

POLITICAL ADVERTISING

By Donna L. Johnson

and Art Pertile

A municipality and its employees are prohibited from using public funds and resources for political advertising. If a violation is alleged, a complaint may be filed with the Texas Ethics Commission (“TEC”) which has the constitutional and statutory duties for enforcement. The statutory duties are set out in Chapter 571 of the Government Code. The TEC is responsible for administering and enforcing these laws: 1) Title 15, Election Code, concerning political contributions and expenditures, and political advertising; 2) Chapter 302, Government Code, concerning the election of the Speaker of the Texas House of Representatives; 3) Chapter 303, Government Code, concerning the governor for a day and speaker's reunion day ceremonies; 4) Chapter 305, Government Code, concerning lobbyist registration, reports, and activities; 5) Chapter 572, Government Code, concerning personal financial disclosure of state officers and conduct of state officers and employees; 6) Chapter 2004 Government Code, concerning representation before state agencies; 7) Chapter 159, Local Government Code, concerning judges of statutory county courts or statutory probate courts who elect to file a financial statement with the Commission; 8) Government Code, Section 2152.064 (concerning Conflict of Interest in Certain Transactions involving the Texas Facilities Commission); and 9) Government Code, Section 2155.003 (concerning Conflict of Interest involving the Office of the Texas Comptroller of Public Accounts).

In this paper, we will briefly address political advertising. Section 255.003 of the Election Code provides, in relevant part, as follows:

(a) An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising.

(b) Subsection (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.

(b-1) An officer or employee of a political subdivision may not spend or authorize the spending of public funds for a communication describing a measure if the communication contains information that:

(1) the officer or employee knows is false; and

(2) is sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure.

(c) A person who violates Subsection (a) or (b-1) commits an offense. An offense under this section is a Class A misdemeanor.

The Election Code defines “political advertising” as

...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:

(A) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or

(B) appears:

(i) in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or

(ii) on an Internet website. Elec. Code § 251.001(16).

The critical question in determining whether a communication constitutes “political advertising” is whether it supports or opposes a candidate, political party, public officer or measure. Whether a particular communication supports or opposes a candidate or measure is a fact question. Ethics Advisory Opinion No. 504 (2012). A factor in determining whether a particular communication supports or opposes a candidate or measure is whether the communication provides information and discussion of the candidate or measure without promoting the outcome of the measure. Ethics Advisory Opinion No. 476 (2007).

In 2011, the TEC issued Ethics Advisory Opinion No. 501 to answer the question of “[w]hether a communication relating to a measure election complies with section 255.003 of the Election Code.” In this instance, the Coryell County Commissioners Court approved placing a jail and law enforcement center bond initiative on an election ballot. A brochure was prepared using public funds, including public resources. (A copy of the brochure is attached.) The brochure at issue included facts about the proposed project such as the current jail situation, where a new jail would be built, the costs of a new jail, and alternatives to building a new jail. The brochure also included the question as it would appear on the ballot and the date and time of early voting. The TEC ruled that the brochure provided information and discussion of a measure without promoting the outcome of the measure and did not constitute political advertising as the term is defined in the Election Code. They further opined that such communications by public entities are sufficiently substantial and important because it answered common factual questions that arise regarding a bond election.

Many cities produce newsletters for their citizens to inform them of important events occurring in the city. The Texas Administrative Code (“TAC”) provides that for purposes of § 255.003 of the Election Code, a newsletter is not political advertising if:

- (1) It includes no more than two pictures of a public officer per page and if the total amount of area covered by the pictures is no more than 20 percent of the page on which the pictures appear;
- (2) It includes no more than eight personally printed phrased references (such as the public officer’s name, “I”, “me”, “the city council member”) on a page that is 8 ½ x 11 or larger, with a reasonable reduction in the number of such personally phrased references in pages smaller than 8 ½ x 11; and
- (3) When viewed as a whole and in the proper context:
 - (A) is informational rather than self-promotional;
 - (B) does not advocate passage or defeat of a measure; and

(C) does not support or oppose a candidate for nomination or election to a public office or office of political party, a political party, or a public officer.

