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CITY COUNCIL AGENDA ITEM

Date: June 17, 2020

To: Honorable Troy City Council Members

From: Lori Grigg Bluhm, City Attorney

Subject: Campaign Finance Act Restrictions for Public Bodies and Officials

The recent discussions about potential ballot options for library continuation provides a perfect opportunity to discuss MCL 169.257, which is part of the Campaign Finance Act. Under this statutory provision, public bodies and officials are prohibited from using or authorizing funds, personnel, office space, computer hardware or software, stationary, postage, vehicles, equipment, supplies or other public resources in support of or in opposition to a ballot question or candidate. Public officials are allowed to express their views on candidates or issues, as long as it is part of their official responsibilities, and are allowed to express personal opinions without using public resources.

Rather than completely reinventing the wheel, the attached Michigan Municipal League One Pager Plus provides a good synopsis of these restrictions, and some examples of prohibited and allowable conduct as it relates to election activity. Although it was created in 2017, this instructional piece is still viable today.

The attached One Pager Plus identifies that one portion of the State Statute, MCL 169.257 (3) cannot be enforced by the Secretary of State, as determined by U.S. District Court Judge John Corbett O'Meara in *Taylor v. Roseville*. The Michigan Legislature has not yet addressed this provision. As a result, although the express statutory language appears to prohibit municipalities from mailing impartial educational materials to its voters within sixty days of an election (after September 4 for the November 3, 2020 election), this is not currently valid or enforceable.

The Secretary of State enforces the Campaign Finance Act, and local resources cannot be used to defend any official from an alleged violation of this statute or any other election law (MCL 169.221a)

Please let me know if you have additional questions or concerns.

Campaigning by Public Officials/PA 269 Dos and Don'ts

Introduction

U.S. District Judge John Corbett O'Meara accepted an agreement between the Secretary of State's office and local governments and school groups, permanently keeping the Secretary of State from enforcing a law that prevented local officials from providing factual information on local ballot proposals. O'Meara's order, entered April 28, 2016, references his previous temporary injunction against enforcement of the law, saying that the local governments had "demonstrated a strong likelihood of success on the merits of their claim that (the law) is unconstitutionally vague and thus void." The gag order was part of a larger campaign finance bill that passed the Legislature with little debate in the final days of 2015's legislative session and was signed by Gov. Rick Snyder, becoming Public Act 269 of 2015.

Section 57 of the Michigan Campaign Finance Act limits how a public body can use public funds or property when it comes to campaigning for ballot questions or candidates.

Campaign Finance Act—Permitted Activities

Generally, public officials can issue communications to voters using public dollars if the communications contain factual information regarding the election, the proposal, and what impact either its passage or defeat will have on the public body. Moreover, the prohibition on using public monies to support or defeat a ballot proposal does not prevent certain high level officers and employees from expressing their opinions. For example, nothing prevents a municipal official from standing up at a public meeting and telling the gathering that, in his or her opinion, the municipality needs to ask for a millage increase and the voters need to support it.

Although there are opportunities to carefully use public time and money to further educate the electorate on a proposal, public employees and officials should also keep the following additional guidelines in mind:

- 1) Non-policy making staff may not take "official" time (i.e., time during their regular jobs) to participate in campaign committee activities, as this would constitute an inappropriate expenditure of public funds. Nothing would restrict the ability of these individuals to work in any way on the campaign on their own time.
- 2) A public body may provide information to individuals and/or a campaign committee that is publicly available in the same manner as it would provide information to anyone else requesting the information.
- 3) Campaign committees may meet at public facilities only to the extent that, and on the same terms as, any other group is permitted to use the same facilities. If the public body incurs any expense in providing meeting space to the committee, the committee must reimburse the public for that expense.

Campaign Finance Act Don'ts

- 1) Don't use city or village funds, municipal-owned office space, or other property to expressly advocate a vote for or against a candidate or ballot question. "Expressly advocate" means to state support for the passage or defeat of a ballot question or the election or defeat of a candidate—in other words, to say "Vote yes for" (or no) or "Support" (or defeat) a candidate or ballot question.
- 2) Don't put links on your municipal website to sites that expressly advocate only for or against one candidate, one slate of candidates, or one side of a ballot question.
- 3) A city or village council cannot authorize or use public resources for a payroll deduction plan to collect for a campaign committee.

Appendices

Appendix I USE OF PUBLIC FACILITIES, FUNDS, ETC. PROHIBITED

An injunction issued on February 5, 2016 by U. S. District Judge John Corbett O'Meara, from the U.S. District Court in Ann Arbor prevents the enforcement of PA 269 of 2015 as it affects Section 57 of the MCFA only.

