



DENNIS J. HERRERA
City Attorney

MEMORANDUM

TO: ALL ELECTED CITY OFFICIALS
ALL CITY BOARD AND COMMISSION MEMBERS
ALL CITY DEPARTMENT HEADS

FROM: DENNIS J. HERRERA, City Attorney

DATE: September 6, 2016

RE: Political Activity By City Officers and Employees

As we typically do every year in advance of the November election, the City Attorney's Office is providing this memorandum to outline the basic legal rules restricting political activities by City commissions, departments, officers, and employees. Please note that this memorandum updates and replaces previous memoranda that we have issued on this topic. A further overview of political activity restrictions and other laws governing the conduct of City officers and employees is available in the Good Government Guide posted on the Good Government section of our website at www.sfcityattorney.org.

This memorandum is a general guide to the rules regarding political activity and is not a substitute for legal advice. Please contact the City Attorney's Office in advance with any questions related to participation in political activities.

SUMMARY

In this memorandum we address the most common legal issues that usually arise before elections. In this summary, we answer frequently asked questions in five areas:

1. Use of City Resources: No one—including City officers and employees and City volunteers and contractors—may use City resources to advocate for or against candidates or ballot measures. City resources include, without limitation, City employees' work time, City computers, City e-mail systems and City-owned or controlled property. Also, City commissions, departments, and City advisory committees may not advocate for or endorse measures or candidates. But they may use City resources to analyze and provide information about the effects of proposed ballot measures on City operations, as long as the analysis is objective and avoids campaign slogans and other suggestive language typically associated with campaign literature.

2. Off Duty Political Activity: As a general rule, City officers and employees may support or oppose candidates and ballot measures in their personal capacities, while off duty and outside of City-owned or controlled property. City officers and employees may reference their City titles in campaign materials as long as it is clear that they are using the titles only for identification purposes. For example, the City Attorney's Office recommends that City officers and employees include in printed campaign materials an explicit notation stating that any reference to their City titles are "for identification purposes only." But City officers and employees may not solicit political contributions from other City officers and employees, even while off duty.

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3. **Mass Mailings Using City Funds:** With limited exceptions, the City may not prepare or send more than 200 pieces of similar mail featuring the name or image of a City elected official.

4. **Campaign Contributions To Elected Officials From City Contractors:** City elected officials may not solicit or accept campaign contributions from any person or entity seeking to enter a contract or grant worth \$50,000 or more with the City, if the contract or grant is subject to the elected officials' approval or the approval of one of their appointees to the board of a state agency. This restriction applies from the commencement of contract negotiations until either the negotiations are terminated (and no contract is awarded), or six months have elapsed since the contract or grant approval. The restriction also extends to contributions from the party seeking the contract or grant and that party's directors, executives and owners, as well as any subcontractors listed in the contract or bid.

5. **Campaign Contributions Solicited Or Accepted By Appointed Officials:** Appointed City officials, including department heads and members of boards and commissions, may not solicit political contributions over \$250 from anyone appearing before them in pending proceedings. Such proceedings include conditional use permits, rezoning of property parcels, zoning variances, tentative subdivision and parcel maps, building and development permits, and some contract approvals. Also, appointed officials who are running for office may not participate in proceedings where the parties or participants have directly contributed over \$250 to the officials within the 12 months before the proceeding.

DISCUSSION**I. Misuse of City Resources**

State law prohibits City officers, employees and anyone else from using City resources to support or oppose a ballot measure or the election or defeat of a candidate at the federal, state, or local level. Local law also prohibits City officers and employees from engaging in political activity during work time or on City-owned or controlled premises.

