawful to use public agency funds to hire a consultant to develop and implement a strategy for building support for a ballot measure (both in terms of building coalitions and financial support for a campaign). The Attorney General said having the consultant assist the district chancellor in scheduling meetings with civic leaders and potential campaign contributors in order to gauge their support for the bond measure would be unlawful if the purpose or effect of such actions is to develop a campaign to promote approval of the bond measure by the electorate.[55]

51 *See* Cal. Gov't Code § 6252(e) ("Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.").

52 *See* Cal. Gov't Code § 6253 (a), (b) ("Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. . . Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.").

53 *Vargas,* 46 Cal. 4th at 40. *See also* Cal. Gov't Code § 54964(a), (b)(3) (prohibiting local public agency expenditures for activities that expressly advocate the approval or rejection of a clearly identified ballot measure).

54 *See Santa Barbara County Coal. Against Auto. Subsidies,* 167 Cal. App. 4th at 1241.

55 88 Ops. Cal. Att'y Gen. at 52.

Under this opinion, the key test is whether the "purpose or effect" of a consultant's activities is to develop a campaign to promote approval of the bond measure; if so, those activities should not be undertaken with public resources.[56] The Attorney General said this means public resources should not be used to fund activities that will form the basis for an eventual campaign to obtain approval of a measure.[57] It also means that the safest thing to do is to avoid using public resources for activities that may have the effect of influencing the voters (for example, "developing themes or messages").

A recent FPPC enforcement action levied a substantial fine against a county for communications about a ballot measure that were funded by a special appropriation made after the measure qualified, and that were not consistent with the county's normal communications.

If the agency does hire communications consultants, the agency and the consultants should be aware of the transparency requirements that apply to public entity endeavors. This includes the fact that the scope of work in the consultant's contract, the consultant's work product, emails and other writings relating to their work that are in the possession of and regularly retained by the agency will be subject to public disclosure should there be an inquiry.[58]

6. Are there any concerns if the communications strategist ultimately becomes either one of the consultants or the sole consultant to the campaign?

No court decision or Attorney General opinion addresses this specific issue. Having consultants involved in pre-qualification activities (which are not supposed to involve actions designed to develop a campaign to promote approval of a measure) and then become involved in campaign activities may create a greater risk that a court may conclude the pre-qualification activities were truly designed to support a campaign to promote approval of a measure. It also increases the possibility that the pre-qualification expenses will be reportable as in-kind support for the campaign.

7. May public resources be used to fund signature gathering to qualify a measure for the ballot?

The Attorney General says "no."[59] The Attorney General reasoned that such activities cross the line to promoting a single point of view and influence the electorate, which cannot occur unless there is clear and explicit authorization for such activities.[60]

56 88 Ops. Cal. Att'y Gen. at 52.
57 88 Ops. Cal. Att'y Gen. at 52, citing *League of Women Voters*, 203 Cal. App. 3d at 558 (expenditures made in anticipation of supporting a measure once it is on the ballot come within reporting requirements of Political Reform Act of 1974); *In re Fontana* (1976) 2 FPPC Ops. 25 (expenditures made in support of proposal become reportable after proposal becomes a ballot measure).
58 *See* Cal. Gov't Code § 6250 and following (California Public Records Act). The breadth of what records are subject to disclosure was recently reviewed by the California Sixth District Appellate Court, which vacated a superior court ruling holding that emails sent and received on officials' personal (non-agency) email accounts are subject to disclosure, see *City of San Jose v. Superior Court of Santa Clara*, --- Cal.Rptr.3d ---, 2014 WL 1515001 (Cal.App. 6 Dist., 2014).
59 73 Ops. Cal. Att'y Gen. 255 (1990).
60 *See* 73 Ops. Cal. Att'y Gen. at 266 (finding no distinction between an initiative or referendum or whether the measure was a state or local one).

About the Institute for Local Government

The Institute for Local Government (ILG) is a nonprofit organization that has served and supported California's local government leaders for over 65 years. We are committed to empowering and educating public servants by delivering real-world expertise that helps them navigate complex issues, increase their capacity, and build trust in their communities. Together, we work hand-in-hand with local agency staff and elected officials to build a strong foundation of good government at the local level, centered on trust, accountability, responsiveness, and transparency.

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