
ETHICS ADVISORY OPINION NO. ____

December 8, 2016

Whether certain newsletters would constitute political advertising for purposes of section 255.003 of the Election Code. (AOR-616)

The Texas Ethics Commission (commission) has been asked to consider whether certain newsletters would comply with section 255.003 of the Election Code.

The requestor of this opinion, who is a city officer, states that between July 1, 2011, and June 10, 2016, city officers and employees drafted or reviewed hundreds of weekly newsletters and distributed them on the city's Internet website and by e-mail to all individuals who had subscribed to the newsletter's mailing list. The requestor has submitted five selected newsletters as examples of similar newsletters that the requestor wishes to publish in the future. The newsletters are attached to this opinion as an appendix and labeled as Newsletters 1, 2, 3, 4, and 5.

The issue in this opinion is whether the requestor, as an officer or employee of a political subdivision, would violate section 255.003(a) of the Election Code by spending or authorizing the spending of public funds to create, review, or distribute newsletters that are similar to the example newsletters. That section provides, in relevant part, as follows:

An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising.

Elec. Code § 255.003(a).¹ Accordingly, the question is whether the newsletters constitute political advertising, which is defined as follows:

"Political advertising" means a communication supporting or opposing a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that:

(A) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or

(B) appears:

¹ Section 255.003 does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure. *Id.* § 255.003(b). The newsletters at issue do not address a measure, and we therefore do not address this section. A violation of section 255.003(a) is a Class A misdemeanor. *Id.* § 255.003(c).

(i) in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or

(ii) on an Internet website.

Id. § 251.001(16).²

For purposes of section 255.003 of the Election Code, the spending of public funds includes the use of a political subdivision's resources for political advertising. Ethics Advisory Opinion Nos. 532 (2015), 516 (2014), 443 (2002), 45 (1992). According to the requestor's facts, public funds were used for the creation and distribution of the example newsletters, including distribution by e-mail and on the city's Internet website. Therefore, if the requestor distributes or authorizes distribution of newsletters in a similar manner, section 255.003 of the Election Code would prohibit such distribution if the newsletters are political advertising.

The critical issue in determining whether any of the example newsletters is political advertising is whether a newsletter supports or opposes a candidate, political party, public officer, or measure. *See* Ethics Advisory Opinion No. 476 (2007). None of the newsletters at issue address a political party or measure, and we therefore consider whether the newsletters support or oppose a candidate or public officer. Whether a communication supports or opposes a candidate or public officer is a fact question and depends upon the specific content of the communication. In determining whether a communication supports or opposes a public officer, a factor is whether the communication provides information and discussion of official activities without promotion of the public officer. *Id.*

Additionally, we have adopted a rule regarding a public officer's newsletter as political advertising, which states:

For purposes of section 255.003 of the Election Code, a newsletter of a public officer of a political subdivision is not political advertising if:

(1) It includes no more than two pictures of a public officer per page and if the total amount of area covered by the pictures is no more than 20 percent of the page on which the pictures appear;

(2) It includes no more than eight personally phrased references (such as the public officer's name, "I", "me", "the city council member") on a page that is 8 ½" x 11" or larger,

² "Political advertising" does not include an individual communication made by e-mail but does include mass e-mails involving an expenditure of funds beyond the basic cost of hardware, messaging software, and bandwidth. Ethics Commission Rules § 20.1(13)(B). We assume the newsletters that were distributed by e-mail involved such an expenditure of funds.

with a reasonable reduction in the number of such personally phrased references in pages smaller than 8 ½" x 11"; and

(3) When viewed as a whole and in the proper context:

(A) is informational rather than self-promotional;

(B) does not advocate passage or defeat of a measure; and

(C) does not support or oppose a candidate for nomination or election to a public office or office of political party, a political party, or a public officer.

Ethics Commission Rules § 26.2.

Example Newsletters

The example newsletters indicate that they are statements made by the elected mayor of the city that discuss various city events, focusing on city council meetings and interaction between the mayor, city council members, and others within the community. Some of the newsletters also discuss city council elections and candidates in the elections. The newsletters include photographs of various individuals, including the mayor, city council members, and others within the community.

In applying rule 26.2 to the newsletters at issue, we note that the rule provides a safe harbor for newsletters that meet all of its standards. The newsletters marked as Newsletters 1 and 5 meet the rule's standard for photographs,³ and all of the newsletters except for Newsletter 3 meet the rule's standard for personally phrased references.⁴ However, each newsletter must also meet the rule's remaining standard: when viewed as a whole and in the proper context, the newsletter must be informational rather than self-promotional; it cannot advocate passage or defeat of a measure; and it cannot support or oppose a candidate, political party, or public officer.

Newsletter 1: In addition to other city council matters, Newsletter 1 identifies the names of candidates on the ballot in a city council election on the bottom of page 1, and continuing onto the next page. Half of the first paragraph on page three contains

³ Page 6 of Newsletter 2; pages 10, 11, and 14 of Newsletter 3; and pages 9 and 12 of Newsletter 4 include photographs of the public officer that exceed 20 percent of the page on which each photograph appears.

⁴ Page 8 of Newsletter 3 contains more than eight personally phrased references to the public officer from whom the newsletter states it was issued.

favorable statements regarding a city council member who was earlier identified in the newsletter as a candidate for re-election.⁵

Newsletter 3: In addition to other city council matters, Newsletter 3 discusses a redevelopment project that was on the city council agenda in a public meeting. Page seven includes lengthy statements regarding the city council's decision on the project, including statements in support of the project and in support of the officeholders who voted to support the project.

In our opinion, Newsletters 1 and 3, when viewed as a whole and in the proper context, support a public officer and are therefore political advertising. Accordingly, a city officer or employee may not spend public funds or authorize the spending of public funds for the newsletters or for a newsletter that similarly supports a public officer. The remaining newsletters do not support or oppose a candidate, political party, public officer, or measure and therefore are not political advertising.⁶

SUMMARY

An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. For purposes of section 255.003 of the Election Code, certain newsletters at issue in this opinion are identified as political advertising supporting a public officer and, therefore, an officer or employee of a political subdivision may not spend or authorize the spending of public funds for the newsletters or for a newsletter that similarly supports a public officer. The remaining newsletters at issue in this opinion are not political advertising.

⁵ The remaining half of the paragraph includes favorable statements regarding two other members of the community, each of whom is accorded a relatively small portion of the paragraph.

⁶ With respect to any future newsletters that the requestor of this opinion may wish to distribute, we cannot determine whether such newsletters would constitute political advertising unless such newsletters are before us.