- **What is a misuse of City resources?**

Any use of City resources or City personnel for political activity is prohibited. This ban prohibits any use of City e-mail, telephones, copiers, fax machines, computers, office supplies or any other City resources for political purposes. City personnel's time and attention may not be diverted from their City duties for political purposes. Activities that would fall within the scope of this ban include addressing envelopes for campaign mailers; circulating ballot petitions; making campaign telephone calls; attending campaign events; or engaging in similar types of campaign activity on City time or on City-owned or controlled property that the City does not make available to the general public to use for political purposes (such as a public plaza or sidewalk).

Example: On his lunch hour, a City employee uses his City computer to send invitations to a fundraiser for a candidate. The employee has misused City resources by using his City computer for political activity. The fact that he was on his lunch hour or used his personal e-mail account does not excuse this improper use of City resources.

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Example: A City employee wishes to volunteer with a political campaign on a full-time basis in the weeks leading up to the general election. The employee may use any accrued vacation time, or other paid time-off, while the employee is volunteering for the campaign because an employee's vacation is not "City time" that must be devoted to the employee's official duties.

The prohibition on the use of City resources for political activity also means members of City boards, commissions, and advisory committees may not use their meetings to influence elections. As a result, appointed boards, commissions, and advisory committees may not vote to endorse a measure or a candidate. The courts have allowed an exception to this rule for legislative bodies like the Board of Supervisors ("Board"). The Board, acting as a body, may take a position on behalf of the City on a ballot measure, and the Mayor may take a public position on a measure. But no City officials, including the Mayor and members of the Board, may distribute campaign literature at City events or include campaign literature in official mailings to employees or members of the public.

Example: Members of a City commission feel strongly about the merits of a measure appearing on the ballot that relates to matters within their jurisdiction. The commission may not vote on a resolution to support or oppose the ballot measure. The commission may ask staff for information about the impact of the ballot measure on the City, and individual commissioners may support or oppose the measure on their own time using their own resources.

Example: Members of a City commission wish to support a bill pending in the state legislature that would further one of the commission's policies. The commission may urge the Mayor or the City's State Legislation Committee to adopt an official position on the pending legislation. Because the legislation is not before the voters, political activity rules do not prohibit the City from supporting it.

- **May City officers and employees analyze a ballot measure's effects?**

City officers and employees may lawfully use City resources (where budgeted for such a purpose and otherwise authorized) to investigate and evaluate objectively the potential impact of a ballot measure on City operations. The analysis must be made available to the public.

Example: A City department wants to inform its commission about the potential impacts on the department if a ballot measure passes. If the department has money budgeted for the purpose, the department may research the potential impact of the measure and present objective information to the commission. The analysis must also be made available to the public.

Example: As required by the City's Municipal Elections Code, the Department of Elections asks a City department to analyze a

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measure for the City's Ballot Simplification Committee, the body responsible for preparing the digests that appear in each election's Voter Information Pamphlet. The department's written analysis must present objective information and must be made available to the public. Employees of the department may also appear at the Committee's meetings to explain the effect of the measure or to answer the Committee's questions, but their presentation must remain objective and impartial.

- **May City officers and employees respond to inquiries about a measure?**

City officers and employees may respond to public requests for information, including requests to participate in public discussions about ballot measures, if the officers' or employees' statements are limited to an *objective and impartial* presentation of relevant facts to aid the voters in reaching an informed judgment regarding the effects of the measure on the City. All statements must be accurate and fair. But City officers and employees should not participate in any campaign event on City time, even to provide an impartial informational presentation, if the purpose of the event is to support or oppose ballot measures or candidates.

Example: A community organization asks a department head to attend the organization's meeting to provide information about a pending ballot measure. As long as the department head provides impartial and objective information, she can attend the meeting on City time. But if a candidate asks the department head to provide the same information at a campaign fundraiser, the department head cannot attend on City time. If the community organization wishes to have the "Yes" and "No" sides of the pending ballot measure to be presented at a meeting, the department head can inform the organization who it may contact to present those respective positions.

- **May a City department publicize its analysis of a ballot measure?**

If a City department analyzes a ballot measure, the department should make its analysis public and distribute or publicize it consistent with the department's regular practice. But the department should not use special methods—such as methods associated with political campaigns—to distribute its analysis.

