

TEXAS ETHICS COMMISSION

IN THE MATTER OF
MARK M. BRIGGS,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-31803115 AND SC-31804167

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (Commission) met on December 13, 2018, to consider sworn complaints SC-31803115 and SC-31804167. A quorum of the Commission was present. The Commission determined that there is credible evidence of violations of sections 254.031 and 255.003 of the Election Code, laws administered and enforced by the Commission. To resolve and settle these complaints without further proceedings, the Commission proposed this resolution to the respondent.

II. Allegations

The complaint alleged the respondent: 1) knowingly spent or authorized the spending of public funds for political advertising in violation of section 255.003 of the Election Code; and 2) did not disclose in a campaign finance report individual political expenditures made in connection with the May 2017 mayoral election, and the total amount of political expenditures made during a reporting period, in violation of sections 254.031(a)(3) and 254.031(a)(6) of the Election Code.

III. Facts Supported by Credible Evidence

Use of Public Funds for Political Advertising

1. The respondent was the Position 5 member of the El Lago City Council and a candidate for mayor in the May 2017 election. He was elected mayor in May 2017 and resigned from the position on May 21, 2018.
2. Sworn complaint SC-31803115 alleged that the respondent, when he was mayor, authorized the payment of city funds for a letter, signed by the respondent and sent to city

residents on or about March 5, 2018, that supported a candidate for city council and opposed the council-candidate's opponent.

3. The letter, among other things:

- a. praises one incumbent candidate for city council by name (but does not identify the person as a candidate);
 - b. accuses the candidate's opponent, by name, of spreading misinformation (but does not clearly identify the person as a candidate or state that the two people are opposing candidates);
 - c. accuses the candidate's opponent, by name, of being removed from a social media platform for posting inappropriate content;
 - d. identifies an upcoming election;
 - e. informs the reader not to listen to candidates or social media posts (impliedly especially those statements and posts from the person accused of spreading misinformation); and
 - f. asks the reader to directly contact the respondent for the city's official position on issues of importance to the city in order to be an informed voter.
4. The respondent used city funds to pay for the printing and mailing of the letter, which totaled \$462.61.¹
5. The respondent denies that the letter meets the definition of political advertising because in his view the communication: 1) does not support or oppose a candidate for election; and 2) the letter is not a circular, flyer or other similar media.

Reporting Political Expenditures

6. Sworn complaint SC-31804167 alleged the respondent failed to disclose on a campaign finance report multiple political expenditures made in connection with the May 2017 mayoral election.
7. The respondent was an opposed candidate for City of El Lago mayor in the May 2017 election. Prior to the complaint being filed, he only filed one campaign finance report that covered from March 17, 2017, to April 17, 2017. That report covered the 30-day pre-election reporting period (ending March 27, 2017) and most of the 8-day pre-election reporting period (ending April 26, 2017).

¹ The letter is attached as appendix 1.

8. In failing to file reports covering the parts of the pre-election reporting period, the respondent failed to include at least four reportable campaign expenditures. (Whether the respondent failed to timely file a campaign finance report was not at issue in this complaint).
9. The specific allegations of unreported political expenditures by the respondent on campaign finance reports for the May 2017 election include:
 - a. Printing two surveys to gauge voters' opinions on various issues facing the city and hosting a website to publish the results;
 - b. A two-sided political brochure sent to El Lago residents;
 - c. A color copy "rumor" letter distributed by hand to residents;
 - d. Costs associated with a meet and greet in connection with the respondent's campaign held at a restaurant. The event included drinks, food and about 14 people attended, according to a sworn witness affidavit; and
 - e. A meet and greet in connection with his campaign held at a park pavilion that requires a \$100 rental fee and a banner displayed at the event.
10. In response to the specific allegations, the respondent:
 - a. admitted he did not disclose the costs of printing surveys, but denies that they were a reportable expense because he did not use political funds to pay for the printing and he claims they are an officeholder expense;
 - b. admitted he did not disclose a \$2,119.58 political expenditure for the two-sided political brochure sent to El Lago residents, but included it as an expenditure on a campaign finance report filed after he received the sworn complaint;
 - c. admitted he did not disclose the costs of the "rumor letter" but denies that it was a reportable expense because he used his own computer to print it;
 - d. admitted he did not report the costs of the event at the restaurant, but said the event was not well attended and cost him less than \$100 (he later said he incurred no cost for the event);
 - e. admitted he did not report the expense for the pavilion rental and push cards and a banner used at the event, but disclosed the expenditures totaling \$420 on a campaign finance report after the complaint was filed.
11. The respondent stated all of the expenditures came from personal funds and the one major expenditure during his campaign, the advertising brochure, contained the political advertising disclosure statement clearly identifying that he paid for it. After the complaint was filed, the respondent filed reports with the City of El Lago to account for all of the expenditures (except for the potential restaurant meet and greet costs, which he swore did not cost him anything).

