

Advocacy Do's & Don'ts

Lunch Lessons with CLiC

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I. Introduction. There are advocacy steps that local government/libraries and library nonprofits can take during an election season. The purpose of these materials is to generally outline what is allowed or disallowed under applicable law.

II. Guidance for Libraries/Local Governments.

A. The Fair Campaign Practices Act, Section 1-45-101, *et seq.*, C.R.S. ("FCPA") and Article XXVIII of the Colorado Constitution govern public entities' use of taxpayer funds in a campaign for the election of an individual to public office or regarding any election question.

B. The policy behind the restrictions is that there need to be limits on using taxpayer funds since some taxpayers may support a certain ballot question and some may not, and may or may not desire their funds to be used to support the opposing view.

C. Applies to the State and Political Subdivisions (e.g., cities, counties, library districts, referred to collectively here as "Government").

D. Basic Prohibitions of Section 117 of the Act.

1. The Act prohibits governmental bodies from making a contribution to a campaign for public office, and from expending public moneys to urge electors to vote for or against any ballot issue or referred measure. The rule prohibits Government employees or officials to use public moneys to produce campaign materials designed to increase public support for a particular ballot measure (e.g., library mill levy increase), whether it is a question placed upon the ballot by the Government or it is a Statewide ballot measure.

2. "Use of public money" includes the use of publicly owned facilities or equipment, including vehicles, meeting rooms, phones, fax machines, copiers, computers, internet access or newsletters. None of these tools should be used to create campaign materials, nor should work email accounts be used for campaign messages. No violation of the Act occurs if both supporters and opponents of an issue have equal access to publicly owned equipment and facilities on the same terms and conditions. Therefore, library facilities and equipment that are available to all persons may be used for campaign purposes.

E. Effective Date of Prohibitions.

1. There is a specific time at which the FCPA prohibitions take effect. governmental entities shall not make any contribution to campaigns for or against any “local ballot issue that has been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that has had a title fixed pursuant to that section.” Therefore, the prohibitions do not take effect until a ballot measure has been submitted for a title to be fixed and an election has been ordered. If neither of these requirements has been met, a Government is free to expend public moneys on the measure because the prohibitions do not apply.

2. If a Government obligates public moneys to send a communication to the voters regarding a measure to be proposed on the ballot before the prohibitions take effect, and the Government does not pay the bill until after the Act becomes effective, the Government will be in violation of the Act. *See Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140 (Colo. App. 2004).

3. Example: a school district may not post information on its website advocating the passage of a bond issue that it has referred to voters. *See Wimsatt v. Jefferson County Public Schools, District R-1, Agency Decision, Case No. OS 2004-018.*

F. Exceptions to Prohibitions.

1. *Limited Expenditures of Public Moneys by Policy-Makers (Trustees)*

a. Governmental employees who have policy-making responsibilities may expend public moneys to express their opinions. This may be in the form of letters, telephone calls, or other activities if the amount spent does not exceed \$50.00. This provision, however, is intended to help public officials avoid technical violations of the FCPA as opposed to explicit authority to spend funds for a campaign.

b. Officials do not exceed the \$50 exception by spending their own money to advocate for or against an issue.

2. *Responses to Unsolicited Questions*

An employee of the public entity may respond to questions about any ballot issue as long as that employee or public entity did not solicit the question. An employee may agree to write a newspaper article supporting a proposed ballot measure if the newspaper has asked the employee to do so. A Government agency may request information on a proposed issue from another Government agency and an employee may respond. However, the public entity should keep track of all unsolicited requests for proof if the responses are reported to the Secretary of State as a violation. An ALJ opinion held that a Government employee could answer questions, posed at a public meeting where he was invited to speak about how a proposed issue would affect his department so long as that employee did not urge a yes or no vote.

3. *Distributing a Factual Summary*

The governing body may distribute a factual summary regarding an issue that will appear on the ballot within its jurisdiction, which must include arguments both for and against the measure in a balanced and even-handed manner. The summary must not contain a conclusion or opinion in favor of or against any particular issue. Even if a factual summary contains both arguments for and against and does not state: “vote for/against,” if it favors one position, it will likely violate the FCPA. See *Bruce v. School District 11, Agency Decision, Case No. OS 2008-0030*. Although the summary should present reasonably framed, legitimate positions of both viewpoints, it does not have to include the best arguments available to either side or necessarily reflect the proponents’ input. See *Bruce v. City of Colorado Springs, Agency Decision, Case No. OS 2003-005*. The pro and con summaries do not have to be of equal length. Even if the fact sheet does not specifically urge a voter to vote, in order to fit into the factual summary exception, language should be included that urges a voter to “decide for yourself.” We recommend that you have any FCPA-related material, particularly factual summaries reviewed by legal counsel.

4. *Government Resolution of Support*

A governmental entity may pass a resolution taking a position of advocacy on a particular issue. The governmental entity may also report the passage of or distribute such resolution through established, customary means, by which information about other proceedings of the agency is regularly provided to the public. For example, a resolution may be posted on the agency’s website if it regularly posts other information to the public by that means. If the agency regularly does mailings to constituents, it may mail the resolution. However, any accompanying language with the resolution must be neutral and impartial with regard to the measure in question even though the resolution is not. Extraordinary methods of distribution, such as paid advertising or a one-time newsletter may not be used.