City officers and employees who are considering providing the public with an informational presentation regarding a ballot measure should consult in advance with the City Attorney's Office.

Example: If a City department regularly issues a newsletter to interested City residents, it may include an objective and impartial analysis of a pending ballot measure, but the department should not create a special, one-time-only newsletter to distribute its analysis. Similarly, City departments should not increase the frequency of distributing such newsletters as an election approaches.

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- **What is an objective and impartial presentation?**

Courts evaluate materials prepared or distributed by a public entity 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 resemble campaign materials for or against a ballot measure. In its analysis of the effect of a proposed measure, a City department should present factual information, avoid one-sided rhetoric or campaign slogans, and not urge a vote in one way or another.

Example: A City department wants to prepare a PowerPoint presentation about a ballot measure explaining the department's view that the measure could have a significant negative impact on the department's operations. Any such presentation must be limited to an accurate, fair, and objective presentation of the relevant facts. It should not urge a Yes or No vote, and it should not use campaign slogans or rhetoric.

- **When do these rules apply?**

These rules prohibit using City resources when a matter is pending before the voters, but not when the matter is pending before the Board. City measures may be placed on the ballot in three different ways: (1) by the Board acting as a body through majority vote of all of its members at a public meeting, (2) by the Mayor or four or more individual Board members submitting the measure directly, or (3) by the voters submitting an initiative petition with the sufficient number of valid signatures.

- When the Board, as a body, is considering placing a measure on the ballot, City officers and employees may use City resources to influence the Board's decision on whether to place the measure before the voters. After the Board has taken its final vote to place the measure on the ballot, no additional City resources may be used to advocate for or against the measure.
- When the Mayor or four or more individual members of the Board have submitted a measure, the Charter requires the Board to hold a public hearing on the measure. City officers and employees may use City resources at this hearing to explain the effects, advantages or disadvantages of the measure, and to urge the Mayor or individual Board members to withdraw the measure from the ballot, but not to urge voters to vote for or against the measure. In addition to this hearing, City resources may be used to convince Board members or the Mayor to withdraw their support for these measures, until the deadline for such withdrawal has passed. After this deadline, no additional City resources may be used to advocate for or against the measure.
- A voter may begin circulating a proposed ballot measure for signatures after having obtained a title and summary from the Department of Elections and City Attorney's Office. Once the initiative petition is circulating for signatures, no City resources may be used to advocate for or against it.

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II. 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 and outside of City-owned or controlled property. As a general rule, City officers and employees may take public positions, as private citizens, on candidates or ballot measures. Federal law also restricts the political activities of local employees whose principal employment involves a federally-funded activity, although the federal restrictions largely mirror state and local political activity rules. The City also restricts the off-duty political activities of certain officers and employees, including the Ethics and Election Commissions and their employees, and the City Attorney. Finally, local law imposes some off-duty restrictions on all City officers and employees.

- **May City officers and employees use their official titles in campaign communications?**

As long as they are not otherwise using City resources to do so, City officers and employees may use their official titles in campaign communications. But it must be clear that the City officers or employees are making the communication in their personal capacity and are using their titles for identification purposes only. For example, the City Attorney's Office recommends that City officers and employees include in printed campaign materials an explicit notation stating that any reference to their City titles are "for identification purposes only."

- **May City officers and employees solicit campaign contributions from other City officers and employees?**

No. City officers and employees may not directly or indirectly solicit campaign contributions from other City officers or employees or from persons on City employment lists. A City officer or employee can request campaign contributions from other City officers or employees only 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. If the City officer or employee is aware that a distribution list includes other City officers or employees, the officer or employee should make reasonable efforts to remove those individuals from that distribution list. In no event can the requestor use City resources in making any solicitation.

