

## Vanni, Mark

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**From:** Campaign Guidance  
**Sent:** Wednesday, November 24, 2021 10:29 AM  
**To:** [REDACTED] Campaign Guidance  
**Cc:** PublicRecordsRequest  
**Subject:** RE: \*NEW SUBMISSION\* Request Public Records  
**Attachments:** Reminder Regarding Campaign Restrictions

Dear Mr. Doan,

Correct – you are allowed to place “City of San Jose Fire Captain” as your ballot designation on the ballot.

No, you are not allowed to place “San Jose Fire Captain” or “San Jose Firefighter” or “Fire Captain” or “Firefighter” on your campaign literature. For reference, I am attaching the email from OER regarding Campaign Restrictions under the City’s Administrative Policy, which is under the purview of the City Manager, which provides, of relevance: **“On their own time, City employees may campaign or advocate for or against candidates or ballot measures, but cannot use their City job titles while campaigning or in campaign materials for candidates.”**

Thank you for consulting with our office. We hope you have a terrific Thanksgiving!

**Campaign Guidance**  
**Office of the City Attorney**  
**City of San José**  
**200 East Santa Clara Street, 16th Floor Tower**  
**San Jose, CA 95113**  
**Office No: (408) 535-1900**  
**Fax No: (408) 998-3131**

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**From:** Bien Doan for San Jose City Council D7 [REDACTED]  
**Sent:** Monday, November 22, 2021 11:30 PM  
**To:** Campaign Guidance <SJElections@sanjoseca.gov>  
**Cc:** PublicRecordsRequest <PublicRecordsRequest@sanjoseca.gov>  
**Subject:** Re: \*NEW SUBMISSION\* Request Public Records

[External Email]

Thank you for answering my questions thoroughly and thoughtfully.

To clarify, I am allowed to place "City of San Jose Fire Captain" on the ballot. Am I allowed to place "San Jose Fire Captain" or "San Jose Firefighter" on my campaign literature including printed materials, digital materials, and more?

Thank you again for all your hard work,  
**The Campaign Team for Bien Doan for San Jose City Council D7 2022**  
(669) 261 - 9001  
[www.BienDoan.com](http://www.BienDoan.com)

**Paid for by Bien Doan for San Jose City Council D7 2022 FPPC#1441081**

*NOTICE: This email is confidential and is legally privileged to the original recipients only. If you have received it in error or are not the original recipient, you are on notice of its status. Please notify Bien Doan for San Jose City Council D7 2022 immediately via e-mail ([info@BienDoan.com](mailto:info@BienDoan.com)) and then delete this message from your system. Do not copy, print, share, screenshot, forward, fax, discuss, or use it for any purposes, or disclose its contents to any other person as this could be a violation of local, state, and/or Federal laws. Thank you.*

On Wed, Nov 17, 2021 at 4:24 PM Campaign Guidance <[SJElections@sanjoseca.gov](mailto:SJElections@sanjoseca.gov)> wrote:

Dear Mr. Doan:

Below in red are answers to your questions. Please also see the attached Campaign Activities memo and email to City employees regarding Campaign Restrictions. We are treating your email as inquiries regarding Campaign Guidance, not as Public Records Act request since you are not requesting any documents. You had also sent two other emails with identical questions; this email serves as a response to those emails as well.

If a candidate is a city employee, specifically a firefighter, what are the requirements and guidelines for posting photos online and in print for the following situations:

1. Is the candidate allowed to place photos of themselves from their job on campaign social media, printed materials, website, and more?

No. California Government Code Section 3206 provides that "No officer or employee of a local agency shall participate in political activities of any kind while in uniform." [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=GOV&sectionNum=3206](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV&sectionNum=3206). See also the attached email regarding Campaign Restrictions under the City's Administrative Policy, which is under the purview of the City Manager: "City employees cannot campaign or advocate for or against candidates or ballot measures **while wearing a City uniform or other clothing that would identify you as a City employee, or while wearing a City badge.**" Photos of yourself, a City employee in uniform or on duty, cannot be used for your campaign.

2. Is the candidate allowed to place photos of themselves from their job (actively on duty) in uniform on social media, printed materials, website, and more?

