

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY



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Legal Opinion No. 2010-01

To: Councilmember Randy Foster, Esq.
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Date: April 16, 2010

You have requested the Metropolitan Department of Law to answer the following questions:

QUESTIONS

- (1) Can the Council, short of discontinuing the availability of the generic letterhead, control the use of the generic letterhead by Council Members?
- (2) Would Proposed Rule 47, if passed, violate a Council Member's rights under the United States Constitution or the Tennessee Constitution?
- (3) If Proposed Rule 47 is adopted, what sanctions, if any, could be imposed upon a Council Member who violates the Rule?

SHORT ANSWERS

- (1) Yes. The Metropolitan Council has the authority to adopt rules governing the use of the generic Council letterhead that are consistent with the free speech clauses of the United States and Tennessee Constitutions.
- (2) No. It is the opinion of the Department of Law that a court is likely to find that Proposed Rule 47 is valid under the free speech clauses of the United States and Tennessee Constitutions.

- (3) The Metropolitan Council has not set forth any sanctions for violation of Proposed Rule 47. It should be noted, however, that there are Metropolitan ordinances and state laws that regulate the use of government property by public officials. While there are no proposed sanctions for merely failing to utilize the disclaimer, use of the generic Council letterhead in a manner that violates the Metropolitan Standards of Conduct or the provisions of Tennessee Code Annotated may subject a Council member to sanctions.

PROPOSED AMENDMENT TO THE COUNCIL RULES OF PROCEDURE

The following amendment to the Rules of Procedure of the Metropolitan Council has been proposed:

Amendment to the 2007-2011 Rules of Procedure of the Metropolitan Council

The 2007-2011 Rules of Procedure of the Council of the Metropolitan Government of Nashville and Davidson County (as amended) are hereby amended by adding the following new Rule 47 and renumbering the remaining rules accordingly.

47. Use of Member of Council letterhead

Members of Council shall not use the generic Member of Council letterhead provided by the Council Office in correspondence concerning matters of public policy for which legislation is pending, or which may result in future Council legislation. Rather, such correspondence shall be on a Council Member's personalized letterhead. If a Member of Council does not have personalized letterhead, or if more than one Member of Council has placed his/her signature on the correspondence, such correspondence shall include a disclaimer in bold print at the bottom of the letter stating that, "the views, thoughts, and/or opinions contained in this letter do not necessarily reflect those of all Members of Council."

Council staff has advised the Department of Law that the generic Council letterhead and personalized Council Member letterhead are obtained with funds of the Metropolitan Government. Members of Council have the option of using the generic Council letterhead or requesting a personalized Council Member letterhead. Proposed Rule 47 would require members of Council that utilize the generic letterhead to include a disclaimer in correspondence concerning matters of public policy for which legislation is pending or anticipated. The disclaimer is: "the views, thoughts, and/or opinions contained in this letter do not necessarily reflect those of all Members of Council."

ANALYSIS

The Metropolitan Council has the authority to adopt rules of procedure. *Metropolitan Charter* § 3.03.¹ The rules of procedure adopted by the Metropolitan Council must be consistent with the provisions of the United States and Tennessee Constitutions.²

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech, or of the press”³ U.S. CONST. amend. I. The First Amendment is applicable to states and local governments through the Fourteenth Amendment.⁴ Similar to the United States Constitution, the free speech clause of the Tennessee Constitution states that “[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.”⁵ TENN. CONST. art. I, § 19. The “Tennessee constitutional provision assuring protection of speech and press, Tenn.Const. art. I, s 19, should be construed to have a scope at least as broad as that afforded those freedoms by the first amendment of the United States Constitution.”⁶ The freedom of speech protected by the First Amendment is not absolute.⁷ “[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.”⁸

The authority of the government to regulate speech depends on the type of forum or public property that the speaker seeks to utilize for expressive purposes.⁹ ¹⁰ The United

¹ “The council may determine its rules of procedure.” *Metropolitan Charter* § 3.03.

² *Bible v. Hamblen County, ex rel. Hamblen County Beer Bd.*, 1994 WL 66657, *4 (Tenn. Ct. App. 1994) (“A municipal corporation can pass no by-laws inconsistent with the constitution and laws of the state.”) *See*, AMJUR MUNCCORP § 137 (“Legislative bodies have an inherent power to enact rules of procedure for the conducting of business before them provided such rules do not conflict with law.”)

³ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

⁴ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500-501 (1952).

⁵ “That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.” TENN. CONST. art. I, § 19.

⁶ *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979).

⁷ *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 295 (2007).

⁸ *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

⁹ Forum analysis applies both to governmental physical property and fora that are metaphysical. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (The same principles apply to government fora that are metaphysical, rather than spatial or geographic).

¹⁰ *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 800 (1985).

