



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 20, 1997

The Honorable Ben W. "Bud" Childers
Fort Bend County Attorney
301 Jackson, Suite 621
Richmond, Texas 77469-3506

Letter Opinion No. 97-077

Re: Whether a county clerk is authorized to mail materials relating to the clerk's campaign for office in a private professional association at county expense (ID# 39550)

Dear Mr. Childers:

Your letter states that the county clerk in your county is running for office in the County and District Clerk's Association of Texas. Your office has been informed that the county clerk has used the county's postage meter to mail campaign materials. For purposes of this opinion, we assume these allegations are true. You ask whether a county clerk is authorized to mail such materials at county expense. We conclude that a county clerk is not authorized to mail materials relating to the clerk's campaign for office in a private professional association at county expense unless the commissioners court has budgeted for and authorized the expenditure. In addition, any such expenditure would have to comport with article III, section 52 of the Texas Constitution.

The county postage meter is county property and the use of the county postage meter constitutes an expenditure of county funds. The Local Government Code vests control over the expenditure of county funds in the county commissioners court. *See generally* Local Gov't Code ch. 111. The commissioners court adopts the county budget and county funds may only be expended in accordance with the county budget. *See id.* §§ 111.039 - .041, .070(a), .092. In addition, the commissioners court also sets the compensation of other county officials, including the county clerk. *See id.* ch. 152, subch. A. We are aware of no statute or common-law rule that would give the county clerk independent authority to appropriate county funds not budgeted by the commissioners court.¹ You have provided us with no information that would lead us to believe that the commissioners court has authorized the county clerk to use the county postage meter to mail the campaign materials, either as part of the county clerk's compensation or as a separate county expenditure. Assuming that the commissioners court did not budget for and authorize the

¹*See* Attorney General Opinion H-1243 (1978) at 2 (county clerk "without authority to incur any expense on behalf of the county without the approval of the commissioners court"); *accord* 36 DAVID B. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 7.13 (Texas Practice 1989) ("Although there has been no definitive opinion, county officials perhaps lack the authority to independently incur necessary and reasonable expenses not budgeted by the commissioners court.").

expenditure, we conclude that the county clerk's use of the county postage meter was beyond the county clerk's authority.²

We also note the constitutional limitations on a commissioners court's (or any other county officers') authority to expend county funds. Article III, section 52 of the Texas Constitution prohibits a county from using public funds or "thing of value" to aid an individual or association. This office has applied article III, section 52 to the use of county funds to mail correspondence,³ and we have no doubt that a court would conclude that use of a county postage meter constitutes use of public funds or a thing of value for purposes of that provision. Article III, section 52 does not prohibit all expenditures that incidentally benefit individuals or associations, however. A county is precluded from using public funds to benefit a private interest unless private benefit is only incidental to an expenditure made for the direct accomplishment of a legitimate county purpose.⁴ In addition, this office has opined that a county must receive an adequate quid pro quo in exchange for the expenditure and maintain sufficient controls on the expenditure to ensure that the county purpose is achieved.⁵

Over the past two decades, attorneys general have issued numerous opinions about the permissibility of expenditures of public funds that benefit public officials and employees under article III, section 52 and section 51, which contains a similar prohibition applicable to state expenditures. In general, expenditures that incidentally benefit a public official or employee but also

²You do not ask and we do not address whether a commissioners court would be authorized to ratify such an expenditure after the fact or to amend the county budget to provide for such an expenditure in the middle of a fiscal year.

³See Attorney General Opinion MW-36 (1979) (Harris County Department of Education precluded under Tex. Const. art. III, § 52 from using county funds to buy and mail Christmas cards).

⁴See *Graves v. Morales*, 923 S.W.2d 754, 757 (Tex. App.--Austin 1996, writ denied); *Brazoria County v. Perry*, 537 S.W.2d 89 (Tex. Civ. App.--Houston [1st Dist.] 1976, no writ).

⁵See, e.g., Attorney General Opinions DM-317 (1995) at 3, DM-268 (1993) at 3, DM-256 (1993) at 2, JM-1229 (1990) at 6, JM-1030 (1989) at 3, JM-516 (1986) at 2, JM-324 (1985) at 2; see also *Key v. Commissioners Court*, 727 S.W.2d 667, 669 (Tex. App.--Texarkana, 1987, no writ) ("to insure that the political subdivision receives its consideration, viz., accomplishment of the public purpose, the political subdivision must retain some degree of control over the performance of the contract") (quoting Mike Willatt, *Constitutional Restrictions on Use of Public Money and Public Credit*, 38 TEX. B.J. 413, 422 (1975)).

serve a legitimate public purpose are permissible.⁶ On the other hand, expenditures that benefit a public official or employee but do not serve a public purpose are impermissible.⁷

The commissioners court must make the initial determination whether a county expenditure will directly accomplish a legitimate county purpose, subject, of course, to judicial review⁸ for abuse of discretion.⁹ The County and District Clerk's Association of Texas is a private professional association. Clerks are not required by law to belong to the association. It may be the case that membership and participation in the association enhance a clerk's job performance, thus benefiting the county, even though the clerk also receives an incidental personal benefit.¹⁰ In determining whether to expend county funds to support the campaign of a county official for an office in a private professional association, however, a commissioners court must determine that the county would directly benefit from the county official *holding office* in the association. In addition, a commissioners court must also determine that the private benefit to the county official is only incidental to the county purpose. Furthermore, we also believe that a commissioners court would have to consider whether the county has any legitimate interest in influencing the internal politics and governance of a private association.

⁶See, e.g., Attorney General Opinions DM-397 (1996) (judge may use public resources to conduct wedding ceremonies because performance of weddings is an official function), JM-1063 (1989) (state agency not precluded from paying professional fees of employees if agency determines that expenditures would be related to governmental function), MW-251 (1980) (legislature may authorize state agency to spend public funds for employees' notary license fees because expenditure related to performance of state's governmental function).

⁷See, e.g., Attorney General Opinions DM-431 (1997) (county precluded as matter of law from paying county sheriff's attorneys fees in defending election contest suit because election contests involve personal interests, not county interests), JM-685 (1987) (school district has no authority to pay legal expenses of trustee in election contest because no school district interest in the litigation), MW-89 (1979) (school district not authorized to grant teachers paid release time to pursue business of professional organization because expenditure not tailored to accomplish school-related purpose).

⁸See Attorney General Opinions DM-317 (1995) at 3, DM-256 (1993) at 2, JM-824 (1987) at 2-3.

⁹See *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 80 (Tex. 1997).

¹⁰We note, for example, that the legislature appears to have determined that membership in "a nonprofit state association of counties" serves a public purpose. See Local Gov't Code § 81.026 (authorizing commissioners court to spend county general funds for membership fees and dues of nonprofit state association of counties under certain circumstances).

S U M M A R Y

A county clerk is not authorized to mail materials relating to the clerk's campaign for office in a private professional association at county expense unless the commissioners court has budgeted for and authorized the expenditure. In addition, any such expenditure must comport with article III, section 52 of the Texas Constitution.

Yours very truly,

A handwritten signature in black ink that reads "Mary R. Crouter". The signature is written in a cursive style with a large, sweeping initial "M".

Mary R. Crouter
Assistant Attorney General
Opinion Committee