



CITY OF PHILADELPHIA

BOARD OF ETHICS
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**Philadelphia Board of Ethics
General Counsel Opinion No. 2017-505**

August 2, 2017

Stephanie Waters
Digital Director, Office of the Mayor
City Hall, Room 215
Philadelphia, PA 19107
stephanie.waters@phila.gov

**Re: Application of Political Activity Restrictions to Use of
City Social Media Accounts in an Official Capacity**

Dear Ms. Waters:

You have requested a public advisory opinion regarding the application of the Philadelphia Home Rule Charter political activity restrictions to three proposed uses of City social media accounts in your official capacity and as part of your City work. For the purposes of Board Regulation 8, these uses would not involve engaging in political activity while on duty or while using City resources and would not involve the use of a City position for political purposes. As previously conveyed to you by this Office in conversations, the political activity restrictions would not prohibit you from engaging in these social media activities in your official capacity.

I. Jurisdiction

The Board of Ethics has jurisdiction to administer and enforce all Philadelphia Home Rule Charter (“Charter”) provisions and ordinances pertaining to ethical matters. Charter § 4-1100. The Charter and The Philadelphia Code (“Code”) authorize the Board

to render advisory opinions concerning a City officer's or employee's proposed future conduct. Charter § 4-1100; Code § 20-606(1)(d). Board of Ethics Regulation 4 describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board's General Counsel. Board Reg. 4 ¶¶ 4.0, 4.24.

II. Facts Provided by Requestor

You are the Digital Director for the City of Philadelphia. As Digital Director, you are charged with using social media on behalf of the Mayor's Office to engage constituents. To that end, you use a City Facebook and Twitter account as part of your City job and to carry out your City duties. You also monitor social media accounts for departments that are part of the Executive and Administrative branch. Given your job duties, you have questions about the application of the Charter political activity restrictions to the use of social media on behalf of the City. You have provided three proposed social media posts, which are addressed below.

III. Discussion

The Charter political activity restrictions would not prohibit you from making the social media posts you have identified because none would involve the use of City resources to engage in political activity or the use of a City position for political purposes. This Opinion addresses the political activity restrictions as applied only to your social media use in an official capacity as part of City work, while on duty, and using City resources. It does not address the restrictions as applied to social media use while off duty, in a personal capacity, and not using City resources. Furthermore, this Opinion does not endorse or comment on the advisability of the social media posts you have identified. Notably, in some circumstances, even if a proposed use of a City social media account would not be prohibited by the political activity restrictions, there may be other reasons not to issue the communication from a City account. Finally, although each of the scenarios presented here occurs in the context of social media, the analysis would still hold if the same information were to be disseminated in a paper format, such as in a City newsletter or report.

A. Overview of Charter Political Activity Restrictions as Applied to Actions Taken by a City Employee in an Official Capacity

Under Charter Section 10-107, appointed City employees are subject to various restrictions on their political activity. *See* Charter § 10-107. In terms of actions taken by a City employee in an official capacity, the political activity restrictions mandate, in addition to other requirements, that a City employee carry out his or her City duties in a

strictly non-partisan manner and maintain neutrality among political parties, among candidates, and among partisan political groups. Board Opinion 2012-002 at 4. A City employee must perform his or her duties without regard to personal political preferences. *Id.*

Charter Subsection 10-107(4) provides in relevant part: “No appointed officer or employee of the City shall . . . take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.” Charter § 10-107(4). Board Regulation 8, which interprets Charter Subsection 10-107(4), prohibits an appointed City employee from, among other things, engaging in political activity while on duty. Board Reg. 8 ¶ 8.3. A City employee is on duty: (i) during normal working hours, which for those with fixed work schedules includes the time between the start and end of the workday excluding a lunch break; (ii) when performing the duties of his or her City jobs or appointments; or (iii) when acting in his or her official capacity as a City appointed officer or employee. Board Reg. 8 ¶ 8.1(k). Board Regulation 8 also prohibits a City employee from engaging in political activity while using City-owned or leased resources, including computers and mobile phones, and from using the employee’s authority, influence, title, or status as a City employee for any political purpose. *See* Board Reg. 8 ¶¶ 8.3, 8.4.

