



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 563

September 1, 2021

ISSUES

Whether an officer or employee of a political subdivision may use public funds to advertise and produce an event that uses the officer's title, such as "Mayor's Fun Run" or "Mayor's Unity Walk."

Whether an officer of a political subdivision may announce, at a public meeting of the political subdivision that is recorded and broadcast on an Internet website, that the officer will have a booth at the event where he or she will distribute merchandise purchased with personal funds.

Whether an officer or employee of a political subdivision may spend public funds—including the use of paid staff time—to set up tents and provide tables, chairs, and traffic control for a food distribution event at which public officials from other governmental entities are present and distributing personal campaign items purchased with their campaign funds. (AOR-642)

SUMMARY

Section 255.003(a) does not broadly prohibit political subdivisions from producing or advertising an event that uses an official's title in its name. However, such an event that otherwise entails the use of public funds to support or oppose a candidate or measure would violate section 255.003(a).

Section 255.003(a) does not prohibit discussion of matters pending before a governmental body. However, it does prohibit one or more members of a governmental body from arranging a discussion of a matter not pending before the governmental body in the hopes that broadcasts of the discussion would influence the outcome of an election.

An officer or employee of a political subdivision may not spend public funds to produce an event for the purposes of providing a place for public officials to distribute campaign items.

FACTS

The requestor, an employee of a city, asks several questions on behalf of both herself and several elected officials and other employees of the city, including its elected mayor and city councilmembers.

First, the requestor seeks an opinion on whether the city may use city resources including staff to produce an event that uses the title of an elected official. Further, the requestor seeks an opinion on whether the city may use city resources to advertise the event. To that end, the requestor seeks an opinion on whether either of two particular written communications constitute “political advertising” for purposes of section 255.003(a) of the Texas Election Code. The first communication is a one-page advertisement for an event called “The Mayor’s Unity Walk,” and it includes: (1) the name of the event, (2) the name of the city’s elected mayor, (3) the time and place of the event, and (4) the city’s name and official logo. The second communication is identical to the first with the exception of an additional line of text with information about a city councilmember’s presence at the event. The requestor asks whether the city may use public resources to create and distribute these communications in advance of the event. The requestor asks whether the answer depends on whether there is a “pending election for the office after which the event is named,” whether the “incumbent has not announced his/her candidacy to run for office,” or whether “the event is not a regularly held event.”

Second, the requestor seeks an opinion on whether it would be a violation of section 255.003(a) for a member of the city council to announce, during a public meeting of the city, that he will have a booth at the event where he will distribute water bottles purchased with his private funds. The requestor asks whether it would violate section 255.003(a) if the public meeting was broadcast or rebroadcast over the subdivision’s cable channel, its website, or any of its social media platforms.

Finally, the requestor seeks an opinion on whether it would be a violation of section 255.003(a) for employees of a political subdivision to set up tents and provide tables, chairs, and traffic control for a “food distribution event” at which public officials from other governmental entities are present and passing out not only the food but also personal campaign items purchased with their campaign funds.

ANALYSIS

Legal Standard:

Section 255.003(a) of the Texas Election Code states that an officer or employee of a political subdivision may not spend public funds for political advertising. “Political advertising” is defined in part as a “communication supporting or opposing a candidate” or “public officer.” *Id.* at 251.001(16). Furthermore, oral communications may constitute “political advertising” if they are either broadcast by radio or television in return for consideration or appear on an Internet website. *Id.*

We have previously found that “the critical issue in determining whether an advertisement is ‘political advertising’” is, as relevant here, whether a communication supports or opposes a public officer. Tex. Ethics Comm’n Op. No. 102 (1992). Whether a communication supports or opposes a public officer is a “fact question that can be answered only when the communication is viewed as a whole.” Tex. Ethics Comm’n Op. No. 476 (2007).

Under most circumstances, the requestor’s written communication and named event would not violate section 255.003:

Whether a political subdivision may spend public funds to produce and advertise an event is a fact-specific inquiry. Section 255.003(a) would prohibit an incumbent official from using public funds to pay for what amounts to a campaign event for his reelection. However, we do not believe that the mere use of an official’s title in the name of an event—such as the “Mayor’s Unity Walk”—renders the event a political advertisement.

Section 255.003(a) may at times require a consideration of the circumstances surrounding the expenditure of public funds. For example, the timing of an event—particularly in relationship to an election date—may be relevant to whether the event amounts to political advertising. But, we again stress that the inquiry required by section 255.003(a) demands a holistic consideration of the facts and does not focus on any single factor. *See* Tex. Ethics Comm’n Op. No. 476 (2007).