Title 1 Part 2 Chapter Tex. Admin. Code § 26.2 (2008). The TEC considered a newsletter and whether it constituted political advertising when it issued Ethics Advisory Opinion No. 476. (A copy of the newsletter is attached). The TEC opined that the “mere fact that the name of a public officer or the picture of a public officer appears in a newsletter would not determine whether the communication constitutes political advertising. However, the context and frequency with which the name or picture appears are relevant to making that determination.” EAO No. 476 (2007). The newsletter at issue consisted of four pages and included one individual picture of the public officer and twenty-two other pictures in which the public officer appeared with other persons. The area covered by the pictures was approximately 50% of the newsletter. Additionally, the name of the public officer appeared twenty-two times in font that was bold or larger than the main text. The TEC ruled that that this particular newsletter constituted political advertising and public funds could not be used to pay for it.

Cities are broadcasting taped and live meetings to their citizens on television and on the internet. The TEC has addressed the broadcast of City Council meetings. In Ethics Advisory Opinion No. 456 (2004), the TEC opined that § 255.003 of the Election Code does not prohibit a city from broadcasting a tape of a City Council meeting at which the city council considers placing an issue before the voters if the broadcast is in keeping with the city’s regular practice of broadcasting meetings. EAO 456 also states that § 255.003 is not interpreted to prohibit a city from broadcasting a tape in which council members and members of the public are likely to voice opinions on issues. Further, the TEC would consider it to be a situation in which city

resources were not used “for” political advertising even if an incidental effect of broadcasting the tape would be to broadcast statements supporting or opposing a ballot measure.

The consequences of noncompliance with these statutes can range from payment of a fine of up to \$4,000, confinement in jail for up to one year, or both a fine and incarceration. If public funds and resources are going to be used to educate and advise the public about factual information concerning a candidate or measure, the Election Code provides the TEC may issue an advance written advisory opinion. Specifically, section 255.003(e) provides that

(e) On written request of the governing body of a political subdivision that has ordered an election on a measure, the commission shall prepare an advance written advisory opinion as to whether a particular communication relating to the measure does or does not comply with this section.

Elec. Code § 255.003(e). It is an affirmative defense to prosecution for an offense under this section or the imposition of a civil penalty if a governmental body relies on a written opinion issued by a court, the attorney general or the TEC. Elec. Code § 255.003(d). The TEC has a brochure to provide guidance on using public resources for political advertising. (A copy of the brochure is attached.) As we stated earlier, it is a fact question whether a communication violates the prohibitions set forth by Chapter 255 of the Election Code therefore the most prudent course is to include a paragraph in the order calling the election on a measure instructing the City staff to submit a written request to the Texas Ethics Commission for an advisory opinion as to whether a particular communication relating to the measure does or does not comply with Chapter 255 of the Election Code.

**EAO NO. 501
BROCHURE**

How much will the project cost?

Based on an assessment from our independent architectural firm, the Jail and Law Enforcement Center facility total development budget is \$18,764,000. The Project includes construction, furnishings and all related architectural and engineering fees which will be awarded through competitive bid.

What will the project cost taxpayers?

- ◆ The facility would require a tax increase of about four and one-half cents per \$100 valuation to pay the estimated \$950,000/year bond payment
- ◆ Any operational savings including personnel, utilities, and maintenance savings per inmate, may reduce the tax increase to about three and one-half cents.

When could the project be completed?

If the bond election is approved by voters, final architectural and engi-

neering work could commence quickly, and construction would likely commence approximately 6 months later. Part of the 6-month time frame will be for soliciting competitive bids for all phases of the construction. It is anticipated construction would be completed in late 2013.

The following will appear on the November 8, 2011 ballot.

PROPOSITION

**FOR)
AGAINST)**

THE ISSUANCE OF \$18,764,000 TAX BONDS FOR THE CORYELL COUNTY JAIL AND LAW ENFORCEMENT FACILITY.

