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October 1, 2014

SUPPLEMENTAL GENERAL ADVISORY OPINION

Re: 14 A 0001
Electronic Communications During Election Periods

ISSUE

In response to several questions from Cook County officials and employees over the course of the last 13 months, the Cook County Board of Ethics (“Board”) has chosen to supplement its previous guidance and issue this revised general advisory opinion on the applicability of Section 2-586 of the Cook County Ethics Ordinance (“Ethics Ordinance”) to electronic communications during election periods.

As enacted by the Cook County Board of Commissioners, Section 2-586 prohibits the use of County resources (including County funds, equipment, employees and time) during the two-and-a-half months prior to an election for the creation and distribution of unsolicited, non-political¹ newsletters, brochures and other written public outreach materials. *See* Cook County Code of Ordinances (“County Code”), § 2-586(a). Via a pair of general advisory opinions dated November 17, 2010 (10A0008) and March 16, 2012 (11A0021), the Board extended the scope of section 2-586 to cover all forms of electronic communications. The Board’s expansion of this provision to include, for example, PDFs of unsolicited newsletters emailed en masse to County residents and other electronic communications helps to bring the Ethics Ordinance into the 21st century.

But this expansion of the original scope of Section 2-586 also raises questions about the permissible use of County funds and resources to continue non-political, new media communications operations during an election season. As the Board recognized in its prior advisory opinions, printed brochures and newsletters are being replaced by newer forms of communications such as websites, email subscription services, Facebook and Twitter. The question arises, should County officials shut down or discontinue the maintenance of various informational County websites in the run up to an election? Must County officials who rely on a

¹ The Ethics Ordinance separately prohibits the use of public resources for campaign communications and other political activities. Cook County Code of Ordinances (“County Code”), §§ 2-576, 2-583(c) (prohibitions); 2-602(a),(c),(d) (imposing fines of up to \$5,000 per violation and criminalizing conduct).

communications staff scrub third-party websites, such as Facebook and Twitter, of posts that might be informative to County voters? This opinion highlights an exception in Section 2-586 for constituent-initiated communications and explains its application to the continued use of County funds and resources for communicating non-political information on County websites, email listservs, Facebook accounts and Twitter feeds during an election period.

SHORT ANSWER

The Board's interpretation of Section 2-586 for new media aims to strike a balance between a desire to level the playing field for non-incumbent candidates during an election and a desire to support a County government that is transparent and accountable year round – before, during and after an election. To achieve this, the Ethics Ordinance draws a distinction between communications initiated by a constituent and unsolicited communications by a County official. During the several months before an election, a County official cannot use County funds or resources to create or distribute unsolicited newsletters, brochures or their analog and electronic equivalents. County Code, § 2-586(a). However, a County official can use County funds and resources to respond to a constituent's request for information at any time. *Id.* at § 2-586(b).

It is the opinion of the Board that this response can permissibly take a number of forms, including publicly-funded, electronic media, such as updates to an informational, non-political website, Facebook account or Twitter feed. In such cases, constituents seek out the information that they receive by, for example, using search engines to find information posted online or signing up to receive streaming updates through push notification services like “friending” on Facebook or “following” on Twitter. In all of these circumstances, a County official is making information available to the particular population of those who have solicited it without obtaining the unfair advantage of communicating the same to all potential County voters.

As a caveat, the Board's analysis here is on Section 2-586(a)'s election-period limits on methods for communicating government-service-related information using public funds and resources. Where (1) the information created and posted is campaign-related, or (2) the website updated includes political or personal messages, then the Ethics Ordinance strictly prohibits the use of County funds and resources (including staff while on County time) at all times – and not just during specific election periods. *See* County Code, §§ 2-576, 2-583. This Opinion provides guidance on posting non-political, constituent-service-related information on official County websites and on third-party websites created and maintained for this public purpose.²

DISCUSSION

The important public purpose behind Section 2-586(a) is to promote fair elections. Simply by virtue of their position in public office, incumbents enjoy inherent advantages, such as wide name recognition and public credit for beneficial government activities. Elected officials also have special access to the voting public. The regular process of governing involves using County funds and resources to communicate directly with constituents. Indeed, good government requires providing the public with current, detailed information on County programs, services, activities and outcomes. As an election draws closer, however, allowing the

² If, for example, a County official maintains a Facebook page for his or her reelection campaign, the County official cannot use public funds or resources to update this website, even if the specific update is non-political in nature.

incumbent candidate to use County funds and resources to communicate directly with potential voters creates (or appears to create) an unfair advantage in the upcoming election.