The meaning of “political activity” is critical to identifying behavior prohibited by these restrictions. The term “political activity” is defined as activity that is directed toward the success or failure of a political party, candidate, or partisan political group. Board Reg. 8 ¶ 8.1(n). Similarly, the term “political” is defined as “[r]elated to a political party, candidate, or partisan political group.” Board Reg. 8 ¶ 8.1(m). Another key term is “partisan political group,” which is defined as any committee, club, or other organization that is affiliated with a political party or candidate or whose primary purpose is to engage in political activity. Board Reg. 8 ¶ 8.1(l).

Applying these definitions, your three proposed social media uses would not constitute political activity or use of a City position for political purposes. The posts are not directed toward the success or failure of a political party, candidate, or partisan political group either through coordination with one of the foregoing or by virtue of their content. *See* Board Opinion 2012-002 at 8 (advising that rally planned by City employees in their official capacities regarding a public policy issue could not involve: (1) partisan statements or displays; or (2) coordination with political parties, candidates, or partisan political groups). It follows that making these posts on City social media accounts in your official capacity would not be prohibited by the Charter political activity restrictions. By contrast, examples of social media use in an official capacity that would be problematic under the political activity restrictions include posting endorsements of a candidate, criticisms of a political party, or advocacy materials created by a political party. *See id.* at 6, 8-9.

B. Retweeting a Public Policy Message of an Entity that Is Not a Partisan Political Group

Question Presented: While you are on duty, as part of your City work, and from a City social media account promoting health, are you permitted to retweet an American Academy of Pediatrics’ tweet that states: “Vaccines are safe. Vaccines are effective. Vaccines save lives.”?

Answer: Using a City social media account in your official capacity to retweet this American Academy of Pediatrics’ message would not be prohibited by the Charter political activity restrictions. The tweet, which addresses a public policy issue, is not directed toward the success or failure of a political party, candidate, or partisan political group. The tweet would not constitute political activity either through coordination with one of the foregoing or through its content. In particular, the American Academy of Pediatrics is not a partisan political group. The American Academy of Pediatrics is a professional organization of 66,000 pediatricians that is committed to the optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults. AMERICAN ACADEMY OF PEDIATRICS, <https://www.aap.org/en-us/about-the-aap/Pages/About-the-AAP.aspx> (last visited Aug. 2, 2017). Using a City social media account that promotes health to retweet this message advocating for vaccinations would not constitute political activity as defined by Board Regulation 8 while on duty or while using City resources, and it would not constitute the use of a City position for political purposes.

C. Linking to an Op-Ed by a Health Professional on a Public Policy Issue

Question Presented: While you are on duty, as part of your City work, and from a City social media account promoting health, are you permitted to tweet a link to a *New York Times* op-ed on vaccinations entitled “How the Anti-Vaxxers Are Winning”? This pediatrician-authored piece references President Trump and his comments regarding vaccines made at a Republican presidential primary debate. The opinion piece, which is attached as Exhibit A, provides a scientific explanation for why vaccines are safe, and makes the case for why parents should vaccinate their children.

Answer: Sending this tweet from a City social media account in your official capacity would not be prohibited by the Charter political activity restrictions. This op-ed by a pediatrician advocates for childhood vaccinations and opposes the anti-vaccination movement. This tweet would not qualify as political activity merely because the op-ed being distributed references a Republican Party debate and President Trump as follows:

The myth that vaccines like the one that prevents measles are connected to autism has persisted despite rock-solid proof to the contrary. Donald Trump

has given credence to such views in tweets and during a Republican debate, but as president he has said nothing to support vaccination opponents, so there is reason to hope that his views are changing.

However, a leading proponent of the link between vaccines and autism said he recently met with the president to discuss the creation of a presidential commission to investigate vaccine safety.

(Exhibit A at 1-2.) These references to a political party debate and to President Trump describe the status of the vaccination issue at the national level, and these references are not advocacy for the success or failure of any political party, candidate, or partisan political group. As a result, tweeting this message from a City social media account would not constitute political activity as defined in Board Regulation 8 while on duty or while using City resources and would not constitute the use of a City position for political purposes.

D. Opposing an Elected Official's Appointee to Head an Agency

Question Presented: In an official capacity, while you are on duty, and as part of your City work, are you permitted to tweet or post a link from a City social media account to a news article that contains negative information about an incumbent elected official's nominee to fill a government position? Specifically, from a City account that promotes sustainability, may you tweet a link to a *New York Times* article and state the following: "Scott Pruitt is not qualified to enforce environmental laws like the Clean Power Plan and the Clean Air and Clean Water Act as he has actively opposed and sued the EPA 14 times." The article is attached to this Opinion as Exhibit B.

