

**CITY OF MINNEAPOLIS**  
**ETHICAL PRACTICES BOARD**  
**ADVISORY OPINION 2005-01**

**Introduction**

This matter is before the Board at the request of the City's Mayor for an advisory opinion regarding a January 2005 newsletter ("January Newsletter") and the permissible use of public funds to pay the costs associated with that publication. Two issues are presented before the Board: (1) whether the Board has jurisdiction over this matter; and (2) if jurisdiction lies, whether the January Newsletter violates the City's Ethics in Government Ordinance. As a collateral issue, the Mayor's Office has requested an opinion regarding the amount of funds to be repaid if the Board finds it has jurisdiction and further that the January Newsletter violates the Ordinance.

For the reasons set out below, the Board finds that it has jurisdiction over this matter, and that the January Newsletter does not violate the Ethics in Government Ordinance. For that reason, it recommends no repayment obligation. The Board further strongly urges the City to develop a review process and standards for future major publications that remove any question of doubt about their purpose or attribution.

**Background**

On February 24, 2005 Mayor R.T. Rybak sent a letter to the Ethical Practices Board, through the City's Ethics Officer, requesting an opinion about the use of public funds to pay for the January 2005 newsletter. The Mayor's letter is attached as Exhibit A. The letter refers to a January 24, 2005 letter from the Minnesota State Auditor to the City Council President concluding that the January Newsletter violated state law and requesting repayment of a portion of the costs of the publication. The State Auditor recognized that it is "appropriate for the City to send out a newsletter to communicate with its residents," but that "elected officials are not allowed to give the impression that they are personally responsible for taxpayer-funded publications." The State Auditor outlined various features of the publication that in her view tended to attribute the January Newsletter to the Mayor himself, and not to the City.

**Discussion**

**I. Whether the Board has jurisdiction over this matter.**

Jurisdictional standard. The Board was created by the passage of the City's Ethics in Government Ordinance, M.C.O. Ch. 15, as an independent body. The Ordinance provides at M.C.O. §15.210:

The ethical practices board shall have jurisdiction to review and make findings concerning any alleged violation of this ethics code by any person subject to these provisions...”

Among its powers and duties, the Ordinance specifically vests the Board with jurisdiction to “respond to local official . . . questions about this Code” and to “give opinions on the interpretations of this Code.” M.C.O. §15.210 (e)(5) and (7).

Application. The issue presently raised is whether it was an improper use of City funds to pay costs associated with the January Newsletter. The Ordinance provides in pertinent part at M.C.O. §15.100:

City property. A local official or employee shall not engage in or permit the unauthorized use or destruction of city property.

The Ordinance does not define or otherwise limit what constitutes City “property.” The manifest purpose of this provision is to ensure that City resources are used only for City purposes. It would be truly anomalous for the Board to find that M.C.O. §15.100 protected only the City’s chattels, but not its purse. Clearly, as used in this section, “property” includes both public funds, as well as the goods associated with those funds.<sup>1</sup> Accordingly, the Board finds that the use of City funds associated with the January 2005 Newsletter implicates the Ethics Ordinance and falls within the Board’s jurisdiction pursuant to M.C.O. §15.210(e) (5) and (7).

**II. Whether the January 2005 Newsletter violated M.C.O. §15.100, and if so, the amount of funds to be returned to the City.**

Standard. The Ordinance itself contains no express language, commentary, or other indicia which specifically address what constitutes an “unauthorized use” of City property. Additionally, the Board has not identified any other City ordinance that speaks to this issue. At the very least, however, we may presume that use of City funds must be consistent with Minnesota law to be “authorized.” The Board looks, then, to Minnesota law regarding the appropriate use of public funds in this context. Both Minnesota common law and Minnesota statute inform our decision. We have identified two related standards and address them separately.