Here, the requestor has asked whether surrounding circumstances are relevant, but did not provide the Commission with any specific circumstances to consider. We struggle to imagine any set of facts that would render either the event described in this request or the submitted advertisement for that event a political advertisement. In this instance, the one-page advertisement provided by the requestor features two lines of text that identify a public official: one with the title of the event (“The Mayor’s Unity Walk”) and the other with the name of the city’s Mayor. Neither mention is unduly conspicuous, and neither the instances of identification nor the flyer as a whole indicate that the purpose of the flyer is to support the incumbent. *See* Tex. Ethics Comm’n Op. No. 211 (1994) (concluding that a brochure describing the duties of a justice of the peace was not political advertising because its inclusion of the incumbent’s name was not “unduly conspicuous.”).

The requestor also asks whether using public funds to create and distribute a second, similar communication would violate section 255.003(a). This second communication is identical to the first with the exception of an additional line of text with information about a city councilmember’s presence at the event. We reach the same conclusion with respect to this communication. Standing alone and without the benefit of knowing the surrounding circumstances, the communication does not appear to be a political advertisement.

The test under section 255.003(a) is whether the expenditure of public funds would lead one to “reasonably believe” that the purpose of the expenditure was to support the incumbent. Tex. Ethics Comm’n Op. No. 560 (2020) (citing Tex. Ethics Op. No. 211 (1994)). Therefore, we cannot categorically say that there are *no* set of possible circumstances that would lead someone to reasonably believe that the purpose of this event or these advertisements was to support the incumbent mayor or city council member. For example, and without reaching any conclusion

because it is outside the scope of this request, we believe the question would be more challenging if a “Mayor’s Unity Walk” was scheduled on election day and involved an organized walk to a polling place.

In summary, we conclude that under most circumstances section 255.003(a) would not prohibit officers or employees of political subdivisions from spending public funds to produce the communications or event in question. The requestor provides no information that would indicate that the timing of the event relative to an upcoming election, the potential candidacy of the elected official in that election, or whether the event is held regularly would make this particular communication or event impermissible under section 255.003(a). However, we believe it is possible for an elected official or political subdivision to use public funds to produce and promote an event that is deliberately timed and arranged to support or oppose a candidate or public official. Each case must be viewed as a whole.

Section 255.003 does not prevent public officers from discussing matters properly before their respective government bodies:

The requestor next asks whether a city councilmember may make remarks regarding their presence at a city event during a city council meeting that is broadcast online. As a threshold matter, oral communications that “appear on an Internet website” can constitute political advertising, provided the communication “[supports] or [opposes] a candidate” or “public officer.” Tex. Elec. Code §§ 251.001(16)(A), 255.003(a). And the use of city resources (*e.g.* cameras, computers, and bandwidth) to broadcast the meeting online would constitute an expenditure of public funds for purpose of section 255.003(a). Tex. Ethics Comm’n Op. No. 550 (2019) (“The ‘spending’ of public funds includes the use of a political subdivision’s employees work time or a political subdivision’s equipment or facilities.”). However, the Commission previously concluded—and at least one state court of appeals agrees—that section 255.003(a) was not intended to “inhibit discussion of matters pending before a government body.” Tex. Ethics Comm’n Op. No. 456 (2004); *In re Turner*, 558 S.W.3d 796, 800 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

As we have previously stated, whether a communication supports or opposes a candidate is a fact-specific inquiry. And in this particular instance, the requestor has not provided any information that would indicate the matter is, or is not, pending before the city council. However, assuming that the remarks relate to a matter pending before the council and are not made “with the hope that the discussion and its broadcast would influence the outcome of an election,” then there is no violation of section 255.003(a). *Id.* (“It is not possible, however, to state that comments by city council members at a recorded public meeting could never give rise to a violation of section 255.003 because we can imagine a situation in which one or more city council members might arrange a discussion of a matter not pending before the council with the hope that broadcasts of the discussion would influence the outcome of an election.”).

Spending public funds to facilitate the distribution of political advertising is spending public funds for political advertising:

Finally, the requestor asks whether the city may spend public funds to produce an event at which elected officials from other government entities are invited to distribute their own campaign materials. Under this request, no public funds are being spent to *create* the political advertisements. However, in our view, Section 255.003(a) prohibits officers and employees of political subdivisions from spending public funds to facilitate the distribution of political advertisements. The city's production of an event deliberately designed to provide a platform for the dissemination of political advertising is therefore prohibited by section 255.003.