

State of South Carolina

State Ethics Commission

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SEC AO2018-004

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SUBJECT: USE OF PUBLIC RESOURCES TO INFLUENCE THE OUTCOME OF AN ELECTION OR BALLOT MEASURE; INFORMATIONAL MATERIALS CONCERNING A BALLOT MEASURE

QUESTIONS: According to the Beaufort County (County) Council_(Council), two referenda will appear on the ballot for voter approval in an upcoming election. Council Members want to express their personal opinions on these referenda during Council meetings and ask to what extent such expressions are permissible under § 8-13-1346, which prohibits the use of "public funds, property, or time" in an attempt to influence the outcome of a ballot measure.

Council also asks if § 8-13-1346(C), which permits Council to expend public resources to prepare "informational materials" on these referenda, requires the materials to be viewpoint neutral or whether the Council may provide information that portrays the referenda in a positive or negative light.

SUMMARY: A Council Member's expression of a personal opinion on a ballot measure during a Council meeting constitutes use of public resources. Whether such an expression constitutes an attempt to influence the outcome of a ballot measure in violation of § 8-13-1346 is a factual question and must be determined by looking to the totality of the circumstances.

Informational materials provided pursuant to § 8-13-1346(C) must be informational only and must not favor one side of a controversy over another. Whether such materials are "informational" will be determined by looking to factors such as the style, tenor, and timing of the publication.

APPLICABLE LAW:

Section 8-13-1346 provides:

- (A) A person may not use or authorize the use of public funds, property, or time to influence the outcome of an election.
- (B) This section does not prohibit the incidental use of time and materials for preparation of a newsletter reporting activities of the body of which a public official is a member.
- (C) This section does not prohibit the expenditure of public resources by a governmental entity to prepare informational materials, conduct public meetings, or to respond to news media or citizens' inquiries concerning a ballot measure affecting that governmental entity; however, a governmental entity may not use public funds, property, or time in an attempt to influence the outcome of a ballot measure.

DISCUSSION:

Section 8-13-1346 prohibits the use of "public funds, property, or time" in an attempt to influence the outcome of a ballot measure. Therefore, the Commission must analyze the following: (1) whether a Council Member's expression of a personal opinion on a ballot measure during a Council meeting constitutes use of public funds, property, or time; and, if so, (2) whether such an expression is an attempt to influence the outcome of a ballot measure.

Question 1(A): Does a Council Member's expression of a personal opinion during a Council meeting constitute a use of public funds, property, or time?

Yes. The Commission finds that a publicly called Council meeting constitutes a use of public resources and, therefore, any action taken during such a meeting also constitutes a use of public resources.

In its request, Council focuses on the use of "public time," urging this Commission to treat Council Members differently by requiring more than the use of public time to find a violation of § 8-13-1346. In support of this argument, Council contends that, unlike public employees, Council Members "are in a sense always on public time . . ." Therefore, according to Council, a Council Member must utilize more than just his or her time in an attempt to influence a ballot measure in order to be subject to potential violations of § 8-13-1346.

Indeed, there is some precedent for this distinction in prior Commission and Attorney General opinions. See SEC AO2018-003 (finding the prohibitions against use of public resources to influence the outcome of an election or ballot measure do not generally apply when elected or appointed officials are acting in their private capacities)¹; SEC AO2000-008 (prohibiting campaign

¹ Specifically, SEC AO2018-003 allowed County Council Members to take the following actions in their private capacities when not using public resources: (1) writing letters to the editor of a

activity during normal working hours and advising that “[t]he use of staff time while on the state’s payroll is prohibited by the Act”); S.C. Atty. Gen. Op., Dec. 23, 2013 (2013 WL 6924890) (“... the Governor does not stop being the Governor at 5:00 P.M. He is Governor twenty-four hours a day, and must respond to the duties of his office whenever they arise.”).

However, in this instance, this argument creates a distinction without a difference, as it is difficult to imagine how Council could call or hold a Council meeting without using additional public property, facilities, materials, equipment, or personnel. Therefore, a Council Member’s expression of a personal opinion on a ballot measure during a Council meeting constitutes a use of public resources for purposes of § 8-13-1346. The relevant question then follows—when does such an expression constitute an attempt to influence the outcome of a ballot measure?