**A. Primary Purpose Test**

The Minnesota courts have long applied a “primary purpose” test to examine situations where public funds are used in a manner that may have another, non-public impact. The Minnesota Supreme Court explained “it is well settled that . . . the state or

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<sup>1</sup> Indeed, the thousands of copies of the printed newsletter and postage constituted City “property,” even if the funds used to pay those costs were not themselves considered “property.”

its municipal subdivisions or agencies may expend public money only for a public purpose, but that “the mere fact that some private interest may derive an incidental benefit from the activity” does not by itself deprive the activity of its public purpose. Visina v. Freeman, 89 NW 635, 643 (Minn. 1958). Instead, Minnesota applies a broad analysis that looks to the use, as a whole, and considers if the “primary purpose” of the expenditure is public. Id. citing Burns v. Essling, 194 N.W.2d 404, 405 (Minn. 1923). The Court in Burns explained that:

[I]f the primary object of an expenditure of municipal funds is to serve a public purpose, the expenditure is legal, although it may also involve as an incident an expenditure which standing alone would not be lawful. It is equally well-settled that, if the primary object is to promote some private end, the expenditure is illegal, although it may incidentally serve some public purpose also.

Burns v. Essling, 194 N.W.2d 404 (Minn. 1923).

Minnesota courts recognized that what constitutes a “public purpose” cannot be precisely defined. Instead, the analysis considers whether the expenditure:

- (1) “serves as a benefit to the community as a body” and
- (2) is “directly related to the functions of government.”

Visina at 184 N.W.2d at 643; *see also* Minnesota Pollution Control Agency v. Hatfield, 200 N.W.2d 572 (Minn. 1972).

Thus to be permissible under the “primary purpose test” the issue is whether the expenditure’s “primary purpose” serves a benefit to the community as a body, and is directly related to the functions of government.

#### Application of the Public Purpose Test

As noted by the Minnesota courts, what constitutes a “public purpose” is not subject to a precise definition. It is axiomatic that the office of an elected official can only act through the individual holding that office. The City official need not pretend that the office is held by an anonymous party when communicating relevant City business to residents.

Apparently the City has, for many years, informed the citizenry about City issues through newsletters and reports. There likewise is nothing before the Board to suggest the Mayor is generally prohibited from sending out a newsletter to “inform” the citizenry of Minneapolis at public expense. So long as these publications serve the City as a body, and directly relate to functions of City government, as opposed for example to the private activities of elected officials—such as campaigning—they do not run afoul of the public purpose test.

Moreover, we recognize that the public officials holding offices with authority to act on behalf of the political subdivision have discretion and latitude to determine what *public* “activities” and topics they will inform the citizenry about. As the Minnesota Supreme Court in R.E. Short Co. v. City of Minneapolis observed, Minnesota courts should pay deference to initial decisions that public expenditures serve public purposes, and the courts should assume that public officials are properly performing their duties when they make decisions about how to expend public money. R.E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 337 (Minn. 1978). This Board pays the same deference to local officials’ decisions on how to communicate using public funds.

The January Newsletter does have some “private” indicia. These include:

- Photo of the Mayor on the cover, together with other photos in which the Mayor appears with others
- Use of first person “I” in many of the sections
- Anecdotal stories about the activities of the Mayor
- Header “News from Mayor R.T. Rybak” on every page
- Personal signature of the Mayor

On the other hand, the January Newsletter clearly has many, if not the vast majority of, features that benefit the community and are directly related to the functions of government when viewed with the discretion duly afforded to office holders. These include:

- Information about City events
- Updates on City projects
- Statistics on City-related issues
- Information about new city Police and Fire Department leadership
- Information on the City’s budget challenges and activities
- City Development issues
- Transportation issues
- City contact information.

Moreover, substantially all, if not all, of the content of the Newsletter relates to activities taken by the Mayor under the auspices of the Office of the Mayor in his capacity as a public official. While there clearly is a line between using public funds for self-promotion and “campaigning,” in absence of any clear standards for City newsletters and reports, we do not believe the January Newsletter crosses that line. The great balance of content of the Newsletter is about public business. In light of this, it certainly is not the role of the City’s Ethical Practice Board to second-guess what “public” or governmental functions should be reported. On balance, we believe the January Newsletter served a *primarily* public purpose under the test articulated above and accordingly does violate M.C.O. §15.100 under the “primary purpose” test.

As noted in Section III, this should not, however, be viewed in any way as condoning the tone or the other “private” indicia of the January Newsletter.