No. California Government Code Section 3206 provides that "No officer or employee of a local agency shall participate in political activities of any kind while in uniform." [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=GOV&sectionNum=3206](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV&sectionNum=3206). See also the attached email regarding Campaign Restrictions under the City's Administrative Policy, which is under the purview of the City Manager: "City employees cannot campaign or advocate for or against candidates or ballot measures **while wearing a City uniform or other clothing that would identify you as a City employee, or while wearing a City badge.**" Photos of yourself, a City employee in uniform or on duty, cannot be used for your campaign.

3. If the candidate places a disclaimer on any picture referenced above, such as "Fire Captain (insert name) is a member of the San Jose Fire Department. Use of their rank, job titles, and photographs in uniform does not imply or represent endorsement by the San Jose Fire Department or the City of San Jose," does that allow for the posting/printing of the photo?

No. Such a disclaimer is allowed but state law prohibits City employees from participating in any political activities in uniform. City policy (see attached Campaign Activities memo, page 3 of 11) prohibits City employees from participating

in political activities while on duty. See also the attached email regarding Campaign Restrictions under the City's Administrative Policy, which is under the purview of the City Manager: "City employees cannot campaign or advocate for or against candidates or ballot measures **while wearing a City uniform or other clothing that would identify you as a City employee, or while wearing a City badge.**"

4. Is the candidate allowed to write their occupation as "San Jose Fire Captain" or "SJ Fire Captain" on the ballot? If not, how can they convey their occupation to the voters on the ballot?

California Elections Code Section 13107 governs ballot designations:

[https://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=ELEC&division=13.&title=&part=&chapter=2.&article=](https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=ELEC&division=13.&title=&part=&chapter=2.&article=). You may use the ballot designation "City of San Jose Fire Captain". More information can be found on the Ballot Designation Worksheet from the California Secretary of State: <https://elections.cdn.sos.ca.gov/ballot-designation-worksheet/ballot-designation-worksheet.pdf>

5. Is there anything else the candidate should be aware of regarding their occupation with the city of San Jose?

Please see the attached detailed Campaign Activities memo, and the attached email regarding Campaign Restrictions from the City's Office of Employee Relations to all City employees.

6. Is the candidate allowed to post photos of themselves in generic firefighter gear, without the city of San Jose's logo on it?

California Government Code Section 3206 provides that "No officer or employee of a local agency shall participate in political activities of any kind while in uniform." [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=GOV&sectionNum=3206](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV&sectionNum=3206). See also the attached email regarding Campaign Restrictions under the City's Administrative Policy, which is under the purview of the City Manager: "City employees cannot campaign or advocate for or against candidates or ballot measures **while wearing a City uniform or other clothing that would identify you as a City employee, or while wearing a City badge.**" Photos of yourself, a City employee in a City uniform or on duty, cannot be used for your campaign. Photos of yourself in generic firefighter gear (not City or any public employer uniform) and not on duty, would be permitted.

7. Is the candidate allowed to post photos of themselves in uniform or wearing clothing with the city's fire department logo on it from public events, such as speaking events?

No. California Government Code Section 3206 provides that "No officer or employee of a local agency shall participate in political activities of any kind while in uniform." [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=GOV&sectionNum=3206](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV&sectionNum=3206). See also the attached email regarding Campaign Restrictions under the City's Administrative Policy, which is under the purview of the City Manager: "City employees cannot campaign or advocate for or against candidates or ballot measures **while wearing a City uniform or other clothing that would identify you as a City employee, or while wearing a City badge.**" Photos of yourself, a City employee in a City uniform or on duty, cannot be used for your campaign.

8. May the candidate post photos of themselves in San Jose Fire Department clothing and gear if the logo and city name is blurred out? Thank you.

No. California Government Code Section 3206 provides that "No officer or employee of a local agency shall participate in political activities of any kind while in uniform." [https://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=GOV&sectionNum=3206](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV&sectionNum=3206). See also the attached email regarding Campaign Restrictions: "City employees cannot campaign or advocate for or against candidates or ballot measures **while wearing a City uniform or other clothing that would identify you as a City employee, or while wearing a City badge.**" Photos of yourself, a City employee in a City uniform or on duty, cannot be used for your campaign, even if the logo and city name is blurred out.

