MEMORANDUM OF LAW

DATE: June 28, 1990

TO: Ruth Ann Hageman, Director, Citizens Assistance

FROM: City Attorney

SUBJECT: City Telephone Directories and Proposition 73 "Mass Mailing" Restrictions

This is in response to your memorandum of May 31, 1990, in which you ask about the legal propriety of including photographs of the Mayor and Councilmembers in the City Offices Telephone Directory (Directory) in light of Proposition 73 "mass mailing" restrictions.

BACKGROUND

The Directory contains photos not only of elected officials, including the Mayor, City Council, and City Attorney, but also of several appointed City officials, including the City Manager, Assistant and Deputy City Managers, Department Directors and Deputy Directors, among others. By telephone on June 25, 1990, you informed me that over 4,000 Directories are distributed to City officers and employees annually. The distribution of Directories within the City has been the practice for years. Well over 500 per calendar year, but less than 200 per calendar month, are also distributed upon request to members of the public, who are charged the costs of their production and distribution. The City does not advertise the availability of the Directory and the requests by the public are unsolicited.

APPLICABLE LAW

The portion of Proposition 73 that applies to the question is codified at Government Code section 89001, which reads: "No newsletter or other mass mailing shall be sent at public expense." The term "mass mailing" is defined in Government Code section 82041.5 to mean "over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry."

According to Fair Political Practices Commission (FPPC) regulation 18901, as amended in December 1989, these statutes are interpreted to preclude a local government's using public money to produce and distribute materials that "feature" an elected official, if more than 200 substantially similar items are sent in a calendar month, except those sent in response to an

unsolicited request. 2 Cal. Code Regs. section 18901(a). (A copy of that regulation along with the City Attorney's recent report to the Mayor and Council regarding the regulation is attached for your reference.) An item "features" an elected official if it contains, among other things, the elected official's photograph. 2 Cal. Code Regs. section 18901(c)(2).

The FPPC expressly interprets the term "mass mailing" to exclude telephone directories which include "the names of elected officers as well as individuals in the agency sending the mailing, where the name of each elected officer and individual listed appears in the same type size, typeface, and type color." 2 Cal. Code Regs. section 18901(b)(8). This exclusion, however, does not cover telephone directories that include photographs of elected officials. 2 Cal. Code Regs. section 18901(b)(8). There is, however, a general exception to the term "mass mailing" for intra-agency communications that are sent in the normal course of business to employees, officers, deputies, and other staff. 2 Cal. Code Regs. section 18901(b)(4).

ANALYSIS

In the present instance, since the Directory contains photographs of elected officials, the express "mass mailing" exemption for telephone directories under regulation 18901(b)(8) will not apply to permit unlimited distribution of the Directory, because that exemption only applies where there are no photographs of elected officials in the telephone directory. The fact the Directory also contains photographs of appointed officials and employees does not trigger operation of the exemption. Photographs of elected officials are simply not permitted if the "telephone directories" exemption (regulation 18901(b)(8)) is to apply.

The 4,000 copies of the Directory distributed to City officers and employees, however, would appear to be a form of intra-agency communication within the meaning of the express exemption in 2 Cal. Code Regs. section 18901(b)(4). Therefore, the 4,000 copies of the Directory distributed to City officers and employees appear to be exempted from the prohibition established by Government Code section 89001.

It must still be decided whether the 500 copies of the Directory distributed to the public comes within the prohibition in Government Code section 89001 and 2 Cal. Code Regs. section 18901(a).

We find that these 500 copies may be distributed to the public, even though they contain photographs of City elected officials, for three reasons. First, fewer than 200 copies per

month are distributed to the public per calendar month. (Regulation 18901(a)(4).) Second, the public fully reimburses the City for the cost of the production and distribution. (Regulation 18901(a)(3)(A) and (B).) Therefore, no public money is spent on the production and distribution of these directories. Third, the public asks for copies of the Directory and the City does not advertise its availability. (Regulation 18901(a)(4).) Therefore, distribution of the 500 copies of the Directory to the public per calendar year does not fall within the "mass mailing" prohibition of Government Code section 89001 and 2 Cal. Code Regs. section 18901(a), even though the Directory contains photographs of elected City officials.

JOHN W. WITT, City Attorney
By
Cristie C. McGuire
Deputy City Attorney

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