## B. Statutory Prohibition Against the Use of Photos

The second issue relates specifically to the use of a photo of the Mayor in the Newsletter. In 1992, the Minnesota Legislature enacted a provision specifically aimed at the use of photos in municipal publications, stating:

**Pictures prohibited.** When a statutory or home rule charter city . . . issues a report or other publication for public distribution to inform the general public of the activities of the political subdivision, the report or publication must not include pictures of elected officials nor any other pictorial or graphic device that would tend to attribute the publication to an individual or groups of individuals instead of the political subdivision . . .

Minn. Stat. §471.68, subd. 3. The Board is unaware of any Minnesota case law further explaining, interpreting, or applying this statute. As noted above, we would consider a violation of this statute, assuming it applied to a newsletter from the City's Office of Mayor,<sup>2</sup> as an "unauthorized use" of City property under M.C.O. §15.100.

### Application

This matter is more complicated than suggested by the Mayor's request and the State Auditor's letter. Notably, the statute does not ban the use of pictures of elected officials in any publications outright. To the contrary, the statute contains an express limitation. The plain language of the statute forbids pictures only where they "would tend to attribute the publication to an individual or groups of individuals instead of the political subdivision." *Id.* (emphasis added). Thus the mere fact that a publication has an elected official's picture does not, in our view, violate the statute. Rather, Minn. Stat.

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<sup>2</sup> We have some question as to whether this statute even applies to an otherwise permissible publication of a particular office of the City, or the office of one elected official, as opposed to a publication on behalf of the governing body for the City as such. Minn. Stat. §471.68, subd. 3 refers to a "city" report. One reading of this Section is that it relates to publications such as the "annual or biennial reports" referred to in subdivision 1. These do not to us seem to be of the same nature as a "newsletter" from one office of a city, and raise very different concerns. Although both types of publications clearly use "public" funds, it may be that the purpose of this provision has more to do with individual elected officials misrepresenting the content of their city or municipal reports as their own accomplishments or issues instead of those of the governing body itself. In this matter, no one has suggested that the Mayor is prohibited from issuing a newsletter about the City from the Office of Mayor outright. Rather, the issues raised deal with the private "indicia" in the content. The January Newsletter makes abundantly clear that it is a publication from Mayor's Office, not the City council or City at large: the return address is "Office of Mayor R.T. Rybak" and the opening cover says "Minneapolis News from Mayor R.T. Rybak."

§471.68, subdivision 3 is fully consistent with the Minnesota case law on use of public funds more broadly, and its requirement that the “primary object” of the use be for a public, not private or individual purpose.

Likewise, the statute only relates to the use of *photos* that would tend to attribute the publication to an individual or groups. While the Minnesota Legislature may have issued a bar on other elements, or publications which as a whole, which “tended to attribute the publication to an individual or group,” that is not what the Legislature did. This statute is about pictures, nothing more.

In this respect, we do not agree with the State Auditor’s interpretation of Minn. Stat. §471.68, subd. 3. The State Auditor looked broadly to other “items” in the Newsletter which in her view tended to attribute the publication to the Mayor individually, including items such as a personal signature, use of the first person, and “personal accomplishments and goals” in addition to the Mayor’s photo, and relied on these in finding a violation of the statute. The statute does not prohibit these, does not address these, and in fact is squarely by its very title “**Pictures prohibited**” limited only to the use of photos. The only issue with respect to Minn. Stat. §471.68, subd. 3 are the photographs of the Mayor, and whether these photos violate that statute.

Even if we were to consider the context of the photos by looking at the other “items,” the issue under Minn. Stat. §471.68, subdivision 3 is not whether the *rest of the items* of the publication tended to attribute the publication to an individual rather than a political subdivision. Nor is it whether the publication, taken as a whole, tended to attribute the publication to an individual rather than the political subdivision.<sup>3</sup> The issue, under the plain reading of the statute, would remain whether the *photos*, when viewed in context, tend to attribute the publication to an individual rather than the political subdivision.

