



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 559

March 12, 2021

ISSUE

Whether certain written communications, created by a political subdivision and related to the political subdivision's upcoming elections, constitute political advertisements for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a).

SUMMARY

When asked to consider whether a specific written communication constitutes political advertising for purposes of the Election Code, we view the communication as a whole. A significant factor in determining whether a particular communication is a political advertisement is whether it provides information without promoting a public officer or measure.

The mere fact that a communication includes an express disclaimer of support or opposition is not determinative. However, the specific communications considered in this opinion are not political advertisements for purposes of section 255.003 of the Election Code because they are entirely informational and do not include any advocacy.

FACTS

The requestor, an officer of a political subdivision, has asked the commission to consider a collection of proposed written communications related to the subdivision's general and special elections, including: (1) a 16-page brochure, (2) three posters, and (3) three social-media posts. The question presented to the commission is whether any of the written communications constitute "political advertising" for purposes of the Election Code. *See* Tex. Elec. Code §§ 251.001(16); 255.003(a).

ANALYSIS

Legal Standard:

Under section 255.003(a) of the Election Code, an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. Tex. Elec. Code § 255.003(a). “Political advertising” means, in relevant part, 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 appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id.* at § 251.001(16) (emphasis added).

“The critical issue in determining whether an advertisement is ‘political advertising’ is whether it is a communication supporting or opposing a candidate or a public officer [or a measure].” Tex. Ethics Comm’n Op. No. 476 (2007) (citing Tex. Ethics Comm’n Op. No. 102 (1992)). Whether a particular communication supports or opposes a measure is a fact question. *Id.*

A significant factor “in determining whether a particular communication supports or opposes a public officer [or measure] is whether the communication provides information ... without promotion of the public officer [or measure].” Tex. Ethics Comm’n Op. No. 476 (2007). For example, in Ethics Advisory Opinion No. 211, we concluded that an informational brochure was not a political advertisement—despite identifying the incumbent in the letterhead—because it “merely describe[d] the duties” of the public office and did not reference the incumbent “in a way that would lead one to believe that the purpose of the brochure was to support the incumbent.” Tex. Ethics Comm’n Op. No. 211 (1994).

Some of the materials include an express disclaimer of support or opposition, but that is not determinative:

As an initial matter, both the brochure and the posters include the following statement: “[t]his document is to be used for informational purposes and is not intended to advocate passage or failure of any issue on the ballot.” With respect to the brochure, this statement is included on multiple pages, printed in a larger typeface than the other text, and conspicuously placed.

However, the mere fact that a written communication contains an express disclaimer of support or opposition does not determine whether the communication constitutes political advertising. Instead, we view the communication as a whole. Tex. Ethics Comm’n Op. No. 476 (2007) (“We stress that whether a particular communication supports or opposes a candidate or a public officer is a fact question that can be answered only when the communication is viewed as a whole.”). *Id.*

When viewed in their entirety, the materials are informational and do not support or oppose any candidate or measure:

Each of the documents, even the social media posts, include at least some factual information about the ballot measures, including but not limited to the date of the election. The brochure in

particular includes pages of information about the election, including the ballot language and a detailed description of the purpose of each ballot item. For example, in describing one of the proposed bond measures, the brochure describes: (1) the amount of the proposed bond, (2) what the money would be used for, and (3) the process by which the political subdivision determined how to use the money. The brochure also describes the potential tax implications of approving general obligation bonds.

At least some of this factual information would undoubtedly affect whether certain voters will support or oppose the measures. After reading the materials, a voter may not think the bonds are necessary or that the potential tax consequences outweigh the proposed benefits. But there is a difference between advocacy and education. The Election Code does not prohibit political subdivisions from spending public funds to enable voters to make informed decisions.

However, no matter how much factual information about the purposes of a measure election is included in a communication, *any amount* of advocacy is impermissible. Violations sometimes occur when a factual explanation is accompanied by a motivational slogan or a call to action. Common examples include, “it pays to invest in the future;” “it’s time to move ahead;” “let’s build a better city;” and “show that you care about our future.” See TEC guide “A Short Guide to the Prohibition Against Using Political Subdivision Resources for Political Advertising in Connection with an Election,” at https://www.ethics.state.tx.us/resources/advertising/Bsub_adv.php.

In a similar context, we have said that a communication includes “express advocacy” if it uses words or phrases such as “vote for,” “support,” “vote against,” “defeat,” “reject,” or “cast your ballot for.” See 1 Tex. Admin. Code § 20.1(18). In our opinion, the inclusion of these or any similar words or phrases would also tend to indicate that a communication contains support or opposition for purposes of section 251.001(16) of the Texas Election Code.

Importantly, the materials considered in this opinion do not include any motivational slogan or call to action; they merely describe the purposes and potential consequences of each measure. Nor do they include any of the words or phrases included in Ethics Commission Rule 20.1(18). In fact, they say exactly the opposite. For example, when the brochure includes the ballot language on page one, it states for each measure, “VOTE FOR OR AGAINST.” Viewed within the context of the document, this is not a statement of support or opposition, but rather a factual description of the options voters will be presented with.

In conclusion, the written communications considered in this request do not constitute political advertisements. Consequently, section 255.003(a) of the Election Code does not prohibit the political subdivision from using public funds to create and distribute them.