PA 269 of 2015 signed by the Governor in January of 2016 with immediate effect made changes to the Michigan Campaign Finance Act relative to the use of public funds for communications prior to the election. See PA 269 of 2015 for details.

Section 57 of the Michigan Campaign Finance Act (MCFA) stipulates a public body or person acting for a public body **must not use or authorize the use of public funds or resources** to make a contribution or expenditure to further the nomination or election of a candidate or the qualification, passage or defeat of a ballot question. The inclusion of Section 57 in the MCFA does not restrict the constitutionally protected right to associate or to engage in political speech. It is intended to prevent those who control public resources from using those resources to influence the outcome of an election. It is up to the people and not public bodies to decide elections. This means that a public body is prohibited in participating in elections for:

- State and Local Ballot Questions
- Federal Candidates
- State Candidates
- Local Candidates

This means that a public body cannot contribute to or make expenditures on behalf of committee's registered to support or oppose candidates and ballot questions. This prohibition includes Candidate Committees, Ballot Question Committees, PACs, SuperPACs and Political Party Committees.

A public body is:

- A state agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
- The legislature or an agency, board, commission or council in the legislative branch of state government.
- A county, city, township, village, intercounty, intercity, or regional board; a council, school district, special district, or municipal corporation; or a board, department, commission, or council or an agency of a board, department, commission, or council.
- Any other body that is created by state or local authority or is primarily funded by or through state or local authority, which body exercises governmental or proprietary authority or performs a government or proprietary function.

EXAMPLES OF PROHIBITED USES

The prohibition includes, but is not limited to the use of personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, provide volunteer personal services or other public resources.

- A public body is prohibited from displaying political signs, brochures, pamphlets, etc in any governmental building or government property.
- Public officeholders and other public bodies are prohibited from using their office email and phones for campaign purposes.

Payroll Deduction Prohibition

The prohibition includes using or authorizing the use of public resources to establish or administer a payroll deduction plan to directly or indirectly collect or deliver a contribution to or make an expenditure for a committee. Advance payment or reimbursement to a public body does not cure a use of public resources.

EXEMPTIONS

The prohibition does not apply to any of the following:

- The expression of views by an elected or appointed public official who has policy-making responsibilities.
- The production or dissemination of factual information concerning issues relevant to the function of the public body.
- The production or dissemination of debates, interviews, commentary, or information by a broadcasting station, newspaper, magazine, or other periodical or publication in the regular course of broadcasting or publication. This exemption does not apply to the dissemination of an advertisement of a candidate.
- The use of a public facility owned or leased by or on behalf of a public body if any candidate or committee has an equal opportunity to use the public facility.
- The use of a public facility owned or leased by or on behalf of a public body if that facility is primarily used as a family dwelling and is not used to conduct a fund raising event.

On September 20, 2017, 2017 implements a num (MCFA). Click here to v

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- An elected or appointed public official or an employee of a public body who, when not acting for a public body but is on his or her own personal time, is expressing his or her own personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services.

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Special notes:

- The mere act of voting on a resolution that encompasses matters at a meeting does not constitute a misuse of public resources within the meaning of Section 57. A public body may record the resolution in the meeting minutes as required by the Open Meetings Act and may disseminate copies of those minutes in its regular course of publication.
- Public facilities that are rented to committees for use, may display the committee function on the facility marquee without violating section 57 as long as any candidate or committee has an equal opportunity to use the facility and the marquee is use equally for all events.
- Public facilities and resources can be used for public forums and public education on candidate elections and ballot questions provided the public resources are not used to influence the outcome of the election and views of all candidates and views of both supporters and opponents of a ballot question are treated equally.

Appendices:

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PENALTIES

A person who knowingly violates this section is guilty of a misdemeanor punishable, if the person is an individual, by a fine of not more than \$1,000.00 or imprisonment for not more than 1 year, or both, or if the person is not an individual, by one of the following, whichever is greater: (a.) A fine of not more than \$20,000.00 or (b.) A fine equal to the amount of the improper contribution or expenditure.

OTHER PROHIBITIONS OF THE MCFA

For a more complete listing of prohibitions covered under the MCFA see Appendix O; Prohibited Contributions.

COMPLAINTS

If you believe a violation of any provision of the MCFA has occurred, the law provides for a specific process that can be followed to file a complaint. A Complaint Process Form has been created to assist you with filing a complaint.

FAQs

What is a public body? A public body is:

- A state agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of state government.
- The legislature or an agency, board, commission or council in the legislative branch of state government.
- A county, city, township, village, intercounty, intercity, or regional board; a council, school district, special district, or municipal corporation; or a board, department, commission, or council or an agency of a board, department, commission, or council.
- Any other body that is created by state or local authority or is primarily funded by or through state or local authority, which body exercises governmental or proprietary authority or performs a government or proprietary function.

