



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 564

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*September 1, 2021*

### ISSUE

*Whether a written communication, created by a political subdivision and related to the political subdivision's special election, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a). (AOR-643)*

### SUMMARY

The specific communication considered in this opinion is not political advertising for purposes of Section 255.003 of the Election Code because it is entirely informational and does not include any advocacy.

### FACTS

The requestor is the legal representative of a town and its town secretary, who is an officer or employee of that political subdivision. The town called a special election to consider adopting a home rule charter. The requestor has asked the commission to consider "a draft cover letter that the Town Secretary plans to send to each registered voter of the Town forwarding a copy of the proposed Home Rule Charter document pursuant to the requirements of Texas Local Government Code 9.003(b)." The question presented to the commission is whether the written communication constitutes "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).

Section 255.003(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. Tex. Elec. Code § 255.003(b).

When viewed in its entirety, the letter is informational and does not support or oppose any candidate or measure:

The cover letter contains factual information about the ballot measure, including the date the Home Rule Charter Commission was established, the date the Home Rule Charter Commission submitted the proposed Charter to the Town Council, the date the Town Council ordered a special election, and the date of the special election. The letter states the type of municipality the town is currently and the type of municipality it would be if the measure were to pass. The letter next includes the language of the proposition to adopt the Home Rule Charter with the words “FOR ( )” or “AGAINST ( )” as the language will appear on the ballot. Finally, the letter concludes with a statement from the town secretary that, by adoption of the election order, the town council directed her to mail a copy of the proposed charter to each registered voter in the town.

No matter how much factual information about the purposes of a measure election is included in a communication, *any amount* of advocacy is impermissible under Section 255.003(a). 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.

The cover letter considered in this opinion does not include any express advocacy, motivational slogan, or call to action. It describes the chronological sequence of events for voter approval of the home rule charter, the purpose of the charter, and language of the measure. Viewed as a whole,

this letter is not a statement of support or opposition, but rather a factual description of the measure the voters will be presented with.

In conclusion, the cover letter considered in this request does not constitute political advertising and does not advocate passage or defeat of a measure. Consequently, Section 255.003(a) of the Election Code does not prohibit the town secretary, or any other officer or employee of the political subdivision, from using public funds to create and distribute the written communication.