Subsections 2-586(a) and (b) balance these competing public purposes by addressing the use of County funds and resources for one method of communication – written brochures and newsletters. Subsection (a) prohibits the production and mailing of such taxpayer-funded material during an election season. The rationale is that, even if the information contained in a brochure or newsletter does not specifically extoll the elected official-candidate’s accomplishments, it does have promotional value because it showcases and reminds the voters of the good work done under his or her leadership. But the work of government does not grind to a halt during the months prior to an election, and so Subsection (b) provides an exception to that ban: an elected official-candidate is allowed to continue addressing constituent needs for information by mailing responsive written materials, even on the eve of an election and even if the written materials were created with public funds and resources.

The Ethics Ordinance draws a line between permissible and impermissible activity based on who initiates the communication: a member of the public or an elected official-candidate. Where a constituent actively seeks information from and/or about the County, providing that material is essential for a transparent and accountable government. But where an elected official-candidate, without solicitation, initiates the distribution of information during an election period, the balance shifts, and the public interest in fair elections controls.

Ordinance Language & Traditional Media

Section 2-586 states in relevant part:

- (a) County funds and resources may not be used by any elected County official to print or pay for the printing of any newsletters or brochures during the period beginning January 1 of the year of a general primary election and ending the day after such general primary election and during a period beginning September 1 of the year of a general election and ending the day after such general election if the elected County official is a candidate in such primary or general election. A County elected official may not mail, during the period beginning January 1 of the year of a general primary election and ending the day after such general primary election and during a period beginning September 1 of the year of a general election and ending the day after such general election, any newsletters or brochures that were printed at any time using County funds or resources if the elected County official is a candidate in such primary or general election.³
- (b) This section shall not apply to . . . a brochure mailed to a constituent in response to that constituent’s inquiry concerning the needs of that constituent or questions raised by that constituent.

³ Unlike its federal equivalent, Section 2-586(a) is not limited to unsolicited *mass* mailings: there is no threshold number of recipients for a violation of the County ordinance. See 39 U.S.C. § 32310 (a)(b)(A) (applies only to unsolicited mailings to over 500 persons).

County Code, §§ 2-586(a)-(b).

The Board’s general framework for determining whether there has been a Section 2-586(a) violation of the Ethics Ordinance is to determine whether there is substantial evidence of:

- (1) action by an elected official-candidate or his or her proxy;
- (2) during an election period;
- (3) to produce or transmit a “newsletter or brochure”;
- (4) using County funds or resources.

The phrase “newsletters or brochures” is not defined in the Ethics Ordinance,⁴ but the Board interprets it broadly as a term of art, in light of the Section’s purposes, to include all means and formats of printed information for public distribution.

Similarly, although Subsection (b), as written, expressly exempts only “brochures” printed with public funds or resources and sent in response to a constituent request – making no mention of “newsletters” – the Board has also interpreted this provision broadly to exempt all means and formats of printed information responsive to a constituent inquiry. The Board recognizes that sometimes the most effective, efficient method for providing information in response to a constituent’s inquiry may be mailing a newsletter or some other printed material (*e.g.*, a manual, a regulation, a newspaper article).

While the exemption for constituent-initiated communications might typically take the form of a single request for information and a single response, there is nothing in the language of the Ethics Ordinance that prevents a standing inquiry from a constituent, *i.e.* a one-time request to “opt in” to a stream of non-political information about the County and receive updates as they become available until and unless that standing request is revoked. The paradigmatic case would be a County resident who has subscribed to a non-political newsletter and wishes to receive the latest copy of the newsletter each month without having to re-submit a new request for each issue. Cutting off that resident’s subscription before an election or requiring the resident to re-request the information renders County government less transparent and less accountable. As such, the Board finds such standing requests for information to be consistent with, and permissible under, the Ethics Ordinance.⁵

⁴ Generally speaking, brochures provide summary information on a County program or service, while newsletters generally are produced and distributed at regular intervals (*e.g.*, weekly, monthly, annually) and provide general information, news and updates regarding a particular department, group or topic.

