



DENNIS J. HERRERA  
City Attorney

## MEMORANDUM

TO: All Elected Officials  
All Board and Commission Members  
All Department Heads

FROM: Dennis J. Herrera  
City Attorney

DATE: February 1, 2002

RE: Political Activities By City Officers and Employees

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As the March election approaches, the City Attorney's Office would like to take the opportunity to remind City officers and employees of the laws that restrict their use of City resources and positions for political activities. This memorandum reminds all City officers and employees of the fundamental legal prohibition against using City resources to take sides in election campaigns, along with the equally important principle that, with certain limited exceptions, City officers and employees are free to engage in political activities while off duty. Additionally, this memorandum outlines other prohibitions that often give rise to questions during an election period. Please contact the City Attorney's Office with any questions related to this memorandum or your ability to participate in political activities.

### A. Use of City Resources and Personnel

It is unlawful for City officers or employees to use public resources or personnel to engage in political activity while on duty. *See* Cal. Gov't. Code § 54964; *Stanson v. Mott*, 17 Cal.3d 206 (1970); *Mines v. Del Valle*, 201 Cal. 273 (1927); *People v. Battin*, 77 Cal.App.3d 635 (1978); *see also* Cal. Penal Code § 424 (embezzlement or misappropriation of public funds); S.F. Campaign and Governmental Conduct ("C&GC") Code § 3.400(c) (unlawful to engage in political activity during working hours or on City premises). This prohibition covers activities relating to elective offices and ballot measures at the federal, state and local level. Examples of the prohibition include: using photocopy or fax machines, circulating petitions, addressing envelopes or engaging in any other activities that use City resources or divert City employees from their assigned duties.

The law prohibits any misuse of public resources and personnel, no matter how small. *See Battin*, 77 Cal.App.3d at 659; *see also People v. Nathanson*, 134 Cal.App.2d 43 (1955) (felony conviction of city council member who used \$75 worth of city stationery in his re-election campaign). A City officer or employee does not need to intend to misuse public resources, and violations are not limited to theft. *See People v. Groat*, 19 Cal.App.4th 1228, 1232 (1993). The law covers all City officers and employees – it does not require that an officer

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or employee have actual possession of public monies, or have primary duties related to public monies. *Id.* at 1232-33.

Additionally, City officers and employees may not use their official positions to influence elections. For example, members of a board or commission may not vote to endorse a measure or a candidate, and a City official may not distribute campaign literature along with official forms. City officers and agencies may, however, lawfully use City resources (where budgeted for such a purpose) to investigate and evaluate objectively the potential impact of a ballot measure on City operations. *See Stanson*, 17 Cal.3d at 220-21. City officers and employees may then make the analysis available to the public. *See id.* City officers and employees may also respond to public requests for information, including requests to participate in public discussions about ballot measures, if the officer's or employee's statements are limited to a balanced, objective assessment of the measures. Courts will evaluate such communications in terms of whether they make a balanced presentation of facts designed to enhance the ability of the voters intelligently to exercise their right to vote, or whether the communications promote a particular position for or against a ballot measure.

City officers and employees who are considering providing the public with an informational presentation regarding a ballot measure should first consult with this office to avoid any illegal use of City resources.

Courts may impose considerable penalties for violation of these rules. For example, violating Penal Code section 424 by misappropriating public funds is a felony punishable by imprisonment for two, three or four years. A person convicted of violating the statute is also barred from holding public office in the state. Use of City funds for political or election activities may also be deemed official misconduct that justifies removal of a public officer, or cause to fire a public employee. Other sanctions may also apply. For example, the Fair Political Practices Commission ("FPPC") fined the County of Sacramento \$10,000 for failing to report the use of public funds to prepare and distribute pamphlets on pending ballot measures. The FPPC concluded that the pamphlets were not objective, balanced analyses of the measures. The FPPC found that the County had therefore made campaign expenditures, which must be reported under the Political Reform Act.

**B. Off-Duty Political Activities By City Officers and Employees**

City officers and employees have a First Amendment right to engage in political activities while off duty. As a general rule, the California Government Code preempts local regulation of political activity by public employees except as authorized under that Code. Government Code section 3203 provides:

Except as otherwise provided in this chapter, or as necessary to meet the requirements of federal law as pertains to a particular employee or

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employees, no restriction shall be placed on the political activities of any officer or employee of a state or local agency.<sup>1</sup>

State and local laws do, however, prohibit City officers and employees from engaging in certain off duty political activities. *See* Gov't. Code §§ 3205-3207; C&GC Code § 3.400. City officers and employees may not directly or indirectly solicit funds from other City officers or employees or from persons on City employment lists. *See* Gov't. Code § 3205; C&GC Code § 3.400(a). This prohibition does not preclude a City officer or employee from requesting political contributions from other City officers or employees if the request is part of a solicitation made to a significant segment of the public that may include officers or employees of the City. *See id.* City officers and employees may also not participate in political activities of any kind while in uniform, during working hours or on City premises. *See* Gov't. Code § 3206; C&GC Code § 3.400(b) and (c).<sup>2</sup>

