
We Petition and Lobby

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March 29, 2016

Office of Governor Nikki R. Haley
1205 Pendelton Street
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Dear Governor Haley:

My name is Rudolph Caparros. I am General Manager of We Petition and Lobby. We are a company that petitions and lobbies government officials and employees within the United States with respect to a particular cause or issue.

The use of emails for petitioning government is a protected activity under the "Petition Clause" of the First Amendment of the United States Constitution and does not violate the Can-Spam Act or constitute any malicious activity.

We send emails from IP address <31.193.15.202 and 31.193.15.203>.

We are being blocked by your Webmaster from sending emails to government addresses.

I provide to you additional confirmation that we do not generate spam. Please find enclosed an August 7, 2015, Memorandum from Allan B. Gelbard, Esq.

Please help me resolve this problem, as it is causing harm and damage, and instruct your Webmaster to stop blocking our emails.

Thank you.



Rudolph Caparros

Enc.

ALLAN B. GELBARD

ATTORNEY AT LAW

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MEMORANDUM

To: We Petition and Lobby

From: Allan B. Gelbard, Esq.

Re: Opinion regarding e-mail lobbying activities.

Date: August 07, 2015

This brief memorandum addresses the First Amendment implications of lobbying government officials via their government e-mail addresses; and the applicability of various California and federal laws pertaining to the sending of e-mails to said lobbying activities.

Acquisition of Government Employee E-Mail Addresses

We Petition and Lobby's ("WPL") acquisition of e-mails to be employed in the lobbying activity have been described as follows:

1) WPL's employees are tasked with obtaining government officials' e-mail addresses from various state and governments' public facing websites.

2) The e-mail addresses obtained are intended to be only the officials' government (job) related e-mail addresses and not their personal e-mail addresses (e.g., RepJohnSmith@usagency.gov as opposed to JohnSmith@gmail.com).

3) None of the government websites include any language that prohibits the use of the e-mail addresses by and/or for citizens use in contacting their government representatives or other officials.

4) No "spiders" or "web-crawlers" are employed; no "hacking" activity is employed to obtain unauthorized access, or to exceed the otherwise authorised access¹; and no alpha-numeric predictive systems are employed to obtain otherwise protected e-mail addresses.

¹ 18 U.S.C. 1030, the federal computer fraud statute, prohibits one from "intentionally access[ing] a computer without authorization or exceed[ing] authorized access" to obtain "information from any department or agency of the United States." 18 U.S.C. § 1030(a)(2)(B)

Under such circumstances, it appears that the acquisition of government officials' e-mail addresses for the purpose of exercising the First Amendment right to petition would not, and most likely could constitutionally be found to, violate state or federal law.

Sending of E-Mails Advocating Government Action to Government Employees and Officials

The First Amendment protects the right to "petition the government for a redress of grievances." (U.S. Const. Art I) The right to petition extends to all departments of government California Motor Transport Co. v. Trucking Unlimited, (1972) 404 U.S. 508 and protects both private citizens (Gearhart v. Thorne, (9th Cir. 1985) 768 F.2d 1072 and corporations. Citizens United v. FEC, (2010) 558 U.S. 310. Rights under the First Amendment are also applicable to the states under the Fourteenth Amendment. Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, (1980) 447 U.S. 557.

As the proliferation of e-mail is a relatively recent occurrence, there are no Supreme Court opinions that hold that sending e-mails for the purpose of lobbying would be constitutionally protected under the Petition Clause. There is dicta in Rumsfeld v. Forum for Academic and Institutional Rights, (2006) 547 U.S. 47 in which the Court acknowledges that the sending of e-mails implicates First Amendment protection. There are also decisions that hold that the previous method of communication, the sending of letters (see e.g., In re IBP Confidential Business Documents Litigation, (8th Cir. 1985) 755 F.2d 1300, certiorari denied 479 U.S. 1088) is, in fact, protected activity under the Petition Clause.

As such, it is highly likely that the Supreme Court, if faced with the specific issue, would hold that use of e-mail to send otherwise lawful requests for government action, to government officials, would be protected activity under the Petition Clause of the First Amendment.

Applicability of the CAN-SPAM Act

The Federal CAN-SPAM Act (15 U.S.C. 1701 *et seq*) was promulgated to attempt to alleviate the negative effect on interstate commerce caused by sending of unsolicited commercial and/or sexually explicit bulk e-mail.

The relevant portions of the act provides "[i]t is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message that is unlawful under subsection (a) of this section.... 15 U.S.C. § 1704(b), *emphasis added*.

The Act specifically defines and limits the term "commercial electronic mail message" to mean "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." 15 U.S.C. § 7702(2)(A).

As the sending of an e-mail message to a government official for the purposes of lobbying for a change in government policy or practice under the Petition Clause of the First Amendment would not, by definition, be for the primary purpose of advertising a commercial product or service, the sending of such an e-mail would not appear to violate the CAN-SPAM Act.

Likewise, the various other CAN-SPAM requirements such as the opt-out provisions (15 U.S.C. § 7704(a)(5)); automated e-mail harvesting provisions (15 U.S.C. § 7704(b)(1)(A)); or even apparently the deceptive header prohibitions (15 U.S.C. § 7704(a)(1)(A)) may not be applicable² under CAN-SPAM as each requires that the message sent be a commercial electronic mail message.³

Other Potential Statutory Considerations

It is important to note that sending even otherwise protected petitioning e-mails could violate several other state and federal laws if the number of e-mails sent was found to be abusive, or disruptive as to the actual computer systems being employed by government officials.


For example, California Penal Code § 502(10) prohibits “[k]nowingly and without permission disrupt[ing] or cause[ing] the disruption of government computer services” 18 U.S.C. § 1030(a)(3)(C) prohibits “intentionally access[ing] a protected computer without authorization, and as a result of such conduct, cause[ing] damage and loss.”

Assuming the volume of e-mail petitions to individual accounts, and to systems in general, is not so great as to disrupt the functioning of government, it is unlikely that statutes such as these (which are more applicable to “denial of service attacks”) could be applied to otherwise lawful petitioning activities.

Conclusion

Having researched the matters presented, the undersigned is of the opinion that the use of e-mail as stated herein, for the petitioning government officials and employees, would constitute protected activities under the Petition Clause of the First Amendment. Providing that the petitioning activity was not a sham attempt to advertise the commercial availability of goods and/or services, the sending of e-mails to petition for government action would not violate the CAN-SPAM Act.

Dated August 7, 2015



Allan B. Gelbard, Esq.
Attorney at Law.

² This is not to suggest that these provisions should be disregarded as to do so may have a negative effect on the petitioner’s ability to influence the recipient, and may violate other state or federal statutes.

³ Note that a closer question would be posed if the lobbying was - in reality - an attempt to cause the government to purchase a particular commercial product. The Supreme Court has held that speech “which does no more than propose a commercial transaction” does not lose its First Amendment protection. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., (1976) 425 U.S. 748. However, even protected speech may be subject to content neutral time, place and manner restrictions. United States v. O'Brien, (1968) 391 U.S. 367 and CAN-SPAM would most likely be found to be such a permissible regulation. As such, the applicability of CAN-SPAM to e-mails sent to government officials, attempting to have the government purchase the sender’s goods and services, might still be found to implicate CAN-SPAM.