



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 550

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*June 28, 2019\**

### ISSUE

*Whether a public officer may use government resources for political advertising. (SP-14)*

### BACKGROUND

The Texas Ethics Commission (“Commission”) has been asked on numerous occasions about the permissibility of a public officer’s<sup>1</sup> use of government resources for political advertising. For example, we have been asked whether a public officer may be interviewed in his or her government office for use in a campaign video.

In the circumstances described above, the government resources come into the public officer’s custody or possession by virtue of holding the public office.

### SUMMARY

A public officer, including a statewide officer, legislator, county officer, municipal officer, or school district officer, would be prohibited from using government resources, such as the officer’s office in a government building, to create a photograph, video, or other communication for political advertising because the officer has custody or possession of the government resources by virtue of holding the public office.

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<sup>1</sup> “Public officer” includes an officer of the state or a county, municipality, city, or political subdivision, as defined in section 1.07(a) of the Penal Code and section 1.005 of the Election Code. This opinion applies to a state officer who is a district officer of the state government, such as a legislator (*see* Elec. Code § 1.005(4)), or who is a statewide officer (*see id.* § 1.005(19)). This opinion also applies to an officer of a county, city, school district, or other subordinate self-governing entity. *See id.* § 1.005(13).

\* The Commission voted to reconsider and amend this opinion by striking a footnote limiting the scope of the opinion. That change took effect June 1, 2020.

## ANALYSIS

The Commission, on its own initiative, issues this advisory opinion to address whether a public officer may use government resources, such as the public officer's office, to create a photograph, video, or other communication for political advertising. We also address whether a public officer may similarly use government resources that are equally accessible to the public. To resolve this question, we must address sections 39.02(a)(2) and 39.02(a)(1) of the Penal Code and section 255.003(a) of the Election Code, which restrict the use of government resources for political advertising.

### Use of Government Resources for Political Advertising

#### *Section 39.02(a)(2), Penal Code*

Section 39.02(a)(2) of the Penal Code states that a public servant may not, with intent to obtain a benefit<sup>2</sup> or harm or defraud another, intentionally or knowingly “misuse[] government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.” Penal Code § 39.02(a)(2). A public servant, as defined in the Penal Code, includes a public officer, among other enumerated persons.<sup>3</sup> Because the questions addressed by the Commission relate to public officers, this opinion applies to that class of public servants.

A “misuse” means:

[T]o deal with government property contrary to:

- (A) an agreement under which the public servant holds the property;
- (B) a contract of employment or oath of office of a public servant;
- (C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or
- (D) a limited purpose for which the property is delivered or received.

*Id.* § 39.01(2).

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<sup>2</sup> “Benefit” is defined, in pertinent part, as “anything reasonably regarded as economic gain or advantage.” Penal Code § 1.07(a)(7).

<sup>3</sup> “Public servant” also includes an employee or agent of government, a juror or grand juror, an arbitrator or referee, a notary public, and a candidate for nomination or election public office. Penal Code § 1.07(a)(41).

The use of government resources for an individual public servant's benefit is a misuse contrary to the state constitutional requirements that public money be used for a public purpose. Tex. Const. art. III, §§ 51, 52(a).<sup>4</sup> Therefore, the use of government resources for an individual public servant's private campaign purposes would be a misuse. Section 39.02(a)(2) of the Penal Code applies only to a misuse of government resources that have "come into the public servant's custody or possession by virtue of the public servant's office or employment." A public officer would have custody or possession<sup>5</sup> of an office or other government resources by virtue of having exclusive control over those resources as a public officer. The public officer's use of a government office, which is restricted to the custody or possession of that officer, for political advertising would confer a benefit to the individual public servant for private campaign purposes and would violate section 39.02(a)(2) of the Penal Code.

Regarding government resources, such as the public area of a government facility, in our opinion, such an area would not be in the "custody or possession" of a public officer. Such an area would be equally accessible to those not having custody or possession of the government resources. Therefore, section 39.02(a)(2) of the Penal Code would not prohibit a public officer from using the public areas of a government building to create a communication for political advertising.