Additionally, we do not place undue emphasis on the presence of an elected official’s photo on a city publication. We note that the statute does not define what constitutes a “publication.” In our view, it makes little conceptual difference whether the “publication” is in traditional print, or an electronic publication. Electronic publications on governmental media use public funds as well, including costs associated with the writing, posting, hosting, and maintaining the website or other electronic media on which they reside.<sup>4</sup> In this “digital” age, it appears to make little conceptual difference if a public communication to inform the general public about the activities of the political

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<sup>3</sup> The issue of whether the publication as a whole tended to attribute the publication to an individual rather than the political subdivision is subsumed under the primary purpose test.

<sup>4</sup> Although there clearly are differences in both costs and context between sending an unsolicited letter to City residents, and publishing a report on a website City residents may chose to visit, we do not believe these differences go to the substance of whether this is a “publication” for the purposes of the statute. In either event, City resources are used for this publication of information under the auspices of a governmental office.

subdivision is from print, an e-mail attachment, or posted on a website. Each carries with it public expense, the imprimatur of the governmental office, and the risk that such governmental “publications” may be used to promote primarily private or campaign-related interests.

Displaying personal photos and personal information about elected officials in an electronic report or governmental web site which informs the public about the activities of the office of the official, which we deem to be a “publication” for purposes of Minn. Stat. §471.68, subd. 3 if it otherwise applied, appears to be a common practice that crosses offices and political boundaries. Indeed, as an example, we have observed websites of State office holders which contain personal photos and information about personal hobbies and interests.<sup>5</sup> Thus the mere fact that the January Newsletter contains the Mayor’s picture does not in our view by itself violate state law, and hence M.C.O. §15.100.

In this matter, the Office of the Mayor apparently has the authority to issue publications from his office about activities affecting the City. We are aware of no other restrictions on the right to issue publications about City business to City residents on behalf of that Office. As noted, city offices can only act through the individuals who hold those offices. Public officials do not have to be part of a faceless bureaucracy. When viewed by themselves, or context with the other private “indicia” noted above, we do not believe the photos of the Mayor tend to attribute the publication to R.T. Rybak as an individual rather than the City’s Office of the Mayor. While it may be ill-advised to include a personal photo together with the other private indicia, we do not find this creates substantial confusion about whether this photo was from R.T. Rybak, as an individual or the candidate for re-election, or R.T. Rybak, as sitting Mayor presenting matters on behalf of the Office of Mayor relating to City business.

Accordingly, we do not find January Newsletter violates M.C.O. §15.100 on this basis.

### **III. Recommendation for Adoption of Guidelines and Review Process**

Of course, this advisory opinion on whether the January Newsletter technically violates the City’s Ethics in Government Ordinance should not be read to suggest the Board condones or endorses the tone or personal “indicia” in the January Newsletter. This Board questions whether the January Newsletter accords with the spirit of the Ethics in Government Ordinance. The Ordinance “defines levels of conduct below which no official or employee can fall without being subject to disciplinary action.” M.C.O. §15.10. However, the entire City service should strive to avoid, altogether, situations that would create the appearance of impropriety or remotely implicate the City’s Ethics in Government Ordinance. To quote the Ordinance “We do not use our positions to gain

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<sup>5</sup> Minnesota has also enacted legislation prohibiting elected, administrative and executive officers from including photos in publications that tend to attribute the publication to an individual. *See* Minn. Stat. 16B.52, subd. 1.

privileges or special treatment and do not use public property or personnel for private or personal purposes.”

At the same time, we recognize the using personal “indicia” in governmental reports was not an uncommon practice, both within Minneapolis and for other units of government. We further recognize the lack of meaningful standards to guide City officials regarding the content of City publications, and that as a result City officials are left with little insight on standards to apply when issuing public reports about their offices. Clearly, there is a substantial opportunity for questionable self-promotion when personal “indicia” are commingled with City business, especially during “campaign season.”

For this reason, we agree with the State Auditor’s recommendation, and join in the Mayor’s request, to implement a process whereby significant publications such as this are reviewed by the City’s Communications Department prior to issuance to ensure adherence to the Ordinance, state law, and other City policies. We would add to that a suggestion that standards or guidelines be developed and implemented regarding the use of photos and other private “indicia” to ensure City publications stay far clear of creating even a question about their “public purpose” or attribution.

Date: \_\_\_\_\_

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Laura Reich, Chair  
Ethical Practices Board