

MEMORANDUM

To: All City Elected Officials, Members of City Boards and Commissions, and City Department Heads
From: Leslie E. Devaney, City Attorney and Christina M. Cameron, Deputy City Attorney
Date: November 4, 2019
Re: ***Political Activity by City Officers and Employees***

INTRODUCTION

The beginning of the election season is a good time for a reminder of allowed and prohibited political activities by City officers and employees.¹ The Constitution and laws of the State of California provide substantial guarantees to ensure that City officers and employees are able to exercise their right to participate robustly in the political process. There are equally important limitations intended to ensure that everyone's participation (members of the public, City officers and employees alike) is free of coercion or fear of retribution.

This following information is of a general nature and intended to give guidance on the types of activities City officials and employees may and may not engage in. The memo also provides guidance on mass mailings at public expense, which tends to come up during the campaign season, as well as special rules regarding solicitation and acceptance of campaign contributions by appointed officials. As with any general guidance, it will not answer all questions or address every conceivable situation.

POLITICAL ACTIVITIES BY CITY OFFICERS AND EMPLOYEES

As a general matter, Cities may not restrict City officers' and employees' off-duty political activity. Officers and employees are free to support or oppose candidates and ballot measures in their personal capacities, while off duty and outside of City-owned or controlled property. Within that overall framework, there are specific things that officers and employees can and cannot do.

I. City Officers and Employees MAY:

A. **Engage in Off Duty Political Activity.**² This includes: attending political rallies, participating in campaign committees, campaign related work, phone banking, posting campaign signs, registering voters, or advocating that people contribute to or vote for or against a candidate or measure.

- As further described below, there are limitations on who an officer or employee may solicit for contributions.

¹ This memo uses the terms "officer" and "official" interchangeably to mean an individual who may or may not be an employee (appointed or elected) with authority to take specified actions on behalf of a city or agency.

² Gov. Code, § 3203; see also, *Fort v. Civil Service Commission of Alameda County* (1964) 61 Cal.2d 331; *Bagley v. Washington Tp. Hospital Dist.* (1966) 65 Cal. 2d 499.

- For hourly employees, off duty means before the beginning of a shift, after the end of a shift. A shift includes both regular and overtime hours.
- Salaried employees are generally off duty outside of an agency's normal business hours.
- All public employees are considered off duty when they are on an approved lunch break or vacation, on an administrative day or on a City holiday on which they do not work.

B. **Vote.**

C. **Make Contributions.** Officers and employees are advised that under the California Political Reform Act, political contributions of \$99 or more must be reported on publicly available disclosure forms. Some candidates choose to disclose all contributions of any size.

D. **Solicit Contributions from Public Agency Vendors.** Must be done while off duty. As described in more detail below, employees and officers may NOT knowingly solicit contributions from another officer or employee of the agency.³

E. **Make Endorsements.** On a personal level, officers and employees may make whatever endorsements they wish.⁴

- Use of City title in endorsements.
 - Officers and employees may reference their title in endorsement for identification purposes but may not imply or state that they represent the legislative body, City or department (as applicable) in that endorsement.
 - City Attorney's Office recommends that officers and employees whose titles are used include in printed campaign materials an explicit notation stating that any reference to their City titles are "for identification purposes only."

II. **City Officers and employees MAY NOT:**

A. **Engage in Political Activities During Work Hours.** "Work hours" (described above) include standard and overtime hours that are part of a shift that the officer or employee is required to work. An officer or employee is considered "off-duty" when he or she is on an approved lunch break, vacation, administrative leave day, or during a public holiday on which they do not work. It is a recommended best practice that Cities require employees to document all leave time in which they engage in political activity.

- Political Activity Includes:
 - Distributing materials – including signs.
 - Attending Campaign events.
 - Making telephone calls for campaign purposes.

³ Gov. Code, § 3205(a)

⁴ Bagley, 65 Cal. 2d 499.

