4297 Library

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

November 2, 1990

The Honorable Michael T. Rose
Senator, District No. 38
314 Chessington Circle
Summerville, South Carolina 29485

Dear Senator Rose:

By your letter of October 3, 1990, you have raised several questions in connection with the activities of various people or entities toward favorable results of the local option sales tax referendum questions in the upcoming general election. Each of your questions will be addressed separately, as follows.

Question 1

> Was it legal for full-time employees of the Municipal Association of South Carolina and the South Carolina Association of Counties not registered as lobbyists to ask or urge members of the General Assembly to vote for passage of the Local Option Sales Tax, or for the granting of Free Conference Powers to conferees of the General Assembly to reconcile differing versions of the proposal?

The question has been raised because both of the above-named organizations are "agents of their member political subdivisions organized under the laws of South Carolina," funded by the tax revenues "authorized by the General Assembly," according to the letter attached to your request letter.

Registration of lobbyists and regulation thereof are governed by S. C. Code Ann. §§ 2-17-10 et seq. (1986). Exceptions to registration requirements are found in § 2-17-50, which provides in relevant part:

> The provisions of § 2-17-20 [the registration requirements] are not intended and shall not be construed to apply to the following:
>
> * * * *
>
> (c) Any duly elected or appointed official or employee of the State, the United States, a county, municipality, school district or public service district, when appearing only and solely on matters pertaining to his office and public duties....

Construing this statute, in an opinion rendered during the administration of former Attorney General Daniel R. McLeod, it was concluded that "it is clear that in South Carolina municipal employees are exempt from registering before lobbying in the South Carolina General Assembly when appearing solely on official public matters." Op. Atty. Gen. No. 3961, dated February 3, 1975. The opinion continued:

> While the employees of the Municipal Association of South Carolina are not technically "appointed official(s) or employee(s) of a municipality", the exemption of Section [2-17-50] (c) would appear to apply to employees of the Municipal Association by virtue of their being paid from municipal funds and serving at the pleasure of a board of directors composed of municipal officials.

See also: 1975 Op. Atty. Gen. No. 4008, March 28, 1975 ["Therefore, it is the opinion of this Office that the University Legislative Liaison Officer is exempt from registering as a lobbyist in effecting liaison with the General Assembly when appearing solely in matters pertaining to his office and public duties."] The same reasoning contained in these earlier opinions would apply to employees of counties and the South Carolina Association of Counties. Thus, if the employees of the above-named entities are appearing only and solely on matters pertaining to their employment and public duties, they are not required to register as lobbyists.

After reviewing Georgia constitutional and statutory provisions concerning the levying of taxes by counties and municipalities with respect to lobbying activities of the Georgia Municipal Association and the Association of County Commissioners of Georgia, the Supreme Court of Georgia stated:

> The Georgia Constitution, Art. IX, Sec. V, Par. II (Code Ann. § 2-6202) specifically authorizes counties to raise taxes for the exercise of certain enumerated purposes, as well as other public purposes authorized by the General Assembly. Among the public purposes specifically enumerated is the payment of expenses of county government. We find that in today's complex world the activities carried on by defendant organizations constitute necessary activities for the administration of county government. [Cite omitted.]
>
> Elected officials who participate as members and officers of defendant organizations are elected by the voters for the purpose of performing certain public functions. Among the functions of officers of municipal corporations or counties is to represent the views of the constituents to law-making bodies in regard to pending issues affecting the political subdivision. Since it is the responsibility of the government entities to represent the views of their constituents in this manner, it is proper to carry out this function in concert with officials of other governmental bodies. If the electors of a political subdivision disagree with the position taken by their officials, the remedy is at the ballot box.

Peacock et al. v. Georgia Municipal Association, Inc., 247 Ga. 740, 279 S.E.2d 434, 437-38 (1981).

Considering the foregoing authorities in light of § 2-17-50 (c) of the Code, if the activities described in the first question have been undertaken by employees of the Municipal Association and the Association of Counties solely and only as the activities pertain to the public office (employment) and public duties of those employees, then the authorities have not considered these activities as being illegal or requiring registration. Final resolution of this question depends upon the particular facts involved; determination of

questions of fact are, of course, outside the scope of an opinion of this Office. Ops. Atty. Gen. dated January 6, 1976; December 12, 1983. 1/ It should be stressed that these previous opinions interpret those lobbying laws presently on the books. As you know, both houses of the General Assembly attempted major reforms of these laws during the last session, among them being the regulation of certain activities other than the influence of members of the General Assembly. Such reforms, which this Office supported, were not enacted into law, however.