**Campaign Guidance**  
**Office of the City Attorney**  
**City of San José**

200 East Santa Clara Street, 16th Floor Tower  
San Jose, CA 95113  
Office No: (408) 535-1900  
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**From:** [webrequests@sanjoseca.gov](mailto:webrequests@sanjoseca.gov) <[webrequests@sanjoseca.gov](mailto:webrequests@sanjoseca.gov)>  
**Sent:** Saturday, November 6, 2021 12:01 PM  
**To:** PublicRecordsRequest <[PublicRecordsRequest@sanjoseca.gov](mailto:PublicRecordsRequest@sanjoseca.gov)>  
**Subject:** \*NEW SUBMISSION\* Request Public Records

[External Email]

## Request Public Records

**Submission #:** 1284481  
**IP Address:** 45.131.194.247  
**Submission Date:** 11/06/2021 12:00  
**Survey Time:** 10 minutes, 58 seconds

You have a new online form submission.

Note: all answers displaying "\*\*\*\*\*" are marked as sensitive and must be viewed after your login.

**About the Right to Access Records:** The public's right to access information concerning the conduct of the people's business is a fundamental and necessary right. A record shall not be withheld from disclosure unless it is clearly exempt under applicable laws, or unless the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

**An email address is required so that we may respond to your request.**

### Email

[info@biendoan.com](mailto:info@biendoan.com)

### Full Name

### Company/Organization/Agency

### Address

,

**Phone**

**Fax**

**Records Requested**

Other: General Information

**Records Requested**

If a candidate is a city employee, specifically a firefighter, what are the requirements and guidelines for posting photos online and in print for the following situations: 1. Is the candidate allowed to place photos of themselves from their job on campaign social media, printed materials, website, and more? 2. Is the candidate allowed to place photos of themselves from their job (actively on duty) in uniform on social media, printed materials, website, and more? 3. If the candidate places a disclaimer on any picture referenced above, such as "Fire Captain (insert name) is a member of the San Jose Fire Department. Use of their rank, job titles, and photographs in uniform does not imply or represent endorsement by the San Jose Fire Department or the City of San Jose," does that allow for the posting/printing of the photo? 4. Is the candidate allowed to write their occupation as "San Jose Fire Captain" or "SJ Fire Captain" on the ballot? If not, how can they convey their occupation to the voters on the ballot? 5. Is there anything else the candidate should be aware of regarding their occupation with the city of San Jose? 6. Is the candidate allowed to post photos of themselves in generic firefighter gear, without the city of San Jose's logo on it? 7. Is the candidate allowed to post photos of themselves in uniform or wearing clothing with the city's fire department logo on it from public events, such as speaking events? 8. May the candidate post photos of themselves in San Jose Fire Department clothing and gear if the logo and city name is blurred out? Thank you.

**Requests must be focused and reasonably describe the record(s) being sought. Try to be as clear as possible when requesting records and put date limits on your request. Offer any search clues you can and if you are informed that the records you are requesting do not exist, discuss alternatives with the City staff to whom you are making the request.**

**Preferred Method of Delivery**

Email

Thank you,  
**City of San Jose**

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**This is an automated message generated by Granicus. Please do not reply directly to this email.**

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

**Vanni, Mark**

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**From:** Employee Relations  
**Sent:** Thursday, October 15, 2020 10:07 AM  
**To:** #All City Employees  
**Subject:** Reminder Regarding Campaign Restrictions  
**Attachments:** Memorandum on Campaign Activities 2015.pdf

**REMINDER: CAMPAIGN RESTRICTIONS**

**IF YOU SUPERVISE EMPLOYEES WHO DO NOT RECEIVE CITY E-MAIL, PLEASE PRINT OUT AND DISTRIBUTE THIS E-MAIL TO THOSE EMPLOYEES.**

With the November elections approaching, we are reminding all City employees about the legal restrictions on political activities of public employees. As stewards of the public's trust, we cannot use public resources – including, but not limited to, City staff time, funds, or equipment – for any campaign activities or advocacy. As individual citizens we can and should participate in our democratic processes, but this must be done in a personal and private role.