- Other Campaign Activities: making copies, writing campaign statements or scripts, stuffing envelopes, advocating or ‘informing’ fellow workers about campaign issues, or wearing campaign signs or buttons.

B. **Engage in Political Activities on Public Property.**⁵ Public property includes all property owned by a public agency. For example, maintenance yards, community centers, and recreational facilities. For purposes of this restriction, public property does not include use of a public park when the sponsors have obtained the appropriate permits, at public facilities (such as a library, or other meeting hall) that are routinely available for private functions, or on public property made available to the general public for political purposes (such as sidewalks and public plazas).

Examples:

- An officer or employee may not engage in political activity in a common hallway or breakroom of the City - even if he/she is on an approved break - because this area is not made available to the general public for political purposes.
- A City officer or employee may not, even on an approved day off or break, participate in an impromptu political rally or demonstration that will take place in areas not made available to the general public for political purposes.
- Use City telephones and office space to make political telephone calls or use City email accounts or computers to send political emails.

C. **Use Public Funds or Resources to Advocate.** “An officer [or] employee ... of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.”⁶ In this context, “expenditure” includes the misuse of public resources and equipment. This prohibition does not preclude an agency from providing fair and impartial relevant facts to aid voters in reaching a judgment regarding a ballot measure.⁷

- Public Resources include: copiers, faxes, computers, printers, telephones, email, office space, office supplies or equipment.
- Prohibited activities include:
 - Making calls to voters for or against a measure or candidate on City time, or using City equipment, or supplies.
 - Making arrangements or plans by phone or email using City equipment related to any campaign or political activity.
 - Using City photocopiers to reproduce any campaign or political documents (flyers, agendas, scripts, invitations, etc.).
 - Taking or ‘borrowing’ any City equipment or supplies (pens, paper clips, staples, etc.) to use for a political purpose.

⁵ Gov. Code, §3207

⁶ Gov. Code, § 54964; *Stanson v. Mott*, (1976) 17 Cal.3d 206, 209-210

⁷ *Id.*

- It is OK for officers and employees to direct political inquiries initiated by members of the public to an appropriate campaign organization or committee if known.

D. **Appear in Uniform.** “No officer or employee of a local agency shall participate in political activities of any kind while in uniform.”⁸ This restriction applies whether an employee is on or off duty. Officers and employees should not wear any portion of their uniform while undertaking any political activities. As a best practice, officers and employees who do not wear a full uniform, but wear certain required items (such as name tags) should remove those items before engaging in political activities. This prohibition encompasses being photographed in uniform for use in campaign materials.

E. **Solicit Campaign Contributions from other officers and employees.** Candidates for local elective office as well as officers and employees of a local agency “shall not, directly or indirectly, solicit a political contribution from an officer or employee of that agency, or from a person on an employment list of that agency, with knowledge that the person from whom the contribution is solicited is an officer or employee of that agency.”⁹

- The inclusion of officers and employees within larger solicitations made to a significant segment of the public is not prohibited. The key is not to intentionally include or target employees and officers.
- The same targeting rule applies to phone banking.
- Candidates, employees and officers may not make direct in-person, email or telephonic solicitations of other employees or officers.
- Employees and officers may not compile lists of officers and employees for personal or political use.

F. **Use Position to Influence.** No candidate, public officer or employee may promise a gift, money, a promotion, a job or any other form of compensation to anyone in return for a contribution or a vote.¹⁰ A candidate, public officer or employee, may not threaten to take any action against any person in order to obtain a particular vote or secure a contribution.¹¹ Violations subject to criminal prosecution.

- Promises include:
 - Offers to hire, appoint, or promote someone or to increase a person’s salary in exchange for a vote or contribution.
 - Gifts (anything of value) payment of money or loans in exchange for a particular vote, a contribution or the failure to contribute. Includes Criminal Penalties.¹²
 - Boarding, lodging or domiciling a person within a particular jurisdiction in order to induce a person to vote for a particular person or measure.

