



**OFFICE OF THE ARIZONA ATTORNEY GENERAL**

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October 9, 2024

***VIA EMAIL & U.S. MAIL***

Tempe City Council  
c/o Kate Belinski  
Ballard Spahr LLP  
1909 K Street, NW  
Washington, DC 20006-1157  
[belinskik@ballardspahr.com](mailto:belinskik@ballardspahr.com)

Re: Disposition of Election Complaint concerning Tempe City Council  
Investigation No. EC2023-0065

Dear Ms. Belinski:

As you know, the Office of the Attorney General received a complaint alleging that the Tempe City Council ("Council") violated A.R.S. § 9-500.14, which prohibits the use of public resources to influence an election. The complaint arises from the Council's consideration and approval of a proposed development of City-owned property known as the Tempe Entertainment District ("TED"), a project which was ultimately rejected by Tempe voters in the City's May 16, 2023 Special Election. The complaint alleges that the Tempe City Council improperly used public resources "to conduct social media tracking of its residents in relation to and furtherance of ballot referenda," in violation of § 9-500.14(A). The complaint also alleges that individual Councilmembers "used Twitter and Facebook to promote ballot initiatives, in violation of Arizona Electioneering Law."

Based on our review of the events discussed below, the City's January 5, 2024 Response to our Inquiry Letter, and its February 14, March 15, and April 19 supplemental responses, we find no violation of A.R.S. § 9-500.14.

The facts recited in this letter serve as a basis for our conclusions, but are not administrative findings of fact.

**Facts**

On October 15, 2022, the City of Tempe entered into a Consulting Agreement with Policy Development Group, Inc. d/b/a/ Strategy Forty-Eight (the "Contract"). Pursuant to the Contract,

Strategy Forty-Eight was to “render advisory services for issues related to the development project proposed on City owned property along Tempe Town Lake, off Rio Salado Parkway and Priest Drive[.]” Contract, Sec. 2. Exhibit A to the Contract was a Scope of Work which more fully described the nature of Strategy Forty-Eight’s engagement and its deliverables.

The Contract provided that Strategy Forty-Eight would “conduct [a] digital community assessment, digital monitoring and develop messaging” in a series of phases. In Phase One, Strategy Forty-Eight would (1) “Identify social media pages and groups that could provide a platform for project opposition to publicize their concerns” and “[a]nalyze critical stakeholders that are active on social media channels and categorize each by stakeholder group; (2) “Analyze individuals who posted and commented about the project, determine where they live, and categorize individuals by stakeholder group;” and (3) “Analyze digital media stories and posts to better understand potential opposition messaging strategy.” Contract, Exhibit A. After approximately 45 days, Strategy Forty-Eight would shift into Phase Two, which included providing a weekly social media report and developing a social media calendar. *Id.*

On November 29, 2022, the Council voted to approve key aspects of the Tempe Entertainment District proposal. This approval triggered the project developer’s ability to submit the requisite referendum applications, which it did on November 30, 2022. Tempe voters rejected all three ballot initiatives at the May 16, 2023 Special Election.

Strategy Forty-Eight was to be paid \$10,000 a month for its services under the Contract, which had a six-month term. Contract, Sec. 4, 5. On December 23, 2022 and before Strategy Forty-Eight could perform Phase Two, the City terminated the Contract, effective January 23, 2023. Thus, the City paid Strategy Forty-Eight a total of \$32,258.05 for services rendered pursuant to the Contract.

### **Analysis**

This Office articulated the test for determining what conduct is prohibited by the Public Resource Election Statutes, including A.R.S. § 9-500.14, in a 2015 Arizona Attorney General Opinion. Ariz. Att’y. Gen. Op. I15-002 (the “Opinion”).<sup>1</sup> Specifically, the Opinion considered what conduct or communications the prohibition in A.R.S. § 9-500.14 precludes. Ariz. Att’y. Gen. Op. I15-002 at \*1. To answer this question, this Office articulated a two-part test: (1) “Was there a use of public resources?” and (2) “If so, were the public resources used for the purpose of influencing the outcomes of elections?” *Id.* at \*3.<sup>2</sup>

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<sup>1</sup> Although the Opinion answered a question about A.R.S. § 11-410, our Office made clear that “[b]ecause the operative language in that section is repeated elsewhere,” the Opinion’s analysis “applies equally to the same language as found in” the other Public Resource Election Statutes, including A.R.S. § 9-500.14. Ariz. Att’y. Gen. Op. I15-002 at n.2.

