



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 565

September 1, 2021

ISSUES

Whether section 255.003(a) of the Election Code prohibits officers and employees of a special purpose district from spending public funds to create and distribute certain written communications. (AOR-650)

SUMMARY

While section 255.003(a) applies to the requestor, a special purpose district, it does not prohibit the district's officers and employees from spending public funds to create and distribute the specific communications considered in this request because they are entirely informational and do not include any advocacy.

FACTS

The requestor is the legal representative of a special purpose district authorized by state law. The district has specific powers under state law, including the power to impose certain taxes and fees; to adopt and enforce reasonable rules and regulations for the administration and operation of the district and its properties and facilities, and to provide for public safety and security within the district. The district provides certain municipal types of services including parks, facilities, and recreation centers, but not other core services, such as law enforcement, transportation infrastructure maintenance, and water management services.

The district encompasses a geographic area with boundaries defined by law. It is governed by an elected board of governors, and every qualified voter within the district is eligible to vote in their elections. After being elected, the board of directors elect a chairman, a vice chairman, a secretary, and any other officers the board considers necessary.

The requestor states that the district's board of directors is considering whether to call an election to incorporate as a municipality.¹ In connection with that election, the district wants to provide certain educational materials to voters. The requestor has provided those materials to the

¹ The requestor states that the district has the authority to incorporate as a municipality. For purposes of this opinion, the Commission relies on that statement as true.

Commission for review and asked for an advisory opinion addressing whether they contain political advertising for purposes of section 255.003(a) of the Texas Election Code.

ANALYSIS

As a political subdivision, the requestor may not spend public funds for political advertising:

The threshold question addressed by this opinion is whether Section 255.003(a) of the Texas Election Code applies to the district. That section prohibits officers and employees of political subdivisions from “knowingly spend[ing] or authoriz[ing] the spending of public funds for political advertising.” Tex. Elec. Code § 255.003(a). The requestor represents a special purpose district, and the Commission has never before issued an opinion addressing whether special purpose districts are political subdivisions for purposes of section 255.003(a).

The Election Code defines “political subdivision” as “a county, city, or school district or *any other governmental entity that*: (A) embraces a geographic area with a defined boundary; (B) exists for the purpose of discharging functions of government; and (C) possesses authority for subordinate self-government through officers selected by it.” Tex. Elec. Code § 1.005(13) (emphasis added). The district, having the above-described powers, boundaries, and governance, satisfies each element of this three-part test.

The Commission therefore concludes that the district is a political subdivision for purposes of section 255.003(a) of the Election Code. Consequently, its officers and employees are prohibited from knowingly spending public funds for political advertising. “Political advertising” means, in relevant part, a communication *supporting or opposing* a measure that appears in a pamphlet, circular, flier, billboard, or other sign, bumper sticker, or similar form of written communication. Tex. Elec. Code § 251.001(16) (emphasis added).

The materials submitted with the request do not contain political advertising:

The requestor submitted for review three one-page flyers and a 10-page “Public Education Summary.” The Commission has reviewed each of the documents and determined that none of them contain political advertising for purposes of section 255.003(a).

The three flyers describe: (1) the history of the district’s existence and governance; (2) the district’s roadmap for studying incorporation and calling an election; and (3) how the district might transition to a Home Rule City if and when the voters approve the district’s incorporation as a General Law City. All three flyers use colorful graphic designs, but, fundamentally, they all provide factual content without promoting the measure. For example, the second flyer primarily outlines the steps the district would take prior to calling an election, including retaining consulting firms, studying various issues related to incorporation, and providing public forums for residents to voice their support or opposition. To the extent that it also describes the consequences of incorporation, it does so using factual terms and appears to include both the advantages (*e.g.* expanded services) and disadvantages (*e.g.* higher taxes).

The longer document summarizes the results of a study conducted by the district to consider the benefits and impacts of municipal incorporation. It describes how certain issues of governance, municipal services, and law enforcement would change if the district was to incorporate. For example, the document explains that as a special purpose district, municipal utility services are provided to residents through various Municipal Utility Districts (“MUD”), but if it was to incorporate, the district could enact an ordinance that assumes all assets, liabilities, and operations of the MUDs and begin operating as a city municipal utility. As another example, the document explains that the district is currently prohibited from directly hiring law enforcement personnel or creating a police department, but as an incorporated city it would be *required* to provide law enforcement services.

Each of the communications contain factual information that may affect whether voters will support or oppose the district’s incorporation. However, “[t]he Election Code does not prohibit political subdivisions from spending public funds to enable voters to make informed decisions.” Tex. Ethics Op. No. 559 (2021).

Instead, the critical issue in determining whether a particular communication supports or opposes a measure is whether it provides information “without promotion” of the measure. *Id.* (citing Tex. Ethics Op. No. 476 (2007)). “[W]hether a communication supports or opposes a measure is a fact question that can be answered only when the communication is viewed as a whole. Tex. Ethics Op. No. 476 (2007).

Here, as in some prior opinions, the communications do not include a “motivational slogan or call to action.” Tex. Ethics Op. No. 559 (2021). Nor do they include any “express advocacy” as defined by the Commission’s rules. *See id.* (citing 1 Tex. Admin Code § 20.1(18)). And when viewed as a whole, the Commission’s conclusion is that they do not support or oppose any candidate or measure. Consequently, section 255.003(a) of the Election Code does not prohibit the district from spending public funds to create and distribute the communications.