Early Voting

Oct 24 - 28; 8 to 5 pm

Oct 31 - Nov 2; 8 to 5 pm

Nov 3 - 4; 7 to 7 pm

Gatesville & Copperas Cove Annexes

**CORYELL COUNTY
JAIL AND LAW
ENFORCEMENT
FACILITY**

**BOND ELECTION
NOVEMBER 8, 2011**

***Facts about the Proposed Project
and Bond Election***

Coryell County has a constitutional requirement to provide inmate incarceration as part of its law enforcement, judicial and public safety missions.

The question to voters is whether general obligation bonds should be authorized to build a larger jail and law enforcement facility so that the County can house inmates within Coryell County and provide more space for the Sheriff Department to operate and train.

Background:

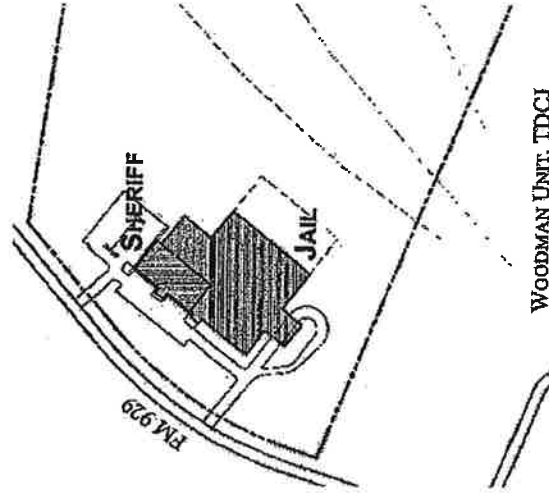
Twenty years ago, the current 92 bed jail was built providing an increase of 65 beds which was able to satisfy all County incarceration needs for fifteen years. After the jail reached full capacity in 2006, a jail committee of County citizens was formed to explore actions that should be taken.

Current Jail Situation:

- Existing jail capacity is 83 inmates with separation requirements. The average county inmate count of about 115 prisoners requires over one-fourth to be housed out of county.
- County inmates above the jail capacity are transported and housed in other county jails. The County paid \$700,000 in 2010 to other counties to house its inmates.
- In 2010, \$44,989 was spent on repairs and maintenance of the jail.

Where would we build the Jail?

Adjacent to the Woodman Unit operated by the Texas Department of Criminal Justice (TDCJ) on FM 929 in Gatesville. The required land for the project was given to the County by TDCJ. Below is the proposed site plan for the project:



Items impacting new Jail costs?

⇒ The County has received a 40 year loan commitment from the U.S. Department of Agriculture (USDA) Rural Development to fund the jail construction costs at an interest rate no greater than 4.625%. If approved by voters, the general obligation

bonds will provide the necessary security required by the USDA loan offer.

⇒ Although the USDA loan approval was for approximately \$22 million, the Commissioners' Court and Sheriff redesigned areas of the facility and reduced the project budget to the current \$18,764,000.

Alternatives to building New Jail?

- Continue to pay for the transport and housing of prisoners out of county.
- Invest maintenance and repair dollars in the existing jail facility in order to maintain compliance with standards developed by the Texas Commission on Jail Standards.

What if final building costs come in less than budgeted?

- The bond proceeds may only be used for the construction and related costs of the Jail and Law Enforcement Center.
- The amount of bonds issued will be decreased and cost to taxpayers reduced.

EAO NO. 476
NEWSLETTER



Jarvis JOHNSON

LEADING BY EXAMPLE

HOUSTON CITY COUNCIL, DISTRICT B
 City Hall Annex - 900 Bagby Street - 77002
 Direct 713.247.2009 - Fax 713.247.2707
 eMail. DistrlctB@cityofhouston.net



B INFORMED

REPORT FROM JARVIS JOHNSON HOUSTON CITY COUNCIL DISTRICT B



ACCOMPLISHMENTS

CITY BUDGET REPORT, AMENDED

Council Member Jarvis Johnson successfully added Amendments to the **FY07 (Fiscal Year 2007)** City Of Houston's **Budget**, including the **SWEAT EQUITY PROGRAM** and an **Amendment** to "Review Fire Inspection Fees".

