

June 22, 2005

SDEC Informal Advice Letter No. IA05-04

Councilmember Scott Peters
San Diego City Council, District 1
202 "C" Street, 10th Floor
San Diego, CA 92101

Re: Request for Advice Regarding Protocols for Constituent Contacts During
Campaigns

Dear Councilmember Peters:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated May 24, 2005. You are seeking advice from the Ethics Commission regarding the requirements and prohibitions of the City's Ethics Ordinance [ECCO] which is contained in the San Diego Municipal Code [SDMC]. Your inquiry pertains to procedures in your Council office regarding contact with constituents during City elections. Your letter asks general, hypothetical questions, and accordingly we consider your letter to be a request for informal advice.

In your letter, you provide examples of office protocols for contacts with constituents during campaign seasons, and you ask the Commission to review these protocols and provide guidance to ensure compliance with local governmental ethics laws. As you know, the Ethics Commission does not provide advice regarding past actions. Accordingly, we cannot address the specific scenarios that presented themselves during the 2004 election cycle which are detailed in your letter. Instead, we will address the general policies that you have outlined in your letter and provide advice concerning the appropriateness of such policies in light of the provisions of the City's Ethics Ordinance. You have also asked the Commission to provide suggestions for improvement. Please be advised that the Commission does not provide suggestions or general observations regarding policies and whether or how they could be improved. Instead, the Commission evaluates proposed future actions and provides advice regarding whether such actions comply with the letter and intent of local governmental ethics laws.

BACKGROUND

In general, the three protocols you intend to follow in your Council office in the event that you run for another elective office in the future can be summarized as follows:

Proposed Protocol One: In response to constituent inquiries regarding your campaign for elective office, your Council staff will provide the telephone number, email, or street address for the campaign office, and will direct constituents to contact the campaign staff. In response to inquiries that are partly related to City business and partly related to an ongoing campaign for elective office, your staff will explain that they can provide information related to the business of the Council office, but they cannot address campaign issues. They will then ask constituents to contact the campaign office directly.

Propose Protocol Two: In response to inquiries regarding campaign fundraising, your Council staff will tell the requestors that they cannot discuss campaign fundraising in the office, and then direct them to the campaign staffer or consultant in charge of fundraising.

Proposed Protocol Three: If your Council office receives inquiries regarding campaign literature, your staff will explain that they are only permitted to address questions regarding your position on issues facing the City and your past actions with respect to such issues. Other inquiries will be directed to campaign staff. You might educate your Council staff on the contents of campaign literature distributed by an opponent so that they will be prepared to respond to inquiries related to City business (such as a factual account of your voting record on a particular issue). In some instances, you may actually provide an opponent's campaign literature to your staff for use in responding to constituent inquiries concerning City business.

ANALYSIS AND CONCLUSIONS

Although you did not specify the provision of local governmental ethics laws at issue, it appears that the following provision in the City's Ethics Ordinance is relevant to your questions concerning protocol for Council staff during an election season:

It is unlawful for any *City Official* to engage in campaign-related activities, such as fund-raising, the development of electronic or written materials, or research, for a campaign for any elective office using *City* facilities, equipment, supplies, or other *City* resources.

San Diego Municipal Code section 27.3564(b).

The term "*City Official*" is defined in SDMC section 27.3503 and clearly includes Councilmembers and members of their staff. Although the phrase "campaign-related activities" is not defined, several examples of campaign-related activities are provided in the section. Specifically spelled out are [campaign] fundraising, development of electronic or written

[campaign] materials, and [campaign] research. This is not an exhaustive list. Instead, these examples are intended to provide guidance so that the intent of the ordinance may be understood.

In light of the prohibitions on using City resources for campaign activities, we conclude as follows with respect to the protocols you have proposed for future campaign seasons:

Proposed Protocol Number One: This protocol will allow your Council staff to respond to inquiries regarding the business of the City and your policies as a Councilmember, but will also require your staff to direct all campaign-related inquiries to campaign staff. This protocol apparently complies with the letter and intent of San Diego Municipal Code section 27.3564. It should be noted, however, that the effectiveness of the protocol can only be assessed in a fact-specific context. In other words, in order to determine if the proposed actions of your Council staff will actually comply with the Ethics Ordinance, the Commission would need to review the specific constituent inquiry and the specific proposed response. In general, however, a policy that requires City Officials to separate policy issues from campaign issues is advisable.

Proposed Protocol Number Two: This protocol will require your Council staff to direct all campaign fundraising inquiries to campaign staff. Because fundraising is clearly a campaign-related activity that falls within the prohibitions codified in San Diego Municipal Code section 27.3564, this protocol is appropriate and is actually required in order to ensure compliance with the City's Ethics Ordinance.

Proposed Protocol Number Three: This protocol is very difficult to evaluate in an absence of underlying facts. As discussed above, in general it is clearly advisable for Council staff to draw a clear distinction between policy issues and campaign issues, and to refer all campaign-related inquiries to campaign staff. However, the use of campaign literature to help City staff respond to constituent inquiries is potentially problematic, especially if the campaign literature also addresses issues that are not directly related to City business. Because we do not have any specific facts to analyze, we can only advise you to generally refrain from using campaign literature (both yours and your opponent's) to educate your staff regarding issues that might be raised by constituents. While it is certainly appropriate to advise your Council staff that a particular policy issue has been raised by an opponent so that they in turn can provide information regarding your policy positions to constituents, the use of campaign literature for this purpose would invite potential violations of the Ethics Ordinance. For example, it would likely violate local law for a City Official to directly refer to an opponent's campaign literature and then criticize aspects of the literature. In addition, it would clearly be inappropriate for your Council staff to gather information that would subsequently be used to prepare a campaign response (either verbally or through advertisements).

In summary, your proposed protocols appropriately recognize the need to separate City business from campaign activity, which is clearly the intent behind San Diego Municipal Code section 27.3564. However, because it is very easy for the line between City business and campaign activity to become blurred, we strongly encourage you and your staff to contact our office with requests for formal or informal advice when a fact-specific situation presents itself.

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Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

Stacey Fulhorst
Executive Director