Example: After work, a City employee sends an e-mail to her coworkers—from her personal e-mail account to the coworkers' personal e-mail accounts—soliciting contributions to a candidate for local office. Even though the employee used no City resources, the solicitation is not lawful because she solicited political contributions from other City employees.

Example: The same City employee sends an invitation to a fundraiser to a list of all graduates from the local college she attended. A number of City employees, who also happened to attend that college, receive invitations. Although the officer sent the solicitation to some City employees, the solicitation is lawful because it was made to a significant segment of the public that included some City employees.

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- **May City officers and employees engage in political activities on City premises?**

City officers and employees may not participate in political activities of any kind while on City-owned or controlled property, other than property that the City makes available to the general public to use for political purposes (such as a public plaza or sidewalk).

Example: A City employee seeks endorsements for the employee's candidacy for a political party's central committee in the hallway of her City department's office. This activity violates the ban on political activity on City premises because it is being done inside City property that is not available to the general public for political purposes.

- **May City officers and employees engage in political activities while in uniform?**

No. City officers and employees may not participate in political activities of any kind while in uniform. City officers or employees are in uniform any time they are wearing all or any part of a uniform that they are required or authorized to wear when engaged in official duties.

III. Mass Mailings at Public Expense

In addition to the general prohibition against using public resources or personnel to engage in political activity, the City cannot use public money to print or send non-political newsletters or mass mailings that feature or make reference to an elected official. A non-political newsletter or mass mailing is prohibited if all of the following four requirements are met:

- **Sent or delivered.** The item is sent or delivered by any means to the recipient at a residence, place of employment or business, or post office box.
- **Features an elected official.** The item either features a City elected official, or includes the name, office, photograph, or other reference to a City elected official.
- **Paid for with public funds.** Any public money is used to pay for distribution, or more than \$50 of public money is used to pay for design, production and printing.
- **More than 200 items in a single month.** More than 200 substantially similar items are sent in a single calendar month.

Certain types of mailings are exempt from the mass mailing prohibition. For example, the prohibition does not apply to e-mails, text messages or postings on websites. It also does not apply to press releases, meeting agendas and intra-office communications. Please check with the City Attorney's Office in advance if you have any questions about the mass mailing rule.

IV. Campaign Contributions to Elected Officials and Candidates

Local law prohibits City elected officials from soliciting or accepting contributions from any person or entity seeking to enter into a contract or grant worth \$50,000 or more with the City, if the contract or grant requires their approval or the approval of their appointees to the board of a state agency. This restriction applies to the party seeking the contract or grant, the party's board of directors, chairperson, chief executive officer, chief financial officer, chief operating officer, any person with an ownership interest greater than twenty percent, and any

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political committees controlled or sponsored by the party, as well as any subcontractors listed in the contract or bid. The law both prohibits the donor from giving contributions *and* prohibits the elected official from soliciting or accepting them.

- **May a City contractor make a campaign contribution to a City elected official who approves the contract?**

A person or entity that contracts with the City may not make a campaign contribution to an elected official if the contract would require approval by that official, a board on which the official serves, or a board of a state agency on which an appointee of the official sits. The people and entities listed in the preceding paragraph may not make a campaign contribution to the elected official at any time from the commencement of negotiations for the contract until either: (1) negotiations are terminated and no contract is awarded; or (2) six months have elapsed since the award of the contract.

- **May a City elected official solicit or accept a campaign contribution from a City contractor?**

A City elected official may not solicit or accept a campaign contribution from a business or entity seeking a contract with the City, including all of the associated people and entities listed above in the first paragraph of this Section IV, if that elected official, a board on which the official serves, or a board of a state agency on which an appointee of the official sits must approve the contract. This prohibition applies to the official at any time from the formal submission of the contract to that official until either: (1) negotiations are terminated and no contract is awarded; or (2) six months have elapsed since the award of the contract.