IV. Findings and Conclusions of Law

The facts described in Section III support the following findings and conclusions of law:

Use of Public Funds for Political Advertising

1. An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. ELEC. CODE § 255.003(a).
2. In order to find a violation of section 255.003 of the Election Code, the Commission must determine:
 - 1) the respondent was an officer or employee of a political subdivision;
 - 2) the respondent knowingly spent or authorized the spending of public funds (or the use of public resources) for the letter; and
 - 3) the letter constituted or contained political advertising.
3. "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.* § 251.001(16) (emphasis added). The Commission has considered a letter to be a form of written communication similar to a circular or flier. Cf. Ethics Commission Rules § 26.1 (creating an exception for the political advertising disclosure requirement for certain letters).
4. Based on the statutory definition of "political advertising," section 255.003 prohibits an officer or employee of a political subdivision from spending or authorizing the spending of public money on a written communication that merely supports or opposes a candidate or officeholder. This is a lower threshold than the requirement that political advertising containing "express advocacy" include a disclosure statement. Compare ELEC. CODE § 255.003 (prohibiting the use of public funds for political advertising) with *id.* § 255.001 (requiring a disclosure statement for "political advertising containing *express advocacy*") (emphasis added). This lower standard is constitutionally sound because "government speech" is generally not afforded First Amendment protection. See, e.g., *Walker v. Sons of Confederate Veterans*, 135 S.Ct. 2239, 2245 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). It is the Legislature's prerogative to restrict the use of public funds and resources to fund political speech that is merely supportive of a candidate or officeholder.

"Support or Oppose" Standard

5. Whether a particular communication supports or opposes a candidate or a public officer depends on the specific facts. Ethics Advisory Opinion No. 102 (1992).
6. In advisory opinions, the Commission has determined:
 - 1) whether a particular communication supports or opposes a candidate or a public officer can only be answered when the communication is viewed as a whole; and
 - 2) self-promotional communications, especially those containing photographs and the name and title of the public officer in an unduly conspicuous way, will constitute political advertising.

See Ethics Advisory Opinion No. 102 (1992) (Magazine advertisement congratulating a sports team that identified a candidate or public officer as such is political advertising); Ethics Advisory Opinion No. 211 (1994) (Brochure that described the duties of the justice of the peace court and contained the name of the incumbent justice of the peace only in the letterhead and not in an unduly conspicuous way or in a way that would lead one to believe that the purpose of the brochure was to support the justice of the peace is not political advertising); Ethics Advisory Opinion No. 476 (2007) (Newsletter that included one individual picture of a public officer, 22 other pictures in which the public officer appeared with other persons, the name of the public officer 22 times in print type that was bolded or larger than the main text, and pictures covering more than 50% of the newsletter is political advertising); Ethics Advisory Opinion No. 506 (2012) (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 type size that was larger than any other text on the magnet, the name of the office the public officer held, the public officer's contact information, the Internet website address for information about the public officer, 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." is political advertising).

7. The standards set out in the advisory opinions are reflected in Ethics Commission Rules section 26.2. Under section 26.2, 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 8½" x 11" or larger, with a reasonable reduction in the number of such personally phrased references in pages smaller than 8½" 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.

Ethics Commission Rules § 26.2.

8. The respondent does not dispute that he was an officer of a political subdivision when he authorized the use of public funds for the production and distribution of the letter. The only disputed question is whether the letter is political advertising.
9. While the letter appears to meet the first two prongs of the § 26.2 safe harbor, the most important question is whether it passes the third prong: "when viewed as a whole and in the proper context [the letter]: (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." *Id.* § 26.2(3).
10. The Commission has historically taken a broad view as to what constitutes self-promotion, or in this case, promotion and opposition of other candidates. *See, e.g.,* EAO 102 (finding a magazine advertisement congratulating a sports team that identified a candidate or public officer as such is political advertising).
11. The following aspects of the mailer are indicative of promotion and therefore advertising:
 - The letter was sent 60 days before an election;
 - The letter praises by name one candidate, and criticizes the candidate's opponent by name (although does not specifically identify either as a candidate);
 - The letter expressly references an upcoming election;
 - The letter attacks a candidate's credibility by accusing him of spreading "misinformation" and being removed from a social media platform; and
 - The letter asks the reader not to listen to social media and candidates when it comes to issues (and impliedly refers to the named candidate's social media posts).
12. The following militate toward finding the letter does not meet the definition of political advertising.
 - There is no express advocacy (i.e. words such as "vote" "support" "elect");

