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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Germond, Commissioners Cardenas, Hatch, and Hayward

From: Dave Bainbridge, General Counsel
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Subject: Review of Denial for an Opinion: Toskr Inc.; Regs. 18320 and 18321

Date: January 7, 2019

PROCEDURAL SUMMARY

Toskr, Inc., is a text messaging service provider for political campaigns through its platform “Relay.” On September 27, 2018, through counsel, Mr. David Mitrani, Toskr, Inc. requested the following general opinion¹ and finding from the Commission:

“ . . . we ask that the Commission find that messages sent through Relay-whether disseminated by volunteers, paid staff, or paid texters- do not require a disclaimer.”

In making this request, Toskr, Inc. stated that its committee clients were able to provide the required disclaimers, also referred to as “disclosures,” on the text message advertisements, but that doing so made “recipients significantly less responsive” to the text messages.

Acting Executive Director Loressa Hon denied this request on October 11, 2018, finding that the request “raises no substantial question of interpretation, and therefore, requires only a routine reply more appropriately made by staff.” (Regulation 18320(f)(2).) Text messages sent by a committee for the purpose of supporting or opposing a candidate or ballot measure meet the definition of an “advertisement” under Government Code Section 84501² and are subject to the disclosure requirements for electronic media advertisements under Section 84504.3(a). Further, none of the Act’s disclosure exemptions were applicable to text message advertisements.

¹ While the request included examples of sample text messages, no material facts regarding a particular Toskr, Inc. client were presented. Government Code Section 83114 provides that any person may request the Commission to issue an opinion with respect to his duties under the Political Reform Act. The opinion provides future immunity to the requestor so long as the material facts are as stated in the opinion request, and that person acts in good faith reliance on an opinion issued to him.

² Unless otherwise indicated, all further statutory references are to this code.

On November 29, 2018, Mr. Mitrani, requested a review of the denial for an opinion, and to present on an adjusted question to the Commission. For purposes of this denial review, we examine the denial as it applies to this question, set forth below, and the applicable sections as amended effective January 1, 2019, noted below.

QUESTION BEFORE THE COMMISSION

Is the following question appropriate for an opinion request under Regulation 18320:

Does the Section 84504.3 disclaimer requirement on volunteer-sent text messages paid for by a committee using Toskr’s platform, Relay, fall under the impracticability exemption envisioned in Regulation 18450.1(b)?³

RECOMMENDATION AND COMMISSION ACTION

Toskr, Inc.’s request does not raise a substantial question of interpretation of Section 84501, or of Section 84504.3. Advertisements sent as text messages to the general public must carry the required language as a hyperlink, or if impracticable then a hyperlink alone, to a committee’s web site where the information required under Sections 84502, 84503 and 84506.5 are provided for the voter to review. (Section 84501 and Section 84504.3.) Toskr, Inc. acknowledges that its committee clients are capable of providing the required disclosures on text message advertisements sent through the Relay platform. Regulation 18320(f)(2) provides that a request may be denied where the question raises no substantial question of interpretation. Therefore, the denial of this opinion request is appropriate.

If a majority of the Commission identifies a substantial question of interpretation, it may approve this opinion request, rescind the denial, and follow the procedures for issuing an opinion set forth in Regulation 18322 and 18324. If the Commission finds that this request is properly denied, it may affirm the denial.

BACKGROUND

Peer-to-Peer Text Message Advertisements

Toskr, Inc.’s Relay service allows a committee’s staff, volunteers, or paid texters to upload a phone list of voters, send a pre-set message, and then proceed to have text message replies go back and forth. The text messages can be sent to anyone’s cell phone without the necessity of the person opting-in to receive messages.⁴ Recipients see a localized 10-digit phone number provided by Relay, not the texter’s personal number. This is known as peer-to-peer or “P2P” texting. In its request, Toskr, Inc. states:

³ Regulation 18450.1(b) provides that a committee has the burden of proof when claiming that the inclusion of a required disclosure in an electronic media communication is impracticable or would severely interfere with the committee's ability to convey the intended message under Section 84501(a)(2)(E) [recently redesignated as subsection (G), as noted further below].

⁴ <https://relaytxt.com/how-it-works/> viewed December 5, 2018.