As discussed above, City officers and employees may not use their official positions to influence elections. This prohibition, however, does not affect the ability of individual officers and employees to take a public position, as private citizens, on an electoral race or a ballot measure. In addition, acting as private citizens, City officers and employees may endorse candidates or measures even where the commission as a group may not. For example, the members of a commission, acting as private citizens and not using City time or resources, may join in submitting a ballot argument in support of a measure and may even identify themselves by the City office they hold as long as the argument does not mislead the public into thinking that the commission itself is taking the position.<sup>3</sup>

**C. Additional Prohibitions**

Although applicable at all times of the year, public officials and employees often raise questions during an election period related to the following legal prohibitions:

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<sup>1</sup> Federal law places some limits on the political activities of local government employees whose principal employment is in connection with an activity that is financed in whole or in part by loans or grants from the United States or a Federal agency. *See* 5 U.S.C. § 1502.

<sup>2</sup> The Charter further restricts the off duty political activities of some City officers and employees. For example, the Charter prohibits members and staff of the Ethics Commission, Elections Commission and the Department of Elections from participating in, contributing to, soliciting contributions to, publicly endorsing or urging the endorsement of federal, state and local candidates and ballot measures. *See* SF Charter §§ 13.103.5, 13.104, 15.100 and 15.101.

<sup>3</sup> Members of boards and commissions should bear in mind, however, that state and local law prohibit a quorum of members of a board, commission, or committee, from meeting to discuss a subject within the jurisdiction of the board or commission outside of a duly noticed meeting.

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**1. Mass Mailings At Public Expense**

In addition to the general prohibition against using public resources or personnel to engage in political activity, City officers and employees are prohibited from sending at public expense, non-political newsletters or mass mailings that feature or make reference to an elected official. Gov't. Code § 89001. A non-political newsletter or mass mailing is prohibited if all of the following four requirements are met:

- (1) the item is sent or delivered by any means to the recipient at his or her residence, place of employment or business, or post office box (the FPPC has interpreted the rule broadly, to apply to a range of modes of transmission, including fax and personal delivery as well as postal delivery);
- (2) the item sent either features an elected officer affiliated with the agency that produces or sends the mailing, or includes the name, office, photograph, or other reference to an elected officer affiliated with the agency that produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer;
- (3) any of the cost of distribution is paid for with public moneys or costs of design, production, and printing exceeding \$50 are paid with public money, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation; and
- (4) more than 200 substantially similar items are sent in a single calendar month.

Taken literally, the statute would preclude any large mailing at public expense, including many mailings essential to the operation of government, such as tax notices, sample ballots, and meeting agendas. To avoid this result, the FPPC has promulgated regulations clarifying which mass mailings are permissible and which are impermissible. For example, the prohibition does not apply to press releases and intra-office communications. *See* 2 Cal. Code Regs. § 18901. Please contact this office with any questions about these exceptions.

**2. Appointed Board Members Soliciting or Accepting Campaign Contributions**

Members of appointed boards and commissions may not solicit, accept or direct campaign contributions of more than \$250 from any party to or participant in any use entitlement proceeding (as described below) pending before the board or commission, during the proceeding or for three months after the final decision is rendered in the proceeding. *See* Gov't. Code § 84308(b).<sup>4</sup> This rule applies whether the contributions are sought for the official or for someone else, and whether the contributions come directly from the party or participant, or are made by an agent acting on behalf of the party or participant. *See id.* For purposes of section

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<sup>4</sup> This prohibition does not apply to agencies whose entire membership consists of officers directly elected by the voters to serve on that agency. *See* 2 Cal. Code Regs. § 18438.1(b).

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84308, contributions include contributions for candidates or committees in federal, state, or local elections. *See* Gov't. Code § 84308(a)(6).

An official does not violate this rule if the official makes a request for contributions in a mass mailing sent to members of the public,<sup>5</sup> to a public gathering, in a newspaper, on radio or television, or in any other mass medium. Further, an official does not engage in a solicitation solely because his or her name is printed with other names on stationery or letterhead used to ask for contributions.

For purposes of section 84308, a “use entitlement proceeding” is a government action granting, denying, revoking, restricting or modifying a license, permit, or other entitlement for use. Use entitlement proceedings include proceedings on all business, professional, trade and land use licenses and permits, as well as other entitlements for land use, all contracts (other than competitively bid, labor or personal employment contracts) and all franchises. Decisions on general plans, general building or development standards, or other rules of general application are not use entitlement proceedings.

A “party” is a person, including a business entity, who files an application for, or is the subject of a proceeding involving, an entitlement for use. A “participant” is any person who is not a party to a proceeding but who (1) actively supports or opposes a particular decision (*i.e.*, lobbies the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence the decision of the officers of the agency), and (2) has a financial interest in the decision. An “agent” is an individual who represents a party or participant in a proceeding. If an individual agent is also acting as a member of a law, architectural, engineering or consulting firm, or a similar entity, both the entity and the individual are considered agents.