- The letter contains information about issues facing the city;
 - The letter does not contain pictures; and
 - Although the letter names people who are candidates, it does not *clearly* identify them as candidates for the election.
13. The letter, when viewed as a whole, opposes a council member by referencing an election, focusing on the debate about an election issue, accusing a candidate by name of spreading misinformation on that issue and getting removed from a social media platform, and advises the reader not to listen to the candidates when educating themselves about the issues in the election. Therefore, there is credible evidence of a violation of section 255.003 of the Election Code.

Reporting Political Expenditures

14. Each report filed by a candidate must include, among other things, the amount of political expenditures that in the aggregate exceed \$100 and that are made during the reporting period, the full name and address of the persons to whom the expenditures are made, and the dates and purposes of the expenditures and the total amount of all political contributions accepted and the total amount of all political expenditures made during the reporting period. ELEC. CODE §§ 254.031(a)(3), (a)(6).
15. "Campaign expenditure" means an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure. *Id.* § 251.001(7).
16. "Officeholder expenditure" means an expenditure made by any person to defray expenses that: (A) are incurred by an officeholder in performing a duty or engaging in an activity in connection with the office; and (B) are not reimbursable with public money.
17. "Political expenditure" means a campaign expenditure or an officeholder expenditure. *Id.* § 251.001(10).
18. The use of a personal asset for a campaign does not by itself give rise to any reporting requirement. Ethics Advisory Opinion No. 116 (1993).
19. The printing of the survey and the "rumor letter" were done using the respondent's personal computer and printer and therefore were not reportable as expenditures. *See* EAO No. 116. Therefore, there is credible evidence of no violation of section 254.031 of the Election Code with respect to those expenditures.

20. The respondent also swore that although he did host a meet-and-greet at a restaurant, he did not incur any expenses because people paid for their own refreshments. Therefore, there is credible evidence of no violation of section 254.031 of the Election Code with respect to that putative expenditure.
21. However, the respondent admitted he did not disclose a \$2,119.58 political expenditure for the two-sided political brochure sent to El Lago residents. The respondent also admitted that he did not report the expense for the pavilion, push cards, and a banner used at the event totaling \$420. After the complaint was filed the respondent filed a campaign finance report disclosing those expenditures. Therefore, there is credible evidence of violations of sections 254.031(a)(3) and 254.031(a)(6) of the Election Code, with respect to political expenditures totaling approximately \$2,500.

V. Representations and Agreement by Respondents

By signing this order and agreed resolution and returning it to the Commission:

1. The respondent neither admits nor denies the facts described under Section III or the Commission's findings and conclusions of law described under Section IV, and consents to the entry of this order and agreed resolution solely for the purpose of resolving these sworn complaints.
2. The respondent consents to this order and agreed resolution and waives any right to further proceedings in this matter.
3. The respondent acknowledges that: 1) an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising; 2) each campaign finance report must include the amount of political expenditures that in the aggregate exceed \$100 and that are made during the reporting period, the full name and address of the persons to whom the expenditures are made, and the dates and purposes of the expenditures; and 3) each campaign finance report must include the total amount of all political expenditures made during the reporting period.
4. The respondent agrees to comply with these requirements of the law.

VI. Confidentiality

This order and agreed resolution describes violations that the Commission has determined are neither technical nor *de minimis*. Accordingly, this order and agreed resolution is not confidential under section 571.140 of the Government Code and may be disclosed by members and staff of the Commission.

VII. Sanction

After considering the nature, circumstances, and consequences of the violations described under Sections III and IV, and after considering the sanction necessary to deter future violations, the Commission imposes a \$500 civil penalty.

VIII. Order

The Commission hereby orders that if the respondent consents to the proposed resolution, this order and agreed resolution is a final and complete resolution of SC-31803115 and SC-31804167.

AGREED to by the respondent on this _____ day of _____, 20___.

Mark M. Briggs, Respondent

EXECUTED ORIGINAL received by the Commission on: _____.

Texas Ethics Commission

By: _____
Seana Willing, Executive Director