



STATE OF MICHIGAN  
RUTH JOHNSON, SECRETARY OF STATE  
DEPARTMENT OF STATE  
LANSING

January 19, 2017

Robert Davis  
180 Eason  
Highland Park, Michigan 48203

Dear Mr. Davis:

The Michigan Department of State (Department) acknowledges receipt of your letter dated October 15, 2016, requesting the issuance of a declaratory ruling or interpretive statement regarding the Department's interpretation of the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 *et seq.*, as it applies to your intention to print and disseminate anonymous campaign literature. A copy of your request was published on the Department's website beginning October 17, 2016 inviting public comments regarding your request, but none were received.

The MCFA and Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 *et seq.*, require the Department to issue a declaratory ruling if an interested person submits a written request that presents a question of law and a reasonably complete statement of facts. MCL 24.263, 169.215(2). If the Department declines to issue a declaratory ruling, it must instead offer an interpretive statement "providing an informational response to the question presented [.]" MCL 169.215(2). As the factual statement provided in your letter is insufficient to support the issuance of a declaratory ruling, the Department issues this interpretive statement in response to your request.

Although you requested a response within 5 days, the MCFA establishes a mandatory sequence of steps that preceded the issuance of any declaratory ruling or interpretive statement, including an initial public comment period of 10 business days, publication of a preliminary response, and an additional public comment period lasting 5 business days. MCL 169.215(2). In view of these timeframes, the Bureau of Elections provided a provisional response to your questions on October 28, 2016.

According to your letter, your objective was to produce and distribute "campaign literature advocating the defeat of certain candidates who are running for the Detroit Community School District Board of Education" in the preceding November 8, 2016 general election. You further explained,

I will not be acting independently in printing and distributing anonymous campaign literature. I will be acting in concert with the candidates he is [sic] supporting for the Detroit Community School District Board of Education. And, I

will be acting as an agent for at least one of the candidate he is [sic] supporting for the new Detroit Community School District Board of Education, in printing and distribution anonymous campaign literature, if I am permitted to do so.

Consequently, the exemption set forth in [MCL] 169.247(1), which states, ‘[a]n individual other than a candidate is not subject to this subsection if the individual is acting independently and not acting as an agent for a candidate or any committee,’ would not be applicable to me.

The MCFA generally requires the person who pays for printed matter “having reference to an election, a candidate, or a ballot question” to identify the payor, yet different identification and disclaimer requirements apply to advertisements containing words of express advocacy and issue advocacy.<sup>1</sup> MCL 169.247. Without a copy of the campaign literature, it is impossible to say for certain which of the statute’s *identification and disclaimer* requirements might have applied to the material you aimed to distribute. Nonetheless, because the MCFA’s *identification* requirement applies to both express advocacy and issue ads disseminated 60 or fewer days prior to a general election and your request was made for the purpose of issuing print advertising material prior to an election that was (at that time) approximately 3 weeks away, you have provided a sufficient statement of facts to warrant the issuance of an interpretive statement.

With respect to print advertising, the MCFA requires the following:

(1) Except as otherwise provided in this subsection and subject to subsections (3) and (4), a billboard, placard, poster, pamphlet, or other printed matter having reference to an election, a candidate, or a ballot question, shall bear upon it an identification that contains the name and address of the person paying for the matter. Except as otherwise provided in this subsection and subsection (5) and subject to subsections (3) and (4), if the printed matter relating to a candidate is an independent expenditure that is not authorized in writing by the candidate committee of that candidate, in addition to the identification required under this subsection, the printed matter shall contain the following disclaimer: ‘Not authorized by any candidate committee’. An individual other than a candidate is not subject to this subsection if the individual is acting independently and not acting as an agent for a candidate or any committee. This subsection does not apply to communications between a separate segregated fund established under section 55 and individuals who can be solicited for contributions to that separate segregated fund under section 55.

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(4) Except for a communication described in subsection (5) and except for a candidate committee's printed matter or radio or television paid advertisements,

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<sup>1</sup> A communication is generally exempt from MCFA regulation unless it, “in express terms advocate[s] the election or defeat of a clearly identified candidate so as to restrict the application of this act to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for governor,’ ‘vote against,’ ‘defeat,’ or ‘reject.’” MCL 169.206(2)(j). Even when express advocacy is absent from a communication, it may still be subject to the identification requirements of MCL 169.247 if it is published “within 60 days before a general election or 30 days before a primary election … is targeted to the relevant electorate,” and is broadcast or disseminated via radio, TV, pre-recorded telephone message or a mass mailing in excess of 500 pieces of literature “of an identical or substantially similar nature within any 30-day period.” MCL 169.210(2), 247(5).

each identification required by this section shall also indicate that the printed matter or radio or television paid advertisement is paid for ‘with regulated funds’. Printed matter or a radio or television paid advertisement that is not subject to this act shall not bear the statement required by this subsection.

