STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

December 22, 2016

Opinion No. 16-48

Use of State Property for Campaign Related Activities

Question 1

Does state law prohibit elected state officials from using state property, including the Executive Residence, for campaign-related activities?

Opinion 1

No, state law does not prohibit elected state officials from using state property, including the Executive Residence, for campaign-related activities.

Question 2

If state law does not prohibit elected state officials from using state property for campaign-related activities, does state law require an accounting of any and all expenditures incurred for such campaign-related activities on state property?

Opinion 2

Yes, Tennessee's Campaign Financial Disclosure Act would require the disclosure of such expenditures if they constitute either a "contribution" or an "expenditure" as defined under the Act.

Question 3

Does state law require the public disclosure of the Governor's non-personal schedule, including non-personal events hosted at the Executive Residence?

Opinion 3

To the extent that the Governor's non-personal schedule, including events at the Executive Residence, meets the definition of "public record" as set forth in Tenn. Code Ann. § 10-7-503(a)(1)(A), then it is subject to disclosure under Tennessee's Public Records Act, unless a state law provides otherwise.

ANALYSIS

1. Use of State Property for Campaign-Related Activities

Tennessee's "Little Hatch Act," governs the activities of public officers and employees with respect to elections and campaign-related activities. Tenn. Code Ann. §§ 2-19-201 – 208. It provides, in pertinent part, as follows:

> (a) It is unlawful for any elected or appointed official of the state, or any employee of the state or any department, division or agency thereof, to display campaign literature, banners, placards, streamers, stickers, signs or other items of campaign or political advertising on behalf of any party, committee or agency or candidate for political office, on the premises of any building or land owned by the state, or to use any of the facilities of the state, including equipment and vehicles for such purposes.
>
> (b) It is unlawful to use public buildings or facilities for meetings or preparation of campaign activity in support of any particular candidate, party or measure, unless reasonably equal opportunity is provided for presentation of all sides or views, or reasonably equal access to the buildings or facilities is provided all sides.

Tenn. Code Ann. § 2-19-206.

But it also specifically provides that "[p]opularly elected officials, officials elected by the general assembly, qualified candidates for public office, members of the governor's cabinet, and members of the governor's staff *are expressly excluded* from the provisions of [the Act] except for the provisions of § 2-19-202." Tenn. Code Ann. § 2-19-201(3) (emphasis added).

The interplay between § 2-19-206 and the specific exclusions in § 2-19-201(3) was directly addressed by the Davidson County Chancery Court in *Hooker v. Sundquist*, Davidson County Chancery Court No. 98-2748-I. In that case, Mr. Hooker challenged then-Governor Sundquist's use of the Executive Residence for a political fundraiser as violating Tenn. Code Ann. § 2-19-206. The Chancery Court found that the provisions of Tenn. Code Ann. § 2-19-201(3) controlled and, because the Governor is a popularly elected official, he was excluded from the prohibitions contained in § 2-19-206; those prohibitions did not apply. Accordingly, elected state officials are not prohibited from using state property for campaign-related activities. *See also* Op. Tenn. Atty. Gen. 02-114 (Oct. 16, 2002).

2. Accounting of Expenses for Use of State Property for Campaign-Related Activity

Expenses incurred by elected state officials in conducting campaign-related activities on state property may be required to be disclosed pursuant to the Campaign Financial Disclosure Act of 1980, Tenn. Code Ann. §§ 2-10-101 – 121. That Act requires each candidate for state or local public office or political campaign committee to regularly disclose all contributions received and

all expenditures made by or on behalf of the candidate. *See* Tenn. Code Ann. § 2-10-105. A "contribution" is defined as

> any advance, conveyance, deposit, distribution, transfer of funds, loan, loan guaranty, personal funds of a candidate, payment, digital currency, gift or subscription of money or like thing of value, and any contract, agreement, promise or other obligation, whether or not legally enforceable, made for the purpose of . . . nomination for election or the election of any person for public office or for the purpose of defraying any expenses of an officeholder incurred in connection with the performance of the officeholder's duties, responsibilities, or constituent services.

Tenn. Code Ann. § 2-10-102(4). An "expenditure" is defined as "a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for the purposes of . . . the nomination for election or election of any person to public office," as well as the "use of campaign funds by an officeholder for the furtherance of the office of the officeholder." Tenn. Code Ann. § 2-10-102(6).

Thus, to the extent that any expenses incurred in conducting campaign-related activities on state property meet the definition of either a "contribution" or an "expenditure," such expenses would have to be disclosed by the candidate or political campaign committee on the appropriate campaign financial disclosure report.

3. Disclosure of Non-Personal Events

Tennessee's Public Records Act in general provides for the disclosure of public records to Tennessee citizens, unless otherwise provided by state law. Tenn. Code Ann. § 10-7-503(a)(2)(A). A public record is defined as a record that is "made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental entity." Tenn. Code Ann. § 10-7-503(a)(1)(A). Accordingly, to the extent that the Governor's non-personal schedule, including events at the Executive Residence, meets this definition, then it is subject to disclosure under Tennessee's Public Records Act, unless a state law provides otherwise.

One state law that does provide otherwise is the common law deliberative process privilege, also referred to as the "executive privilege." *Guy v. Judicial Nominating Com'n*, 659 A.2d 777, 782 (Sup. Ct. Del. 1995); *see also United States v. Nixon*, 418 U.S. 683 (1974), and *Hamilton v. Verdow*, 414 A.2d 914 (Md. 1980). The executive privilege exempts from disclosure the deliberative and mental processes of the executive. Thus, to the extent that disclosure of events on the Governor's non-personal schedule would disclose the Governor's deliberative and mental processes, the Governor's non-personal schedule is protected from disclosure under the deliberative process/executive privilege. *See, e.g., Times Mirror Co. v. Superior Court*, 813 P.2d 240, 252 (Cal. 1991) (using terms "executive privilege" and "deliberative process privilege" interchangeably, the court holds that privilege protects Governor's appointment calendars and schedules).

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