



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
1102 Q Street • Suite 3000 • Sacramento, CA 95811  
(916) 322-5660 • Fax (916) 322-0886

November 14, 2019

Colin Burns  
Attorney for City of Fountain Valley  
Fountain Valley  
453 S Glassell St  
Orange, CA 92866

Re: Your Request for Informal Assistance  
**Our File No. I-19-145**

Dear Mr. Burns:

This letter responds to your request for advice on behalf of the City of Fountain Valley (the "City") regarding the campaign and advertisement provisions of the Political Reform Act (the "Act.")<sup>1</sup> Please note we do not advise on any other laws concerning the use of public resources by government officials for campaign activities such as Government Code sections 8314 and 54964 and Penal Code section 424. Because your questions are general in nature, we are treating your inquiry as a request for informal assistance.<sup>2</sup>

Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

### QUESTION

May City staff "tag" City Council members on posts displayed on the City's Facebook page where the tag: identifies the person by name in the post as a link to that person's Facebook profile page, may place the post on the person's profile page and appear on their friends' news feeds, and also send the person tagged a notification with a link to the post?

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<sup>1</sup> 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.

<sup>2</sup>Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

## CONCLUSION

Although it may not be prohibited for the City to “tag” the City Council members on Facebook under the Act, this scenario raises several issues both within and outside the purview of the Act. We can only address the issues set forth under the Act and suggest seeking further advice from the Attorney General with regards to Government Code sections 8314 and 54964 and Penal Code 424 to ensure full compliance.

## FACTS AS PRESENTED BY REQUESTER

You are the attorney for the City. The City staff maintains a Facebook page and posts updates regarding City activities on the City’s Facebook page. Council members have inquired as to whether they can be “tagged” by staff on posts on the City Facebook page. When “tagged,” they will receive a notification on their own Facebook page. This notification will help them remain aware of what is posted on the City’s page and allow them to stay informed on the latest news and events regarding the City. This request seeks assistance for prospective actions only. No person has been “tagged” on the City’s Facebook page prior to seeking formal written advice. In a subsequent email, you stated that the sole purpose of the “tagging” on Facebook is to keep the City officials informed as to news and events and there are no intentions to use the “tagging” of officials on Facebook for campaign activities. In a follow-up conversation, you stated this request specifically relates to tagging by staff of the City’s five City Council members. The City Council members may maintain personal, campaign, and professional Facebook accounts, and the “tagging” may result in links to and posts to any of these accounts.

## ANALYSIS

### Use of Public Funds

Section 85300 restricts the use of public funds by providing that “[n]o public officer shall expend, and no candidate shall accept any public moneys for the purpose of seeking elective office.” Regulation 18530 strictly interprets Section 85300 to prohibit only “the payment of public moneys, in the form of matching funds or cash subsidies, for the public financing of elections.” (Regulation 18530.) As indicated by the facts provided, the City intends to tag public officials in news and events occurring in the City; therefore, the City’s Facebook page is neither a matching fund nor a cash subsidy for the public financing of elections, and thus is not subject to Section 85300 or Regulation 18530.

### Mass Mailing Sent at Public Expense

Tagging a City Council member will result in electronic messages sent by City staff to members of the public. Section 89001 states: “No newsletter or mass mailing shall be sent at public expense.” A “mass mailing” means over two hundred substantially similar pieces of mail sent in a calendar month, unless it is sent in response to an unsolicited request, letter or other inquiry. (Section 82041.5, Section 89002(a)(4).) A mailing is prohibited by Section 89001 if all of the following criteria are met: (1) the item sent is a tangible item, such as a written document, videotape, record, or button and is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box; and (2) the item either (A) features an agency-

affiliated elected officer or (B) includes the name, office, photograph, or other reference to the elected officer and is prepared or sent by the affiliated agency in cooperation, consultation, coordination, or concert with the elected officer. (Section 89002.)

