



ADVISORY OPINION 18-04

Date: August 8, 2018

Decision by Commissioners: Paula Jenkins-Massie, Sally Jensen, Robert Ralston, Kellie Tetrick, Charles Toliver

Question

The Requester, an elected official, has asked the Ethics Commission for guidance on how to disseminate information about County government to the general public through social media without violating the Ethics Code, including whether the governmental symbols may be used.

Conclusion

An elected official may use social media to disseminate information about County government to the general public without violating the Ethics Code so long as the platforms are not used in a manner which may lessen the confidence of the public in their County government including, but not limited to, any act which may comprise a violation of the Ethics Code such as conflicts of interest, personal financial gain, or the dissemination of confidential information learned through an official capacity. Additionally, such platforms may not be used for campaign purposes, and any elected official must make it very clear to the public that a platform used for the dissemination of general information is separate and apart from a different platform used for campaign purposes. The question as to the use of governmental symbols and the like on the social media platforms is, by itself, not an Ethics Code issue and should be addressed to the appropriate legal counsel.

Facts

An elected official (the “Requester”) desires to use social media platforms to provide general information to constituents regarding their County government. At the time of this writing, some of the popular social media sites or apps for this type of information sharing include (in no particular order) Facebook, Twitter, Instagram, Tumblr, and LinkedIn. Before launching any such sites in the Requester’s official name and capacity, the Requester consulted the Ethics Commission for guidance for the

purpose of avoiding unintended Ethics Code violations in the process and execution of these sites. Additionally, the Requester asked whether and to what extent any official governmental symbols, etc., may be used in these sites or apps.

Code or Prior Opinion:

Relevant Ethics Code Provisions and Case Law

In Section 2.03.102, the following relevant terms are defined by the Ethics Code, as follows:

Appearance of impropriety means conduct which is prohibited by Section 2.03.104A.

Authority of office or employment means the actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular County office or position of County employment.

Business means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

Business with which he or she is associated means any business in which the person is a director, officer, owner or employee; or a business in which a member of the person's immediate family is a director, officer, owner or has a financial interest.

Candidate means any individual who seeks nomination or election to County office by vote of the electorate, whether or not such individual is nominated or elected. An individual shall be deemed to be seeking nomination or election to such office if he or she has taken the action necessary under the laws of the State to qualify himself or herself for nomination or election to such office. The term shall include individuals nominated or elected as write-in candidates unless they resign such nomination or elected office within thirty (30) days of having been nominated or elected.

Commission means the County Ethics Commission established by this Code.

Compensation means any money, thing of value or any other economic benefit of any kind or nature whatsoever conferred on or received by any person in return for services rendered or to be rendered by oneself or another.

Confidential information means information not obtainable from reviewing a public document or from making inquiry to a publicly available source of information.

Conflict or conflict of interest means conduct which is prohibited by Section 2.03.103.

County means New Castle County and including any County department.

County official means any person elected or appointed to any County office, board, commission or the New Castle County Council Audit Committee provided, however, that for purposes of Sections 2.03103.B.2, 2.03.103.C, and 2.03.104.C, "County official" does not include any member of a board or commission which operates solely in an advisory capacity, and whose members are not compensated, other than reimbursement for expenses.

Electronic record means an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign an electronic document or record, as defined under 6 Del.C.Ch.12A (Uniform Electronics Act).

Financial interest means any interest representing more than five (5) percent of a corporation, partnership, sole proprietorship, firm, enterprise, franchise, organization, holding company, joint stock company, receivership, trust, or any legal entity organized for profit.

Governmental body means any department, authority, commission, committee, council, board, bureau, division, service, office, official, administration, legislative body, or other establishment in the executive, legislative or judicial branch of a state, a nation or a political subdivision thereof or any department performing a governmental function.

Governmental body with which a County official or County employee is or has been associated means the governmental body within County government by which the County official or employee is or has been employed or by which the County official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

Income means any money, thing of value or other pecuniary benefit received or to be received in return for, or as reimbursement for, services rendered or to be rendered. The term does not include gifts; governmentally mandated payments or benefits; retirement, pension or annuity payments funded totally by

contributions of the County official or employee; or miscellaneous, incidental income of minor dependent children.

Nominee means any person whose name has been submitted to a County official or governmental body vested with the power to finally confirm or reject proposed appointments to County office or employment.

Opinion means advice of the Commission issued pursuant to Section 2.04.102I setting forth the duties of a County official or County employee under this Division.

Person means a business, governmental body, individual, corporation, union, association, firm, partnership, committee, trust, joint venture, club or other organization or group of persons.