What activities are exempt from Section 57? Section 57 is not intended to squash the constitutional right to free speech by public officials or public bodies, but rather ensure that public resources are not used to influence elections. That decision must be left to the voters. Therefore, the prohibition does not apply to any of the following:

- The expression of views by an elected or appointed public official who has policy-making responsibilities.
- The production or dissemination of factual information concerning issues relevant to the function of the public body.
- The production or dissemination of debates, interviews, commentary, or information by a broadcasting station, newspaper, magazine, or other periodical or publication in the regular course of broadcasting or publication. This exemption does not apply to the dissemination of an advertisement of a candidate.
- The use of a public facility owned or leased by or on behalf of a public body if any candidate or committee has an equal opportunity to use the public facility.
- The use of a public facility owned or leased by or on behalf of a public body if that facility is primarily used as a family dwelling and is not used to conduct a fund raising event.
- An elected or appointed public official or an employee of a public body who, when not acting for a public body but is on his or her own personal time, is expressing his or her own personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services.

Can a public official use the office telephone for campaign purposes? No. A public official should not use his public office telephone or any phone paid for with public funds to campaign or advertise it as a way of contacting the public official for campaign purposes. Any time spent answering campaign phone calls diverts attention for the ordinary business of the public body and is permanently lost. Additionally, any staff time answering and transferring campaign related phone calls also causes the loss of time to the county. Any of this activity would result in a prohibited expenditure of public resources.

Can a public official use the office email for campaign purposes? No. A public official should not use his public office email system paid for with public funds to campaign or advertise it as a way of contacting the public official for campaign purposes. Any time spent answering emails calls diverts attention for the ordinary business of the public body and is permanently lost. Additionally, any staff time reading, handling or transferring campaign related emails also causes the loss of time to the county. Any of this activity would result in a prohibited expenditure of public resources.

Can a public official use pictures taken in the public office and/or wearing their official uniform? Maybe. A public body violates the MCFA by expending its resources for prohibited campaign activity. The expenditure of public funds must have “ascertainable monetary value” in order to meet this threshold. There is no ascertainable monetary value in connection with a picture being taken in a public office. In addition, section 57 of the MCFA contains an exception that allows the use of a public facility if any candidate has the same opportunity to use that facility.

Can a public official campaign in their uniform? Maybe. A public body violates the MCFA by expending its resources for prohibited campaign activity. The expenditure of public funds must have “ascertainable monetary value” in order to meet this threshold. There is no ascertainable monetary value in connection with a public official wearing a uniform. In addition, some public officials are asked to purchase their own uniforms. In this case, no public resources are involved.

Can a public official campaign using a publicly funded vehicle such as a patrol car? No. A publicly funded vehicle such as a patrol car must not be used to campaign. The prohibition would extend to attending campaign events, transporting campaign materials or any other exclusively campaign related use.

Can a public official campaign while on publicly paid time? No. At no time can a public official campaign when being paid to work. A public official must use personal time or accrued leave time to campaign during working hours. Public officials that are on call, but not actively working and not being paid are considered to be on personal time unless and until they are called to duty.

Can a public official use official letterhead for campaign purposes? No. A public official cannot use official letterhead of the public body to campaign for himself/herself or any other candidate.

Can a public official endorse another candidate? Yes. An endorsement in and of itself has no value. However, the public official cannot use public resources to promote or advertise the endorsement of himself or any other candidate.

Can a public official use public resources if the cost is reimbursed to the public body? No. A violation of the MCFA occurs at the point that the resources are used and reimbursement to the public body does not cure the violation.

Can campaign signs be placed on public property or displayed in public buildings? No. Campaign signs should not be placed on public owned or leased property. This extends to placing brochures in a public building.

I see signs on public property, can I take them down? No. You do not have the authority to remove signs from any property that you do not own or do not have permission to remove the signs from by the owner.

Can a public facility be used for a candidate meet and greet or ballot question informational meeting? Yes. Public facilities and resources can be used for public forums and public education on candidate elections and ballot questions provided the public resources are not used to influence the outcome of the election and views of all candidates and views of both supporters and opponents of a ballot question are treated equally.

I think a violation has occurred, can I file a complaint? Yes. If you believe a violation of any provision of the MCFA has occurred, the law provides for a specific process that can be followed to file a complaint. A Complaint Process Form has been created to assist you with filing a complaint.