⁵ A standing request for new information as it becomes available should not be confused with a past request for information. Where a constituent’s inquiry has already been answered, a past query cannot be used as a justification for sending out additional unsolicited materials on the same general topic during an election period. Standing requests are strictly construed.

The Prior Advisory Opinions

The two prior Board of Ethics opinions on this issue, General Advisory Opinions Nos. 10 A 0008 and 11 A 0021 (“the Prior Opinions”), expanded the scope of Section 2-586(a) from traditional, publicly-funded printed and mailed communications to electronically-created and/or electronically-transmitted, publicly-funded communications. The Prior Opinions stated (using identical language):

The Board interprets Section 2-586 of the Cook County Ethics Ordinance which currently prohibits certain publicly funded forms of communication during election periods to also include by inference electronic communications as defined by the University of California Santa Cruz’s Glossary of IT Policy Related Terms. This means that any information, such as newsletters or brochures which are transmitted electronically, which includes but is not limited to, via email and email attachments, web pages and faxes . . . is also prohibited by Section 2-586. This means that the limitations or prohibitions which apply to “traditionally printed and/or mailed” newsletters or brochures under 2-586, also applies to those newsletters or brochures which could be “electronically created and or mailed.”⁶

By expanding the scope of Section 2-586(a) to include electronic communications, the Ethics Ordinance is able to reach the digital equivalents of unsolicited, printed outreach materials. Under the Board’s existing precedent, Subsection (a) reaches increasingly common practices, such as:

- Faxing a printed newsletter or brochure;
- Sending by email, either as an attachment or in the body of the email, a printed newsletter or brochure that has been converted into an electronic format (*e.g.*, pdf or Word); and
- Sending by email, either as an attachment or in the body of the email, a digital version of a newsletter or brochure that was created electronically.

However, while deciding that websites are covered as electronic communications, the Prior Opinions did not interpret how Section 2-586 applies to non-political information posted by a County official or his or her proxy on a County website or third-party service such as Facebook or Twitter during an election period.

⁶ The Ethics Ordinance prohibits County officials who are running for office from associating their name, voice or likeness with a public service announcement or advertisement for a County program during the pendency of their candidacy. *See* County Code, § 2-586(c). While a County official’s newsletter or brochure frequently contains his or her name and image and may discuss County programs, a County official’s newsletter or brochure is not a public service announcement or advertisement for a County program in the strictest sense and the two restrictions should be analyzed separately. To clarify, Section 2-586(a) applies to all “newsletters or brochures” and their analog or electronic equivalents, regardless of whether they include an elected official-candidate’s name, image or voice. To the extent that this opinion is inconsistent with the Prior Opinions, this opinion controls.

Websites and Social Media

Because the restriction in Section 2-586(a) is time bound, applying it to electronic communications on a website is an awkward fit. Section 2-586(a) is only applicable during an election year from January 1 until the day after the primary election and from September 1 until the day after the general election. Printed and mailed newsletters and brochures, and many electronically-created and -transmitted communications, such as faxes and emails, are communicated by County officials to their intended recipients at an identifiable point in time (*i.e.* when they are physically mailed or when a director of communications hits “send” on a mass email). The production of content on a website, on the other hand, is more organic, and the moment when information is actually communicated from its author to a reader is virtually impossible to identify. New information is constantly being added, removed and changed on County websites, and constituents visiting these sites at various times throughout the year can access new and old information.

To force this square peg into a round hole, the Board has two bad choices. It could read Subsection (a) to require that County officials not update or alter County websites during an election period. Such a rule, however, seems a bit pointless. The openness of government would be compromised during the two-and-a-half months prior to an election if website visitors could only access out-of-date information. Nor would such a rule further the effort to lessen incumbents’ election advantage because old posts would remain available to be read during the election period.