Political contribution means any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, pledge, purchase of a ticket to a testimonial or similar fundraising affair, or subscription of money or anything of value, except volunteer services, in connection with a political campaign.

Private enterprise means any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property. Private enterprise does not include any activity of the federal, State or local government or of any department, authority or instrumentality of the federal, State or local government.

Reasonably foreseeable means an event which should be expected or anticipated based upon credible past and present facts known to a reasonable observer or participant at the time a decision is made, or an action taken.

Recusal means, including but not limited to, withdrawing from sponsorship, deliberation, vote, research, preparation, discussion, negotiation, contract formation, policy making, planning, decision making, and/or implementation of a matter. It also includes a prohibition on conducting, in an official capacity, any private or public discussion of a measure raising a conflict or improper appearance. As soon as a potential conflict or improper appearance arises or is recognized, an official or employee must end direct or indirect participation, advice, input, direction, recommendation, or discussion, as well as refraining from vote, if the person is not an elected official. Elected officials may choose to avoid recusal and may vote if they follow the alternate process described in Subsection 2.03.103.A.2.

The New Castle County Ethics Code recognizes that public office, that is, employment by the County, is a public trust, and a violation of that trust by a County official or employee for personal gain or profit may cause serious harm as such a violation will undermine the confidence of the public in its government.¹ For this reason, the Code requires, among other things, public disclosure of financial interests of certain County officials, employees, and candidates for office, so that the public may be assured that their financial interests do not conflict with the public trust.² The Code further recognizes that because the public confidence in County government is best secured by assuring the impartiality and honesty of their County officials and employees, the Ethics Code sets forth minimum standards for ethical conduct and that the Code should be liberally construed to promote complete public financial disclosure, and official and employee conduct, which is deserving of the public's trust.³

It is important that the Code also recognizes that County officials are citizens which bring to their office their knowledge and concerns for issues facing the ordinary citizen.⁴ The Code is not intended to cause County officials or employees to disengage from their contacts in their communities. However, the Ethics Code prohibits the disclosure of confidential information gained as a result of a County official or employee during their official duties.⁵ For these reasons, the Commission strives to provide guidance to County officials and employees regarding the application of the Ethics Code

¹ New Castle County Code, Section 2.03.101.A:

It is hereby declared that public office is a public trust and that any effort to realize personal financial gains through public office other than compensation provided by law is a violation of that trust. It is further declared that the people have a right to be assured that the financial interests of holders of or nominees to or candidates for public office do not conflict with the public trust. Because public confidence in government can best be sustained by assuring the people of the impartiality and honesty of public officials, this Division shall be liberally construed to promote complete financial disclosure as specified in this Division. Furthermore, it is recognized that clear guidelines are needed in order to guide public officials and employees in their actions. Thus, this Division intends to define as clearly as possible those areas which represent conflict with the public trust.

² Id.

³ Id. See also New Castle County Code, Section 2.03.101.D, which states:

This Division is intended to establish a minimum standard for ethical conduct and financial disclosure. Elected officials may superimpose conduct rules for officials and employees which are more strict, but not less strict, than these minimum standards. The Ethics Commission has jurisdiction to decide whether superimposed rules fall below the minimum standards expressed in this Division.

⁴ New Castle County Code, Section 2.03.101.B:

It is recognized that many public officials are citizen-officials who bring to their public offices the knowledge and concerns of ordinary citizens and taxpayers. They should not be discouraged from maintaining their contacts with their community through their occupations and professions. Thus, in order to foster maximum compliance with its terms, this Division shall be administered in a manner that emphasizes guidance to public officials and public employees regarding the ethical standards established by this Division.

⁵ New Castle County Code, Section 2.03.104.F:

No County employee or County official shall, beyond the scope of such public position, disclose confidential information gained by reason of such public position nor shall such employee or official otherwise use such information for personal gain or benefit.

to their actions taken as County officials or employees in a manner which best promotes compliance with the Ethics Code.⁶

The New Castle County Ethics Code prohibits conduct on the part of County officials or employees which creates the appearance of impropriety even where no direct conflict of interest is present. Specifically, conduct which creates an appearance of impropriety is prohibited by Section 2.03.104.A of the New Castle County Code.⁷ To determine if an appearance of impropriety exists, the Delaware courts have stated that “[t]he test is... if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official’s ability to carry out [his or] her duties with integrity, impartiality and competence is impaired.” *Hanson v. Delaware State Public Integrity Com’n*, 2012WL3860732, at *16 (Del.Super. 2012), aff’d, 69 A.3d 370 (Del.Supr. 2013); and “[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the [official’s] ability to carry out [the official’s] responsibilities with integrity, impartiality and competence is impaired.” *In re Williams*, 701 A.2d 825, 832 (Del.Super. 1997). Delaware court decisions must be interpreted such that the Commission must look at the totality of the facts presented, and this Commission has historically applied this standard when reviewing the conduct of County officials and employees.