CAPITAL IMPROVEMENT PROGRAMS

CM Jarvis Johnson worked to pass the successful **NOVEMBER 2006 CITY BOND REFERENDUM**, authorizing **\$625-million in Capital Improvements (CIP)** and quality of life expenditures—street repair and restoration; storm sewer enhancement and drainage projects; with additional funding for police, fire, parks, health care, and library programs.



DISTRICT B's CITY COUNCIL TEAM

... **ALVIN BYRD**, *Constituent Services* ... **EMILY BARRIERE**, *Senior Citizen Activity Director* ... **LINDA LAYTON**, *Council Agenda Director* ... **CM JARVIS JOHNSON** ... **JANAeya CARMOUche**, *Calendar Scheduler & Special Events* ... **JERI BROOKS**, *Senior Council Aide* ... **ASHLEY TAYLOR**, *High School Student Intern* ... **LATRICIA SELLS**, *Volunteer, Small Business Development*. — vj.Bennett Photography & Graphic Design

THANK YOU friends, neighbors, volunteers, community leaders and my City Hall staff for working with me to help build a coalition within Houston City Council District B, that is working each day to resolve individual concerns and neighborhood issues, as we increase our community pride and family security.

Jarvis' 2006 REPORT

LEADING BY EXAMPLE is my guiding work ethic in District B as we • **GROW** economic development opportunity • **BUILD** sustainable housing • **INCREASE** parks and green space, and • **FIGHT** to provide comfortable and stable communities for our youth and older residents.

OUR GOAL, to serve the needs of our 300,000+ residents in District B, is being accomplished through new • **Partnerships** • **Collaborations** and • **Information Dissemination** that is **EMPOWERING** our small businesses, civic clubs, faith-based groups, and professional organizations.

WE ARE PROUD of our first year of accomplishments. I invite each of you to **"GET INVOLVED"** and work with me to improve and revitalize our communities in District B.

Jarvis Johnson
 Houston City Council Member

Community Programs

SMALL BUSINESS INITIATIVES

Small business continues to be the fastest growing industry in the United States. **CM Johnson** is committed to providing educational seminars, community conversations and networking experiences for business owners in District B. **Jarvis** and the **Port of Houston** co-sponsored **Doing Business With The Port**, a small business networking event in December 2006.



PORT OF HOUSTON Commissioner **Janiece Longoria** and Council Member **Jarvis Johnson** hosted 60 business people from District B to a luncheon and boat ride down the **Houston Ship Channel**. An introductory seminar, "HOW TO DO BUSINESS WITH THE PORT OF HOUSTON", was presented by Ms. Longoria.

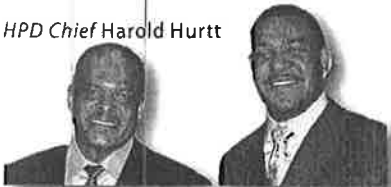
INTERNSHIP OPPORTUNITIES IN DISTRICT B

Council Member **Johnson** has proudly sponsored **STUDENT INTERNSHIPS** in the District B offices at City Hall for five local High School students and several volunteers.

CRIME REDUCTION

CM Johnson supported recommendations from **Houston Police Chief Harold Hurtt** to help reduce crime by adding more **HPD Officers** through approvals in the **FY07 (Fiscal Year 2007)** budget process for seven **HPD Cadet Classes**.

HPD Chief Harold Hurtt



ACRES HOMES AREA

CM Johnson brought the **Houston Police Department**, the **Million More Movement** and other local community and civic groups together to protect the women of **Acres Homes** through his **PROJECT PROTECT HER** and **SILENCE IS NOT SAFETY PROGRAM**. During the active search for murder suspects in Acres Homes, **CM Johnson** organized and lead weekly block walks to distribute self-help information to residents in need of housing and social services.

SWEAT EQUITY PROGRAM

CM Jarvis Johnson and Harris County's **Youth Advocate Program (Y.A.P.)** launched the District B's **Sweat Equity**, revitalization program, with its first project at the **W. LEO DANIELS TOWERS**. The thirty **Y.A.P.** members gave the Towers a fresh coat of paint and installed new benches in front of the senior independent living facility. The **Y.A.P.** students will clean-up dilapidated neighborhoods, plant flowers and distribute informative newsletters within District B, while receiving group training and enrichment from several City Council Members.