Regarding the specific example about which we have been asked, a public officer occupying the public officer's government office would have custody or possession of the government office by virtue of holding the public office. The government office would not be equally accessible to the public. We conclude that section 39.02(a)(2) would prohibit the public officer from using the public officer's government office to create any communication for political advertising, such as an interview for a campaign video. In our opinion, the best practices for public officers are to remove themselves from government facilities and decline to use other government resources, of which they have custody or possession, for campaign activity, including political advertising. We

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<sup>4</sup> Tex. Const. art. III, §§ 51 (legislature may not authorize grant of public money to any individual, association, municipal or other corporation), 52(a) (legislature may not authorize any county, city, town or other political corporation or subdivision of the state to grant public money or thing of value in aid of or to any individual, association, or corporation). *See also* Ethics Advisory Opinion Nos. 386 (1997) (use of state equipment or state employees to handle campaign contributions or prepare campaign finance reports for officeholders is a misuse of government resources), 172 (1993) (state employees' work time may not be used to handle campaign contributions or expenditures); Gov't Code § 556.004 (prohibiting use of legislatively appropriated money and other resources for campaign purposes); *Texans Uniting for Reform & Freedom v. Saenz*, 319 S.W.3d 914 (Tex. App. – Austin 2010), *petition denied*, 2011 Tex. LEXIS 59 (Tex., Jan. 14, 2011) (legislature intended section 556.004 of the Government Code to prohibit state officers and employees from using their official authority to affect the result of an election, to affect the nomination of a candidate, or to achieve purposes similar in kind or nature to achieving or aiding the nomination or election of candidates); Attorney General Opinion Nos. DM-431 (1997), JM-685 (1993) (both holding that governmental entity may not pay costs in connection with election contest involving government officeholder), MW-36 (1979) (public body has no authority to contribute public funds to or on behalf of an individual or organization).

<sup>5</sup> "Custody" is defined as "[t]he care and control of a thing or person for inspection, preservation, or security." Black's Law Dictionary 467 (10th ed. 2014). "Possession" is defined as "[t]he fact of having or holding property in one's power; the exercise of dominion over property," and "[t]he right under which one may exercise control over something to the exclusion of all others." *Id.* at 1351. In the Penal Code, "possession" is more generally defined as "actual care, custody, control, or management." Penal Code § 1.07(a)(39).

conclude that public officers may permissibly use government resources that are equally accessible to the general public, and they should relocate to publicly accessible areas, when creating photographs, videos, or other communications for political advertising.

*Section 39.02(a)(1), Penal Code*

Section 39.02(a)(1) of the Penal Code states that a public servant may not, with intent to obtain a benefit or harm or defraud another, intentionally or knowingly “violate[] a law relating to the public servant’s office or employment.” Penal Code § 39.02(a)(1).<sup>6</sup> Section 39.02(a)(2) of the Penal Code and the constitutional requirement to use public money for a public purpose are laws relating to the public officer’s office or employment. Therefore, in our opinion, a public officer would violate section 39.02(a)(1) of the Penal Code by using government resources of which the officer has custody or possession, including the government office, to create a photograph, video, or other communication for political advertising.

We caution that additional legal restrictions may apply to the use of any government resources, including other state or local laws or policies, and such restrictions may constitute law relating to a public servant’s office or employment under section 39.02(a)(1) of the Penal Code. This prohibition has a wide application and “allows for a vast array of potential means of committing the offense.” *State v. Martinez*, 548 S.W.3d 751, 759 (Tex. App. – Corpus Christi – Edinburg 2018), *reh’g denied*, 2018 Tex. App. LEXIS 5042 (Tex. App. – Corpus Christi – Edinburg June 11, 2018) (indictment alleging an offense under this provision must specify which law or laws relating to the public servant’s office or employment were allegedly violated). We cannot address the application of laws or policies that are outside our jurisdiction for an advisory opinion.<sup>7</sup> Accordingly, we cannot provide assurance that section 39.02(a)(1) of the Penal Code, depending upon all applicable laws, would not prohibit a public officer from using other government resources that are generally accessible to the public to create a photograph, video, or other communication for political advertising.