Answer: The Charter political activity restrictions would not prohibit your sending this tweet or this article from a City social media account that promotes sustainability. Conveying positive or negative information about an elected official's appointee to head an agency that oversees sustainability efforts, without more – such as content from or about some candidate, political party, or partisan political group – would not qualify as political activity under Board Regulation 8. *See* Board Reg. 8 ¶¶ 8.1(n), 8.17. A nominee to head an agency is an individual being considered for appointment to a non-elective office and as such is not a candidate, which is defined as an individual who files nomination petitions or papers for public elective office or who publicly announces his or her candidacy for public elective office. Board Reg. 8 ¶ 8.1(d). Neither criticizing nominee Scott Pruitt in the tweet nor circulating the *New York Times* article is an activity directed toward the success or failure of a political party, candidate, or partisan political group. Accordingly, sending this message from a City account would not constitute political activity as defined in Board Regulation 8 while on duty or while using City resources, and it would not constitute the use of a City position for political purposes.

* * * * *

Thank you for your concern about compliance with the Charter political activity restrictions and for seeking advice. Advisory opinions are fact-specific, and this Opinion provides advice on the social media scenarios presented here. If you have questions about social media use that varies from the types of scenarios addressed here, you should ask for advice on the application of the ethics laws to those particular situations. You are entitled to act in reasonable reliance on this Opinion and not be subject to penalties under the laws within the Board's jurisdiction, unless you have omitted or misstated material facts in your request. Code § 20-606(1)(d)(ii); Board Reg. 4 ¶ 4.12.

Since you have requested a public opinion from the Board of Ethics, we will make this Opinion public as required by Code Section 20-606(1)(d)(iii) and Board Regulation No. 4, Paragraph 4.22. Please let me know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS



Maya Nayak
General Counsel

cc: Michael H. Reed, Esq., Chair

EXHIBIT A

The New York Times | <https://nyti.ms/2k1LpSB>

The Opinion Pages | OP-ED CONTRIBUTOR

How the Anti-Vaxxers Are Winning

By PETER J. HOTEZ FEB. 8, 2017

HOUSTON — It's looking as if 2017 could become the year when the anti-vaccination movement gains ascendancy in the United States and we begin to see a reversal of several decades in steady public health gains. The first blow will be measles outbreaks in America.

Measles is one of the most contagious and most lethal of all human diseases. A single person infected with the virus can infect more than a dozen unvaccinated people, typically infants too young to have received their first measles shot. Such high levels of transmissibility mean that when the percentage of children in a community who have received the measles vaccine falls below 90 percent to 95 percent, we can start to see major outbreaks, as in the 1950s when four million Americans a year were infected and 450 died. Worldwide, measles still kills around 100,000 children each year.

The myth that vaccines like the one that prevents measles are connected to autism has persisted despite rock-solid proof to the contrary. Donald Trump has given credence to such views in tweets and during a Republican debate, but as president he has said nothing to support vaccination opponents, so there is reason to hope that his views are changing.

However, a leading proponent of the link between vaccines and autism said he recently met with the president to discuss the creation of a **presidential commission** to investigate vaccine safety. Such a commission would be a throwback to the 2000s, when Representative Dan Burton of Indiana held fruitless hearings and conducted investigations on this topic. And a documentary alleging a conspiracy at the Centers for Disease Control and Prevention, “**Vaxxed: From Cover-Up to Catastrophe**,” has recently been shown around the country.

As a scientist leading global efforts to develop vaccines for neglected poverty-related diseases like schistosomiasis and Chagas’ disease, and as the dad of an adult daughter with autism and other disabilities, I’m worried that our nation’s health will soon be threatened because we have not stood up to the pseudoscience and fake conspiracy claims of this movement.

Texas, where I live and work, may be the first state to once again experience serious measles outbreaks. As of last fall, more than **45,000 children** here had received nonmedical exemptions for their school vaccinations. A political action committee is raising money to protect this “conscientious exemption” loophole and to instruct parents on how to file for it. As a result, some public school systems in the state are coming dangerously close to the threshold when measles outbreaks can be expected, and a third of students at some private schools are unvaccinated.

The American Academy of Pediatrics has produced a **21-page document** listing all of the studies clearly showing there is no link between vaccines and autism, in addition to more recent epidemiological studies involving hundreds of thousands of children or pregnant women that also refute any association. A study of infant rhesus monkeys also shows that vaccination does not produce neurobiological changes in the brain.