Do I need evidence of the violation to file a complaint? Yes, a complaint that is not substantiated with evidence will be dismissed. Evidence can be in the form of pictures, videos, receipts or vouchers or anything else that substantiates the allegations.



CAMPAIGNING WITH A PURPOSE

Public Employees/
Officials Support
of Ballot Proposals

By Christopher Trebilcock

On August 5, 2014, Oakland County saw 45 ballot proposals, primarily for millage renewals or increases. Ten proposals failed to pass. Ingham County had ten ballot proposals. Two failed to pass, including the Fowlerville School Millage by one vote out of the reported 13 cast. In Kent County, voters cast ballots on 13 different proposals. All 13 proposals passed.

In general, ballot proposals are more likely to succeed if there is an

active campaign within the community voicing strong support for the measure. These campaigns typically include the traditional “yard sign” wars, direct mailers, and other direct voter contact. Often, leading public officials in the community who are supporting the proposal are asked or seek to take all steps necessary to ensure the passage of the proposal. When this happens, any public employee or official must proceed cautiously to ensure that he or she does not violate the Michigan Campaign Finance Act.

Until 1995, there were no statutes that expressly prohibited using public funds to support or oppose ballot proposals or candidates. Without statutory guidance, questions related to the use of public funds in election proposals were often referred to the attorney general of the state of Michigan. In 1987, the attorney general issued an opinion addressing a series of questions regarding the permissible interactions between a school district and independent political ballot or candidate committees relating to election proposals.¹ The following

year, the attorney general opined that a governmental unit “can expend public funds to inform their electors in a fair and objective manner of the facts surrounding an upcoming ballot proposal.”²

LEGISLATURE ADDRESSES PUBLIC CAMPAIGNING

In 1995, the Michigan Legislature amended the Campaign Finance Act to prohibit a public body from using public funds or resources to make a contribution to an individual candidate or a ballot question campaign. In 1996, the statute was amended to clarify what is permissible under the law by adding a list of activities that can be done without violating the Campaign Finance Act.

In essence, these Campaign Finance Act amendments codified much of the content of the old attorney general opinions. Section 57 of the Campaign Finance Act prohibits public employees from using funds, personnel, office space, computers, or other public resources to make a contribution or expenditure for political purposes. This prohibition, however, explicitly exempts opinions of public employees with policy making duties, the production of factual information regarding city services and



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functions, the leasing or use of public space by candidates provided that all candidates are given equal treatment, and public employees who engage in political activities during his or her personal time. To encourage compliance, Section 57 imposes significant fines and criminal penalties to individuals and public bodies for violations.

At first blush, the language above suggests that public officials are virtually banned from most campaign activities. However, public officials seeking to advocate for a proposal can find solace in the fact that “specifically excluded from the definition of expenditure is any expenditure on a communication on a subject or issue if the communication does not support or oppose a ballot question by name or clear inference.” MCL 169.206(2)(b). The secretary of state has consistently reaffirmed that it is required to “apply the express advocacy test to communications financed by public bodies.” *Interpretive Statement to David Morley* (Oct. 31, 2005). Under this test, com-

munications are outside the reach of regulation by the secretary of state unless it urges votes to “vote yes,” “vote no,” “elect,” “defeat,” “support,” or “oppose” a ballot question. The secretary of state will look solely at the substance of the communication and not examine the broader context or implication of the communication.

DOS AND DON'TS

Public officials can generally issue communications to voters using public dollars if the communications contain factual information regarding the election, the proposal, and what impact either its passage or defeat will have on the public body. Moreover, the prohibition on using public monies to support or defeat a ballot proposal does not prevent certain high level officers and employees from expressing their opinions. For example, nothing prevents a city council member or city manager from standing up at a public meeting and telling the gathering that, in his or her opinion, the city needs to ask for a




millage increase and the voters need to support it.

Although there are opportunities to carefully use public time and money to further educate the electorate on a proposal, public employees and officials should also keep the following additional guidelines in mind:

- A** Non-policy making staff may not take “official” time (i.e., time away from their regular jobs) to participate in campaign committee activities, as this would constitute an inappropriate expenditure of public funds. Nothing would restrict the ability of these individuals to work in any way on the campaign on their own time.
- B** The public body may provide information to individuals and/or a campaign committee which is publicly available in the same manner as it would

provide information to anyone else requesting the information.

- C** The campaign committees may meet at public facilities only to the extent that and on the same terms as any other group could use the same facilities. If the public body incurs any expense in providing meeting space to the committee, the committee must reimburse the public for that expense.
- D** The public body should not place links to campaign-related websites on its website. 

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- 1 OAG Opinion No. 6423 (February 24, 1987).
- 2 OAG Opinion No. 6531 (August 8, 1988).



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