<sup>2</sup> The Opinion also concluded that the prohibitions on communications influencing the outcomes of elections arise upon the filing of an application for a serial number for a ballot initiative or referendum.” Ariz. Att’y. Gen. Op. I15-002 at \*3. Because we conclude that Strategy

### **A. Councilmembers' Social Media Posts**

Complainants allege that “Tempe City Council members used Twitter and Facebook to promote the ballot initiatives.” Without question, a Tweet or other post encouraging Tempe voters to approve the TED ballot initiatives would be “for the purpose of influencing the outcome of an election.” Ariz. Att’y. Gen. Op. I15-002 at \*13 (“If the use of public resources unambiguously urges voters to vote for or against a ballot measure, it will violate the statutory prohibitions[.]”). Our investigation revealed that Mayor Woods and Councilmembers Navarro and Keating each made at least one social media post which was “not impartial or neutral” as to the upcoming TED election. A.R.S. § 9-500.14(H)(2).

However, elected officials are not barred from expressing support for or otherwise using their title to advocate for a particular election outcome. Ariz. Att’y. Gen. Op. I15-002 at \*9 (concluding “[t]he use of either an elected official’s title or other incidental uses of the attributes of office” is not a use of public resources for purpose of the statutory prohibition). “Indeed, in order to fulfill their official duties, elected officials must be able to share their ‘considered judgment of the proposal [with] the community which [they] serve[.]’” Ariz. Att’y. Gen. Op. I07-008 at \*3 (quoting *Smith v. Dorsey*, 599 So. 2d 529, 541 (Miss. 1992)).

Thus, the use of one’s title as an elected official, standing alone, is not the use of a “public resource” in this context. *See* Ariz. Att’y. Gen. Op. I07-008 (use of a public official’s name and title on a mailing that is not paid for with public resources would not constitute a use of public resources). Instead, public resources include any “thing of value” to a city, including “equipment,” “telecommunications,” and “computer hardware and software.” A.R.S. § 9-500.14(A).

The City confirmed that it provides devices to some Councilmembers. If requested by an incoming Councilmember’s office, staff in the City’s Communications Department will also “set up” (*i.e.*, activate) that Councilmember’s social media accounts, but does not manage them.

Councilmember Keating has no City-issued devices and no City-initiated social media accounts. Councilmember Navarro and Mayor Woods each have a City-issued device, but do not use that device to access their social media accounts. We decline to find that City staff’s initiation of a social media account on behalf of Councilmember constitutes a use of public resources within the meaning of A.R.S. § 9-500.14, because there is no evidence or reason to believe that City staff helped the council members set up the social media accounts for the purpose of the TED-related Tweets or any other activity related to an election.

Because none of the identified, nonneutral social media posts were made using public resources, the authoring Councilmembers did not violate A.R.S. § 9-500.14.

### **B. Strategy Forty-Eight Contract**

Payment of City funds to a consultant is plainly a “use of resources” within the meaning of A.R.S. § 9-500.14(A) (resources include “monies”). The City’s Response confirms that Tempe paid the Strategy Forty-Eight \$32,258.05 pursuant to the Contract. We proceed, then, to the second

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Forty-Eight’s work product and recommendations to Council were appropriately content neutral, they are permissible under A.R.S. § 9-500.14 regardless of the date on which they were performed.

question: whether State Forty-Eight’s engagement was for the purpose of “influencing the outcome” of the TED election. Ariz. Att’y. Gen. Op. I15-002 at \*7. Although this is a closer question, we ultimately conclude that it was not.

“Influencing the outcomes of elections” includes “supporting or opposing a ballot measure . . . in any manner that is not impartial or neutral.” A.R.S. § 9-500.14(H)(2). Our Office has adopted a second two-prong test to determine whether a use of public resources is for the purpose of influencing an election: “(1) whether the use of public resources has the purpose of supporting or opposing a ballot measure, and (2) whether the use of public resources involves dissemination of information in a manner that is not impartial or neutral.” Ariz. Att’y. Gen. Op. I15-002 at \*12-13.

If “reasonable minds could differ” as to the first prong, then “the test will require closer examination of whether the use of public resources disseminates information in a manner that is not impartial or neutral.” *Id.* “If an analysis of the manner of the use of public resources reveals that it engages in advocacy, misleads, or uses rhetorical strategy, the use of public resources will violate [§ 9-500.14] because (1) a reasonable person could find that the use [of public resources] supports or opposes” a ballot measure, and “(2) it is not impartial or neutral.” *Id.* This inquiry is an objective one.