V. Campaign Contributions Solicited or Accepted By Appointed Officials

Section 84308 of the California Government Code prohibits appointed officials from soliciting contributions of more than \$250—for any candidate or campaign—from any party or participant in a proceeding pending before the appointed official or from anyone with a pending contract subject to the appointed official's approval. It also disqualifies appointed officials from participating in decisions that involve persons who have contributed \$250 or more directly to them within the past 12 months.

- **May appointed officials solicit contributions from persons in a proceeding pending before them?**

Appointed officials may not solicit, accept or direct campaign contributions of more than \$250 from any party to or participant in certain proceedings pending before the official. This prohibition applies during the proceeding and for three months after the final decision is rendered in the proceeding.

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. The prohibition applies to contributions for candidates or ballot measures in federal, state, or local elections.

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, to a public gathering, in a newspaper, on radio or television, or in any other mass medium, provided the solicitation is not targeted to persons who

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appear before the board or commission. An official does not engage in a solicitation solely because the official's name is printed with other names on stationery or letterhead used to ask for contributions.

- **Who is an "appointed official" prohibited from soliciting or accepting contributions?**

An appointed official is an appointed member of board or commission, or an appointed department head. Although the Board is an elected body, the prohibitions of Section 84308 apply to members of the Board when they sit as members of an appointed body.

- **What proceedings are covered by this prohibition?**

Section 84308 applies to "use entitlement proceedings," which are actions to grant, deny, revoke, restrict or modify certain contracts or business, professional, trade or land use licenses, permits, or other entitlements to use property or engage in business. Examples of the types of decisions covered by the law include decisions on professional license revocations, conditional use permits, rezoning of property parcels, zoning variances, tentative subdivision and parcel maps, cable television franchises, building and development permits and private development plans. It also includes all contracts other than labor or personal employment contracts and competitively bid contracts where the City is required to select the highest or lowest qualified bidder.

The law does not cover proceedings where general policy decisions or rules are made or where the interests affected are many and diverse, such as general building or development standards and other rules of general application.

- **Who is a "party," "participant," or "agent"?**

A "party" is a person, including a business entity, who files an application for, or is the subject of a use entitlement proceeding. A "participant" is any person who is not a party to a proceeding but who: (1) actively supports or opposes a particular decision (*e.g.*, 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 or entity that represents a party or participant in a proceeding.

- **When is an appointed official disqualified from proceedings involving a contributor?**

An appointed official may not participate in any use entitlement proceeding involving a party or participant (or the party's or participant's agent) from whom the official received contributions totaling more than \$250 in the 12 months before the proceeding. Disqualification is required only if the official received a contribution to the official's own campaign. Soliciting contributions before a proceeding begins does not, by itself, require disqualification, if the official has not directly received contributions as a result of the solicitation.

An appointed official may avoid disqualification if the official returns the contribution (or the portion exceeding \$250) within 30 days of learning of the contribution and the proceeding involving the contributor.

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Whether the appointed official is disqualified as a result of the contribution, the official always 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.

VI. Penalties

State and local enforcement agencies and the courts may impose considerable penalties for violating the laws discussed in this memorandum. Individuals who violate these rules could face criminal fines or imprisonment, orders to repay the City for the misused funds, or civil and administrative penalties of up to \$5,000 per violation. Misappropriation of City funds for political activities also may be official misconduct under the City's Charter that justifies removing a public officer (other than the Mayor) and restricting that person's ability to hold public office in the future, and it may also be cause to discipline or fire a public employee.

The conduct of City officers and employees also could result in fines or liability for the City. For example, the California Fair Political Practices Commission has fined local government agencies as much as \$10,000 for failing to report the use of public funds to prepare and distribute pamphlets on pending ballot measures.

ADDITIONAL INFORMATION

Again, for more information about these rules, see the City Attorney's Good Government Guide, which you may find on the Good Government section of the City Attorney's website (www.sfcityattorney.org). If you have any questions, please contact the City Attorney's Office.