Person-to-person text messaging, including platforms such as Relay, are a fairly new technological phenomenon in politics. The ability for individuals to converse with others in a structured way has allowed committees to effectively convey their political advocacy messages to the general public.

Toskr, Inc.'s web site states the P2P texting is “a deceptively simple, incredibly powerful way to reach your target audience.”⁵ If a recipient responds, the committee's sender can engage in a conversation through the Relay platform, often using pre-set responses. The text messages may include questions and responses, such as an intent to attend an event or vote for a candidate, and the response data may be gathered. Relay requires human action to text the pre-set telephone numbers, and it does not allow for multiple messages to be sent automatically.

In its opinion request, Toskr, Inc. notes that one of its California committee clients provided the “Who funded this ad?” language and hyperlink in its text message advertisements related to the June 2018 primary elections. Toskr, Inc.'s essential objection to the text message advertisement disclosure requirements relates to the impact of the information on recipients. Toskr, Inc. requests relief from providing the required disclosures to recipients, stating:

The addition of a disclaimer would fundamentally change the nature of the interaction between message sender and recipient. Reframing a person-to-person communication as an “ad” will make recipients significantly less responsive. This concern was borne out during the June 5th California primary, when at least one Toskr client added disclaimers to their messages – that client saw an approximately 50% reduction in responses to their California messages as compared with identical messages sent in other jurisdictions where they did not add a disclaimer.

ANALYSIS

Regulation 18320 provides that an opinion request may be denied where the question raises no substantial question of interpretation.⁶ These requests may be more appropriately replied to by staff. In this instance, the requestor highlights the newer technological methods employed by committees to reach and persuade voters. However, Toskr, Inc.'s question does not raise a substantial question of interpretation of Section 84501, or of Section 84504.3 and its applicability to text message advertisements.

Questions of interpretation are present when statutory language is unclear or susceptible to more than one reasonable construction. As noted in the Acting Executive Director's denial, the

⁵ *Ibid.*

⁶ A request may also be denied if it is covered by regulations, for lack of standing, if the question is hypothetical, asks for an interpretation of the Act in general terms, or lacks material facts.

applicable law is clear: an advertisement, as defined under Section 84501,⁷ sent by text message must contain the disclosures required by Section 84504.3.⁸ An advertisement is a general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures. (Section 845041(a).)

Text messages sent to members of the general public do not meet the exclusions from the definition of advertisements. The Legislature has excluded from this definition, and thus exempted from the disclosure requirements, specific types of communications where, generally speaking, either the medium makes it impracticable or where the recipient is likely aware of the source of the communication. (Section 84501(a)(2).)⁹ Thus, in the first category,

⁷ Section 84501(a)(1) states: “Advertisement” means any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures.”

⁸ Section 84504.3(a) and (b), applicable to text message advertisements states:

(a) An electronic media advertisement, other than an email message or Internet Web site, paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall comply with both of the following:

(1) Include the text “Who funded this ad?” in a contrasting color and a font size that is easily readable by the average viewer.

(2) Such text shall be a hyperlink to an Internet Web site containing the disclosures required by Sections 84502, 84503, and 84506.5 in a contrasting color and in no less than 8-point font.

(b) Notwithstanding subdivision (a), the text required by paragraph (1) of subdivision (a) is not required if including the language would be impracticable. In such circumstances the advertisement need only include a hyperlink to an Internet Web site containing the disclosures required by Sections 84502, 84503, and 84506.5.

(Note: this section was amended by Assembly Bill 2155, c. 777 of 2018, effective January, 2019.)

⁹ Section 84501(a)(2) states: “Advertisement” does not include any of the following:

(A) A communication from an organization, other than a political party, to its members.

(B) An electronic media communication addressed to recipients, such as email messages or text messages, from an organization to persons who have opted in or asked to receive messages from the organization.

(C) Any communication that was solicited by the recipient, including, but not limited to, acknowledgments for contributions or information that the recipient communicated to the organization.

(D) A campaign button smaller than 10 inches in diameter; a bumper sticker smaller than 60 square inches; or a small tangible promotional item, such as a pen, pin, or key chain, upon which the disclosure required cannot be conveniently printed or displayed.

