



FLORIDA DEPARTMENT *of* STATE

CHARLIE CRIST
Governor

DAWN K. ROBERTS
Interim Secretary of State

June 14, 2010

Honorable R. B. Johnson, Chairman
Don Crane, Member of Board of Directors
Tim Garling, Executive Director
Pinellas Suncoast Transit Authority
3201 Scherer Drive
St. Petersburg, Florida 33716

RE: DE 10-06
Advertising; Expenditures – Use of Local
Government Funds.
§ 106.113, Florida Statutes.

Dear Chairman Johnson, Mr. Crane, and Mr. Garling:

This letter responds to a request for an advisory opinion your attorney submitted on your behalf regarding your activities on the Pinellas Suncoast Transit Authority (PSTA). Because you have questions relating to the propriety of political activities you may take under Florida's Election Code, the Division of Elections has authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2009).

Your attorney states that the PSTA is an independent special district, a political subdivision of the state, and is governed by a 15-member board of directors appointed by Pinellas County and the 24 cities located in the county. The special law creating the PSTA requires 13 members to be elected officials with the remaining two being non-elected officials. Your attorney further relates that Mr. Crane is one of the non-elected members on PSTA's board of directors, Mr. Garling is the PSTA's Executive Director, and Mayor Johnson, the elected mayor of Indian Rocks Beach, is the Chairman of PSTA's board of directors. Your attorney poses several questions regarding section 106.113, Florida Statutes (2009), as applied to your positions with the PSTA. Section 106.113 provides:

106.113 Expenditures by local governments.--

(1) As used in this section, the term:

(a) "Local government" means:

1. A county, municipality, school district, or other political subdivision in this

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state; and

2. Any department, agency, board, bureau, district, commission, authority, or similar body of a county, municipality, school district, or other political subdivision of this state.

(b) "Public funds" means all moneys under the jurisdiction or control of the local government.

(2) A local government or a person acting on behalf of local government may not expend or authorize the expenditure of, and a person or group may not accept, public funds for a political advertisement or electioneering communication concerning an issue, referendum, or amendment, including any state question, that is subject to a vote of the electors. This subsection does not apply to an electioneering communication from a local government or a person acting on behalf of a local government which is limited to factual information.

(3) With the exception of the prohibitions specified in subsection (2), this section does not preclude an elected official of the local government from expressing an opinion on any issue at any time.

Before addressing your questions, we emphasize that our authority is limited to interpreting chapters 97 through 106, Florida Statutes, entitled "The Florida Election Code." We have no authority to interpret laws regarding the Code of Ethics for Public Officers and Employees or other matters outside our jurisdiction. Therefore, our conclusion that a proposed activity may not violate the Election Code (*e.g.*, use of the PSTA photocopier in expressing an opinion about an issue) does not address whether the activity is permissible under other laws or regulations that may otherwise govern your conduct.¹

We further note that the answers to your questions primarily rest upon application of relevant definitions in chapter 106, Florida Statutes, to your factual situations. Section 106.113, Florida Statutes (2009), prohibits the PSTA (a "local government") or a person acting on its behalf from expending or authorizing the expenditure of "public funds" for a "political advertisement" (defined in s. 106.011(17), Florida Statutes (2009)) or an "electioneering communication"²

¹ For example, section 110.233(4)(b), Florida Statutes (2009), prohibits employees in the career service from using the authority of their positions to secure support for or oppose any issue in a partisan election. Local governments may have imposed a similar provision on their employees; therefore, local government officials or persons acting on behalf of local government must be aware of any local laws or regulations concerning restrictions on an employee's political activities.

² Effective May 28, 2010, the definition of "electioneering communication" applies only to certain communications about candidates. The definition does not apply to communications about issues. Ch. 2010-167, § 19, at 18, Laws of Fla. Furthermore, the communication is limited to those that are publicly distributed by a television station, radio station, cable television system, satellite system, newspaper, magazine, direct mail, or telephone that refers to or depicts a clearly

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(defined in s. 106.011(18), Florida Statutes), that concerns an “issue.”³ A “political advertisement” requires a “paid expression” in a “communications media” as defined by section 106.011(13), Florida Statutes (2009). Also, a “political advertisement” excludes any expression that is by “the spoken word in direct conversation.” §§ 106.011(17), Fla. Stat. (2009). Based on the definitions of “political advertisement” and “electioneering communication,” if the opinion is stated in direct conversation, no violation of section 106.113, Florida Statutes (2009), occurs. The bottom-line answer to most of your questions is: The activities at issue are only prohibited if they satisfy the definitions of the terms in section 106.113(2), Florida Statutes.

We first address the five questions asked by your attorney that relate to all three of your positions on the PSTA.

(1) Does section 106.113 prohibit you from expressing an opinion on any issue or referendum at any time?