Vaccines are clearly not the reason children develop autism. So what is? There is strong evidence that **genetics** play a role, and that defects in the brain of children on the autism spectrum occur during **pregnancy**. Exposure during early pregnancy to particular chemicals in the environment or infections could be involved. Researchers have suggested that damage could be done by the drugs thalidomide, misoprostol

and valproic acid; by exposure to the insecticide chlorpyrifos; and by infection of the mother with the rubella virus.

This is what we need to be focusing on, not the myth that vaccines cause autism. Yet I fear that such myths will be used to justify new rounds of hearings or unwarranted investigations of federal agencies, including the C.D.C. This would only distract attention from these agencies' crucial work, and the real needs of families with children on the autism spectrum, such as mental health services, work-entry programs for adults and support for the research being done by the National Institutes of Health.

Today, parents in Texas have to live in fear that something as simple as a trip to the mall or the library could expose their babies to measles and that a broader outbreak could occur. Perpetuating phony theories about vaccines and autism isn't going to help them — and it's not going to help children on the autism spectrum, either.

Peter J. Hotez, a pediatrician at Baylor College of Medicine, is director of the Texas Children's Hospital Center for Vaccine Development.

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A version of this op-ed appears in print on February 8, 2017, on Page A25 of the New York edition with the headline: How the Anti-Vaxxers Are Winning.

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EXHIBIT B

POLITICS

E.P.A. Workers Try to Block Pruitt in Show of Defiance

By CORAL DAVENPORT FEB. 16, 2017

WASHINGTON — Employees of the Environmental Protection Agency have been calling their senators to urge them to vote on Friday against the confirmation of Scott Pruitt, President Trump’s contentious nominee to run the agency, a remarkable display of activism and defiance that presages turbulent times ahead for the E.P.A.

Many of the scientists, environmental lawyers and policy experts who work in E.P.A. offices around the country say the calls are a last resort for workers who fear a nominee selected to run an agency he has made a career out of fighting — by a president who has vowed to “get rid of” it.

“Mr. Pruitt’s background speaks for itself, and it comes on top of what the president wants to do to E.P.A.,” said John O’Grady, a biochemist at the agency since the first Bush administration and president of the union representing the E.P.A.’s 15,000 employees nationwide.

Nicole Cantello, an E.P.A. lawyer who heads the union in the Chicago area, said: “It seems like Trump and Pruitt want a complete reversal of what E.P.A. has done. I don’t know if there’s any other agency that’s been so reviled. So it’s in our interests to do this.”

The union has sent emails and posted Facebook and Twitter messages urging members to make the calls.

“It is rare,” said James A. Thurber, the director of the Center for Congressional and Presidential Studies at American University. “I can’t think of any other time when people in the bureaucracy have done this.”

The campaign is not likely to succeed. Before Friday’s vote, two Democratic senators, Heidi Heitkamp of North Dakota and Joe Manchin III of West Virginia, announced that they would vote for Mr. Pruitt’s confirmation, and only one Republican, Susan Collins of Maine, has said she will oppose him.

But because Civil Service rules make it difficult to fire federal workers, the show of defiance indicates that Mr. Pruitt will face strong internal opposition to many of his promised efforts to curtail E.P.A. activities and influence.

“What it means is that it’s going to be a blood bath when Pruitt gets in there,” said Christine Todd Whitman, a Republican former governor of New Jersey and the E.P.A. administrator during the first term of President George W. Bush.

Ms. Whitman predicted a standoff between career employees and their politically appointed bosses, noting that Mr. Pruitt would be blocked by legal Civil Service protections from immediately firing longtime employees, but would probably be able to retaliate in other ways, such as shifting them to different jobs.

The showdown could embolden the White House and Congress to change federal Civil Service laws.

“The Civil Service is supposed to be a class of experts implementing policy, regardless of politics,” said Myron Ebell, a fellow at the free-market Competitive Enterprise Institute, who led Mr. Trump’s environmental transition team. “If they have now become a special interest group pleading their own agenda, then it is probably time to look at reforming the Civil Service laws.”

The revolt has also angered supporters of Mr. Pruitt.

“There clearly has been an organized effort to demonize Pruitt, and I think that’s unfair and unfortunate,” said Jeffrey Holmstead, a senior E.P.A. official in the George W. Bush administration who has been mentioned as a possible deputy to Mr. Pruitt. “I don’t remember, in my time, anything like this. But I think that anyone Trump nominated would be targeted.”