*Section 255.003(a), Election Code*

Section 255.003(a) of the Election Code states, in pertinent part, that an officer of a political subdivision may not knowingly “spend or authorize the spending of public funds for political advertising.” Elec. Code § 255.003(a).<sup>8</sup> The “spending” of public funds includes the use of a

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<sup>6</sup> “Law relating to a public servant’s office or employment” means a law that specifically applies to a person acting in the capacity of a public servant and that directly or indirectly: (A) imposes a duty on the public servant; or (B) governs the conduct of the public servant. *Id.* § 39.01(1). “Law” means the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute. *Id.* § 1.07(a)(30).

<sup>7</sup> See Gov’t Code § 571.091 (specifying the laws the commission may consider in an advisory opinion).

<sup>8</sup> Section 255.003(a) of the Election Code applies to an officer of a political subdivision. “Political subdivision” includes a county, city, or school district or any other government entity that possesses authority for subordinate self-government through officers selected by it. Elec. Code § 1.005(13)(C). By contrast, section 39.02 of the Penal Code applies to any public servant. *See supra*, n. 4 (defining “public servant”).

political subdivision employee's work time or a political subdivision's equipment or facilities.<sup>9</sup> "Political advertising" is defined, in pertinent part, as a communication supporting or opposing a candidate for nomination or election to a public office or a public officer that is published or broadcast in return for consideration or appears in various forms of writing or on an Internet website. *Id.* § 251.001(16).

For purposes of section 255.003(a) of the Election Code, we have concluded that the use of a facility maintained by a political subdivision, in an area that was restricted to its employees, required government resources to operate while in that restricted area, and therefore violated section 255.003(a) of the Election Code.<sup>10</sup> Furthermore, we have found violations of section 255.003(a) of the Election Code on numerous occasions since the statute was enacted where public officers controlled the access to certain government resources.<sup>11</sup>

## CONCLUSION

Section 39.02(a)(2) of the Penal Code prohibits a public officer from using government resources, of which the officer has custody or possession, to create a photograph, video, or other communication for political advertising. In addition, section 255.003(a) of the Election Code prohibits a public officer, who is also an officer of a political subdivision, from using government resources, such as restricted areas of government facilities, for political advertising. These statutes do not prohibit a public officer from using government resources that are equally accessible to the public for political advertising. Section 39.02(a)(1) of the Penal Code may, depending on all applicable laws, prohibit a public officer from using publicly accessible government resources for political advertising.

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<sup>9</sup> See, e.g., Ethics Advisory Opinion No. 443 (2002) (placement of campaign flyers in a school district teachers' lounge would involve the spending of public funds where school district employees were required to transport the flyers to an area of the school that was not accessible to the public), Ethics Advisory Opinion No. 45 (1992) (distribution of political advertising using school district equipment or school district employees on school district time would be the spending of public funds where an already existing internal mail system was used); Attorney General Opinion No. KP-177 (2018) (this statute prohibits the use of school district staff, facilities, or other resources where school districts electronically distributed links to Internet websites that were partisan in nature).

<sup>10</sup> Ethics Advisory Opinion No. 443 (2002).

<sup>11</sup> See, e.g., *In re Brooks* (SC-3180260) (2018) (use of a county-owned vehicle dedicated to the officer's use), *In re Wilson* (SC-31712183) (2018) (use of a county Facebook page maintained by the officer), *In re Joiner* (SC-31605137) (2017) (use of newsletter headlined as from officer's desk), *In re Hawkins* (SC-31011409) (2012) (use of space in a city utility bill), *In re Downs* (SC-240588) (2004) (use of space in a city water bill), *In re McRae* (SC-240226) (2004) (use of city letterhead), *In re Clark* (SC-240225) (2004) (use of city letterhead), *In re Bowman* (SC-240218) (2004) (use of emergency services district letterhead), *In re Lord* (SC-230963) (2004) (use of city-contracted video production), *In re Williams, et. al.* (SC-211170) (2001) (use of space in city water bill and airtime on city cable channel), *In re Morgan* (SC-210541) (2001) (use of internal mail system), and *In re Williams* (SC-991032) (1999) (use of special edition of sheriff's report).