

# PACKET MATERIALS

DATE September 25, 2009

Item No. 6

## LOCAL AGENCY FORMATION COMMISSION AGENDA PACKET CONTENTS LIST \*

- ☒ City Attorney Memo Re: Political Activity by City Officers and Employees
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- ☐ Exceeds 20 pages; see file to review  
Available for review at City Hall, Room 244

Completed by: Alisa Somera

Date: September 22, 2009

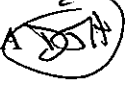
\* This list reflects the explanatory documents provided.



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: September 3, 2009

RE: Political Activity By City Officers and Employees

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As the November municipal election approaches, the City Attorney's Office would like to take the opportunity again to remind City officers and employees of the laws that restrict their use of City resources for political activities. To this end, I am providing to you this updated memorandum, which outlines the basic rules and principles governing the political activities of City officers and employees. These materials are intended as a general guide and are not a substitute for legal advice. Please contact the City Attorney's Office with any questions related to these materials or participation in political activities. Please note that this memorandum updates and replaces previous memoranda on this topic that we have issued before City elections.

This memorandum is divided into five main parts, addressing some of the most common issues that come up in advance of elections. Part I discusses restrictions on the use of City resources and personnel for campaign activities. Part II discusses the rules that apply to City employees and officers engaging in political activities while off duty. Part III discusses the prohibition on using public funds for non-political mass mailings featuring an elected official. Part IV addresses the prohibition on elected officials soliciting or accepting campaign contributions from certain City contractors. And Part V discusses the prohibition on appointed officials soliciting or accepting political contributions from parties and participants in proceedings before City commissions.

### **I. Misuse of City Resources and Personnel**

State law prohibits government employees 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 working hours or on City premises.

#### **• What is a misuse of City resources?**

Any use of City resources or 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. Addressing envelopes for campaign mailers, circulating ballot petitions, making campaign telephone calls, or engaging in similar types of campaign activity on City time or on City property is prohibited.

**Example:** On his lunch hour, a City employee uses his City computer to send invitations to a fundraiser for a candidate. The

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employee has misused City resources by using his City computer for political activity. The fact that he was on his lunch hour does not matter.

- **May a Board or Commission take a position on a ballot measure?**

The prohibition on use of City resources for political activity also means that City officers and employees may not use their official positions to influence elections. Thus, appointed boards and commissions may not vote to endorse a measure or a candidate.<sup>1</sup> Nor may City officials 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.

- **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) 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.

- **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 officer's or employee's statements are limited to an *accurate, fair, and objective* presentation of relevant facts to aid the voters in reaching an informed judgment regarding the measure.

*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 City. Any such presentation must be limited to an accurate, fair, and objective presentation of the relevant facts.

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<sup>1</sup> In contrast to appointed commissions and boards, the Board of Supervisors, 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.

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

Courts will 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 department should present factual information, avoid one-sided rhetoric or campaign slogans and not urge a vote in one way or another. The department should make its analysis public and distribute or publicize it consistent with the department's regular practice. So if a department regularly issues a newsletter to interested City residents, it can include the ballot measure analysis in that newsletter, but the department should not create a special, one-time-only constituent newsletter to distribute its presentation. 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.

- **What are the penalties for violating the law?**

Courts may impose considerable penalties for violating these laws. Under State law, misappropriating public funds is a felony punishable by imprisonment and a ban on holding public office in the State. Under local law, use of City funds for political or election activities also may be official misconduct that justifies removal of a public officer, or cause to fire a public employee. The misuse of public funds to support or oppose a ballot measure may also result in personal liability, requiring a City officer or employee to repay any public funds that have been improperly spent. The conduct of City officers and employees also may risk liability for the City. 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.

## **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 property. As a general rule, City officers and employees may take public positions, as private citizens, on electoral races or ballot measures. Federal law imposes some restrictions on the political activities of local employees whose principal employment is in connection with federally-funded activity. San Francisco 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 from the tenor and nature of the communication that the City officer or employee is making the communication in his or her personal capacity and is using the title for identification purposes only.

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- **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 and the requestor does not use City resources in making the solicitation.

*Example.* An incumbent City officer 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.

- **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 property, other than property that is made 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 hallways of City Hall. This activity violates the ban on political activity on City premises because it is being done inside City Hall, which is City property that is not made available to the general public for political purposes. Conversely, if the City employee engages in this same activity on the steps outside City Hall, the employee would not violate the ban on political activity because the steps outside City Hall are made available to the general public to use 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.

- **What are the penalties for violating these laws?**

A knowing or willful violation of these laws is a misdemeanor, which could result in fines of up to \$10,000 per violation and incarceration in the county jail for up to one year. Violations of these laws may also subject an individual to civil and administrative penalties of up to \$5,000 per violation.

### **III. 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 cannot use public money to print or send

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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 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.
- **Paid for with public funds.** 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.
- **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 press releases, meeting agendas and intra-office communications. Please check with the City Attorney's office 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 must be approved by the City elected official. 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 political committees controlled or sponsored by the party, as well as any subcontractors under the contract. The law both prohibits the donor from giving contributions and prohibits the elected official from soliciting or accepting them.

- **May a City contractor give a campaign contribution to a public official who approves the contract?**

Local law restricts the ability of a person or entity that contracts with the City to make a campaign contribution to an elected official if the contract would require approval by that officer, a board on which the officer serves, or a board of a state agency on which an appointee of the officer sits. These people and entities listed in the preceding paragraph may not make a campaign contribution to the officer 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.

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

Local law also prohibits a City official from soliciting or accepting a campaign contribution from a business or entity seeking a contract with the City, including all of the associated people and entities listed above, if that City 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 officer 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's agency or from anyone with a pending contract subject to the appointed official's approval. It also prohibits an appointed official from participating in a decision that involves a person who contributed \$250 or more to the appointed official's campaign 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 before the official's agency. 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 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 a member of an appointed board or commission, or an appointed department head. Although the Board of Supervisors is an elected body, the prohibitions of Section 84308 apply to members of the Board of Supervisors when they sit as members of an appointed body.

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

Section 84308 applies to any "use entitlement proceeding," which is an action to grant, deny, revoke, restrict or modify a license, permit, or other entitlement for use. Examples of the

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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 (*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 an employee or member of a law, architectural, engineering or consulting firm, or a similar entity, both the entity and the individual are considered agents.

- **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 a contribution of more than \$250 in the 12 months before the proceeding. 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 to that official's campaign in the 12 months before the proceeding. Soliciting contributions before a proceeding begins does not, by itself, require disqualification, if the official has not received contributions as a result of the solicitation.

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

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. 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.

**Additional Information**

For more information about these rules, see City Attorney's Good Government Guide at: [http://www.sfgov.org/site/uploadedfiles/cityattorney/GGG\\_2007-08\(1\).PDF](http://www.sfgov.org/site/uploadedfiles/cityattorney/GGG_2007-08(1).PDF). If you have any questions, please contact the City Attorney's Office.