“We know that he’ll dismantle Clean Power Plan and the Waters of the U.S. rule, but he’s not going to go in there and start firing people,” said Mr. Holmstead, referring to Obama regulations on climate change and water pollution.

Mr. Pruitt, the attorney general of Oklahoma, has sued the E.P.A. at least 14 times, often in concert with the nation’s largest fossil fuel companies, to block major environmental regulations. He has questioned human-caused global warming and is a key architect of the national legal effort to dismantle former President Barack Obama’s climate change policies.

He has harshly criticized the role of the federal agency, saying much of its authority should be dissolved and left to the states. Mr. Pruitt’s legal views on environmental protection broadly, and the role of the E.P.A. specifically, appear to line up with Mr. Trump’s campaign claim that “Environmental Protection, what they do is a disgrace.”

Within days of Mr. Pruitt’s swearing-in, Mr. Trump is expected to sign one or more executive orders aimed at undoing Mr. Obama’s climate change regulations, and possibly to begin dismantling some E.P.A. offices and programs, people familiar with the White House’s plans said.

While it will be impossible to undo most major rules or programs that quickly, the presidential signatures would authorize Mr. Pruitt to cut existing environmental regulations — and, eventually, the jobs of many of the people who enforce them.

Ms. Cantello said most of her career at the E.P.A. had been focused on water protection, particularly on cleaning pollution in the Great Lakes. “I’m afraid all the work I’ve done will be abandoned,” she said.

Ms. Cantello and other longtime agency employees said that while they sometimes chafed under the administration of George W. Bush, who sought to loosen some environmental rules, they did not openly rebel against it — nor, they said, did they fear that Mr. Bush and his appointees wanted to eliminate the agency.

“I’ve been here for 30 years, and I’ve never called my senator about a nominee before,” said an E.P.A. employee in North Carolina who spoke on the condition of anonymity out of fear of losing her job.

The calls to senators come on top of an anti-Pruitt protest last week by Chicago E.P.A. employees, and agency workers say that if Mr. Pruitt is confirmed, they intend to amplify their resistance to him, taking their case to the American public.

“At this point, it’s just, ‘call your senator,’” Mr. O’Grady, the union president, said. “We plan on more demonstrations, more rallies. I think you will see the employees’ union reaching out to N.G.O.s and having alliances with them,” he added, referring to nongovernmental organizations. “We’re looking at working with P.R. firms.”

The White House and E.P.A. did not respond to emailed questions about the employees’ campaign.

The E.P.A. emerged as a Republican political target during the Obama administration, after Mr. Obama turned to the agency to muscle through an environmental agenda that could not get through Congress.

While Mr. Trump campaigned on slashing Obama-era rules on climate change and waterways, his efforts might also be thwarted by Congress. But the E.P.A. is likely to be at the center of his antiregulatory agenda.

Experts say it is not surprising that liberal and environmental groups like the Sierra Club have campaigned against Mr. Pruitt. Over 700 former E.P.A. employees have signed a letter to senators opposing his confirmation.

The Center for Media and Democracy, a left-leaning group, successfully sued the Oklahoma attorney general’s office to release about 3,000 of Mr. Pruitt’s emails, which they say could reveal more about his ties to fossil fuel companies. An

Oklahoma judge ruled Thursday that the emails must be released but gave the attorney general's office until Tuesday to comply, long enough to avoid roiling the confirmation vote unless Democrats can persuade Senate Republicans to hold off.

But former E.P.A. officials said the open rebellion by current employees was extraordinary, especially considering that their resistance could backfire once Mr. Pruitt arrives on the job.

"E.P.A. staff are pretty careful. They're risk-averse," said Judith Enck, who left the agency last month. "If people are saying and doing things like this, it's because they're really concerned."

Senator Rob Portman, Republican of Ohio, said on Wednesday that his office had received dozens of calls from people both opposing and supporting Mr. Pruitt's nomination, including E.P.A. employees, and that he had not yet decided whether to vote for him. "I do have concerns about the Great Lakes," he said.

Mr. O'Grady said that he expected the calls to continue through Friday's vote. "I pray they don't dismantle the E.P.A.," he said. "It's going to be like Humpty Dumpty — very difficult to put back together again."

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A version of this article appears in print on February 17, 2017, on Page A1 of the New York edition with the headline: E.P.A. Workers Fight to Stop Confirmation.