SPRING FLING



YOUTH PROGRAMS IN A PARK

We presented an innovative and amusing environment for District B families. The **SPRING FLING** and **SUMMER SWING** provided a variety of games, give-a-ways, food and entertainment.



SILENCE IS NOT SAFETY

Report all illegal activity that you witness!

CALL 311 TO REPORT

Illegal Dumping of Trash
Weeded Lots
NEGLECTED BUILDINGS
Flooding
Stray / Dangerous Dogs
ABANDONED CARS

When you call - 311

1. Obtain a service request number
2. Give your address, name (your telephone number is optional)
3. Expect a response within 72 hours

Community Involvement



NORTHSIDE WOMEN HONORED

Wanda LeBrie St.Mary LeBlanc (center-left) and Algenita Scott Davis (center-right) were honored, as **HOUSTON HEROES** by Council Members Peter Brown (left) and Jarvis Johnson, for being appointed to the Board of Directors for the Harris County Hospital District Foundation. Wanda is a realtor, and Algenita is the Executive Director for Houston Habitat For Humanity.

— v.f.bennell.photo



EXCESS FUNDS TO LIBRARY PROJECT

CM Johnson made a \$5,000 donation to the City Of Houston Library Department for purchasing **DIGITAL PROJECTORS** for LIBRARIES located in **Fifth Ward, Scenic Woods, Acres Homes, Kashmere Gardens.**



MDI SITE, TOXIC WASTE REMOVAL

CM Johnson worked with the **FIFTH WARD SUPER NEIGHBORHOOD COUNCIL**, local residents and the land developers to clean-up and remediate the toxic waste at **3617 Baer Street** in Fifth Ward. This agreement was signed in November 2006.



WAYSIDE VILLAGE

Council Member Jarvis Johnson led the fight with CM Peter Brown to cause the replotting of a poorly designed land-use plan for a 1,600 home development.

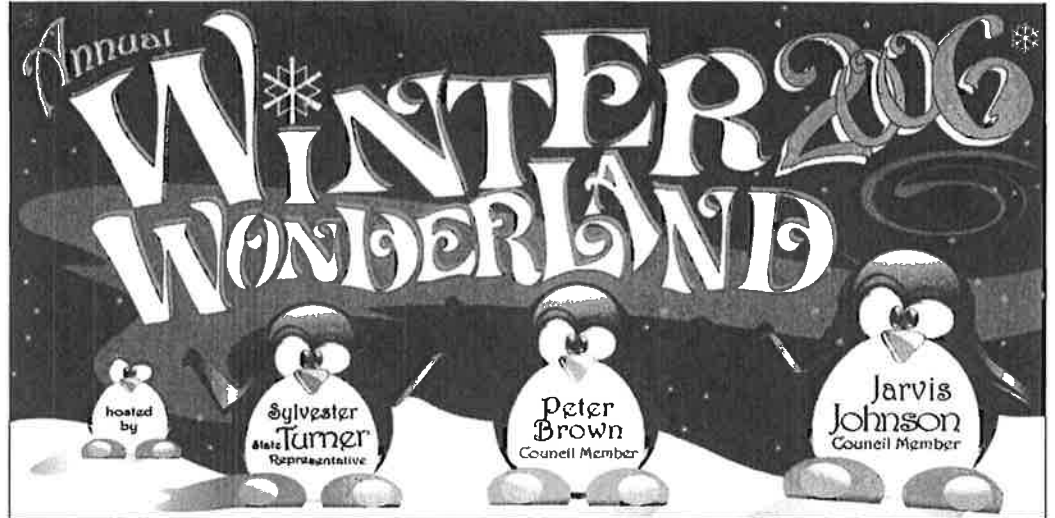
WE SALUTE THE PRESIDENTS OF SUPER NEIGHBORHOOD COUNCILS FOR THEIR DEDICATION FOR FIGHTING TO MAKE STRONG AND SAFE COMMUNITIES FOR ALL. OUR DISTRICT B COUNCIL OFFICE IS COMMITTED TO *STAY INVOLVED*:

- ATTENDED 100+ CIVIC AND FAITH BASED LOCAL MEETINGS
- EARNED A 98.6% RESPONSE RATE FOR 311 CALLS
- SPONSORED AND WORKED THREE CLEAN-UPS
- HOSTED TWO CAPITAL IMPROVEMENT PLAN (CIP) COMMUNITY MEETINGS.