Here are some specific guidelines that we must follow as City employees:

- **While on City time, employees cannot campaign or advocate for or against any candidates or ballot measures.** This includes all local, State, and Federal elections.
- City employees cannot campaign or advocate for or against candidates or ballot measures **while wearing a City uniform or other clothing that would identify you as a City employee, or while wearing a City badge.**
- **On their own time, City employees may campaign or advocate** for or against candidates or ballot measures, but **cannot use their City job titles while campaigning** or in campaign materials for candidates.
- City employees **cannot use public funds to print or distribute any type of campaign materials.** This includes the prohibition of the use of City publications, regardless of form, to disseminate any type of campaign information, as well as the use of City stationary, letterhead, or other City materials to advocate for a candidate or position on a ballot measure.
- City employees **cannot use the City mail routing system to distribute any type of campaign materials.**
- The use of **City equipment** – including, but not limited to, telephones, cellular phones, computers, copiers, or fax machines – **for campaign activities is prohibited.**
- **No City employee may directly or indirectly solicit a campaign contribution from another City employee** unless the solicitation is also made to a significant segment of the public, which may include employees of the City.
- Use of **City websites or City-sponsored social media accounts for campaign activity is prohibited.** This includes placing any links on City websites or City-sponsored social media accounts that direct people to campaign-related materials, communications, social media accounts, or websites.

Additional information about campaign guidelines please refer to the attached memorandum, or you can contact the Office of Employee Relations or the City Attorney's Office if you have questions.

Thanks,

**Office of Employee Relations**



# Memorandum

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**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** CAMPAIGN ACTIVITIES

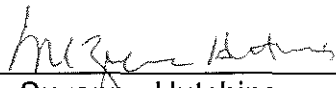
**DATE:** December 7, 2015

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Attached for your information, please find a summary and memorandum regarding campaign activities which was previously distributed by this Office. There have been no changes to the guidelines.

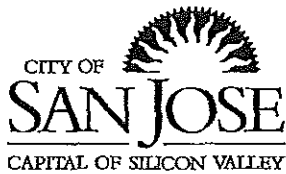
Please call if you have questions.

RICHARD DOYLE  
City Attorney

By:   
Suzanne Hutchins  
Senior Deputy City Attorney

Attachment

cc: Norberto Dueñas  
Toni Taber  
Senior Staff



# Memorandum

**TO:** Honorable Mayor and City Council      **FROM:** Richard Doyle,  
City Attorney

**SUBJECT:** Campaign Activities      **DATE:** January 24, 2012

Attached is our comprehensive memo dated January 24, 2012, about the legal guidelines for the use of public funds for ballot measures and City Council candidate elections, use of City facilities and the rights and restrictions of public officials and employees. We are also including this summary of the memo, below, for quick reference.

## Ballot Measures and Candidate Elections

The City may not make expenditures on communications that:

1. "Expressly advocate" for or against a ballot measure or a clearly identified candidate;

OR

2. Unambiguously urge a particular result in an election.

"Express Advocacy" means using certain words or phrases, such as:

- "Vote For" or "Vote Against"
- "Elect" or "Defeat"
- "Support" or "Reject"
- "Cast Your Ballot" or "Sign Petitions For"

A communication "unambiguously urges a particular result in an election" if it:

1. Is clearly campaign material activity, such as:
  - Bumper stickers
  - Billboards



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- Door-to-door canvassing
- Mass media advertising, such as television and radio spots

OR

2. Can reasonably be characterized as campaign material or activity and is not a fair presentation of facts serving only an informational purpose. Whether a communication can reasonably be characterized as campaign material requires a case-by-case analysis and the context in which the communication is made. The "style, tenor and timing" are the criteria used to evaluate the communication. Other factors to be considered are whether the communication:

- Is funded from a special appropriation related to a ballot measure rather than a general appropriation
- Is consistent with the normal communication pattern for the City (i.e. flyers included in utility bills)
- Is consistent with the style of other communications issued by the City
- Uses inflammatory or argumentative language

### City Facilities

Any person or organization may use the areas of City facilities that are open to the public (e.g. libraries and community centers) for campaign activity. Depending on the activity, some campaign-related events in a City park may require a permit.

