



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 560

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*March 12, 2021*

### ISSUE

*Whether an officer of a political subdivision may use public funds to print and affix graphic designs to bicycle-sharing stations, hats, t-shirts, and water bottles that identify the public official by name, office, and include the following statement: “Funding for this Station Provided by [the requestor].”*

### 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. The mere fact that the name of a public officer appears in a written communication does not determine whether the communication constitutes political advertising, but the context and frequency with which it appears are relevant to making that determination.

The written communications considered in this opinion constitute political advertisements because they identify a public officer as such, include his name in a conspicuous manner, and promote the officer by crediting him with funding a public resource that is paid for by the political subdivision. Rather than being primarily informational, the primary purpose of the communications appears to be to support the incumbent official.

### FACTS

The requestor is an elected officer of a political subdivision. His request asks the commission whether he may use the political subdivision’s funds to print certain graphic designs and affix them to bicycle-sharing stations, hats, t-shirts, and water bottles in connection with a bicycle-sharing program that is also funded by the political subdivision. Each design includes the name of the bicycle-sharing program and the name of the office held by the requestor. Also included on each design—in smaller print, but set apart from any other text—is the following statement: “Funding for this Station Provided by [the requestor].” The statement includes both the requestor’s name and identifies the office he holds.

## 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, 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.” 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 candidate or a public officer is a fact question. *Id.*

“The mere fact that the name of a public officer or the picture of a public officer appears in a [written communication] would not determine whether the communication constitutes political advertising.” *Id.* However, the context and frequency with which the name or picture appears are relevant to making that determination. *Id.* For example, we have cautioned against “the use of personally phrased references, such as the use of the public officer’s name, in particular when those references are set apart from other text.” *Id.* However, including a public official’s name or office may not be political advertising if “the communication provides information and a discussion of official activities without promotion of the public officer.” *Id.*

We have applied this standard in several prior opinions. For example, in Ethics Advisory Opinion No. 476, we considered a four-page newsletter that included several photographs of a public officer and his printed name in a type face that was “bolded or larger than the main text.” We concluded that, “when viewed as a whole,” the newsletter constituted support of a public officer for purposes of the Election Code’s definition of “political advertising.” *Id.* (citing Tex. Elec. Code § 251.001(16)).

In Ethics Advisory Opinion No. 506, we considered a refrigerator magnet that prominently displayed an individual photograph of a public officer standing in front of a representation of a city seal, the name of the public officer in a print size that was larger than any other text on the magnet, the name of the office the public officer held, and the text “DEDICATION to (1) Timely Constituent Response! (2) Responsible City Spending! (3) Standing up for residents, businesses, and for what is right and just! Our #1 Priority.” Tex. Ethics Comm’n Op. No. 506 (2012). We concluded that the magnet constituted “self-promotion of a public officer because the name and photograph of the public officer appear in an unduly conspicuous way and the three-item list promotes the public officer’s priorities.” *Id.*

Conversely, in Ethics Advisory Opinion No. 211, we concluded that a brochure that described the duties of a justice of the peace court and only contained the name of the incumbent in the letterhead and not in an unduly conspicuous way did not constitute support and thus was not

“political advertising” for purposes of section 251.001(16) of the Election Code. Tex. Ethics Comm’n Op. No. 211 (1994).

The Graphic Designs Include Support for a Public Official, and as such are Political Advertisements:

We conclude that the designs constitute political advertisements for purposes of section 255.003 of the Election Code. They identify a public officer as such, include his name in a conspicuous manner, and promote the officer by crediting him with funding the stations. The included statement, which identifies the requestor by name and office and credits him with funding the bicycle-sharing stations, appears in a smaller print size than the rest of the design. However, it is “set apart from other text” and is prominent because there is very little competing text. *See* Tex. Ethics Comm’n Op. No. 476 (2007).

Furthermore, the designs are self-promotional rather than informational. *See* Tex. Ethics Comm’n Op. No. 211 (1994); *see also* 1 Tex. Admin. Code § 26.2(3)(A). They do not include any information about how to use the bicycle-sharing program; nor do they include any information about the duties of the requestor’s office. In fact, the only information included on the designs is the purported source of funding for the bicycle-sharing program, namely, the requestor. In short, the designs would lead one to reasonably believe “that the purpose of the communication was to support the incumbent.” Tex. Ethics Comm’n Op. No. 211 (1994).

For these reasons, the designs constitute political advertisements. Tex. Elec. Code § 251.001(16). Consequently, the political subdivision may not use public funds to affix them to bicycle-sharing stations, hats, t-shirts, or water bottles. Tex. Elec. Code § 255.003(a).