The Ethics Code, in its Code of Conduct section, contains directive related to solicitation.⁸ A County official or employee may not solicit from any entity which does business with the County or is regulated by the County.⁹ The only exception to this prohibition is when a written policy covering such solicitation has been issued by the authorized person representing the County government’s interest which states that such solicitation is in the best interests of the public.¹⁰ A County official or employee may not solicit personal donations from other County subordinates including subordinate County

⁶ Id.

⁷ New Castle County Code, Section 2.03.104.A: No County employee or County official shall engage in conduct which, while not constituting a violation of Subsection 2.03.103.A.1 undermines the public confidence in the impartiality of a governmental body with which the County employee or County official is or has been associated by creating an appearance that the decisions or actions of the County employee, County official or governmental body are influenced by factors other than the merits.

⁸ New Castle County Code, 2.03.104.J: Solicitation.

1. Solicitation from entities which do business with or are regulated by New Castle County are prohibited unless such solicitation is pursuant to New Castle County written policy decision and for the benefit of the public.

2. Personal solicitation of donations by County officials and County employees, or by their agents, spouses or minor children, from subordinates of the County official or employee is prohibited.

3. Elected Officials may set office-wide, non-coercive solicitation policies intended to benefit charitable entities or events if the policy does not create a conflict of interest or appearance of impropriety and does not violate Subsection J.2.

⁹ See New Castle County Code, Section 2.03.104.J.1, fn. 10.

¹⁰ Id.

officials or employees or members of their respective immediate family.¹¹ Further, on the subject of solicitation, the Code states that County elected officials are permitted to set “office-wide, non-coercive” solicitation policies which benefit charities or charitable events, so long as that policy does not violate the Ethics Code by creating a conflict of interest or an appearance of impropriety, or any other section of the Ethics Code.¹²

Additionally, the Code recites prohibitions on County officials concerning their involvement with outside interests which interact with the County government. Section 2.03.103.B.2 prohibits the official from representing or assisting any private enterprise with respect to any matter before the County. This restriction extends to non-profit organizations as well as private businesses or private concerns.¹³ Further, the Code restricts the ability of a County official or employee to “represent or otherwise assist” any private or non-County entity in connection with any matter which comes before the County department or division with which the County official or employee is associated or employed.¹⁴ Importantly, the Ethics Code expressly does not prohibit a County official or employee from appearing before the County or assisting a non-County entity on a matter in the exercise of his or her official County duties.¹⁵

Prior Commission Opinions

In Advisory Opinion 10-01, the Commission determined that two elected officials, who requested guidance, may use County resources to send letters to all new voters in their districts in order to introduce themselves and advise the residents of available County, State and private resources, so long as the letters were non-partisan in nature and contained information deemed helpful to persons in their districts. In making its decision, the Commission stated:

The Code and the Opinions are clear and consistent. An official cannot use County communication equipment or computers, letterhead, county paid postage, printing

¹¹ See New Castle County Code, Section 2.03.104.J.2, fn. 10.

¹² See New Castle County Code, Section 2.03.104.J.3, fn. 10.

¹³ New Castle County Code, Section 2.03.103.B.2, and 3:

2. No County official may represent or otherwise assist any private enterprise with respect to any matter before the County. This prohibition is to be considered personal to the County official and is not, for purposes of the New Castle County Ethics Code only, deemed to impact other members of a firm, business, or other employer by which the County official is employed.

¹⁴ New Castle County Code, Section 2.03.103.B.1:

No County employee or County official may represent or otherwise assist any private enterprise with respect to any matter before the County department with which the employee or official is associated by employment or appointment.

¹⁵ New Castle County Code, Section 2.03.103.B.3:

3. This subsection shall not preclude any County employee or County official from appearing before the County or otherwise assisting any private enterprise with respect to any matter in the exercise of his or her official duties.

facilities, or County staff for purposes other than official business. Official business does not include direct or indirect reference to partisan advocacy, electioneering, fundraising, or any type of political solicitation, including links to websites for such purposes.

In this case, the officials who want to send the letters have a high public profile by virtue of their County positions and they are in a unique position to inform a large swath of the public about the breadth of services available. Certainly, a private benefit accrues to an incumbent who becomes well known as a helpful source but such benefit arises from the duties of the position and is not unwarranted. Conversely, if an incumbent, because of the manner in which he or she performs official duties, becomes known for being a distant or unhelpful source, a negative effect attaches as a result of the same high profile.