(5) A communication otherwise entirely exempted from this act under section 6(2)(j) is subject to both of the following:

(a) Must contain the identification required by subsection (1), (2), or (7) if that communication references a clearly identified candidate or ballot question within 60 days before a general election or 30 days before a primary election in which the candidate or ballot question appears on a ballot and is targeted to the relevant electorate where the candidate or ballot question appears on the ballot by means of radio, television, mass mailing, or prerecorded telephone message.

(b) Is not required to contain the disclaimer required by subsection (1) or (2).

MCL 169.247. A knowing violation constitutes a misdemeanor for which an offender may be sentenced to jail for up to 93 days, ordered to pay a fine up to \$1,000.00, or both. MCL 169.247(6).

The Act’s identification provision was first enacted in 1976 and required the following: “A billboard, placard, poster, pamphlet or other printed matter having reference to an election, a candidate, or ballot question, shall bear upon it the name and address of the person paying for the matter.” 1976 PA 388. The identification statement must include the full name and address of the person who paid for the material, preceded by the phrase, “Paid for by ...”. R 169.36.

Writing after the U.S. Supreme Court issued its seminal decision in *McIntyre v Ohio Election Commission*, 514 U.S. 334 (1995), the Attorney General concluded that the 1978 provision was “functionally indistinguishable from ... the Ohio statute invalidated in *McIntyre*”, and “that the disclosure requirement contained in section 47(1) of the Michigan Campaign Finance Act violates the First Amendment to the Constitution of the United States as applied to either a campaign ‘committee’ or a person making an ‘independent expenditure’ and is, accordingly, void and unenforceable in its entirety.” Op Atty Gen No 6895 (April 8, 1996). In *McIntyre*, the U.S. Supreme Court held that an Ohio law that prohibited the production and circulation of anonymous campaign literature violated the First Amendment.

In view of these developments, the legislature added the following sentence to MCL 169.247(1): “An individual other than a candidate is not subject to this subsection if the individual is acting independently and not acting as an agent for a candidate or any committee.” 1996 PA 225. The amendatory language provides limited authority for anonymous campaign speech by individuals who are not acting as agents of or in collaboration with a candidate or committee, and remains part of the Act today. An individual who prints campaign literature while acting in the capacity of a candidate or committee’s agent, or whose action is not independent of the candidate or committee, is required to include the identification statement required by MCL 169.247.

Additionally, the Sixth Circuit has held that it is permissible to require an identification statement on campaign literature that expressly advocates the nomination or election of a candidate. In *Kentucky Right to Life v Terry*, 108 F3d 637, 648 (CA 6, 1997) (internal citations omitted), it explained:

The identification disclaimer requirement in § 121.190(1) clearly implicates First Amendment protection because it burdens core political speech. When a statute burdens First Amendment rights, it must be ‘narrowly tailored to serve an overriding state interest.’ The State asserts that § 121.190(1) prevents actual and perceived corruption by immediately notifying the public of any possible allegiance a particular candidate may feel toward the publisher. … Applying the analysis of *Buckley*, we believe the identification disclaimer for independent expenditures contained in § 121.190(1) is narrowly tailored toward achieving those goals. Therefore, plaintiffs’ First Amendment challenge to § 121.190(1) is rejected.

With these principles in mind, the Department declines to conclude that, in your words, “MCL 169.247(1), (6), which makes it a crime for a person who is not acting independently to print and distribute ‘anonymous’ campaign literature, is unconstitutional …”

You have also asked the Department to refrain from enforcing MCL 169.247(1) against you and refrain from referring you to the Attorney General for prosecution based on the facts stated in your letter. Please be advised that MCFA enforcement matters are governed by MCL 169.215, which establishes an administrative complaint process and requires the Secretary of State to engage in an informal resolution process prior to any further enforcement action, be it criminal or administrative in nature.

The foregoing constitutes an interpretive statement with respect to the questions presented in your October 15, 2016 request.

Sincerely,



Michael J. Senyko  
Chief of Staff