In addition to prohibiting accepting or soliciting contributions from a party or participant while a proceeding is pending and for three months after, section 84308 requires a member of an appointed board or commission not to participate in any use entitlement proceeding involving a party or participant (or their agent) from whom the official received a contribution of more than \$250 in the 12 months before the proceeding. *See* Gov't. Code § 84308(c). The \$250 threshold applies to the combined total of all contributions from the party or participant and from an agent of the party or participant. Disqualification is required only if the official *received* a contribution for himself or herself in the 12 months before the proceeding; soliciting of contributions before a proceeding begins does not, by itself, require disqualification.

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<sup>5</sup> A “mass mailing” is 200 or more identical or nearly identical pieces of mail sent in a single calendar month. *See* Gov't. Code § 82041.5.

An attorney for the Fair Political Practices Commission has advised this office that the exception for mass mailing may not apply if the mailing is directed to a particular constituency and the official has reason to know that the constituents may be likely parties or participants in proceedings before that official's board or commission. For example, a mass mailing solicitation by an official from the Alcoholic Beverage Control Board to liquor retailers may not be exempt from the provisions of section 84308, even though the mailing technically qualifies as a mass mailing.

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A member of an appointed board or commission may avoid disqualification if he or she returns the contribution (or the portion in excess of \$250) within 30 days of learning of the contribution and the pendency of a use entitlement proceeding involving the contributor.

Before the body renders a decision in a use entitlement proceeding, members of appointed boards and commissions must disclose on the record all campaign contributions totaling more than \$250 received in the preceding 12 months from parties to or participants in the proceeding. As noted above, such members are disqualified from participating in the decision. An attorney for the Fair Political Practices Commission has advised that although not expressly required by statute, these officials should also disclose the receipt of contributions made by agents of parties or participants. If there is a public hearing, the official must make the disclosure on the public record at the beginning of the hearing. If no public hearing is held, the disclosure must be included in the written record of the proceeding.

A knowing or willful violation of section 84308 is a misdemeanor, which could result in fines of up to the greater of \$10,000 or three times the amount of the illegal contributions and incarceration in the county jail for up to one year, as well as prohibitions on being a candidate for public office or acting as a lobbyist for four years. *See* Gov't. Code §§ 91000 and 91002. Violators also face possible civil penalties of up to \$2,000 per violation. *See* Gov't. Code § 91005.5. The City Attorney may bring a civil action for penalties and a private citizen may bring an action for injunctive relief. *See* Gov't. Code §§ 91001(b), 91001.5, 91003, 91004, 91005.5, 91007.

### 3. Taxpayers Protection Amendment of 2000 – Proposition J

City officers and employees who have discretion to approve and actually approve certain contracts known as “public benefits” may not accept campaign contributions, future employment, or gifts in excess of \$50 from the entities or individuals who are deemed “public benefit recipients” of the contract. *See* C&GC Code § 3.715.

The term “public benefit” includes contracts to:

- (1) provide personal services valued in excess of \$50,000 over any 12-month period;
- (2) sell or furnish any material, supplies or equipment to the City and County valued in excess of \$50,000 over any 12-month period;
- (3) buy or sell any real property to or from the City and County valued in excess of \$50,000, or lease any real property to or from the City and County valued in excess of \$50,000 over any 12-month period;
- (4) receive an award of a franchise to conduct any business activity in a territory in which no other competitor potentially is available to provide similar and competitive services, and for which gross revenue from the business activity exceeds \$50,000 in any 12-month period;

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- (5) confer a tax abatement, exception, or benefit not generally applicable to individuals or entities under pre-existing law, which are granted by contract or other agreement to specific private individuals or entities, valued in excess of \$5,000 in any 12-month period; or
- (6) receive cash payments in excess of \$10,000 in any 12-month period.

*See C&GC Code § 3.710(a); Ethics Comm. Reg. 3.710(a)-1.* The value of a public benefit is determined at the time the City and County public official approves the public benefit and does not include "public employment in the normal course of business for services rendered." *See id.*

A "public benefit recipient" is an individual or entity that:

- (1) is a party to the contract or other public benefit;
- (2) has a direct 10% equity, participation or revenue interest in the party to the contract at the time the contract is awarded; or
- (3) is a trustee, director, partner, or officer of the party to the contract at the time the contract is awarded.

*See C&GC Code § 3.710(b); Ethics Comm. Reg. 3.710(b)-1.*

Violations of Proposition J may be prosecuted by the Ethics Commission in an administrative action, by the District Attorney in a criminal action or by any City resident through a civil action. *See C&GC Code § 3.730.* A knowing and willful violation of Proposition J by a public official is a misdemeanor. Public officials who violate Proposition J may be liable for restitution to the City's General Fund and a civil penalty of up to five times the value of the personal or campaign advantage received. In addition, the public official may be disqualified from holding public office or "position[s] within the jurisdiction" in the future. Any citizen who enforces Proposition J through a private right of action may be entitled to collect reasonable attorney's fees and costs and 10% of the civil penalties imposed. The Ethics Commission may impose an administrative penalty of up to \$5,000 per violation. *See C&GC Code § 3.730.*

Please contact deputies on the Ethics Unit of this office if you have any questions about any of these issues.

cc: All Deputy City Attorneys