If use of a City facility usually requires a fee, permitting free use of a City facility for a campaign-related event should be carefully scrutinized. For example, a candidate's forum, where all of the candidates running for particular office are invited, would probably be a permissible event if all of the City funded communications were completely objective and access to the event was open to all. Since assuring unbiased communication and open access necessarily means controlling political speech, the only way to assure that an event does not run afoul of the prohibition on public funding and the First Amendment is for the City to hold the event itself. On the other hand, if a person or organization rents a City facility on the same terms and conditions as any other person or organization, and no City funds are spent on publicizing or staffing the event, then the City cannot control the content of the event and the event can be overtly partisan.

Furthermore, in any City meeting subject to the Brown Act, the public must be allowed to speak on any item under the "Open Forum" or "Public Comment" section of the agenda. The City cannot prevent these public comments even if they constitute express advocacy of a particular candidate.

### **City Officials and Employees**

City officials and employees may:

- Participate in radio and television debates where both sides are heard;
- Respond to questions about the City or a Councilmember's position by members of the public or the press; and
- Campaign for or against a ballot measure on their own time, away from City premises.

City officials and employees may not:

- Use any City staff, telephones, computers, copiers, fax machines or stationery for campaign activity;
- Use public funds for printing or distributing a campaign-related publication or pamphlet;
- Use City publications as a means of disseminating campaign-related information;
- Use City mail routing to distribute campaign-related materials even though the materials are prepared outside of the City;
- Participate in political activities while in uniform; and
- Directly or indirectly, solicit a political contribution from an officer or employee of the City with knowledge that the person is employed with the City unless the solicitation is also made to a significant segment of the public which may include employees of the City. (Violation of this prohibition is a misdemeanor.)

### **Penalties**

City officials can be held personally liable for authorizing the improper expenditure of public funds for campaign purposes. City officials are held to a "standard of due care" which means that an official who fails to exercise "reasonable diligence" in authorizing the expenditure of public funds is subject to liability. Reasonable diligence will be evaluated by taking such factors as the following into account:

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- Whether the impropriety was obvious or not;
- Whether the official had notice of the improper nature of the expenditure;
- Whether the official relied on legal advice.

The unauthorized expenditure of public funds can also result in criminal sanctions under Penal Code Section 424. A conviction under this section is a felony and results in disqualification from holding public office in the future.

RICHARD DOYLE  
City Attorney

By *Lisa Herrick*  
Lisa Herrick  
Sr. Deputy City Attorney

cc: Debra Figone  
Richard Keit  
Dennis Hawkins  
Senior Staff.



# Memorandum

TO: HONORABLE MAYOR  
AND CITY COUNCIL

FROM: Richard Doyle,  
City Attorney

SUBJECT: Campaign Activities

DATE: January 24, 2012

The purpose of this memo is to remind you about the legal guidelines for the use of public funds for ballot measures or and City Council candidate elections, use of City facilities and the rights and restrictions of public officials and employees.

## ANALYSIS

### I. Use of Public Funds for Ballot Measures or Election Campaigns

#### A. The General Rule

Although the City has broad discretion to make public expenditures, as a governmental agency, the City is prohibited from spending public funds for communications that promote a partisan position in an election campaign unless the expenditure is explicitly permitted by law. A public agency may not make expenditures that mount a campaign on behalf of the passage or defeat of a ballot measure or election, of a particular candidate, and communications that expressly advocate for or against a ballot measure or candidate are explicitly prohibited. This applies even when the Council has placed a measure on the ballot or the measure directly relates to a City program.

California Government Code Section 54964(a) provides that "an officer, employee, or consultant 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." "Expenditure" is defined in Section 54964(b) as the use of local agency funds for "communications that expressly advocate the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters."

#### B. Permissible Activities

##### 1. Ballot Measures

The City may use publicly funded communications to provide impartial information about the subject matter of a ballot measure, but only if the communication provides a "fair presentation of facts" and is informational rather than promotional. A fair presentation must make full disclosure of the advantages, disadvantages and

HONORABLE MAYOR AND CITY COUNCIL

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consequences so that voters can make an informed choice. Any such communication will be judged in terms of its "style, tenor, and timing."

According to the California Supreme Court in *Vargas v. City of Salinas* (2009) 46 Cal.4<sup>th</sup> 1, a "fair presentation of facts" does not require that the public entity include a forum in its communications for alternative viewpoints if it does not already do so. However, if a communication is argumentative in tone, if it advocates a position or if it is likely to offend those on the opposite side of the issue, it may be prohibited.