*Exciting
Dazzling
Cross-Cultural
Educational
...enjoyed by all*



CM Jarvis Johnson hosted over 300 children from across District B to a **WINTER WONDERLAND 2006** of music, song, dance, and a three course luncheon—co-hosted by State Representative Sylvester Turner and Houston City Council Member Peter Brown. This gala luncheon presented kings and queens, from local schools, wearing formal tuxedos and ball gowns in the grand lobby of the Wortham Theatre. Special guests: Swishahouse's Paul Wall, and Lil Keke. Performances by: "American Idol" finalist Paris Bennett, Lil J. Xavier and the Houston Grand Opera.



Jarvis Johnson,
Lil J. Xavier,
Peter Brown, &
Sylvester Turner
—v.f.bennett.fotos



Thank You
Students & Educators,
Parents & Friends
Volunteers & Sponsors
FOR A SUCCESSFUL EVENT



2006 Winter Wonderland

*Special Friends
& Partners*

- The Sunland Group
- AT&T
- Esquire Title Company
- Continental Airlines
- Houston Yellow Cab
- Burchfield Companies
- Int'l. Union Of Painters & Allied Trades
- The Port Of Houston
- ARAMARK
- Anheuser-Busch Companies
- Houston Grand Opera
- Inner City Action Network (I.C.A.N.)
- Houston Convention & Entertainment Facilities
- Houston Symphony Orchestra
- Unity Bank
- Kirst Kosmoski, Inc.
- Healthy Resources Enterprise, Inc.
- Swishahouse
- Capital Records
- Dana Kaufmann
- Texans Shuttle
- Plumbers' Union
- SCIENTECH, Inc.
- Mary Hammer Menzel
- Corporate Security Solutions
- Reliant Energy
- CH2M Hill
- Charles D. Gooden Consulting Engineers
- Starbucks
- Kareem McKenzie, New York Giants
- D.A.R.E. + P.L.U.S.
- Schlumberger
- Harris County Youth Advocate Program

TEC BROCHURE

Violations of the law often occur because someone finds it irresistible to wrap up a factual explanation with a motivational slogan such as:

**GOOD SCHOOLS ARE THE FOUNDATION
OF A GOOD COMMUNITY**

or

EVERY CHILD DESERVES A GOOD EDUCATION

Another common misstep is to include “calls to action” such as:

PUT CHILDREN FIRST

or

SHOW THAT YOU CARE ABOUT EDUCATION

Remember: No matter how much factual information about the purposes of a measure election is in a communication, *any amount* of advocacy is impermissible.

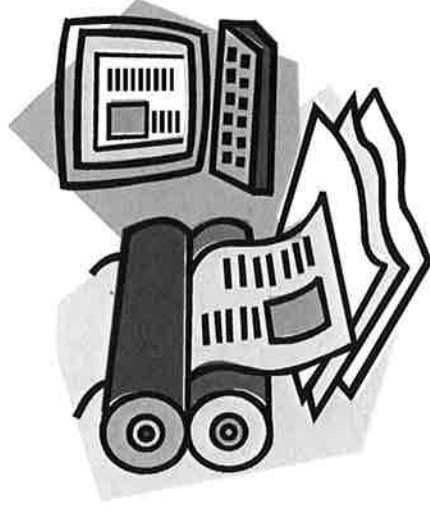
★ A violation of the prohibition is a **Class A misdemeanor**. This means that a violation could lead to criminal prosecution. Also, the Ethics Commission has authority to impose fines for violations of section 255.003.