The alternative approach is equally absurd. The Board could read Subsection (a) to require that County websites be taken down in their entirety before an election so as to prevent constituents from reading both new and old posts that might give them a favorable impression of sitting County officials vis-à-vis their campaign challengers. Again, while this would serve the interest in reducing the advantage of incumbency, requiring the County to “go dark” for more than four months in every election year would violate a central tenet of the Ethics Ordinance – that governance of the County for its residents must continue uninterrupted by the political activity of County officials, appointees and employees. Shutting down websites before an election is not good governance; it is very nearly the opposite. Where a County website contains only non-political information about County programs, services, activities and outcomes, shutting it down abandons the County’s duty to be transparent and accountable to its constituents at all times.

Fortunately, the Board does not have to embrace either absurd result because, in enacting this Ethics Ordinance provision, the County Board of Commissioners provided an exemption in Subsection (b) for constituent-initiated communications. The communicative exchange of information between a website-poster and a website-visitor fits comfortably within this exemption. While a County official may direct that information be posted to a County website, that information is not actually communicated to anyone in particular until an interested constituent visits the website to read the post. Constituents seeking information about the County must actively search the internet to find a County website, and they arrive at the website without specific action by or communication from a government actor. In this respect, the communicative exchange is the equivalent of a constituent stopping by unannounced at a County office to pick up a brochure on a topic of interest to him or her – activity that is squarely within Section 2-586(b)’s safe harbor provision for constituent-initiated communications.

As Cook County websites and other forms of interactive electronic communications increase in form and sophistication, the guiding principles remain the same. The permissibility of “sending” information to members of the public during an election period turns on who initiates the communication. Applying this principle to the numerous types of communication methods on the Cook County website (<http://www.cookcountyil.gov/>) provides a helpful illustration. The home page provides recent news and access to general information on, for example, Cook County departments and agencies. It also provides links to Cook County government’s blog, and Facebook, Twitter, Flickr and YouTube pages. Those pages, in turn, provide additional non-political recent news and information. All of the information is communicated to an individual only when that person actively seeks it out online. Constituents can initiate this communication on a one-off basis by using search engines and typing the names of these websites into internet browsers. Or, constituents can make standing information requests, and opt in to receive a stream of news and information as updates are posted. Common online methods for this include: signing up on a topical email listserv, friending someone on Facebook or becoming a follower on a Twitter account.

All of these constituent-initiated communications are permissible under Section 2-586(b), and County officials may use County funds and resources to maintain these streams of electronic communications during an election period without running afoul of Section 2-586(a). County government remains open, transparent and accountable to inquiring constituents who want to learn more about the County’s programs, services, activities and outcomes, even as they may be associated with sitting County officials – without giving County officials the unfair election advantage of forcing such information on County residents who are not interested in receiving it.

As a final caveat, the foregoing analysis of Section 2-586(a)’s limits on the *methods* for communicating with public funds and resources during election periods presumes that the *content* of all the information communicated is purely informational and non-political in nature. Where (1) that information takes on the characteristics of a campaign communication or (2) the content of the website intermingles with personal or political messages, the Ethics Ordinance strictly prohibits the use of public funds and resource both during and outside of an election period. *See* County Code, §§ 2-576, 2-583. To the extent that a website, email listserv, Facebook account or Twitter feed, includes personal or political content, then the County officials, appointees and employees who use County funds and resources (including time, co-workers and computers) to post additional content do so at the risk of violating the Ethics Ordinance and facing serious sanctions, including fines and criminal prosecution. *Id.* at § 2-602 (a),(c),(d).

Please note the determination of the Board of Ethics herein is based solely on the application of the Ethics Ordinance to the general issue presented. Other laws, rules and policies may also govern the non-political, informational content that a County official or his or her proxy places on County and third-party websites using public funds and resources; the determination of the Board of Ethics here is not binding with respect to their application.

Under the rules and regulations of the Cook County Board of Ethics, all requests for reconsideration of this advisory opinion must be filed in writing within twenty days of the date of

this opinion. Please do not hesitate to contact our office in person, by phone or email with additional questions to request additional clarification.

Sincerely,
THE COOK COUNTY BOARD OF ETHICS

A handwritten signature in cursive script that reads "Roseann Oliver".

Roseann Oliver,
Chairperson