States Supreme Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum.¹¹ “Traditional public fora are those places that ‘by long tradition or by government fiat have been devoted to assembly and debate.’”¹² Public streets and parks fall into the public forum category.¹³ “In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.”¹⁴ Examples of public forums created by government designation are a university campus, a school board meeting, and a municipal auditorium.¹⁵

Content-based limitations on free expression in traditional public forums and designated public forums are subject to strict scrutiny.¹⁶ Thus, the government must show that the content-based restriction or regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.¹⁷ In public forums, the government “may enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”¹⁸

The government may regulate and restrict access to nonpublic forums as long as the limitations and regulations are reasonable, view-point neutral, and are not an effort to suppress expression merely because public officials oppose the speaker's view:

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Perry Education Assn.*, *supra*, 460 U.S., at 49, 103 S.Ct., at 957. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, see *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), or if he is not a member of the class of speakers for whose especial benefit the forum was created, see *Perry Education Assn.*, *supra*, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.¹⁹

¹¹ *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 802.

¹² *Id.*

¹³ *Id.*; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

¹⁴ *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 802.

¹⁵ *Id.* at 802-803; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45.

¹⁶ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45-46.

¹⁷ *Id.*

¹⁸ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45.

¹⁹ *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 806.

“The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.”²⁰ “The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances.”²¹ There is no requirement in a nonpublic forum that the restrictions be narrowly tailored or that the government's interest be compelling.²²

Types of government properties and mediums that courts have found to be nonpublic forums include: federal government workplaces;²³ federal government workplace charity campaigns;²⁴ a city's payroll charitable deduction program;²⁵ a city's Internet web home page and hypertext link from city home page;²⁶ a public school computer system and internal mail facilities;²⁷ a public school district mailbox system;²⁸ a fax machine in a municipal office;²⁹ Internet access in public libraries;³⁰ and a bulletin board and other media used by state workforce commission for job postings.³¹

The generic Council letterhead provided by the Metropolitan Government has not by tradition or designation constituted a public forum for communication purposes. As noted by the Supreme Court, the government creates a public forum “only by intentionally opening a nontraditional forum for public discourse.”³² The generic letterhead is provided to Council Members for use in fulfilling their official duties. It is the opinion of the Department of Law that a court is likely to find that the generic Council letterhead is a nonpublic forum. The purpose of the proposed Council Rule 47 is to avoid confusion to letter recipients by clarifying that communication on the generic letterhead does not necessarily constitute the official view or action of the Metropolitan Council. “A city council can affect the City's business only as a group. It is a well-settled rule that the governing authorities of cities can express themselves and bind the cities only by acting together in a meeting duly assembled.”³³ Statements or opinions of individual or a few Council Members do not constitute official acts of the Metropolitan Council. Proposed Rule 47 is reasonable, view-point neutral, and is not aimed at suppressing speech merely because of opposition to

²⁰ *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 808.

²¹ *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 809.

²² *Id.*

²³ *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985).

²⁴ *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985).

²⁵ *United Black Community Fund, Inc. v. City of St. Louis, Missouri*, 800 F.2d 758 (8th Cir. 1986).

²⁶ *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834 (6th Cir. 2000).

²⁷ *Herbert v. Washington State Public Disclosure Com'n*, 148 P.3d 1102 (Wash. Ct. App. 2006).

²⁸ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

²⁹ *Crevier v. Town of Spencer*, 600 F.Supp.2d 242 (D. Mass. 2008).

³⁰ *U.S. v. American Library Ass'n, Inc.*, 539 U.S. 194 (2003).

³¹ *Cabill v. Texas Workforce Com'n*, 198 F.Supp.2d 832 (E.D. Tex. 2002).

³² *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. at 802.

³³ *City of Corpus Christi v. Bayfront Associates, Ltd.*, 814 S.W.2d 98, 105 (Tex. Ct. App. 1991).

the views of a Council Member. Moreover, Council Members have alternative channels of communication, including the use of the personalized letterheads funded by the Metropolitan Government or their privately funded letterheads.

The Metropolitan Council has not set forth any sanctions for violation of Proposed Rule 47. It should be noted, however, that there are Metropolitan ordinances and state laws that regulate the use of government property by public officials. The Metropolitan Standards of Conduct provide that government officials “[s]hall not receive or use for personal purposes any property, services or funds of Metropolitan Government unless authorized by law”. *Metropolitan Code* § 2.222.020(g). Section 39-16-402 of the Tennessee Code makes it unlawful for a public servant to intentionally receive any benefit not otherwise authorized by law. It is a defense to prosecution for violation of Tenn. Code Ann. § 39-16-402 that the benefit involved was a trivial benefit incidental to personal, professional or business contact and involved no substantial risk of undermining official impartiality. T.C.A. § 39-16-402(b). Thus, while there are no sanctions for merely failing to utilize the disclaimer, use of the generic Council letterhead in a manner that violates the Metropolitan Standards of Conduct or the provisions of Tennessee Code Annotated may subject a Council member to sanctions.

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY

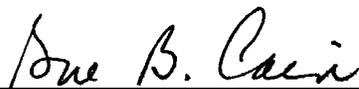


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cc: Mayor Karl F. Dean
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