5. *Use of Personal Time and Money*

Officials and employees of a governmental entity may always expend personal funds, make contributions, or use personal time to campaign for or against any issue. For example, a city council member can write a letter to the editor, provided it was done on personal time and with their own funds. For an example of a Denver City Council member letter to the Denver Post regarding Statewide ballot measures, see www.denverpost.com/opinion/ci_15534770. Employees may not work on a campaign during working hours while on the payroll of the Government. This includes using work email. Use a personal email account for communicating regarding a campaign issue. Maintain records to show that Government time or money was not used for campaign purposes.

G. Violation Reporting and Penalties.

1. A person who believes that a violation of the FCPA has occurred may file a written complaint with the Secretary of State, which is then referred to an Administrative Law Judge, whose decision may be reviewed by the Colorado Court of Appeals.

2. A violation of the FCPA regarding use of Government funds may be subject to the penalties set forth in Section 9(2) and 10(1) of Article XXVIII of the Colorado Constitution or any appropriate order or relief, including ordering the offending party to reimburse the governmental entity. Section 10(1) of Article XXVIII authorizes a penalty anywhere between double and five times the amount of the violation.

H. ***Governmental Entity Dos/Don'ts Recap***

1. **Do:**

- a. Adopt Resolution.
- b. Prepare Factual Summary.
- c. Answer unsolicited questions and otherwise respond to citizen requests for information using factual summary as a reference (so all members of the governmental entity are singing from the same song sheet).
- d. A Board member or employee can spend up to \$50 of public moneys in the form of letters, telephone calls to express his or her opinion.
- e. Elected officials can express his/her on an election issue, including at a public meeting, so long as it is a regular meeting and not convened for the purposes of the opinion.
- f. A Government employee can use his/her own time and money to campaign.
- g. Allow use of meeting rooms in accordance with library policy, on an equal basis to groups on either side of an issue.

2. **Don't:**

- a. Use public funds or publicly owned facilities or equipment, including vehicles, meeting rooms, phones, fax machines, copiers, computers, work email, internet access, newsletters or bulk mail permits to urge a vote in favor of or against the issue, even when the cost is reimbursed. However, public meeting rooms can be used if made available on an equal basis. Employees should use their personal home email and computer for campaign activities.
- b. Allow others who are advocating a position on any issue before the electorate to use the above resources (For example, Friends of the Library; EXCEPTION: equal basis meeting rooms, above).

c. Require employees to work on an election issue (other than on the “factual summary”). Employee time spent on campaign activities is limited to preparation and dissemination of the “factual summary” and to responding to unsolicited questions.

d. Accept donations or contributions for use by the Government in connection with any election; EXCEPTION: Friends of the Library volunteers can volunteer their time to urge a yes or no vote, subject to the guidelines for nonprofits.

e. Release contact information of employees or patrons, regardless of whether the group seeking the information supports or opposes the election, unless the employee, user or person has given express consent to the release of such information for purposes of the election or as part of a directory that is otherwise available to the public.

III. Guidance for Library Nonprofits.

A. Nonprofits, such as Friends of the Library groups generally are aware that they cannot be partisan (i.e., working for a political party or candidate), but this is often interpreted as suggesting they cannot engage in any campaigning activities. This is not true. Nonprofits can take a position on an election issue provided it is nonpartisan and does not exceed the limits set by the Internal Revenue Service.

B. 501(c)(3) nonprofit organizations are considered under IRS regulations to be lobbying when they attempt to influence legislation (1) by contacting or urging the public to contact legislative members or (2) by advocating the adoption or rejection of legislation. There is a three part test to determine if a specific activity constitutes lobbying:

1. the principal purpose of the communication is to influence legislation;

2. there is a reference to a specific piece of legislation; and

3. a point of view is expressed. In the case of 60-61-101, the lobbying rules became applicable at the time the first petition signature is circulated for signature. *See extraction from a 2004 document authored by Toni Larson, Executive Director, Independent Higher Education of Colorado, and Pete Maysmith, Executive Director, Colorado Common Cause.*

C. Specific rules apply to either direct lobbying (influencing legislation by communicating with legislators) or grassroots lobbying (influencing legislation by affecting the opinion of the general public). The rules for direct lobbying are more generous than for grassroots lobbying. *Id.* In the case of initiatives, members of the public are acting as legislators, so it is considered direct lobbying. *Id.*

D. Useful References for Library Nonprofits:

1. *Library People – Friends of Colorado Libraries “Guide to Legislative Activities by Charitable/Philanthropic Groups,”* downloadable from <http://bad3bad4libraries.blogspot.com/> or by contacting www.librarypeople.org.

2. *Colorado Nonprofit Association – “Speak for Yourself Nonprofit Advocacy Toolkit,”* downloadable from www.coloradononprofits.org/lobbying%20toolkit.pdf.

E. *Nonprofit Entity Dos/Don’ts Recap*

1. Do:

- a. Adopt a resolution establishing your organization’s position.
- b. Prepare a letter or flyer communicating the impacts of the measures on your organization.
- c. Write letters to the editor addressed to local leaders.
- d. Participate in campaign efforts.

2. Don’t:

- a. Participate in partisan campaign efforts. If an issue is clearly a partisan issue, exercise caution in 1(b) above.

B. Exceed IRS limits for lobbying activity. See <http://www.irs.gov/charities/article/0,,id=163394,00.html>.

IV. Conclusion. Provided that libraries’ (as local governments) actions fall within one of the exceptions to the FCPA, they can take a position and communicate to their staff and constituents, possible impacts related to proposed ballot measures. Library nonprofits may also lobby and advocate for the causes and constituents they represent provided they avoid partisanship and do not exceed applicable IRS limits for lobbying expenditures.