

KAUFMAN LEGAL GROUP

A PROFESSIONAL CORPORATION

October 9, 2018

Direct: (916) 498-7715

VIA U.S. MAIL & E-MAIL

Heather McLaughlin, City Attorney
City of Benicia
City Hall
250 East L. Street
Benicia, CA 94510

Re: Poll Conducted by EMC Research and Research America

Dear Ms. McLaughlin:

This letter is in response to your letter to Research America and EMC Research dated October 5, 2018. In that letter, you requested two items of information. First is a list of the polling questions used by the professional polling firms for the poll in question. Second is an “itemized invoice showing the dates, times and number of calls made.” You also requested that any future “push” polls that meet the definition of independent expenditure comply with Benicia City Chapters 1.32, 1.40 and 1.42.

As I mentioned in my October 1, 2018 letter to you, the public opinion research poll referenced in your e-mail was conducted by Research America and EMC in full compliance with applicable federal, state and local laws, which do not require campaign advertisement disclaimers on telephone polls. EMC Research and Research America are professional polling companies that conduct surveys based on scientific data and modeling to provide information to campaigns about voter preferences and attitudes. They do not engage in campaign advertising communication—which is exactly what so-called “push” polls are. Contrary to local press reports, the poll at issue was not a “push” poll.

Valero, although under no legal obligation to do so, has identified itself as the entity that commissioned the poll. The purpose of the poll was to gather feedback from local voters on issues relevant to the upcoming election. It involved a robust sample methodology, designed to achieve a random sampling of likely voters from within the City of Benicia. The survey was conducted September 6 through September 20, among a random selection of 256 likely voters from within the City of Benicia. This period lies outside the 45-day period referenced in Benicia Municipal Code Chapter 1.40.041.

There are no federal, State or local laws that require disclaimers on polls, whether conducted telephonically or by electronic mail. As previously noted, a recent opinion issued by the California Fair Political Practices Commission (FPPC) at their September 2018 hearing confirmed this.¹ Polls are not considered campaign communications or “mass mailings” and, thus, do not require campaign advertising disclosures. The Benicia Municipal Code provisions referenced in your letter do not apply to polls. Those provisions, Chapters 1.36, 1.40 and 1.42, only apply to campaign communications. As the FPPC has opined, a poll is not a campaign communication.

Because the poll in question here was not a campaign communication, the professional polling companies are under no obligation to provide you with the information you requested. Polling questions and invoices for polls that show the date, time and number of calls made are confidential, and not subject to compelled governmental disclosure. While the City ordinance may regulate disclosures for campaign communications, they do not regulate polls. Nor should they as a matter of public policy. Polls are not conducted to influence voters; rather, they are targeted to a limited cross-section of voters to form as accurate a representation of the electorate as possible.

Further, the First Amendment of the United States Constitution protects the right of those who paid for the poll to engage in political discourse. Any restrictions on this right by government are examined under an exacting legal standard that prohibits government from passing laws that impermissibly restrict political speech without a showing of a compelling interest.² Polls are an important part of the process of determining whether and how to potentially engage in political speech. Requiring public disclosure of poll funders, questions and other details impermissibly restricts the ability of individuals to engage in political speech and association. *See, e.g., Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (on petition for mandamus, blocking discovery order seeking to compel disclosure of internal campaign materials); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 418 (D. Kans. 2009) (finding privilege against disclosure of internal communications regarding political activities).

This requested disclosure of information is particularly inappropriate where the City is making the request and the poll explored subject responses to statements regarding City Council candidates whose campaigns are being personally supported by current members of the Council. The City should not place itself in the position of immersing itself in the back and forth of electoral politics by attempting to force the public disclosure of confidential poll information. Nor should City resources be used to engage in these activities. These actions serve as a chill on free speech and association rights set forth in the Constitution.

For the above-listed reasons, Research America and EMC Research respectfully decline your request for further information regarding the poll. If the City chooses to issue a subpoena or take

¹ See <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/AgendaDocuments/General%20Items/2018/September/43%20draft%20Kaufman%20Opinion.pdf> Option “B”

² See *Buckley v. Valeo* 424 U.S. 1 (1976); *Citizens United v FEC* 558 U.S. 310.

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other legal action, the companies stand ready to vigorously defend their rights. Finally, since the two polling firms do not engage in campaign communications, we do not expect that any future polls will implicate the disclosure and disclaimer requirements of the Benicia Municipal Code.

Please contact me immediately should you have any further questions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Gary S. Winuk', with a large, sweeping flourish at the end.

Gary S. Winuk

GSW:VCC