



COMMISSIONER OF
POLITICAL PRACTICES

STATE OF MONTANA

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May 13, 2016

Montana Human Rights Network
P.O. Box 1509
Helena, MT 59624
network@mhrn.org

Re: COPP-2016-AO-010
Communications About Policy Change

Dear Montana Human Rights Network,

We write in response to your request for an Advisory Opinion from the Commissioner of Political Practices on the following matter.

FACTS PRESENTED BY MHRN

The Montana Human Rights Network explained that the Office of the Montana State Auditor, Commissioner of Securities and Insurance, under the leadership of Commissioner Monica Lindeen as an elected public official, recently adopted a policy change that MHRN would like to communicate with the public about. Lindeen is also a current candidate for another elected office, Montana Secretary of State. The following is a summation of the activities that MHRN would like to undertake:

- Requesting and assisting a variety of organizations and individuals in writing opinion pieces and letters to the editor thanking Commissioner Lindeen for her actions to change this policy and encouraging Montanans to thank her.
- Posting articles and messages to social media (Facebook, Twitter, Instagram, etc.) thanking Commissioner Lindeen for her decision and encouraging Montanans to contact her at her office and thank her.
- Creating and sending postcards to LGBT Montanans and allies informing them of Commissioner Lindeen's decision and asking them to contact her office to thank her.

QUESTIONS PRESENTED BY MHRN

- 1) Opinion pieces and letters to the editor are explicitly exempt from the definition of electioneering communication at MCA 13-1-101(15)(b)(i), and thus not reportable electioneering communications, however, we [MHRN] have heard varying

interpretations and request clarity confirming that they are not reportable electioneering communications.

- 2) We request an opinion confirming that social media activities informing Montanans of the policy change and requesting them to take action by thanking Commissioner Lindeen would not be considered reportable electioneering communications. Because we would not mention Commissioner Lindeen's candidacy, and because our nonpartisan organization regularly responds to actions taken by government officials on issues central to our organizational mission in exactly this manner, this activity neither refers to "one or more clearly identified candidates" nor is it susceptible to any interpretation that it does so. [Rules 44.11.605(1)(e)(i), (3)(a)]

This is further supported by the "purpose, timing, and distribution of the communication," which is clearly a response to the issuance of a policy decision by a government official, through the channels by which we ordinarily distribute such communications. [Rules 44.11.605(4)]

- 3) Based on the same reasoning, we request an opinion confirming that sending postcards to LGBT Montanans and allies informing them of the policy change and requesting them to take action by thanking Commissioner Lindeen would not be considered reportable electioneering communications.
- 4) If you determine that the communications in 1, 2 or 3 above do constitute electioneering communications, we request information on how we would be required to report those communications: the form to report on; whether we would need to report this as "supporting" Secretary of State candidate Lindeen; factors for determining fair market value for these communications, etc.
- 5) We request an opinion confirming our understanding that a communication that otherwise meets the definition of an electioneering communication but that entails an expenditure of \$250 or less does not trigger the formation of a political committee, and therefore reporting requirements. (MCA § 13-1-101(30)(a),(d)); [Rule 44.11.605(3)]

ADVISORY OPINION

The Commissioner is limited to issuing advisory opinions that address a campaign practice issue within the Commissioner of Political Practices' (COPP) jurisdiction, Mont. Admin. R. 44.11.102. The consideration of the questions and facts in this matter are limited to the information which was provided to the COPP by the Montana Human Rights Network (MHRN) and information which is publically available and specifically referenced herein. Based upon the foregoing scope of information, the Commissioner issues the following Advisory Opinion:

SHORT ANSWER

The COPP finds, based on the facts provided with the request the Montana Human Rights Network, the following determinations:

- 1) Letters to the editor or opinion pieces submitted to a newspaper are exempt from the definition of an expenditure, and therefore are not reportable election activity.