Section 106.113(3) expressly permits an elected official (*e.g.*, Chairman Johnson) to express an opinion on any issue at any time subject to the limitations of subsection (2). We interpret subsection (3) as an affirmation that elected officials have a right to say which course of action they think best on any issue and to use their offices for that purpose.⁴ This express statutory affirmation for elected officials does not preclude other persons acting on behalf of local government from expressing any opinion at any time *if* the statement of the opinion does not violate the prohibition contained in section 106.113(2), Florida Statutes (2009), regarding political advertisements *and* is not contrary to other laws or regulations governing the conduct of such persons. Because the definition of “electioneering communication” now only applies to candidates and not issues, that portion of the section 106.113 containing a prohibition on any activity that relates to an “electioneering communication concerning an issue, referendum, or

identified candidate for office without expressly advocating the election of defeat of a candidate, but which is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate. The communication must be made within 30 days before a primary or special primary election or 60 days before any other election for the office sought by the candidate and be targeted to the relevant electorate in the geographic area the candidate would represent if elected. *Id.*

³ The definition of “issue” in s. 106.011(7), Florida Statutes (2009), encompasses the other terms listed in section 106.113(2), that is, “referendum, or amendment, including any state question, that is subject to the vote of the electors.”

⁴ See Bill Analysis and Fiscal Impact Statement, Senate Ethics and Elections Committee, SB 216 (March 12, 2009) at 4 (creating section 106.113, Florida Statutes (2009)), quoting *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1375 (Fla. 1991) (“Leaders have both a duty and a right to say which course of action they think best, and to make fair use of their offices for that purpose. The people elect governmental leaders precisely for this purpose.”).

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amendment, including any state question, that is subject to the vote of the electors” is superfluous and meaningless.⁵

(2) If you are being interviewed by the media about your opinion on an issue or referendum, would you violate section 106.113 if you provided your opinion?

Unless the PSTA or person acting on behalf of local government paid for the media to be present or otherwise provided remuneration to the media, answering questions from the media would not constitute a “paid expression” and therefore would not constitute a “political advertisement.” Also, because “electioneering communication” does not include communications about an issue, no violation of section 106.113 occurs by answering media questions about your opinion on issues or referenda.

(3) Can you provide factual information from PSTA to entities expressing an opinion on any issue or referendum?

The definition of “political advertisement” requires a paid expression consisting of express advocacy, so providing factual information without expressing a position in support or opposition to the issue would not be a “political advertisement.” Again, the definition of “electioneering communication” does not include communications about an issue, so section 106.113, Florida Statutes (2009), is not violated by expending public funds on communications consisting only of factual information.

(4) What kind of factual information can you provide -- does it include declaratory statements that could be construed as an opinion, such as: “The new tax will improve public transportation in Pinellas County?”

The term, “factual information” is not defined in section 106.113(2), Florida Statutes (2009); however, the ordinary dictionary meaning of “factual” is “restricted to or based on fact.”⁶ “Fact” is commonly defined as “a thing done; the quality of being actual; something that has actual existence; a piece of information as having objective reality.”⁷ The ordinary meaning of “information” is “knowledge obtained from investigation, study, or instruction.”⁸ Based upon these definitions, we interpret the statute to limit your expressions of “factual information” to verifiable actualities, such as: “The new tax will permit the county to purchase 25 buses at a cost of \$100,000 each” and not include any kind of subjective, qualitative statement or comment that “The tax will improve public transportation.” Even if 25 buses were purchased, additional

⁵ This result stems from the newer definition of “electioneering communication” being inserted into law in May 2010 and it being the latest expression of legislative intent regarding what constitutes an electioneering communication.

⁶ *Merriam-Webster Online Dictionary*.

⁷ *Id.*

⁸ *Id.*

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criteria would determine whether the additional buses will actually improve public transportation.

(5) If you are using a PSTA photocopier, are you prohibited from making copies that might contain an opinion about an issue or referendum?

Section 106.113, Florida Statutes (2009), is violated only if the document(s) photocopied satisfies the definitions of a “political advertisement” or “electioneering communication.”

Next, we address a question asked about the possible common activities of Mr. Garling, the non-elected PSTA Executive Director, and Mr. Johnson, the elected Chairman, PSTA.

(6) If Mr. Garling and Mr. Johnson are using a telephone provided by PSTA, are they prohibited from expressing an opinion about an issue or referendum?

The definition of “communications media,” includes the following: “but with respect to telephones, an expenditure shall be deemed to be an expenditure for the use of communications media only if made for the costs of telephones, paid telephonists, or automatic telephone equipment to be used by a candidate or a political committee to communicate with potential voters but excluding any costs of telephones incurred by a volunteer for use of telephones by such volunteer.” § 106.011(13), Fla. Stat. (2009). The use of PSTA’s ordinary business telephones (cellular or landline) by either Mr. Garling or Mr. Johnson would not be a paid expression in a communications media; therefore, section 106.113 would not prohibit their use of PSTA’s telephones to express their opinions about issues.

