



COMMISSIONER OF
POLITICAL PRACTICES

STATE OF MONTANA

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May 9, 2016

Brett O'Neil
Attorney
Office of the Montana State Auditor
840 Helena Ave
Helena, MT 59601

Re: COPP-2016-AO-007
Candidate and State Official Public Service Announcement

Dear Mr. O'Neil,

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

QUESTIONS PRESENTED

1. Is Investor Protection Trust (IPT) grant money considered "state funds" pursuant to § 2-2-141(4)(a)?
2. Can Candidate Lindeen's image/voice be used in radio PSA's, paid newspaper advertisements, paid social media advertisements, and posters (all designed and distributed by the Commissioner of Securities and Insurance (CSI) staff on state time to promote the event)?
3. Can CSI employees use employee time and state resources to produce the PSA's?
4. If IPT money is considered state funds, can it be used to pay for the advertisements for the events using the Commissioner's likeness?

FACTS PROVIDED

"The Montana State Auditor's Office, Commissioner of Securities and Insurance (CSI), regularly conducts Montana performing consumer outreach. Topics of these tours have included Investment Fraud (2011, 2012), Obamacare (2013, 2014), Obamacare and Native Americans (2014, 2016), Filings Claims After Storms (2015), and Money Matters for Women (2016). Typically the CSI reaches out to communities it intends to visit beforehand with mailers, posters, flyers, radio spots, social media, etc. to generate as much turnout as possible. The various types of media frequently include the likeness and image of Commissioner Lindeen, a state officer. However, now that Commissioner Lindeen is also Candidate Lindeen, pursuant to Mont. Code Ann. §§ 2-2-121 (4)(1) and 13-1-101(8), several

questions have arisen internally as to what extent the Commissioner can be represented in the various media heretofore identified.”

"In the instant case, the CSI plans an Investment Fraud Tour paid for through a grant from the Investor Protection Trust (IPT). Founded in 1993 as part of a multi-state settlement to resolve charges of misconduct, the Investor Protection Trust serves as an independent source of non-commercial investor education. Since 1993, the IPT has operated programs under its own auspices and used grants to underwrite important investor education and protection initiatives carried out by other organizations and government entities."

"The CSI receives grant money through an application process regulated by the IPT. If received, the grant money is deposited into a non-budgeted state special revenue account (which is separate from the CSI's regular accounts). The money can only be used in accordance with the grant, and is approved by the CSI's IPT Liaison, Deputy Securities Commissioner Lynne Egan (who also sits on the IPT board)."

Advisory Opinion

The Commissioner is limited to issuing advisory opinions that address an ethics, lobbying or campaign practice issue within the Commissioner of Political Practices' (COPP) jurisdiction, Mont. Admin. R. 44.11.102. The COPP used Ms. Lindeen's campaign finance disclosures publically on file with the COPP to establish the basis of facts in this opinion. Also, the COPP accessed the Montana Commissioner of Securities and Insurance's website for facts used in this opinion. The consideration of the question in this matter is limited to the information which was provided to the COPP, and that could be ascertained from those reports and the website. Based upon the foregoing scope of information and limited to the request for an ethics opinion, the Commissioner issues the following Advisory Opinion:

SHORT ANSWER

The COPP finds, based on the facts provided with the request the Montana State Auditor, Commissioner of Securities and Insurance, the following determinations:

- 1) That the IPT grant money is not considered "state funds" under Mont. Code Ann. § 2-2-121(4)(a).
- 2) That there is no ethics related (use of public funds) issue preventing a candidate's image and voice used in radio PSAs, paid newspaper advertisements and on television so long as the advertisements and PSAs are paid for using IPT grant money.
- 3) That the CSI employees may use employee time and resources to produce the PSAs so long as Commissioner Lindeen makes a determination that the consumer outreach tour is within the jurisdiction of the programs which she administers.
- 4) That, based upon the determination in 1) above, this question is moot.

DISCUSSION

It is noted that the Commissioner issued an advisory opinion last summer extensively explaining application of these same statutes to a particular PSA broadcast in

2015, in COPP-2015-AO-0005.12 The Commissioner hereby incorporates by reference the explanation provided by that Advisory Opinion.

Candidate Restrictions On Use of State Funds

At issue in this request for an Advisory Opinion is whether or not the grant funds provided by the Investor Protection Trust (IPT)³ to the Office of the Montana State Auditor, Commissioner of Securities & Insurance (CSI) to produce a documentary⁴ and to hold events around the State for the purpose of education about investment fraud in Montana, is use of "state funds" contrary to statute.

A candidate, as defined in 13-1-101(8)(a), may not use or permit the use of state funds for any advertisement or public service announcement in a newspaper, on radio, or on television that contains the candidate's name, picture, or voice except in the case of a state or national emergency and then only if the announcement is reasonably necessary to the candidate's official functions.

Mont. Code Ann. § 2-2-121(4)(a).

Here, there are two candidates for public office that appear in the documentary, Monica Lindeen is a candidate for Montana Secretary of State, and Jessie Laslovich is a candidate for Montana State Auditor. As noted above, Ms. Lindeen currently serves as Montana State Auditor; Mr. Laslovich serves as the Chief Legal Counsel for the CSI.

The prohibitions on candidate's usage of state funds for public service announcements was extensively considered by the Office of the Commissioner of Political Practices in the matter of *Montana Republican Party v. Schweitzer*, COPP-2012-ETH-004(Dep. Comm'r Goetz).⁵ The decision of Deputy Commissioner Goetz was affirmed by the District Court on review in *Montana Republican Party v. Schweitzer and COPP*, First Judicial District Court, Cause No. BDV-2012-242 (Sherlock, J., Feb. 4, 2014).