(E) Wearing apparel.

(F) Sky writing.

communications through mediums such as apparel, sky writing, small campaign buttons or pens, are excluded. (Section 84501(a)(2)(D)-(F). Recognizing the changing nature of technology and mediums used for campaign advertisements, the Legislature has also excluded:

(G) Any other type of communication, as determined by regulations of the Commission, for which inclusion of the disclosures required by Sections 84502 to 84509, inclusive, is impracticable or would severely interfere with the committee's ability to convey the intended message due to the nature of the technology used to make the communication.¹⁰

The second category of exclusions, where the source is likely known to the recipient, includes certain communications from organizations to members, or where the recipient solicited the communications. (Section 84501(a)(2)(A), and (C).) Similarly, where an electronic media communication is addressed to the recipient, and the recipient has opted in, or asked to receive the communication from the organization, this communication may also be excluded. (Section 84501(a)(2)(B).) Toskr, Inc.'s request does not present any facts indicating that these text messages involve an "opt-in" process. The messages appear to be sent unsolicited to pre-determined lists of targeted voters. Absent a disclosure, the recipients are unaware of the entity orchestrating the "personal" text messages.

Toskr, Inc.'s request regards electronic media communications sent as text messages by a committee volunteer to the general public for the purpose of supporting or opposing a candidate or ballot measure. These text message advertisements do not meet any of the exclusions from the definition of advertisement in Section 84501(a)(2).

Although the requestor's adjusted question appears to raise the exception to the definition of advertisement under Section 84501(a)(2)(G), where the disclosure is "impracticable" or "severely interferes with a committee's message," this is not truly a matter at issue.¹¹ Toskr, Inc.'s clients have provided the disclosures on text message advertisements. It is not impracticable. Nor has it been argued that the required disclosure severely interferes with the committee's message due to the nature of the technology. Toskr, Inc.'s objection here is that the disclosure "will make recipients significantly less responsive" to the text message advertisement. This does not present a substantial question of interpretation for the Commission. Providing

(G) Any other type of communication, as determined by regulations of the Commission, for which inclusion of the disclosures required by Sections 84502 to 84509, inclusive, is impracticable or would severely interfere with the committee's ability to convey the intended message due to the nature of the technology used to make the communication.

Note: this section was amended effective January, 2019 by Assembly Bill 2155, c. 777 of 2018, to add (a)(2)(B), (C) and amend former (E) and redesignate it as (G). See fn. 10.

¹⁰ Previously designated Section 84501(a)(2)(E), this subsection was amended and redesignated effective January, 2019 to apply to "types of communications" rather than only "an electronic media communication." (Assembly Bill 2155, c. 777 of 2018.)

¹¹ It appears that Toskr, Inc. raises this exception due to its reference to Regulation 18450.1(b) in its revised request. See fn. 3, above.

disclosure information to the voter on advertisements is squarely the intent of the Disclose Act and Section 84504.3.

Section 84504.3 does not provide for a situation where a communication that meets the definition of advertisement under Section 84501 may be completely excepted from the disclosure requirements, as is requested by Toskr, Inc. Under Section 84504.3 a committee must include “Who funded this ad?” language in a contrasting color and easily readable font size on the advertisement as a hyperlink to the committee’s web site, where the required disclosures set forth in Sections 84502, 84503 and 84506.5 are provided for the voter. If including this language is impracticable,¹² the advertisement must include a hyperlink to the committee’s web site displaying the required disclosures. (Section 84504.3(b).) No exception exists for advertisements texted by committee volunteers, but ultimately designed and paid for by the committee.

CONCLUSION

Toskr, Inc.’s request for an opinion and finding from the Commission does not raise an issue appropriate for an opinion. It raises no substantial question of interpretation. It is, instead, an unsupported request for a broad exemption from the application of the Act’s disclosure requirements. Toskr, Inc.’s clients are ultimately responsible for compliance with the Act, and these clients may wish to seek further informal or formal advice if they are uncertain how the Act applies to their text message advertisements.

¹² “Impracticable” is defined as not practicable; incapable of being put into practice with the available means.; unsuitable for practical use or purposes, as a device or material. (See <https://www.dictionary.com/browse/impracticable> as viewed December, 4, 2018.)