



## STATE ETHICS COMMISSION

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### FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

May 10, 2013

Re: Use of Name, Picture or Voice in Radio, Television, or Internet Advertisements  
Promoting Programs Funded by Various Federal Grant Programs  
AO-E-13-002

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Dear Requester:

This is in response to your request for a formal advisory opinion. You have asked whether the State Government Ethics Act (“Ethics Act”), North Carolina General Statutes (“G.S.”) Chapter 138A, would restrict you from using or permitting the use of your name, picture, or voice in radio, television, or Internet advertisements promoting various federally-funded programs. This formal advisory opinion is based upon the information provided in your request and was adopted by the State Ethics Commission at its May 10, 2013, meeting.<sup>1</sup>

#### I. Brief Conclusion.

The Commission has determined that the Ethics Act would restrict you from using or permitting the use of your name, picture, or voice in radio or television advertisements promoting federal grant programs. However, it would be permissible for you to permit the use of your name, picture, or voice for advertisements promoting those programs that appear on the Internet.

#### II. Facts.

You are a public servant subject to the requirements of the Ethics Act. Your agency’s current role includes the administration of various programs, some of which are supported by federal grant funds.

Your agency wants to implement an advertising campaign to educate affected citizens about the availability of the various services provided by these programs. You would like to appear in those advertisements. The advertisements will be paid for by federal grant funds, but

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<sup>1</sup> Please see the enclosure entitled “Formal Advisory Opinions Issued by the State Ethics Commission” for further information regarding the protections offered to individuals receiving those opinions.

those funds will be taken from funds that are held in State bank accounts for your agency's use in administering those programs. None of the federal grants concerned impose specific requirements on the use of grant funds for advertisements or require your participation in the advertisement.

III. Applicable Statutory Provisions.

A. Use of Title in Nongovernmental Advertising.

G.S. 138A-31(b) provides that a covered person (a term that includes public servants):

Shall not mention or authorize another person to mention the covered person's public position in nongovernmental advertising that advances the private interest of the covered person or others.

The term "nongovernmental" means that "the funding or resources used to produce and publicize the advertisement was not derived from the State ... or the federal government." 30 NCAC 08.0101(a). "Advertising" is defined as "a written or oral communication that is published, disseminated, circulated, or placed before the public for the purpose of attracting public attention to a product, business, or service." *Id.* G.S. 138A-31(a) lists a number of exceptions to the prohibition against the use of a covered person's title.

B. Use of State Funds for Advertising and PSAs Featuring Covered Persons.

G.S. 138A-31(c) generally prohibits a covered person from using or permitting:

- i. The use of State funds for any advertisement or public service announcement;
- ii. In a newspaper, on radio, television, magazines, or billboards;
- iii. That contains that covered person's name, picture, or voice;
- iv. Except in case of State or national emergency and where the announcement is "reasonably related to the person's official function."

Fund-raising on behalf of public radio or television is exempt from this prohibition. There is an almost identical restriction against the use of State funds by "declared candidates" for the Council of State. G.S. 163-278.16A.<sup>2</sup>

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<sup>2</sup> That provision applies beginning December 31<sup>st</sup> prior to a general election in which a Council of State office will be on the ballot and does not restrict use of State funds for billboard and magazine advertisements.

Although there are no formal advisory opinions or court decisions that define the use of the term “State funds” in G.S. 138A-31(c) or 163-278.16A, or otherwise explain the restriction against the use of those funds in advertisements featuring public officials, a similar law applicable to candidates for state or local elected office was recently considered by the Kansas Governmental Ethics Commission in Opinion No. 2012-03 (April 18, 2012). The purpose behind the law was explained as preventing “elected officials from using public service announcements and advertisements for a state agency’s programs to help themselves get re-elected ... or to serve as a free campaign commercial.”

Although the term “state funds” is not defined in G.S. 138A-31(c), that term is defined in the State Budget Act as “[a]ny moneys *including federal funds* deposited in the State treasury except moneys deposited in a trust fund or agency fund as described in G.S. 143C-1-3. (Emphasis supplied). G.S. 143C-1-3(8) defines “agency funds” as accounts held by the State in a “purely custodial capacity. Agency funds typically involve only the receipt, temporary investment, and remittance of fiduciary resources to individuals, private organizations, or other governments.”

There are three types of trust funds identified in G.S. 143C-1-3, investment, pension and other employee benefit, and private-purpose trust funds, none of which would apply to the questions posed by your request.

In a 1999 opinion the North Carolina Attorney General was asked to provide guidance to the Office of the Secretary of State with respect to its authority to accept grants from governmental sources. That opinion interpreted the Executive Budget Act, which has since been recodified and amended as the State Budget Act. It was determined that grant funds could be accepted by State agencies, but that those “[f]unds received from grantors, whether governmental or private entities, take on the character of State funds and are generally subject to restrictions applicable to state expenditures.” 1999 N.C. AG LEXIS 17 (June 21, 1999).

#### IV. Analysis.

Based upon your description of the proposed communications concerning the programs your agency administers, those communications constitute advertisements or public service announcements. However, those advertisements would not be subject to the use of title restriction in G.S. 138A-31(b), since the source of the funding for those advertisements is governmental, e.g. derived from state or federal resources.

However, your participation in those advertisements or public servant announcements could be restricted by G.S. 138A-31(c). As described, that provision prohibits the use of State funds for advertisements or public service announcements if your name, picture, or voice is used in those advertisements and they are broadcast on radio or television or displayed in a newspaper, magazine, or billboard. But that would depend upon whether the prohibition against the use of “State funds” in G.S. 138A-31(c) also extends to the use of federal grants to the State.

Based upon the State Budget Act’s definition of the term “State funds,” what the Commission understands to be the legislative intent behind the restriction against the use of governmental resources for advertisements that draw public attention to persons covered by the Ethics Act, and the fact that the grant funds in question are to be used by your agency in its

discretion and are not custodial “agency funds,” the Commission concludes that the federal grant funds deposited in State accounts to support these programs may not be used for advertisements or public service announcements that include your name, picture, or voice.

That restriction against the use of “State funds” would not, however, apply to the use of your name, picture, or voice in advertisements placed on the Internet. Nonetheless, utilizing State funds for that purpose could give the appearance of impropriety. The Commission therefore asks that you consider not using those federal grant funds or other State funds for Internet advertisements promoting any programs that include your name, picture, or voice.

V. Closing.

Thank you for contacting the State Ethics Commission. Please do not hesitate to call the Commission’s staff if you have any questions about the foregoing formal advisory opinion.

**Formal Advisory Opinions Issued by the State Ethics Commission**  
**Pursuant to the Ethics Act**

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).