The Court noted in *Vargas* that a public entity is not precluded from expressing an opinion about the merits of a measure so long as public funds are not expended to mount a campaign. The Court explained that the potential danger to the democratic process is not presented when a public entity simply informs the public of its opinion on the merits of a pending ballot measure or the impact on the entity that passage or defeat of the measure is likely to have. Rather, the threat to the fairness of the electoral process arises when public funds are devoted to campaign activities favoring or opposing such a measure.

A review of the facts in *Vargas* is instructive. The Salinas city council responded to a ballot measure that aimed to eliminate the city's utility use tax, the source of 13% of the city's revenues, by issuing the following communications, all of which related to the reduction and elimination of city services, programs and facilities that the city council voted to implement should the measure be approved in the election:

- a. Material posted on the city's official website, including minutes from council meetings, a report by the city manager setting forth the finance department's analysis of the financial impact of the measure and recommended program reductions, city department slide presentations, and a report by city staff responding to alternative implementation plans advanced by proponents of the measure;
- b. A one-page document, made available to the public at the city clerk's office and in public libraries, which described the measure and listed services that the city council identified for elimination or reduction if the measure were to pass; and
- c. Articles in the regular quarterly municipal newsletter, mailed to all city residents, which contained information similar to that in the one-page document, as well as frequently asked questions about the utility use tax and further information about proposed service cuts.

The Court found the above communications to be informational rather than campaign communications, and set forth the following factors for consideration:

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- a. The information conveyed generally involved past and present facts (such as how the utility use tax was enacted, what proportion of the budget was produced by the tax and how the city council had voted to modify the budget in the event that the measure were to pass);
- b. The communications avoided argumentative or inflammatory rhetoric and did not urge voters to vote in a particular manner or to take other actions in support of or in opposition to the measure; and
- c. The information provided and the manner in which it was disseminated were consistent with established practice regarding use of the city's website and regular circulation of the city's official newsletter.

Other examples of activities that have been deemed to be permissible with regard to ballot measures include:

- Participation by City employees and officials in radio and television debates where both sides are heard;
- Responses to questions about the City or a Councilmember's position by members of the public or the press; and
- City officials and City employees campaigning for or against a ballot measure on their own time and away from City premises.

## 2. Candidates

As stated above, Government Code Section 54964 prohibits the use of public funds "to support or oppose...the election or defeat of a candidate." The law does not specify any permissible activities with regard to the use of public funds on campaigns for political office, as it does with ballot measures. As such, City expenditures, including the free use of City facilities for political events, should be carefully scrutinized to be sure that the expenditure cannot be construed in any way to be partisan.

For example, a candidate's forum, where all of the candidates running for a local seat are invited, would probably be a permissible event if all of the City funded communications were completely objective and access to the event were open to all. Since assuring unbiased communication and open access necessarily means controlling political speech, the only way to assure that an event does not run afoul of the prohibition on public funding and the First Amendment, is for the City to hold the event itself. On the other hand, if another organization rents a City facility on the same terms and conditions as any member of the public, and no City funds are spent on noticing or staffing the event, then the City cannot control the content of the event and the event can be overtly partisan.

Furthermore, in any City meeting subject to the Brown Act, the public must be allowed to speak on any item under the "Open Forum" or "Public Comment" section of the agenda. The City cannot prevent these public comments even if they constitute express advocacy of a particular candidate.

### C. Prohibited Activities

Since Government Code Section 54964 prohibits the use of public funds for communications that expressly advocate support or opposition to a ballot measure or election contest, any communication that advocates a position, is argumentative in tone, or is likely to offend those on the opposite side of the issue may be considered express advocacy.

Furthermore, in *Vargas*, the Court stressed that merely avoiding express words of advocacy is not sufficient to demonstrate that a public entity did not use public funds to "unambiguously urge a particular result." Therefore, when evaluating whether a communication is a prohibited campaign communication or merely informational, a public entity should apply the "style, tenor and timing" test, including the factors set forth in *Vargas*, before expending public funds for that purpose.