Another provision of the Texas Election Code prohibits an officer or employee of a political subdivision from using or authorizing the use of an internal mail system to distribute political advertising. An internal mail system is a system operated by a political subdivision to deliver written documents to its board members or employees. A violation of this prohibition could also lead to the imposition of fines by the Ethics Commission or to criminal prosecution.

Although you may not use *political subdivision resources* for political advertising, you are free to campaign for or against a proposition on your own time and with your own resources. If you do plan to become involved in a campaign, you should educate yourself about filing requirements and about the rules regarding disclosures on political advertising.

Information is available from the Texas Ethics Commission by phone at (512) 463-5800 or on the Ethics Commission's web site at <http://www.ethics.state.tx.us>.

A Short Guide to the Prohibition Against Using Political Subdivision Resources For Political Advertising In Connection With An Election



Texas Ethics Commission
P. O. Box 12070
Austin, Texas 78711-2070

(512) 463-5800
Fax (512) 463-5777

Visit us at <http://www.ethics.state.tx.us> on the Internet.

Revised September 1, 2009

A Short Guide to the Prohibition Against Using Political Subdivision Resources For Political Advertising In Connection With An Election

No matter how enthusiastic you are about an election, it is important to remember that the Texas Election Code prohibits the use of political subdivision resources to produce or distribute political advertising in connection with an election. Section 255.003 of the Election Code provides as follows:

- An officer or employee of a political subdivision may not spend or authorize the spending of public funds for political advertising.
- This section 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.
- A person who violates this section commits an offense. An offense under this section is a Class A misdemeanor.

New legislation effective September 1, 2009, further clarifies that an officer or employee of a political subdivision may not spend or authorize the spending of public funds for a communication describing a measure if the communication contains information that:

- (1) the officer or employee knows is false; and
- (2) is sufficiently substantial and important as to be reasonably likely to influence a voter for or against the measure.

To understand the practical significance of this prohibition, it is useful to look at some of the specific words and phrases used in the law.

★ “Political advertising” is a communication that advocates a particular outcome in an election. It can be a communication in almost any written or broadcast form, such as a billboard, a flier, a newsletter, a poster, a television or radio ad, or an Internet site.

Newsletter of Public Officer of a Political Subdivision. The Ethics Commission adopted a rule providing guidelines for when a newsletter of a public officer of a political subdivision is not political advertising. Texas Ethics Commission Rule 26.2 provides as follows:

For purposes of section 255.003 of the Election Code, a newsletter of a public officer of a political subdivision is not political advertising if:

- (1) It includes no more than two pictures of a public officer per page and if the total amount of area covered by the pictures is no more than 20 percent of the page on which the pictures appear;
- (2) It includes no more than eight personally phrased references (such as the public officer’s name, “I”, “me”, “the city council member”) on a page that is 8 ½” x 11” or larger, with a reasonable reduction in the number of such personally phrased references in pages smaller than 8 ½” x 11”; and
- (3) When viewed as a whole and in the proper context:
 - (A) is informational rather than self-promotional;
 - (B) does not advocate passage or defeat of a measure; and
 - (C) does not support or oppose a candidate for nomination or election to a public office or office of political party, a political party, or a public officer.

★ The prohibition applies to any “officer or employee of a political subdivision.” In other words, if an officer or employee of a political subdivision makes a decision to use political subdivision resources in violation of the prohibition, the employee could be fined by the Ethics Commission or held criminally liable. School board members, as “officers” of a school district, are also subject to the prohibition.

★ The prohibition applies to “spending or authorizing the spending of public funds” for political advertising. Not only does this mean that the political subdivision may not purchase or authorize the purchase of new materials for use in creating political advertising, it also means that a political subdivision would violate the prohibition by using existing paper and machinery to generate, display, or distribute political advertising.

Also, it is not permissible to use or authorize the use of the paid time of an employee of a political subdivision to create or distribute political advertising.

★ The prohibition does not apply to “a communication that factually describes the purposes” of a measure election. In other words, it is permissible to use the resources of a political subdivision to produce explanatory material about what is at stake in a measure election. However, the communication may not contain information that an officer or employee of a political subdivision knows is false. The information must not be sufficiently substantial and important, such that it would be reasonably likely to influence a voter to vote a certain way.