Question 2

> Was it legal for full-time employees of the member political subdivisions (not registered as lobbyists) of the two associations to engage in the activities described above within the halls and offices of the General Assembly?

1/ In an action brought under the Federal Regulation of Lobbying Act, the court in Bradley v. Saxbe, 388 F.Supp. 53 (D.D.C. 1974), noted with respect to whether municipal organizations, mayors, or full-time municipal employees must register under that Act:

> The involvement of cities, counties and municipalities in the day-to-day work of the Congress is of increasing and continuing importance. The Court must recognize that the voice of the cities, counties and municipalities in federal legislation will not adequately be heard unless through cooperative mechanisms such as plaintiff organizations they pool their limited finances for the purpose of bringing to the attention of Congress their proper official concerns on matters of public policy. ...

Id., 388 F.Supp. at 56. The officers and employees in question were not required to register under the Act as long as each person "engages in lobbying undertaken solely on the authorization of a public official acting in his official capacity," 388 F.Supp. at 57-58, and sole compensation and expenses for the lobbying activities come from public funds.

See also 10A McQuillin, Municipal Corporations, § 29.92.

As noted above, § 2-17-50 (c) excepts certain individuals from the requirement of registration as lobbyists. Further, as stated in the referenced opinion, dated February 3, 1975, "it is clear that in South Carolina municipal employees are exempt from registering before lobbying in the South Carolina General Assembly when appearing solely on official public matters." The same reasoning would apply to county employees.

Again, whether the employees are appearing solely on public matters is a question of fact which this Office cannot determine. If the employees are in fact appearing solely on official public matters, then the reasoning of Opinion No. 3961 would be applicable and registration as lobbyists would not be required.

Question 3

> Will it be legal for the association or their member political subdivisions to expend taxpayer funds to urge voters to approve the referendum measure on the Local Option Sales Tax in this coming November 6 elections?

Determining the answer to this question is made difficult by the continuing evolution of law in this area. In an opinion of this Office dated May 29, 1979, it was stated with respect to a public service district's expenditure of funds to oppose the incorporation of a portion of the district's service area:

> The State and its political subdivisions are enjoined by the South Carolina Constitution of 1895, as amended, to expend public funds only for a public purpose. S.C. CONST. art. X § 5. The authorities seem to agree that the expenditure of public funds to obtain or oppose legislation is unauthorized in the absence of express statutory language to the contrary....

The opinion concluded that there was no statutory authorization for such expenditure and thus the district's funds could not be expended for such a purpose. See also Op. Atty. Gen. No. 82-11, dated March 3, 1982. Whether a court would agree with our previous opinions is unclear, due to the changing law in the area and greatly depending on the nature of a particular activity.

In a judicial decision rendered subsequent to our opinion, the Supreme Court of Oregon, in banc, decided Burt v. Blumenauer, 299 Or. 55, 699 P.2d 168 (1985) and in so doing analyzed the evolving

law in this area: 2/

> In tracing the development of the government speech cases, one finds the analyses shifting from demands for explicit authority for a particular government activity to concerns with an authorized action's conflict with other laws, both statutory and constitutional. In the earlier cases in this area, courts placed limitations on municipal spending power by narrowly defining "corporate purpose" and "municipal function," and uniformly prohibited expenditures for government speech.

Id., 699 P.2d at 171. The court then analyzed how the power of local governments has been expanded in recent times, contrasted with older cases which interpreted powers of municipal corporations narrowly. The court continued:

> In recent times, the judicial demand for explicit expressions of authority and a recognition of only attendant authorities "necessarily implied" by those expressed has given way to an interpretation that local governments have broad powers subject only to constitutional or preemptive statutory prohibitions. Thus, it is more often possible to find some source of authority for a government speech-related expenditure. As the first inquiry--whether a particular expenditure is authorized--is more often answered in the affirmative, courts have proceeded to consider whether the government action, even though authorized, conflicted with some other law or constitutional provision.