Past advice letters have interpreted the Section 89001(a)(1) requirement that the mailing be a “tangible item such as a written document” to not apply to a distribution over the Internet. (See for example, *Footo* Advice Letter, No. A-98-114 [the prohibition in Section 89001 did not apply where a committee sought to link the school district’s web site to a web page that advocated for the passage of a bond measure because a distribution over the Internet is not a distribution of a tangible item.]) The *Footo* Advice Letter, *supra*, and others, noted that the language, at that time found in Regulation 18901 and later codified in Section 89002 in 2017, did not address distribution by electronic means. Applied to these facts, because Facebook is an online forum, the messages would not be considered a tangible item for purposes of Section 89002, and thus Facebook tagging would not be considered a mass mailing.

### Contributions

You indicate that staff tagging of City Council members could result in links and postings to the elected official’s Facebook accounts, including personal or campaign accounts. This raises the issue of whether the City’s tagging will result in a contribution to the elected officials as candidates. We now discuss how the City’s tagging of elected officials may result in a contribution under the Act.

Section 82015(a) of the Act defines “contribution” as “a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, except to the extent that full and adequate consideration is received or if it is clear from the surrounding circumstances that the payment is not made for political purposes.” We have previously issued advice relating to city sponsored websites stating that professional services, including the creation and maintenance of a website for a candidate could conceivably result in the contribution from the city to the candidate. (*Peterson* Advice Letter, No. A-99-013; *Footo* Advice Letter, No. A-98-114; *Smith* Advice Letter, No. A-03-177.) On the other hand, where a forum is made available to all candidates for the same office, no contribution results. (*Mancuso* Advice Letter, No. A-94-370.) So long as each candidate has the opportunity to be included in the display on the city’s website, adding candidates to the website will not result in a contribution. It is not necessary that all candidates take advantage of the opportunity, so long as the opportunity is provided on the same terms and conditions to all candidates. (*Smith* Advice Letter, No. A-03-177; *Mancuso* Advice Letter, No. A-94-370; and *Morten* Advice Letter, No. A-88-293.) We advise the City to take steps to ensure a fair and balanced approach for each tagging of a candidate, otherwise the use of the forum could potentially result in a contribution.

Further, a contribution includes the payment of public moneys by a local government agency for the communication to the public that expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election and the communication is made at the behest of the affected candidate. (Section 82015(b)(3).) Regulation 18215(c)(4) states that a contribution does not result where a communication made at the behest of an elected official does not contain express advocacy; does not make reference to the elected

official's candidacy, election campaign, or qualifications for office or those of his or her opponents; and does not solicit contributions related to the campaign. (See *van de Kamp* Advice Letter, No. A-04-130 [city's post of a mayor's welcome message on its web site does not result in a contribution so long as it meets the requirements of Regulation 18215(c)(4).] You indicate that the Facebook tags of the Council members may result in links to the elected official's Facebook campaign or personal account. Where those accounts include express advocacy, reference to a candidacy, or urge a particular result in an election, the tagging may result in a contribution under Section 82015(b)(3) and Regulation 18420.<sup>3</sup> that the local government agency would be required to disclose if it qualifies as a committee under Section 82013.<sup>4</sup>

If the City intends to engage in any campaign activities on its Facebook account, we recommend seeking further advice before doing so. We also recommend the City seek guidance from the Attorney General prior to the City tagging elected public officials on Facebook.

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

Sincerely,

Dave Bainbridge  
General Counsel



By: <sup>for</sup> Katelyn Greene  
Counsel, Legal Division

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<sup>3</sup> Regulations 18420 and 18423 establish when an employee's salary or personal services may be considered a contribution or expenditure.

<sup>4</sup> A person, including a state or local governmental agency, qualifies as a committee if the person (1) accepts contributions of \$2,000 or more, (2) makes independent expenditures of \$1,000 or more, or (3) makes contributions of \$10,000 or more. (Section 82013.)