Assisting the public's access to and use of resources in New Castle County is, in some measure, part of any County official's official function. The Commission notes that neither of the requesting officials fits the Code definition of "candidate" for office at this time, nor identifies his or her political affiliation. While the Commission notes that the political affiliation of an elected official is information that is part of their official status and frequently helpful to the voter, if an official has declared for office or filed the necessary official paperwork, the timing and content of such letters will be carefully scrutinized by the Commission for direct or indirect partisan advocacy.

The content of the mailings which are the subject of their request appear to fit under the category of official business. The source of the names of the recipients is a non-partisan state agency and the recipients are neither selected on a partisan basis nor by prior contribution to or affiliation with the official. The letters serve to introduce the current office holder to the new voter and provide general information about financial and service resources available in the County. The letters and attachments inform the reader where and how to contact the official and direct the recipient to County maintained links and access numbers and

addresses for government employees. The letters make no mention, reference, or link, direct or indirect, to partisan information or fundraising. (footnotes omitted.)

In Advisory Opinion 07-01, the Commission was asked whether an elected official would violate the Ethics Code by advertising that he is a County official on a personal vehicle. The Commission concluded that “advertising to secure or maintain public office is a constitutionally protected right and in itself does not reflect any improper motive to obtain special treatment. Absent some concrete evidence that an office holder uses such advertising to obtain unwarranted privilege as a motorist or to avoid some personal consequence for his conduct, the presumption of good faith is accorded to the official and the advertising does not violate the Ethics Code.”

In Advisory Opinion 09-06, while deciding that it did not have jurisdiction over the question posed, the Ethics Commission discussed whether advertising on the County's website or on its other assets is in the public interest. The Commission cautioned that the conduct of officials or employees charged with implementing a decision to make such advertising available is subject to the prohibitions enacted in the Ethics Code, such as those against advancing the interests of a private entity, creating an appearance of improper favoritism, or degrading the County's image and credibility. The Commission stated that acceptable use restrictions on the source, type, form and content of such advertising should be formulated by the appropriate persons in the executive or legislative branches in order to avoid violation of the Code. The Commission offered that it could review the policies and provide guidance once those restrictions were drafted.

Analysis

When applying the Ethics Code and prior Commission decisions to the facts presented here, it is clear that the Requester has a right to use the internet in a personal or professional capacity. The principles and analyses expressed in the prior Commission decisions cited above, including, especially, Advisory Opinion 10-01, however, should be carefully considered and practiced. To the extent that internet communications as contemplated by the Requester's question are covered by the Ethics Code, the Requester must be deliberate and careful in the postings to avoid communications which may violate the Code. Communications which should be avoided include, but are not limited to, those which a reasonable person would believe to be ones related to or demonstrate campaigning or election purposes. Also, any communications which a reasonable person would believe to be related to or demonstrate conflicts of interest, personal gain or profit, and/or disseminate confidential information learned in an official capacity should be avoided as they may constitute violations of the Ethics Code. Indeed, while it may not constitute an Ethics Code

violation, any communication which may lessen the public's confidence in its County government should be avoided. The question of whether governmental symbols may be used is not one for the Commission to decide and should be directed to the appropriate legal counsel for consideration.

Finding

Providing useful information to the public about County government is an important function of County government leaders, and the Ethics Commission favors government openness and transparency of public information.¹⁶ For the purpose of disseminating general information to County constituents, an elected official may use social media without violating the Ethics Code so long as the communications do not impair the confidence of the public in their County government. Communications which should be avoided, as they may violate the Ethics Code, include, but are not limited to, anything related to or demonstrates a conflict of interest, personal financial gain, or the dissemination of confidential information obtained through an official capacity. Importantly, it must be clear to the reasonable person that such communications are not related to or demonstrate campaign purposes. The appropriate legal counsel should be consulted regarding the use of governmental symbols and the like on such social media platforms.

In rendering this advisory opinion, this Commission has applied the New Castle County Ethics Code, which establishes the minimum level of ethical conduct required of County officials and employees.

BY AND FOR THE NEW CASTLE COUNTY ETHICS COMMISSION

ON THIS 8th DAY OF AUGUST 2018.

Eric J. Monzo, Esquire, Chairperson
New Castle County Ethics Commission

Decision: 5 – 0, unanimous.

¹⁶ Whether information obtained through an official County position is confidential is answered by laws in addition to the Ethics Code. The applicable Freedom of Information and other relevant laws may also be used as a guide in determining whether information is deemed public. If questions arise on this issue, they should be directed to the appropriate legal counsel.