



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 538

April 8, 2016

Whether a communication relating to a measure election complies with section 255.003 of the Election Code. (AOR-610)

The Texas Ethics Commission has been asked to consider whether a communication relating to a measure election complies with section 255.003 of the Election Code.

An emergency services district (“the district”) has ordered an election to adopt a sales and use tax in the district pursuant to chapter 775 of the Health and Safety Code. A city (“the city”) located wholly within the district would like to release certain information in the form of a brochure to answer questions posed by citizens regarding the election. The city expects to release the brochure in a variety of ways, including on its city website and its social media website(s). The city asks whether it may distribute the brochure in its entirety and distribute certain portions of the brochure individually. A copy of the brochure is attached to this opinion as [an appendix](#).

The measure on the ballot is the following:

The adoption of a local sales and use tax in Williamson County Emergency Services District No. 3 at the rate of two percent.

Section 255.003 of the Election Code provides, in relevant part, as follows:

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

(b) Subsection (a) 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.

(b-1) An officer or employee of a political subdivision may not spend or authorize the spending of public funds for a communication describing a measure if the communication contains information that:

(1) the officer or employee knows is false; and

(2) is sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure.

(c) A person who violates Subsection (a) or (b-1) commits an offense. An offense under this section is a Class A misdemeanor.

Elec. Code § 255.003. A “measure” is a question or proposal submitted in an election for an expression of the voters’ will. *Id.* § 251.001(19).

The initial question in determining compliance with section 255.003 is whether the brochure constitutes political advertising for purposes of section 255.003(a). Political advertising is defined by section 251.001(16) of the Election Code 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:

(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).

The critical question in determining whether the brochure constitutes “political advertising” is whether the information supports or opposes a measure. Whether a particular communication supports or opposes a measure is a fact question. A factor in determining whether a particular communication supports or opposes a measure is whether the communication provides information and discussion of the measure without promoting the outcome of the measure. Ethics Advisory Opinion No. 476 (2007).

The brochure at issue includes facts about the district and the city, such as the current property and sales tax rates, estimated sales tax revenue if the measure passes, certain budgetary figures for the district and the city, prospective growth figures, land use information, and how the sales tax revenue is used. The brochure also explains certain effects if the measure passes, including that the city would be unable to collect a sales tax in future areas annexed by the city within district boundaries because those areas would already be assessed the maximum local sales tax rate of two percent, which would be collected by the district.

The brochure includes information beyond a factual description of the measure. However, in our opinion, the brochure provides information and discussion of a measure without promoting the outcome of the measure and therefore does not constitute political advertising as the term is defined in section 251.001(16) of the Election Code. Therefore, the use of public funds for the brochure would not violate section 255.003(a) of the Election Code.

The second question is whether the city may separately distribute any of the individual sections of the brochure that are numbered five, six, eight, and nine. In our opinion, none of those individual sections would individually constitute political advertising. Therefore, the use of public funds to distribute those individual sections would not violate section 255.003(a) of the Election Code.

The remaining question in determining compliance under section 255.003 is whether using public funds to distribute the brochure is permissible under section 255.003(b-1). In our opinion, the information in the brochure is sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure. Therefore, for the use of public funds to distribute the brochure to be permissible under section 255.003(b-1), an officer or employee of the city authorizing the use may not do so knowing that the brochure contains information that is false.¹ Whether or not an officer or employee provides such authorization is a fact question that cannot be resolved in an advisory opinion.

SUMMARY

For purposes of section 255.003 of the Election Code, the attached brochure is not political advertising and, therefore, public funds may be used to distribute the brochure unless an officer or employee of the city authorizing such use of public funds knows that the brochure contains false information.

¹ The prohibition in section 255.003(b-1) also applies to the specific individual sections of the brochure that the city would like to distribute individually, which are numbered five, six, eight, and nine.