- 2) Social media activities, meeting the definition of an electioneering communication would be expenditures potentially subject to reporting and disclosure.
- 3) Postcards mailed to members of MHRN would be exempt from reporting as an expenditure, but mailings beyond MHRN's membership, meeting the definition of an electioneering communication, would be expenditures potentially subject to reporting and disclosure.
- 4) Information and guidance on reporting and disclosure of contributions and expenditures are publically available on the COPP's website.
- 5) MHRN's own receipt of contributions or making of expenditures for electioneering communications, election communications, or independent expenditures will determine whether or not a political committee is formed by MHRN during the 2016 election cycle.

DISCUSSION

The Commissioner issued an advisory opinion in February of this year explaining the required reporting and disclosure for electioneering communications.¹ The Commissioner hereby incorporates by reference the discussion and opinion into the response to Montana Human Rights Network's request for a similar advisory opinion.

Officials are elected by the people of Montana to perform a specific job on behalf of the people of Montana. "The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officer, legislators and public employees" who "shall carry out the individual's duties for the benefit of the people of the state," Mont. Code Ann. § 2-2-103(1).

A public officer's duty to perform the functions of the office they hold does not cease to exist simply because the officeholder chooses to run for election or reelection to public office. However, when individuals engage in communications to Montanans regarding a public official and candidate close to an election cycle, the communication may be an electioneering communication pursuant to the provisions of the Disclose Act, enacted by the 2015 Montana Legislature.

An entity, like MHRN, is not restricted in carrying out their desired communication to Montanans, they are simply required to report and disclose contributions received for and expenditures made on electioneering communications.

Specifically, an electioneering communication is:

a paid communication that is publicly distributed by...internet website, newspaper...or any other distribution of printed materials, that is made within 60 days of the initiation of voting in an election, that does not support

1 Claudia Clifford (AARP) – Electioneering Communication Voter Guide, COPP-2016-AO-005 <http://www.politicalpractices.mt.gov/content/5campaignfinance/2016-AO-005-Final-signed.pdf>

or oppose a candidate....that can be received by more than 100 recipients in the district voting on the candidate...and that...refers to one or more clearly identified candidates in that election.

Mont. Code Ann. § 13-1-101(15)(a)(i).

Communications by MHRN with its membership are specifically exempted from the definition of electioneering communications, Mont. Code Ann. § 13-1-101(15)(b)(ii). Further, MHRN may communicate with Montanans about the policy change adopted by the Office of the Montana State Auditor, Commissioner of Securities and Insurance, without referencing Monica Lindeen or including her "name, image, likeness or voice," thereby removing the communication from consideration as an electioneering communication, Mont. Code Ann. § 13-1-101(15)(a)(i) and (ii).

A. Political Committee Formation

A political committee is formed when "a person other than an individual receives a contribution or makes an expenditure...to prepare or disseminate an election communication, an electioneering communication or an independent expenditure," Mont. Code Ann. § 13-1-101(30)(a)(iii). Therefore, a political committee can be formed by the solicitation or receipt of contributions for specific purposes, as well as by making expenditures.

For entities that do not make aggregate expenditures of \$250 or more a political committee is not formed, Mont, Code Ann, §13-1-101(30)(d). Depending on the extent of MHRN's dissemination of electioneering communications in the 2016 election cycle, it is possible that MHRN will make expenditures for any of the following activities aggregating over \$250 which will require the registration, reporting and disclosure of MHRN's activity with the COPP for the people of Montana.

B. Letters To The Editor Or Opinion Pieces

When a community member or an organization submits a Letter to the Editor (LTE) or an opinion piece to a newspaper for consideration for publication, there is no guarantee that the news organization will choose to publish the material. Further the author is not paying the newspaper to run the LTE or opinion. The statutes exempt from the definition of expenditure "the costs of any bona fide news story, commentary, blog or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication of general circulation," Mont. Code Ann. § 13-1-101(17)(b)(iii). Therefore, a LTE or opinion which is published by a newspaper would not be considered an expenditure made by MHRN.

Should MHRN choose to directly publish the opinion piece or LTE on their own website, Facebook or other social media pages, the costs associated with the creation and publication of the LTE or opinion would be an electioneering communication ("unless the facilities are owned or controlled by a candidate or political committee"), Mont Code Ann. § 13-1-101(15)(b)(i). If the cumulative expenditures of paid staff, website design, maintenance, overhead and the like exceed \$250 for the 2016 election cycle, then MHRN will be required to report and disclose the expenditures to the people of Montana via the COPP.