Strategy Forty-Eight had “two major deliverables” in its contract with the City: (1) building a “dashboard” to track misinformation and disinformation on social media and (2) drafting language for a Frequently Asked Questions tab to include in the City’s project-specific webpage. Response, p. 6.

Strategy Forty-Eight’s “main work product” was clearly the Dashboard, which was a custom database designed to “track[] and synthesize[] public discourse on the TED project—both pro and con—in a neutral manner that allows the data to be analyzed for trends and themes.” Response at pp. 3, 6. The Dashboard appears to identify all social media posts and comments regarding the TED project, and organizes the information therein in a few different ways, including grouping by classification of the person/entity posting (*i.e.*, resident, city, business, Coyotes) and by name. The Dashboard also includes copies of the text of all 1792 identified posts, organized in reverse chronological order from December 17, 2022 to April 25, 2022.

Despite the volume of information contained in the Dashboard, there is no evidence that the City used that data to take any action that would affect the results of the TED election. The Dashboard was basically an accounting of the social media posts that Strategy Forty-Eight found related to the arena—e.g., the number of messages, who posted them, and keywords contained in those messages. Strategy Forty-Eight did not provide the City with any analysis of the messages or any recommendations for how the City should use the bare-bones summary information provided regarding them. There is also no evidence to suggest that any of the individual Councilmembers relied upon the information contained within the Dashboard to inform the scope, tone or targeted audience of their election-related social media communications.

Because the Dashboard itself was purely informational and impartial, and there is no evidence that individual Councilmembers used it (or even could have used it) to craft their own social-media communications related to the election, we conclude that the City did not violate

A.R.S. § 9-500.14 by hiring Strategy Forty-Eight to create the Dashboard.

Our review of additional materials provided by the City showed that representatives of Strategy Forty-Eight also: (1) provided verbal reports regarding social media metrics to the Council and City staff; (2) reviewed and provided feedback on Mayor Woods' December 2, 2022 State of the City address; and (3) provided input on certain public-facing, TED-related materials published by the City.

In addition to the "FAQs" identified in the City's Response, the specific materials to which Strategy Forty-Eight contributed were (a) a November 11, 2022 Press Release concerning the Council's decision to reserve a spot on the May 16 Special Election ballot; (b) a November 16 Press Release regarding the draft Development and Disposition Agreement; (c) a Synopsis of the approved Development and Disposition Agreement; and (d) a "Financial Analysis and Developer Assessment" Memorandum.<sup>3</sup> We have reviewed these materials and concluded that each communication disseminates information regarding the proposed Tempe Entertainment District and (then) possible referendum election in an appropriately neutral and impartial manner.

On these facts, therefore, we cannot conclude that Strategy Forty-Eight produced or contributed to any work product which had the purpose of influencing the outcome of the TED election. In particular, there is no evidence that the City took any steps to convert the Dashboard data into a non-neutral dissemination of information which would have the objective effect of influencing the outcome TED election. Likewise, all of the public-facing communications released by the City which Strategy Forty-Eight participated in drafting, including the City's TED webpage, were appropriately content neutral.

However, had Strategy Forty-Eight, for example, recommended a social media strategy to push otherwise content-neutral messaging regarding the election to identified sub-markets, this likely would have been impermissible. Indeed, the Opinion makes clear that "[t]he use of public resources to disseminate information may be impartial or neutral in content, but violate the statutory prohibition in the manner in which it is disseminated." Ariz. Att'y Gen. Op. I15-002 at \*17 (providing the hypothetical of a mailer sent only to likely voters and concluding that this may indicate improper use of public resources). After a thorough investigation of the facts here, though, we conclude that Strategy Forty-Eight's work product and recommendations to Council were appropriately content neutral and did not run afoul of A.R.S. § 9-500.14.

While we find no violation today, the City should take particular care to comport its future election-related social media activity with the requirements of A.R.S. § 9-500.14, as articulated by the Opinion. Any questions regarding the impartiality of a particular message or work product should be resolved in favor of strict neutrality. Public confidence in the integrity and impartiality of City elections must be paramount.

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<sup>3</sup> See Response at TEMPE000580-81, TEMPE000551, and TEMPE000588. See also City of Tempe, Tempe Entertainment District webpage, available at <https://www.tempe.gov/government/economic-development/priest-rio-salado-rfp>.

**Conclusion**

This letter relates solely to the disposition of the aforementioned complaint, and does not relate to any other matters. This is not a formal opinion of the Attorney General's Office and should not be cited as authority.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary M. Curtin".

Mary M. Curtin  
Senior Litigation Counsel