⁸ Gov. Code, § 3206.

⁹ Gov. Code, § 3205.

¹⁰ Gov. Code, §§ 3204 & 3205.5; Elec. Code § 18520.

¹¹ Gov. Code, §§ 3204 & 3205.5; Elec. Code §§ 18521 & 18522.

¹² Elec. Code, § 18521.

- Threats include:
 - Threatening to fire, demote, or discipline any officer or employee as a result of his or her vote or in order to coerce a contribution.
 - Threatening to reduce an officer or employee's pay rate, salary or fringe benefits as a result of a vote, a contribution or failure to contribute.

G. **Pay Envelopes.** Not limited to City officers and employees, California law prohibits all employers from including with an employee's paycheck, any written materials that include the name of a candidate, any political motto, devices or argument that is calculated to influence the voting opinions of the employee.¹³

H. **Obstruct or Corrupt the Election Process.**¹⁴ Not limited to City officers and employees, California law makes it a felony to use or threaten - or to hire or arrange for someone else to use or threaten - force, violence, coercion or intimidation to induce or compel someone to vote or refrain from voting in any election or to vote or refrain from voting for any person or measure on a ballot. No person may obstruct the conduct of an election or impede any voter in casting his or her ballot.

- Violations include:
 - Physically barring any voter from entering a polling place.
 - Delaying or hindering any voter from reaching or entering a polling place.
 - Intimidation or threats intended to hinder or bar a voter from casting a ballot.
 - Electioneering (engaging in campaign speech) within 100 feet of a polling place.
 - Interfering with an election official's duties.
 - Engage in fraudulent election activity:
 - Making false or misleading statements in an attempt to induce a person to make a contribution or cast a particular ballot.
 - Providing false information regarding polling places, dates/times for casting ballots, or the manner of casting ballots to prevent a voter from casting a ballot or having it counted.
 - Aiding or participating in the illegal casting of any ballot or counting of votes.

¹³ Elec. Code, § 18542.

¹⁴ Elec. Code, §§ 18501, 18502, & 18540.

RESTRICTION ON MASS MAILINGS AT PUBLIC EXPENSE

Although not specifically related to campaign or political activity, it is relevant to provide a reminder about mass mailing restrictions during the campaign season when these types of questions tend to arise.¹⁵

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.¹⁶ A nonpolitical 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. Some of the exceptions are complicated and strict, so officials should check with the City Attorney's Office in advance with any questions about the mass mailing rule. In addition, the rules regarding mass mailings become more strict and limiting within 60 days of an election.

CAMPAIGN CONTRIBUTION SOLICITATIONS BY APPOINTED OFFICIALS

Appointed Officials are prohibited 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.¹⁷ 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.

This restriction applies to citizens appointed to the Planning Commission and members of boards and commissions and also, *elected* City Councilmembers in their roles as appointed officials to other public agencies and Joint Powers Authorities. Appointed elected officials need to be mindful of matters that will come before them on those outside appointed bodies to ensure that campaign contributions do not run afoul of this restriction. Contributions, for purposes of the \$250 restriction, are cumulative of all

¹⁵ State and local agencies are severely limited in paying for communication that relate to a campaign. Such payments are subject to FPPC Regulation 18420.1 which, among other restrictions, prohibits a communication that "urges a particular result" or one that is "not a fair presentation of facts serving only an informational purpose." Such communications are beyond the scope of this memorandum.

¹⁶ Gov. Code, § 89001-89003.

¹⁷ Gov. Code, § 84308.

parties, participants and agents affiliated with an action. The rule is limited 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.

CONCLUSION

In this memo, we have tried to provide a broad outline of the permissions and restrictions under the laws and constitution of the State of California as they apply to officers and employees of the City. As general guidance, it may have answered all of your questions or you may need more information. If you need additional guidance or assistance with specific situations not fully addressed in this memo, please reach out to us for assistance.

/mcl