

October 19, 2011

Jeffrey R. Epp
City of Escondido
201 N. Broadway
Escondido, CA 92025

Re: Your Request for Advice
Our file No. A-11-184

Dear Mr. Epp:

This letter responds to your request on behalf of several mayors in the area north of San Diego for advice regarding the gift and campaign provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) This letter is based solely on the provisions of the Act. The Commission does not give advice on other areas of law, including applicable local laws.

Additionally, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

QUESTION

Whether mayors of six cities in the San Diego area receive gifts or contributions when a private citizen underwrites the costs for them to each write a letter to their constituents in a community newspaper.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

The payments for the newspaper advertisements do not constitute a gift and in most circumstances do not constitute a contribution, but the mayors should be aware that the content of their letters in the newspaper advertisements could constitute a contribution.

FACTS

You represent five city attorneys representing the cities of San Marcos, Escondido, Carlsbad, Oceanside, and Vista (“the Cities”) and specifically the Cities’ mayors who would like to participate in a mayoral forum in a local newspaper. The newspaper, *The Paper*, serves the North San Diego county area and was approached by a local businessman who wanted to underwrite the costs of a full-page forum for local mayors. On this page in *The Paper*, each of the mayors from the Cities has the opportunity to draft a letter to his or her constituents informing them of local news, happenings, and updates.

The local businessman pays *The Paper* \$50 per participating mayor (the price varies depending on the amount of participation on any given week). This amount is a reduction in *The Paper*’s usual advertising rates. The mayors will typically address their communities on local issues and will not discuss elections or campaigns.

ANALYSIS

Contributions

The term “contribution” is defined by Section 82015 and Regulation 18215 to include “any payment made for political purposes.” (Regulation 18215(a).)

Under Regulation 18215(a), a payment is made for political purposes if it is:

- (1) For the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or
- (2) Received by or made at the behest of the following or any agent thereof:
 - (A) A candidate;
 - (B) A controlled committee;
 - (C) An official committee of a political party, including a state central committee, county central committee, assembly district committee or any subcommittee of such committee; or
 - (D) An organization formed or existing primarily for political purposes, including, but not limited to a political action committee established by any membership organization, labor union or corporation.

Regulation 18215(c)(4) explains that payments made at the behest of a candidate are not contributions when they are made for a communication by the candidate or any other person, if the communication:

- “(i) Does not contain express advocacy;
 - “(ii) Does not make reference to the candidate’s candidacy for elective office, the candidate’s election campaign, or the candidate’s or his or her opponent’s qualifications for office; and
 - “(iii) Does not solicit contributions to the candidate or to third persons for use in support of the candidate or in opposition to the candidate’s opponent.”
- (Regulation 18215(c)(4).)

The letters in *The Paper* will contain information of interest to each mayor’s community. Based on your facts, the letters will not be for a political purpose and will not contain express advocacy, refer to elective office, or solicit contributions. The payments from the local businessman to *The Paper* to underwrite the cost of publishing the letters would therefore not be a contribution to any of the mayors.

Additionally, the definition of “contribution” also excludes certain payments, including: “A payment made by any broadcasting station (including a cable television operator, programmer or producer), website, or a regularly published newspaper, magazine or other periodical of general circulation, including any Internet or electronic publication, that routinely carries news and commentary of general interest, for the cost of covering or carrying a news story, commentary or editorial.” (Regulation 18215(c)(8).)

To the extent that *The Paper* covers any of the cost of the advertisements, there is no contribution by *The Paper* to the mayors because *The Paper* fits squarely into the exception in Regulation 18215(c)(8). As long as the topics in the mayors’ letters are informational from the mayors to their constituents and do not engage in express advocacy, there is no contribution under the Act.

Express Advocacy

For purposes of the Act, “express advocacy,” as used above, refers to “a communication that ‘expressly advocates’ the nomination, election or defeat of a measure if it contains express words of advocacy such as “vote for,” “elect,” “support,” “cast your ballot,” “vote against,” “defeat,” “reject,” “sign petitions for,” or, within 60 days prior to an election in which the candidate or measure appears on the ballot, the communication otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election. (Regulation 18225(b)(2), copy enclosed.)

Based on your facts, none of the mayors’ letters that will be published in *The Paper* will engage in this type of speech. We only make this point to make you aware of the confines of the exceptions to the definition of contribution. This result would be different if any of the mayors were engaged in speech that, as described above, unambiguously urges a particular result in an election.

Gifts

The Act defines “gift” in Section 82028(a) as “any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.”

The articles in *The Paper* that you have described confer no personal benefit on any of the mayors. The letters they are writing and *The Paper* is publishing relate to information of use to their constituents. Our advice would be different if the mayors were using the space to promote their own businesses or other personal interests. Here, however, the payments to *The Paper* for space to publish the mayors’ letters do not confer a personal benefit and do not create a gift under the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl

LEGAL DIVISION ASSIGNMENT SHEET

TRACKING NUMBER: 11343

ITEM DESCRIPTION	
X	Advice Letter [No. 11-184 , Requestor Epp, Jeffery R.]
	Opinion Request [No. _____, Requestor _____]
	Regulation Project [No. _____]
	Public Records Act Request [No. _____, Requestor _____]
	Committee Termination Extensions/Reopening [Requestor _____]
	Conflict of Interest Code Exemption Request [Requestor _____]
	Other [_____]

DUE DATE 10/27/11

ASSIGNED TO: Heather

Chair Review	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	YES	NO		

		TRACKING/APPROVAL				
Received by FPPC on: 09/28/11		Date to Assignee: 09/28/11				
REVIEWERS	DATE TO REVIEW	1st APPROVAL & DATE (Incl. Regulation Prenotice Memos)	DATE TO REVIEW	2nd APPROVAL & DATE (Incl. Regulation Notices)	DATE TO REVIEW	FINAL APPROVAL & DATE (Incl. Regulation Adoption Memos)
Proofed						
Senior						
Assistant General Counsel						
General Counsel	ZPM					
Executive Director						
Chair						