For example, the public entity could overwhelm the voters by using public funds to finance bumper stickers, posters, television and radio advertisements and other campaign material containing messages that, while eschewing the use of express advocacy, effectively promote one side of an election. The Court explained that, if the City of Salinas had posted large billboards around the city prior to the election stating in capital letters, "If measure O is approved, six recreation centers, the municipal pool and two libraries will close," it would defy common sense to suggest that the city had not engaged in campaign activity.

Other specifically prohibited activities include:

- Having an employee do campaign work on City time. For example, employees should not advocate or urge a position on a bond measure or a candidate to a citizen during work time;
- Using City telephones, computers, copiers or fax machines for communications that expressly advocate a position on a ballot measure or candidate;
- Using public funds for printing or distributing a publication or pamphlet that expressly advocates a position on a ballot measure or candidate;

- Using City publications as a means of disseminating information in a manner that expressly advocates a position on a ballot measure or candidate;
- Making written materials available on City premises, including libraries and community centers, in a manner that expressly advocates a position on a ballot measure or candidate;
- Using City staff to write campaign speeches for ballot measures or candidates;
- Using City mail routing to distribute materials that expressly advocate a position on a ballot measure or candidate even though the materials are prepared outside of the City;
- Preparing or sending out press releases in a manner that expressly advocates a position on a ballot measure or candidate;
- Using City stationary in a manner that expressly advocates a position on a ballot measure or candidate.
- Using public funds to produce bumper stickers, billboards, posters, television and radio advertisements and other campaign material, regardless of whether such media expressly advocate a position.

#### D. Penalties

City officials can be held personally liable for authorizing the improper expenditure of public funds for campaign purposes. City officials are held to a "standard of due care" which means that an official who fails to exercise "reasonable diligence" in authorizing the expenditure of public funds is subject to liability. Reasonable diligence will be evaluated by taking such factors as the following into account:

- Whether the impropriety was obvious or not;
- Whether the official had notice of the improper nature of the expenditure;
- Whether the official relied on legal advice.

The unauthorized expenditure of public funds can also result in criminal sanctions under Penal Code Section 424. A conviction under this section is a felony and results in disqualification from holding public office in the future. See *People v. Battin* (1978) 77 Cal.App.3d 635 (member of the Board of Supervisors of Orange County convicted



for authorizing county payments of salary to his office staff for work performed on his campaign for Lieutenant Governor).

Additionally, under new FPPC Regulation 18420.1, which went into effect on February 7, 2009, expenditures by local agencies of \$1,000 or more for communications that expressly advocate for or against a ballot measure also trigger campaign finance reporting requirements which may, in turn, subject the agency to administrative fines or other penalties under the Political Reform Act.

## **II. Prohibition on Political Activities of City Commissioners**

In addition to the state law prohibition on use of public funds for political activity, City Council Policy 0-36 also prohibits City Boards, Commissions and Committees from endorsing any candidate and taking any independent position on any ballot measure. An individual Commissioner may not use his or her Commission title in making personal political endorsements. Additionally, Boards, Commissions and Committees cannot be involved in gathering or disseminating information on candidates or campaigns (e.g. surveys, public debates, mailings, etc.)

## **III. Prohibition on Political Activities of Public Employees**

The following state law prohibitions apply specifically to activities of City and Agency employees:

- A public employee may not participate in political activities while in uniform. (Government Code Section 3206.)
- An employee of a public agency may not, directly or indirectly, solicit a political contribution from an officer or employee of that agency with knowledge that the person is employed with the agency unless the solicitation is also made to a significant segment of the public which may include employees of the agency. Violation of this prohibition is a misdemeanor. (Government Code Section 3205.)

## **CONCLUSION**

Neither the City nor Agency may expend any funds in support or opposition to any ballot measure or for any campaign for public office. Because the penalties are severe, it is important to exercise extreme care in providing information or engaging in activities which may be construed as promoting a partisan position in an election campaign.

HONORABLE MAYOR AND CITY COUNCIL

Re: Campaign Activities

January 24, 2012

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Please feel free to call this Office with any questions you may have about these requirements and to distribute this memo to all employees.

RICHARD DOYLE

City Attorney

By



Lisa Herrick

Sr. Deputy City Attorney

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Richard Keit  
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