Question 1(B): When is a Council Member’s expression of a personal opinion during a Council meeting used “to influence the outcome of a ballot measure?”

The Commission advises that whether a Council Member’s expression of a personal opinion on a ballot measure during a Council meeting should be construed as an attempt to influence the outcome of a ballot measure is a factual question that must be determined by looking to the totality of circumstances in any given case. Undoubtedly, if such an expression unambiguously urges voters to support or oppose a particular side of a controversy, this would violate the Ethics Reform Act. However, when a statement does not unambiguously urge voters to support or oppose one side over another, the Commission may also consider whether the statement contains: (1) any indications of advocacy; (2) any misleading tendencies, including amplification, omission, or fallacy; and (3) any partisan coloring.²

By enacting § 8-13-1346, the General Assembly has clearly indicated its intent to prohibit the use of public resources in an attempt to influence the outcome of a ballot measure. The Commission acknowledges that individual elected officials may freely advocate for or against matters that may be on the ballot, but finds it would be inappropriate to use public resources to support their efforts.

local newspaper advocating for or against a referendum; (2) making public speeches before private groups (such as Rotary Clubs) advocating for or against a referendum; (3) organizing a public meeting on his or her own time and own expense to discuss the pros and cons of a referendum without any restrictions on what can be discussed at this meeting; or (4) meeting to discuss or promote the referendum in a public building such as a public library, so long as the official’s position is not used to access the public building, and the building is available on equal terms and at the same cost to all members of the general public.

² This factor-based test, which the Commission finds appropriate, derives from a 2015 Arizona Attorney General’s opinion provided by Council’s attorney. See Ariz. Atty. Gen. Op. No. I15-002 (2015 WL 4719005).

Question 2: Must the “informational materials” provided pursuant to § 8-13-1346(C) be viewpoint neutral?

Yes. The Commission finds § 8-13-1346(C) allows Council to provide only informational, rather than promotional, materials to voters on a ballot measure. The rules of statutory construction require the Commission to consider § 8-13-1346(C) “in conjunction with the purpose of the whole statute and the policy of the law.” Georgia-Carolina Bail Bonds, Inc. v. Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003). Although the term “informational” is not defined within the Act, allowing Council to favor one side of a controversy over another would be inconsistent with other provisions in the Act requiring impartiality and neutrality related to the use of public resources. See § 8-13-765(B) (allowing a governmental entity to provide public facilities for political meetings or campaign purposes only so long as they are available on similar terms to all candidates and committees); § 8-13-765(C) (allowing government personnel to participate in election campaigns only when on their own time and on nongovernment premises); § 8-13-1336 (prohibiting acceptance or solicitations of campaign contributions on State Capitol grounds and surrounding areas); § 8-13-1338 (prohibiting solicitation of contributions by law enforcement officers in uniform, judicial candidates, solicitors/investigators, and the Attorney General); § 8-13-1346(B) (allowing a governmental entity incidental use of time and materials to provide a newsletter reporting the activities of the body).

To be clear, the prohibitions in § 8-13-1346(C) do not “bar knowledgeable public agencies from disclosing relevant information to the public, so long as such disclosure is full and impartial.” Stanson v. Mott, 551 P.2d 1 (Cal. 1976). However, the information provided must not be an attempt to convince voters to take a particular action. Rather, it must be a balanced presentation of the facts which takes into account all the consequences of a particular proposal. See Dollar v. Cary, 569 S.E.2d 731 (N.C. Ct. App. 2002) (finding local government advertising designed to promote a particular side of an issue to influence the outcome of an election is impermissible). The Commission further finds that even when a publication or communication imparts useful information and does not expressly advocate for or against a particular vote, the determination of whether such materials are informational is a factual question, and it will consider factors such as the publication’s style, tenor, and timing. The Commission finds this to be a reasonable prohibition, given that public resources entrusted to the government belong equally to the proponents and opponents of any given proposal.