Id., 699 P.2d at 172. The court then reviewed several judicial decisions which seemed to permit expenditure of public funds for government speech, the determining factor being whether the purpose

---

2/ We note that, obviously, a judicial decision rendered in Oregon has no precedent in South Carolina. The decision discussed a number of cases from jurisdictions across the United States to analyze national trends; for this reason, we cite the decision.

was to educate and inform the public as opposed to advocating a particular outcome of the election process.

Commenting upon the theoretical background of the issues, the court noted:

> In a democracy, efforts by government to publicize and promote its policy views pose an obvious problem. On the one hand, democratic accountability requires that public officials explain their past, present and intended actions. This means explaining policy goals and reasons for choosing or rejecting particular ways of pursuing those goals. On the other hand, the legitimacy of the chosen policy rests on the consent, if not consensus, of the governed; excessive or questionable efforts by government to manufacture the consent of the governed calls of the legitimacy of its action into question.
>
> ....
>
> Commentators examining the potential constitutional issues which arise when government promotes its own views come to a few uniform conclusions: Neither the free speech clauses, nor principles of representational democracy require that governments, as such, refrain from speech entirely. However, assuming governments may engage in some forms of speech, they are still prohibited from advocacy intended to perpetuate themselves in power. Drawing lines between these two extremes is the task required in this case.
>
> ....
>
> Equally difficult are attempts to distinguish partisan from non-partisan speech or information from advocacy [Cite omitted.] This is because "[n]on-partisan aspects such as informing the populace of government policy and explaining that policy are also necessarily partisan because incumbent candidates almost invariably claim that their reelection is justified by their link to the government policy they explain and defend." [Cite omitted.]

Id., 699 P.2d at 175-76.

In addition, in what appears the only authority in South Carolina addressing this question, The Honorable James E. Moore, Circuit Judge, in Toussaint v. Ham et al., 87 C.P.-30-140, December 23, 1987 applied a similar test to that of the Oregon Court in Burt. In upholding an expenditure of public funds to promote the passage of a bond referendum, Judge Moore concluded:

> A government has a legitimate interest in informing, in educating, and in persuading its citizens. A governmental agency in order to secure cooperation in implementing its programs must be able to communicate and to inform its citizens about their needs and the advantages of pursuing a particular course of conduct as was done in this case....
>
> There is no evidence of bad faith, corruption, personal gain or malicious motives in the exercise of the discretionary function of the Board in determining to expend these funds.

Order, at p. 11.

Applying the foregoing to the question you have posed, we advise that the resolution of the question may ultimately be up to the courts. The law is still evolving in this area, and courts are becoming less reluctant to prohibit all aspects of government speech. On the other hand, a court must be assured that where public funds are expended, such activities possess a valid public purpose. The activities of an individual official, employee, or political subdivision (through its governing body) will require examination to determine whether such activities are educational, informative, or advocatory in nature. As Judge Moore indicated in his Order, such a determination is a question of fact requiring the production of evidence. Of course, these determinations are outside the scope of an opinion of this Office. Depending upon the actual activities, and even the motivations of those engaged in the particular activity, a court might find some to be legal and others not.

As a practical matter, we further note that it would be impossible to render an opinion which could consider the legality of all potential activities. The task is made more difficult by the recognition that reasonable minds could disagree as to whether a particular activity was partisan or non-partisan, educational or advocatory. In short, this Office will not supersede the authority

of a court to bring before it all of the facts relevant to a particular situation, nor will we attempt to provide a per se answer to a question where the particular facts are so crucial to an accurate response.

Question 4

> Is it legal for a city employee, such as the Administrator of the City of Summerville, to spend weeks lobbying for the Local Option Sales Tax while his salary is being paid by the City of Summerville with tax dollars?

To respond to this question, we assume that you are referring to such individual's "lobbying" members of the General Assembly to promote passage of the legislation authorizing the Local Option Sales Tax. If that be the case, your inquiry is answered by the opinion of former Attorney General McLeod, No. 3961 and § 2-17-50 (c), as discussed in response to the first two questions herein.

With kindest regards, I am

Sincerely,

Edwin E. Evans
Chief Deputy Attorney General

EEE/an

REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions