

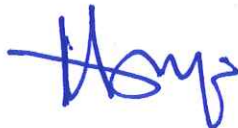


MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Robert Meyers, Esq.
Surfside Town Attorney

FROM: Jose J. Arrojo, Executive Director
Commission on Ethics 

SUBJECT: INQ 19- 129, Municipally Produced Videos Featuring Elected Officials
Section 2-11.1 (g), Exploitation of Official Position Prohibited

DATE: December 19, 2019

CC: All COE Legal Staff

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance regarding Section 2-11.1 (g) of the County Ethics Code, relating to exploitation of official position, and its possible application to municipally-produced videos featuring elected officials.

Facts:

The Town of Surfside has produced eleven videos. The videos advertise the Town's qualities, the work of its elected officials and Town employees, its businesses, beaches, and generally promote the municipality. There is also a season's best wishes video and a hurricane season preparedness video. Finally, there is a short biographical video about a Commissioner. The videos are publicly accessible.

Several of the videos depict at least one of the Town's elected officials: Mayor Daniel Dietch, Vice Mayor Daniel Gielchinsky, or Commissioners Barry Cohen, Michael Karukin, and Tina Paul.

The Town's municipal elections are scheduled for Tuesday, March 17, 2020. Each of the current elected officials has drawn opposition. As of the date of this memorandum, there are three candidates for Mayor, including the incumbent, and nine candidates vying for the three Commission slots, including three incumbents.

Issue:

Does Section 2-11.1 (g), Exploitation of official position prohibited, of the County Ethics Code, prohibit the use of municipal resources to produce and make publicly available, videos depicting elected officials standing for re-election.

Answer:

Section 2-11.1 (g), Exploitation of official position prohibited, of the County Ethics Code, prohibits use of municipal resources to produce and make publicly available, videos depicting elected officials standing for re-election, if there is no clear municipal purpose served by the video, or the video serves to significantly or exclusively highlight the elected official's personal or professional qualifications or accomplishments while in office.

Discussion:

Section 2-11.1 (g), of the County Ethics Code provides as follows:

(g) Exploitation of official position prohibited. No person included in the terms defined in subsection (b)(1) through (6) and (b)(13) shall use or attempt to use his or her official position to secure special privileges or exemptions for himself or herself or others except as may be specifically permitted by other ordinances and resolutions previously ordained or adopted or hereafter to be ordained or adopted by the Board of County Commissioners.

The Ethics Commission has sought to ensure that government resources are not used for campaign or electioneering purposes. In support of this function, Ethics Commission staff distributes an annual election season memorandum that reminds elected officials and local government employees that the following limitation is imposed primarily by Section 2-11.1 (g) of the Ethics Code as well as Florida Statute 104.31 ("Little Hatch Act"), and other state laws, local ordinances and previously-issued administrative orders:

Political campaign activities may not involve the use of public resources in support of any political campaign or candidate, including office stationery, telephones, computers, or vehicles. Taxpayers' monies must be used exclusively for public purposes.¹

¹ The use of a video depicting an elected official promoting discussion with residents where said video was scripted, taped, edited and promoted on official government social media, may constitute a violation of Section 2-11.1 (g) if the evidence indicates it was used as a political self-promotion rather than an effort to address matters of public concern. See COE Complaint C 19-24-05.

Applying a bright line rule that public resources must be used exclusively for public purposes can be difficult during election season when incumbents are running for re-election or election to higher office. The very nature of holding public office involves communicating with constituents and the general public and this requires the expenditure of taxpayers' monies or other government resources or funds.

Drawing from Commission precedent regarding mailings by elected officials, the Commission has recognized that "there is an inherent right for an elected official to communicate with constituents regarding public issues for the purpose of soliciting their input through such a mailing, where there is no overt political message in the mailing and no pending election or political cause that motivates the mailing. *See* INQ 15-08.

Thus, while the Ethics Commission has recognized that an elected official running for office will of necessity make public comment in his official duties on matters that may be relevant in a campaign, he or she should use exercise caution in not using his public office or public duties for campaign or electioneering purposes. Regarding the incumbent candidate, "due diligence is required to make the best effort to avoid any blurring of the lines." *See generally*, INQ 18-200; *See also* INQ 05-157 (an elected official may participate in a town hall meeting to meet his constituents and address their needs as long as the meeting does not turn into a political rally for his re-election bid).

Also, elected officials that are candidates should be careful not avail themselves of public forums that are available to them, but otherwise may not be available to non-incumbent candidates. For example, the Ethics Commission has cautioned regarding the use of a Council meeting's allotted public comment agenda during elections season for purely partisan political speech in support or opposition of a candidate. The use of the public comment agenda during elections season by one candidate to introduce or advocate her candidacy "could also lead to a claim by other candidates" that they are being denied the same access to the forum. *See generally* INQ 18-10; INQ 18-114.

Moreover, they should also be careful in the campaign use of photographs generated during their official acts. The use of photographs or images captured or generated at public expense during an incumbent candidate's official duties, may only be used in his or her campaign under specific circumstances. An elected official's campaign may use photographs taken at public expense during the official's exercise of his or her public duties as long as the photographs are readily available to the public for no cost. However, if they are not readily available or the public has to pay for their use, then the campaign must go through the same process as the public and pay for the photographs otherwise, it might constitute a violation of Section 2-11.1 (g), of the Ethics Code. *See* INQ 18-152.

Applying these broad guidelines to the videos generated by the Town of Surfside and featuring several incumbents currently running for reelection in contested races, we note that there are several instances where there may have been a blurring of the lines, and publicly-funded videos available exclusively to incumbent candidates and not their opponents, may have strayed from their public purpose and have been used, in part, to self-promote the incumbents that are currently running for office.

Specifically, we note as follows:

1. The “Beach Re-nourishment Video” depicting Mayor Daniel Dietch includes commentary from the Army Corps of Engineers and the Assistant Town Manager appears to address a public purpose and does not overly focus on the Mayor seeking re-election.
2. The “Surfside Resilience Video” depicting Mayor Daniel Dietch appears to address a public purpose but it also includes portions that are self-laudatory:

“I feel very comfortable using the skill set that I have and my judgment to weigh the concerns that are expressed in the community” and “My interest in serving the community really started with my parents, I learned from them growing up in a small town in Massachusetts that you make the community that you want to live in. If you think that you can make a difference, then stand up and step forward. I am really driven by my core values. I want to give back to the community that has opened its arms to me.”

Those comments could objectively be characterized as unrelated to the legitimate public purpose of informing the public about beach re-nourishment. The Mayor’s opponents are not going to be afforded the opportunity to espouse on their qualifications for public office in this manner.

3. The “Surfside Promotion Video” depicting Commissioner Michael Karukin appears to address a public purpose in promoting local Surfside businesses but it also includes portions that are self-laudatory:

“I always felt like I was the voice of reason, looking at both sides and all sides of the issue” and [I can] “add value to the discussion on how tourism tax dollars are spent” and finally “I am a medical researcher. [I] Make other people’s lives better anyway I can”

Those comments could objectively be characterized as unrelated to the legitimate public purpose of informing the public about Surfside businesses. The Commissioner’s opponents are not going to be afforded the opportunity to espouse on their qualifications for public office in this manner.

4. The “Surfside Kosher Restaurant Promotion Video” depicting Vice Mayor Daniel Gielchisnky, appears to address a public purpose in promoting unique Surfside businesses. Also, it is unclear from the Surfside Clerk of the Town website if the Vice Mayor is running for re-election. The video nevertheless includes portions that are self-laudatory:

“[I am] always an analytical person” with close-ups of his law school diploma on a wall, and “[I will] lend my experience as a zoning professional to the town.”

Those comments could objectively be characterized as unrelated to the legitimate public purpose of informing the public about Surfside businesses. The Vice Mayor’s opponents, if he is running for re-election, are not going to be afforded the opportunity to espouse on their qualifications for public office in this manner.

5. The “Angela Carlton Surfside Healthy” promotional video appears to address a legitimate public purpose without issue.

6. The “Surfside Holiday Greetings” depicting all the elected officials is a traditional public purpose video during the holidays although, to be clear, one elected official running for re-election does expound on her holiday traditions. Commissioner Tina Paul does go on to comment that: “I love the holidays because it reminds me of my childhood growing up here when we used to sit around the house together and light the Hanukkah menorah as a family and then we would all get in the car and drive to look at all the beautiful Christmas decorations that people had set up on their homes.”

7. The “Calendar of Events” video clearly addresses a legitimate public purpose without issue.

8. The “Surfside Harding Avenue Kosher Restaurants” promotional video appears to address a legitimate public purpose without issue.

9. The “Meet Tina Paul” video” is entirely self-promotional and does not appear to address a legitimate public purpose.

The entire video could objectively be characterized as unrelated to the legitimate public purpose of informing the public about Surfside businesses. The Commissioner’s opponents are not going to be afforded the opportunity to espouse on their qualifications for public office in this manner.

10. The “Hurricane Season Awareness” video clearly addresses a public purpose without issue.

11. The “Surfside Farmers Market” promotional video addresses a public purpose without issue.

Opinion:

Section 2-11.1 (g), Exploitation of official position prohibited, of the County Ethics Code, prohibits use of municipal resources to produce and make publicly available, videos depicting elected officials standing for re-election, if there is no clear municipal purpose

served by the video, or the video serves to significantly or exclusively highlight the elected official's personal or professional qualifications or accomplishments while in office.

In some Surfside publicly funded videos featuring incumbent candidates running for election in contested races and not their opponents, there are several instances where the videos stray from their public purpose and the incumbents engage in self-promotion.

The use of public funds in this manner may constitute a violation of Section 2-11.1 (g), of the Ethics Code, inasmuch, as this may constitute a use or attempted use by the elected official in his or her official position to secure special privileges consisting of promotional or self-laudatory videos during a contested election; video depictions at public expense that are not otherwise available to their election opponents.

Consistent with this opinion, we would encourage that those videos containing the clearest instances of self-promotion not related to public purposes, be removed from distribution. In abundance of caution, those incumbent candidate self-promotion sections might be edited out from the all the videos.

This opinion is limited to the facts as you presented them to the Commission on Ethics and is limited to an interpretation of the County Ethics Code only. While state statutes may be referenced, it is not intended to interpret state laws. Questions regarding state ethics laws should be addressed to the Florida Commission on Ethics.

INQs are informal ethics opinions provided by the legal staff after being reviewed and approved by the Executive Director. INQs deal with opinions previously addressed in public session by the Ethics Commission or within the plain meaning of the County Ethics Code. RQOs are opinions provided by the Miami-Dade Commission on Ethics and Public Trust when the subject matter is of great public importance or where there is insufficient precedent. While these are informal opinions, covered parties that act contrary to the opinion may be referred to the Advocate for preliminary review or investigation and may be subject to a formal Complaint filed with the Commission on Ethics and Public Trust.