



Open Meetings Act v. Political Advertising

Danielle Folsom, Assistant City Attorney, City of Houston

Thursday, June 20, 2019

TCAA 2019 Summer Conference

Overview

- ▶ This presentation will discuss the application of § 255.003 of the Texas Election Code to meetings held under the Texas Open Meetings Act.
- ▶ We will cover the relevant law including recent case, *In re Turner*, 558 S.W.3d 796, 797-98 (Tex. App.—Houston [14th Dist.] 2018, no pet.).
- ▶ We will discuss practical tips for advising clients regarding political advertising issues.

Judge says Houston unlawfully electioneering against firefighters' pay measure

By **Mike Morris** Updated 6:14 pm CDT, Tuesday, July 31, 2018

OPINION // EDITORIALS

The video the Houston firefighters union doesn't want you to see [Editorial]

By **The Editorial Board** | Aug. 1, 2018 | Updated: Oct. 7, 2018 7:59 p.m.

Source: Houston Chronicle

Texas Election Code § 251.001 (Definition of Political Advertising)

- (16) "Political advertising" means 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:
- (A) in return for consideration, is published in a newspaper, magazine, or other periodical or is **broadcast by radio or television**; or
 - (B) appears:
 - (i) in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication; or
 - (ii) on an **Internet website**.

Texas Election Code § 255.003 (Unlawful Use of Public Funds for Political Advertising)

(a) An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising.

(b) Subsection (a) does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure.

(b-1) An officer or employee of a political subdivision may not spend or authorize the spending of public funds for a communication describing a measure if the communication contains information that:

(1) the officer or employee knows is false; and
(2) is sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure.

(c) A person who violates Subsection (a) or (b-1) commits an offense. An offense under this section is a Class A misdemeanor.

Texas Ethics Commission's Enforcement of § 255.003

- ▶ On written request of the governing body of a political subdivision that has ordered an election on a measure, the commission shall prepare an advance written advisory opinion as to whether a particular communication relating to the measure does or does not comply with this section. Tex. Elec. Code § 255.003(e).
- ▶ The critical question in determining whether a communication constitutes “political advertising” is whether the information supports or opposes a measure. Whether a particular communication supports or opposes a measure is a fact question.
- ▶ A factor in determining whether a particular communication supports or opposes a measure is whether the communication provides information and discussion of the measure without promoting the outcome of the measure. See Op. Tex. Ethics Comm'n No. 476 (2007).
- ▶ Whether a violation of section 255.003(a) of the Election Code has occurred depends on an examination of the overall content of the advertising.

Op. Tex. Ethics Comm'n No. 456 (2004)

- ▶ Issue: Whether the recording and televising of city council meetings may violate § 255.003 if a council member states an opinion concerning a measure that is or may be on an upcoming ballot.
- ▶ Holding: Tex. Elec. Code § 255.003 does not prohibit a city from broadcasting a tape of a City Council meeting at which the city council considers placing an issue before the voters if the broadcast is in keeping with the city's regular practice of broadcasting meetings.
- ▶ However, the TEC could not state that comments by city council members at a recorded public meeting could never violate § 255.003, if city council members arrange a discussion 1) of a matter not pending before city council and 2) with intention that broadcast of the discussion would influence the outcome of the election.

Tex. Ethics Comm'n Enforcement Action: *In the Matter of Lane Nichols*

- ▶ Order and Agreed Resolution before Texas Ethics Commission (SC-240223)
- ▶ Before a charter amendment election, Mayor, City Clerk, and City manager participated in taping of TV program in which city officials discussed proposed charter amendments and the effect of passing those amendments. General discussion painted passage of the amendments in a favorable light.
- ▶ The Texas Ethics Commission found credible evidence that city official violated § 255.003 by using or authorizing the use of city resources for political advertising. TEC imposed \$1,250 civil penalty.

In re Turner : Background

- ▶ Petition submitted to City of Houston proposing charter amendment to “require parity in the compensation provided to Houston fire fighters compared to the compensation provided to Houston police officers.”
- ▶ In May 2018, City Secretary certified to Mayor and City Council that petition had requisite number of signatures to require election.
- ▶ On July 26, 2018, City’s Budget & Fiscal Affairs (“BFA”) Council Committee held a special-called public meeting to discuss the proposed charter amendment and its financial implications.

July 26, 2018
10:00 a.m.

City Hall Council Chamber – 901 Bagby, 2nd Floor

1. Welcoming Remarks
 - Council Member Dave Martin, Chair
 - Council Member Amanda K. Edwards, Vice Chair
2. Discussion on Firefighter Pay Parity
 - Tantri Emo, Director, Finance Department
 - Samuel Peña, Chief, Houston Fire Department
 - Joe Gamaldi, President, Houston Police Officers’ Union
 - Ray Hunt, Past President, Houston Police Officers’ Union
3. Public Comments

Excerpts from discussions during BFA Committee

CHIEF PENA: The issue is that -- that this charter amendment is not going to give me, as a fire chief, any additional resources, monies to -- to address the needs that we're facing right now.

I can't use any of this money for apparatus. I can't use any of this money for health and safety programs. I can't use any of this money for professional development of our personnel. I can't use any of this money for -- for the facilities and maintenance. I can't.

So I want to make sure that we're clear on that because the expectation is going to be if a service is costing me more, I want more -- better service. And, you know, we've -- we've been in the paper a lot over -- over the state of our fleet.

This -- this is not going to help me address that particular hygiene factor that's really affecting this organization.

DIRECTOR EMO: Yeah, I just want to remind everyone again, the financial impact that is before you, again, is based on what is stated in the proposed charter amendment, based off what police receive today in July, as of July.

So that is about 98 million each year. So over three years, roughly about what, close to 3 hundred million. So shall the police receive additional pay in the future, is it 2, 3, 4, whatever, 5 percent; it could be whatever it is; the delta that we'll have additional 20 million -- 30 million each year.

So -- so just want to inform or remind you all, the 98 million each year, over three years about 295 million, that is as of today. So more increases in the future for the police will increase that amount.

Excerpts from discussions during BFA Committee

CHAIRMAN MARTIN: I wanted Marty Lineman to come here and talk to us. He turned us down. What more can I ask? The Administration's here presenting their point of view. And parity is defined by the language of the petition. That was done by the firefighters. We had no input into it. No one had any input into it. So what do you think that language is going to be in favor of?

It's not going to talk about 24-hour shifts versus 8 hours. Or having a master's degree versus zero college experience. You wouldn't do that in the commercial world. That doesn't happen.

You have qualifications. And there is no parity when it comes to this subject. Dave Martin's opinion, of course.

COUNCIL MEMBER GALLEGOS: Now, the mayor had made it clear that if this charter amendment passes, there will be a negative impact on city services. And I know Council Member Boykins was talking about representing his district.

Well, I too, represent my district. And I want to make sure that our library hours will not be cut back. I want to make sure our parks department, the swimming pool hours will not be cut back. I want to make sure that the kids have a football league.

COUNCIL MEMBER BOYKINS: But we got to make both police and fire whole. And that's the way I look at it. And whatever we have to do to get there, Chief and Director of Finance, as a native Houstonian who was born and raised and reared and graduated and now currently live in the same district I was reared in, I stand by both public safety.

I want to make them both whole. And I don't care what I have to do to find the money to make it whole. I'm focused on this, and it's important. I do not want my police and fire leaving my city. Thank you.

In re Turner : Procedural History

- ▶ Fire Union filed original petition, application for TRO and request for temporary injunction and permanent injunction against Houston Mayor Sylvester Turner and Houston Council Member Dave Martin (chair of BFA Committee) in their official capacities.
 - ▶ Asserted that 1) posting of the July 26, 2018 meeting video on the City's website violated § 255.003 and 2) Fire Union was entitled to injunction per Tex. Elec. Code § 273.081.
 - ▶ § 273.081 provides: "A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring."
- ▶ Trial judge issued TRO restraining City from displaying on municipal websites or other municipally funded media platforms any audio, video, or transcribed versions of the July 26, 2018 BFA Council Committee meeting.

In re Turner, 558 S.W.3d 796 (Tex. App.—Houston [14th Dist.] 2018, no pet.)

- ▶ Court of Appeals held:
 - ▶ § 255.003 was not intended to inhibit discussion of matters pending before a governmental body;
 - ▶ When a city holds a meeting to discuss pending matters attendant to whether to place an issue before voters, § 255.003 does not prohibit the city from posting a video of such a meeting if in keeping with city's regular practice; and
 - ▶ When the pending issue of a charter amendment's fiscal impact was relevant to whether it should be supported or opposed, public funds were not being used for political advertising, even though incidental effect of posting video to City's website may be to re-publish statements supporting or opposing the charter amendment.
- ▶ TRO was vacated.

In re Turner : Analysis

- ▶ Two matters were pending before City Council at time of July 26 meeting:
 - ▶ Vote scheduled for August 8, 2018 on whether to place the charter amendment on the ballot.
 - ▶ Not an issue that agenda had not been posted for 8/8/18 meeting yet or that discussion was taking place before election was called.
 - ▶ City's brief included 7/20/18 press release from Mayor indicating election would be ordered at 8/8/18 Council meeting.
 - ▶ Requirement per Local Gov't Code § 9.004 to publish fiscal impact of the charter amendment in the local newspaper in advance of the election on the proposed charter amendment.
 - ▶ Fiscal impact is relevant to whether voters and Council Members may oppose or support the charter amendment; “was not unreasonable or unexpected that statements tending to indicate support for, or opposition to, the charter amendment might be voiced at the meeting”.

In re Turner : Analysis

- ▶ Court considered evidence that it was a regular practice of the BFA Committee to post videos, audio and/or transcripts of its meetings on the City's website.
 - ▶ City included following exhibits:
 - ▶ List of previous BFA committee meetings posted on city website
 - ▶ Presentations and Agendas from previous BFA committee meetings held to discuss charter amendments and other election measures

Budget and Fiscal Affairs (/budget-and-fiscal-affairs)

Commissioners Court (/commissioners-court)

Parking Commission (/parking-commission)

Planning Commission (/planning-commission)

Search for...	Go!
Video	Duration
FY 2019 Budget Workshop: City Council (/play/05092018-1271) May 09, 2018	14m 51s 1 items
FY 2019 Budget Workshop: Mayor's Office (/play/05092018-1263) May 09, 2018	33m 39s 1 items
FY 2019 Budget Workshop: Finance (/play/05092018-1214) May 09, 2018	23m 42s 1 items
FY 2019 Budget Workshop: Special Called BFA Committee Meeting (/play/05092018-1212) May 09, 2018	01h 25m 1 items
Budget and Fiscal Affairs (/play/04262018-1232) Apr 24, 2018	54m 46s 1 items
Special Budget and Fiscal Affairs (/play/04192018-1217) Apr 18, 2018	01h 29m 1 items

Practical tips for handling political advertising issues @ City meetings

- 1) If possible, seek an advisory opinion from the Texas Ethics Commission (“TEC”) on whether a proposed communication or broadcast violates § 255.003.
- 2) Review any presentation materials or documents to be presented at the meeting to ensure they only contain factual information.
- 3) Review and gather evidence on your city’s past practices to determine if broadcasting/posting the meeting at issue is part of the city’s regular practice.
- 4) Review the planned format and agenda of the meeting to determine where the meeting falls in the spectrum between the meeting described in Tex. Ethics Comm’n Op. No. 456, the BFA meeting in *In re Turner*, and the broadcast the subject of *In the Matter of Lane Nichols*.

Practical tips for handling political advertising issues @ City meetings

Factors Affecting Categorization of Broadcast Meeting as Political Advertising

Political Advertising	Not Political Advertising
Meeting only presents view of the Administration without opportunity for multiple viewpoints	Meeting subject to TOMA and complies w/ requirements
Meeting aimed at persuading voters on how to vote and only provides information to paint measure in positive/negative light	Meeting aimed at discussion of pending matter among quorum of CMs and educating CMs and voters on the topic
Meeting does not involve matters before a governmental body; quorum is not present	Part of City's usual practice to broadcast/post meetings similar to meeting at issue
	City staff presentations provide factual information only

Questions?

Contact Information:
Danielle Folsom
Assistant City Attorney
City of Houston, Texas
Danielle.Folsom@houstontx.gov