We next address the following questions asked only about the possible activities of Mr. Garling, the non-elected PSTA Executive Director.

(7) If Mr. Garling is using a computer provided by PSTA, is he prohibited from expressing an opinion about an issue or referendum?

Use of the PSTA’s computer would be improper only if what Mr. Garling does on the computer falls within the statutory prohibition in section 106.113(2), Florida Statutes (2009) (*e.g.*, making flyers that constitute a “political advertisement” or “electioneering communication”). If Mr. Garling’s use of the computer involves expressing an opinion on the Internet, he should be aware of the definition of “communications media” as it pertains to the Internet: “with respect to the Internet, an expenditure shall be deemed an expenditure for use of communications media only if made for the *cost of creating or disseminating* a message on a computer information system accessible by more than one person but excluding internal communications of a campaign or of any group.” § 106.011(13), Fla. Stat. (2009). We interpret the “cost of creating or disseminating” an Internet message as being a direct cost, for example, paying someone to create an Internet website on which to post the message or paying for a domain name or an email distribution list to disseminate the message. The Internet service provider fees one pays for

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Internet service already in existence before dissemination of the message would not satisfy the definition.

(8) If Mr. Garling has a vehicle or car allowance provided by PSTA, is he prohibited from using the car to attend a speaking event where he may express an opinion about an issue or referendum?

First, if Mr. Garling is not the speaker at the event and merely engages in direct conversation with other attendees about an issue or referendum, his conversation is expressly excluded from the definitions of a "political advertisement" and "electioneering communication." §§ 106.011(17) and (18), Fla. Stat. (2009). Even if Mr. Garling is the speaker at the event, we reiterate that the prohibition on the use of public funds in section 106.113, Florida Statutes (2009) only pertains to a "political advertisement" and an "electioneering communication." The political advertisement must be made in a "communications media," which means "broadcasting stations, newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, the Internet, and telephone companies." § 106.011(13), Fla. Stat. (2009). Making comments as the speaker at a civic club, for example, would not normally satisfy the definition of being made in a "communications media." Also, the definition of "electioneering communication" would not cover communications about issues or referenda.

(9) Is Mr. Garling prohibited from providing factual information or his opinion to Board members who intend to use the information to make a presentation to others regarding an issue or referendum?

Mr. Garling would be prohibited from providing factual information or his opinion to board members only if his factual information or opinion involved the authorization or expenditure of public funds and constituted a "political advertisement" or "electioneering communication" as set forth in section 106.113(2), Florida Statutes (2009). When the Executive Director provides any information to the board members, the board members themselves must thereafter avoid violating section 106.113(2) in making any subsequent presentation.

Finally, we address the question asked by your attorney concerning Chairman Johnson, an elected official, and Mr. Crane, a non-elected board member.

(10) Can they use copies made using a photocopier at PSTA to hand out as part of a presentation they make about an issue or referendum?

Using a photocopier purchased or leased by PSTA would constitute the use of "public funds;" however, a violation of section 106.113, Florida Statutes (2009), would only occur if the documents or presentation satisfy the definitions of a "political advertisement" or an "electioneering communication."

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SUMMARY

Section 106.113(2), Florida Statutes (2009), prohibits a “local government or a person acting on behalf of local government” from expending or authorizing the expenditure of public funds for a “political advertisement” or an “electioneering communication” that concerns an “issue.” The key to interpreting this statutory prohibition is the application of the definitions in chapter 106, Florida Statutes. Because the Legislature changed the definition of an “electioneering communication” in 2010 to include communications only about candidates, the use of “electioneering communication” in section 106.113 “concerning an issue, referendum, or amendment” is meaningless. Section 106.113, Florida Statutes (2009), is not violated for an expenditure of public funds if the communication only provides factual information. Factual information means verifiable actualities, not subjective, qualitative statements or comments.

Unless the prohibitions in section 106.113(2) are applicable, an elected official of local government may express an opinion on any issue at any time. A non-elected local government official or any other person who is acting on behalf of local government may do likewise *if* he or she does not violate the prohibitions in section 106.113(2) *and* if not otherwise prohibited by laws or regulations outside Florida’s Election Code. No violation of section 106.113, Florida Statutes (2009), occurs if an opinion about an issue or referendum is stated in direct conversation.

Sincerely,

A handwritten signature in black ink, appearing to read 'DLP', with a long horizontal line extending to the right.

Donald L. Palmer
Director, Division of Elections

cc: Alan S. Zimmet, Esq.