Both Deputy Commissioner Goetz and Judge Sherlock determined that there is a difference between the meaning of "state funds" and the meaning of "public time, facilities, equipment supplies, personnel or funds" as used by the legislature in crafting Mont. Code Ann. § 2-2-121(4)(a) and (b).

Simply put, the legislature, if it wanted to ban public officials from using their

¹ <http://www.politicalpractices.mt.gov/content/5campaignfinance/StateOfficialPublicServiceAnnouncementAdvisoryOpinion>

² Neither the 2015 Advisory Opinion in fn1 above, nor this Advisory opinion addresses the issue of a potential reporting and disclosure obligation under Mont. Code Ann. §13-1-101(15) or Mont. Admin. R. 44.11.605.

³ <http://www.investorprotection.org/>

⁴ The documentary is called "Gold Diggers: Investment Fraud in the Treasure State" and is being featured at an event called a "Meal & A Movie". <http://csimt.gov/events/fraud-tour/>

⁵ <http://www.politicalpractices.mt.gov/content/2recentdecisions/MRPvSchweitzerFinalOrder>

time, facilities, equipment or supplies in the creation of a PSA, should and could have clearly stated so in Section (4)(a). Since the legislature clearly used those words in other parts of the statute, failure to use those words in Section (4)(a) demonstrates that the legislature may well have intended something different than public time, facilities and equipment in creating Section (4)(a).

Montana Republican Party, BDV-2012-242, at pp. 14-15.

Based on the previous interpretations of the COPP and the First Judicial District Court, neither candidate may use nor permit the use of state funds to purchase radio, newspaper or television time to promote the "Meal and A Movie Tour" if the advertisements "contain the candidate's name, picture or voice," Mont. Code Ann. § 2-2-121(4)(a).

The funds at issue here are provided by the Investor Protection Trust (IPT). The State Auditor has deposited the funds into a "non-budgeted state special revenue account" which "can only be used in accordance with the grant." A special revenue account can be maintained by an agency when the funds consist of "money and other proceeds from other nonstate or nonfederal sources that is restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation." Mont. Code Ann. § 17-2-102(b)(i). Here, the funds provided by the IPT are restricted in use by the terms of the grant, and in the COPP's opinion the funds do not consist of "state funds." Therefore if a radio, newspaper or television advertisements "contain the candidate's name, picture or voice" to promote "Meal and A Movie Tour", the CSI may use the funds provided by the IPT to purchase the advertisements, Mont. Code Ann. § 2-2-121(4)(a).

State Officer Public Resources Restrictions

Candidate Lindeen also happens to be a State Officer, currently serving as the Montana State Auditor, Commissioner of Securities and Insurance. The position of State Auditor is an elected officer of the executive branch of state government, Mont. Code Ann. § 2-15-102. As mentioned above, a particular provision of Mont. Code Ann. § 2-2-121(4)(b) applies to Ms. Lindeen in her capacity as a state officer.

Subsection (b) is better understood when broken down into its parts:

- i. *A state officer* may not use or permit the use of
- ii. public time, facilities, equipment, supplies, personnel, or funds
- iii. to produce, print, or broadcast any advertisement or public service announcement in a newspaper, on radio, or on television
- iv. that contains the state officer's name, picture, or voice
- v. *except ...* in the case of an announcement directly related to a program or activity under the jurisdiction of the office or position to which the state officer was elected or appointed.

Mont Code Ann. § 2-2-121(4)(b) (2015).

A state officer may use public funds and resources to produce a PSA that is "directly related to a program or activity under the jurisdiction" of the Montana State Auditor, Commissioner of Securities and Insurance. The State Auditor's Office is tasked with

protecting “Montana’s consumers by ensuring fairness, transparency and access for Montanans in two of Montana’s largest industries — securities and insurance.”⁶ The documentary is an educational project of the State Auditor's office to educate Montanans about ways to protect themselves from fraud in their investments. This information is within the jurisdiction of the Commissioner of Securities and Insurance; in fact an entire section of its webpage is dedicated to providing information about the securities and the programs that the State Auditor administers for Montanans, <http://csimt.gov/securities/>.

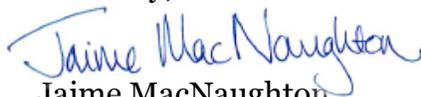
Therefore, in the COPP’s opinion the Montana State Auditor, Commissioner of Securities and Insurance employees may, at Commissioner Lindeen's direction, use "public time, facilities, equipment, supplies, personnel, or funds to produce, print, or broadcast any advertisement or public service announcement in a newspaper, on radio, or on television" in order to promote the "Meal and A Movie Tour" in order to educate the public about investor fraud in Montana.

Please note, that the prohibitions above do not apply to the use of “public time, facilities, equipment, supplies, personnel, or funds” when a state officer makes a PSA in the “case of a state or national emergency...if the announcement is reasonably necessary to the candidate’s official functions”, Mont. Code Ann. § 2-2-121(4)(a), or as stated in (b) for state officers.

LIMITATIONS ON ADVISORY OPINION

This letter is an advisory opinion based on the specific written facts and questions as presented above. It is specifically noted that an issue remains regarding whether or not a reporting and disclosure obligation remains under Montana's Campaign Practices laws, as amended by the 2015 legislature. 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

⁶ <http://csimt.gov/about/>, last accessed April 22, 2016.

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

DATED 9th day of May, 2016.

A handwritten signature in blue ink, appearing to read "Jonathan R. Motl".

Jonathan R. Motl
Commissioner of Political Practices