

# TEXAS ETHICS COMMISSION

IN THE MATTER OF  
KIM SMITH PURCELL,  
RESPONDENT

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BEFORE THE  
TEXAS ETHICS COMMISSION  
SC-31804181

## ORDER and AGREED RESOLUTION

### I. Recitals

The Texas Ethics Commission (Commission) met on October 3, 2018, to consider sworn complaint SC-31804181. A quorum of the Commission was present. The Commission determined that there is credible evidence of a violation of section 255.003 of the Election Code, a law administered and enforced by the Commission. To resolve and settle this complaint without further proceedings, the Commission proposed this resolution to the respondent.

### II. Allegation

The complaint alleges the respondent knowingly spent or authorized the spending of public funds for political advertising in violation of section 255.003 of the Election Code by using city funds to pay for a flyer that congratulated city council members for their "accomplishments" that was sent with city utility bills one month before the May 5, 2018, election.

### III. Facts Supported by Credible Evidence

Credible evidence available to the Commission supports the following findings of fact:

1. The respondent is the mayor of Martindale, Texas.
2. The complaint alleged that the respondent used public funds for political advertising to send a mailer to county residents with their utility bill in April 2018. *See* Appendix 1.
3. The flyer contains the names and pictures of all five city council members and reads in relevant part:

I would like to take a moment to recognize the current Martindale City Council and all their accomplishments for The City this past year. Through collaborative efforts, they have approved a contract for a website, completed a road improvement plan, hired a professional city administrator, restored financial responsibility, lowered taxes and provided a respectful environment for the citizens of Martindale.

4. Four of the city council member seats were up for election on May 5, 2018 (three to fill a full term and one to fill an expiring term). Three of the four elections were contested.
5. The respondent admits that she authorized the use of city funds for the printing and distribution of the mailer, but denies that the communication meets the definition of political advertising.
6. The mailer is titled "Martindale Monthly" and was the April 2018 edition of a regular newsletter that is sent to residents with the city trash and wastewater bills. The respondent said that the letter is "the only formal way the City has of communicating with all Martindale citizens" and the April edition "[i]n addition to providing information on a couple of upcoming community events, it factually outlines some of the provable accomplishments and priorities of the entire Martindale City Council, including one running for re-election without opposition and one not up for election."
7. The respondent cited the Commission's guide, *Political Advertising: What You Need to Know*, to assert that the mailer is "clearly not" political advertising and "[i]t contains no advocacy 'supporting or opposing a candidate for nomination or election' and it contains no advocacy 'supporting or opposing a measure.'"

#### **IV. Findings and Conclusions of Law**

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

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 mailer; and
  - 3) the mailer 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).
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. Smith does not dispute that she is an officer of a political subdivision and that she authorized the use of public funds for the production and distribution of the mailer. The only disputed question is whether the mailer is political advertising.
9. Section 26.2(1) requires that a newsletter contain "not more than two pictures of a public officer per page" that do not cover more than 20 percent of the page on which they appear. Here there is one picture of each of the five city council members. The pictures combine to cover 28.6 percent of the page.

10. Still, the most important question is still whether it passes the section 26.2(3) subjective standard, i.e., 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.
11. Under section 22.6(3) the mailer must, when viewed as a whole and in the proper context: (A) be informational rather than self-promotional; (B) not advocate passage or defeat of a measure; and (C) 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(3).
12. The Commission has historically taken a broad view as to what constitutes self-promotion, or in this case, promotion of other candidates and officeholders. *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).
13. The following aspects of the mailer are indicative of promotion and therefore advertising:
  - There are large pictures of the city council members, who are identified by name.
  - The text of the mailer touts "accomplishments" of the council members that are both tangible (e.g., approved a contract for a website, hired a professional city administrator, lowered taxes) and intangible (e.g., restored financial responsibility, provided a respectful environment for the citizens of Martindale).
  - The mailer was sent less than one month before the May 2018 municipal election.
14. The following militate toward finding the mailer does not meet the definition of political advertising:
  - There is no express advocacy (i.e. words such as "vote" "support" "elect").
  - There is no mention of an election.
  - The mailer overall is rather brief, and does contain information about a few upcoming events and actions taken by the council.
15. The mailer as a whole supports the council members by prominently featuring their pictures and touting subjective accomplishments such as "restoring financial responsibility" and providing "a respectful environment for the citizens of Martindale."

16. The mailer at issue does support the council members, and is therefore political advertising. Credible evidence shows the respondent authorized the spending of public funds for the mailer. As such, there is credible evidence of a violation of section 255.003 of the Election Code.

### **V. Representations and Agreement by Respondent**

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 this sworn complaint.
2. The respondent consents to this order and agreed resolution and waive any right to further proceedings in this matter.
3. The respondent acknowledges that section 255.003 of the Election Code prohibits an officer or employee of a political subdivision from spending or authorizing the spending of public funds for political advertising. The respondents agree to comply with this section of the law.

### **VI. Confidentiality**

This order and agreed resolution describes a violation that the Commission has determined is 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 violation described under Sections III and IV, and after considering the sanction necessary to deter future violations, the Commission imposes a \$500 civil penalty. The respondent agrees to pay the \$500 civil penalty not later than six months after the Commission signs this order.

**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-31804181.

AGREED to by the respondent on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Kim Smith Purcell, Respondent

EXECUTED ORIGINAL received by the Commission on: \_\_\_\_\_.

Texas Ethics Commission

By: \_\_\_\_\_  
Seana Willing, Executive Director