C. Social Media

Posting articles and messages to social media which specifically reference Commissioner Lindeen and thank her for the policy change would be considered electioneering communications. MHRN's facebook page has 6,399 people who "like" the page and are capable of receiving the communication. ¹ Monica Lindeen is a candidate for a statewide office, therefore the entire state is her district. The time spent searching for, linking, creating, posting and maintaining various social media sites are electioneering communications expenditures which must be reported and disclosed if the aggregate expenditures of MHRN are over \$250 for the 2016 election.

D. Postcards

Based on the discussion above, to the extent that MHRN sends postcards to its own membership informing them of the policy change, the postcards are exempt the reporting and disclosure requirements as electioneering communications, Mont. Code Ann. § 13-1-101(15)(b)(ii). To the extent that MHRN sends postcards to individuals who are not members of MHRN, the postcards, if mailed as described, would be electioneering communications which must be reported and disclosed if the aggregate expenditures of MHRN are over \$250 for the 2016 election.

E. Determination of Electioneering Communications

The MHRN has not provided sufficient detail or information for the Commissioner to be able to definitively determine that the above proposed electioneering communications rise to the level of reportable election activity, or whether MHRN would be required to report and disclose as an independent political committee or an incidental political committee. Ultimately, those determinations will be based on the actions taken by MHRN itself in the 2016 election cycle.

F. How to Report and Disclose

Fair market value is defined as "the retail price of such services, property or rights in the market from which it ordinarily would have been either purchased by the expendee at the time of the expenditure", Mont. Admin. R. 44.11.103(21), *see also* Mont. Admin. R. 44.11.503(3) and (4). Further guidance is found in the statutes, administrative rules, and extensive guidance provided in the Accounting and Reporting Manual for Political Committees available on the COPP's website.² Determining the value of MHRN's time in making these types of expenditures is something that MHRN has experience in reporting from previous election cycles supporting ballot initiatives and local or statewide elections by valuing "staff time and overhead" and "space".

Which of COPP's reporting and disclosure forms should be used by a particular political committee will depend on the type of committee formed. All political committees file and maintain a current Form C-2, Statement of Organization, which includes the purpose of the committee, and contains the ability to designate the committee's purpose as to each candidate or ballot issue as "support, oppose or N/A." Political party, ballot issue

² Last accessed May 13, 2016.

³ <http://www.politicalpractices.mt.gov/content/5campaignfinance/2016CommitteeManualUpdate>

and independent political committees report their contributions and expenditures using forms C-6, C-7, and C-7E. Incidental political committees report their earmarked contributions and expenditures using forms C-4, C-7 and C-7E.^{3F4}

CONCLUSION


Based on the facts and questions presented by MHRN, the COPP is unable to make a final determination as to when MHRN's planned activities in the 2016 election cycle will exceed the aggregate \$250 reporting and disclosure limit.

The Disclose Act does require groups to report and disclose their contributions and expenditures, especially when made close to the election. Depending on the type of communication made, MHRN will be required to report and disclose its contributions and expenditures according to the law. Montana's laws and regulations require the reporting and disclosure of contributions and expenditures made regardless of an entities tax status, Mont. Code Ann. § 13-37-233.

LIMITATIONS ON ADVISORY OPINION

This letter is an advisory opinion based on the specific written facts and questions as presented above. This advisory opinion may be superseded, amended, or overruled by subsequent opinions or decisions of the Commissioner of Political Practices or changes in applicable statutes or rules. This advisory opinion is not a waiver of any power or authority the Commissioner of Political Practices has to investigate and prosecute alleged violations of the Montana laws and rules over which the Commissioner has jurisdiction, including alleged violations involving all or some of the matters discussed above.

Sincerely,



Jaime MacNaughton
Attorney for the
Commissioner of Political Practices

I agree with this Advisory Opinion and afford it the full weight of the Commissioner's authority.

DATED 13th day of May, 2016.



Jonathan R. Motl
Commissioner of Political Practices

⁴ For information on how to electronically report using the CERS system, please see the Advisory Opinion linked above at note 1.