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ATTORNEY GENERAL OF TEXAS

September 24, 2019

The Honorable Ryan Guillen
Chair, Committee on Resolutions Calendars
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0272

Re: Whether chapter 1704 of the Occupations Code prohibits a jail or detention facility from using a third-party contractor to provide persons in the custody of law enforcement with information on available bail bond services (RQ-0286-KP)

Dear Representative Guillen:

You ask whether the statutory prohibition against bail bond sureties soliciting business inside a jail prohibits a third-party contractor from installing and maintaining a signboard providing bail bond information inside a jail or detention facility.¹ Answering your question first requires an understanding of bail bond statutes and the requirements placed on certain county officials to ensure they make bail bond information available to those in their custody. Under the Code of Criminal Procedure, a person accused of a crime may be permitted to make bail, which is security that the person will appear before the proper court and answer the accusation. *See* TEX. CODE CRIM. PROC. arts. 17.01, .02. A “bail bond surety” is a person who “(A) executes a bail bond as a surety or cosurety for another person; or (B) for compensation deposits cash to ensure the appearance in court of a person accused of a crime.” TEX. OCC. CODE § 1704.001(2).

Chapter 1704 of the Occupations Code requires counties with a population of 110,000 or more to establish a bail bond board, and it authorizes any other county to do so. *See id.* §§ 1704.002 (“Application of Chapter”), 1704.051 (“Mandatory Creation of Board”), 1704.052 (“Discretionary Creation of Board”). In counties with a bail bond board, the board supervises and regulates each phase of the bonding business in the county, and a bail bond surety must obtain a license from the bail bond board to operate in the county. *Id.* §§ 1704.101(3), .151. Relevant to your question, the county bail bond board may establish rules regulating solicitations or advertisements by or on behalf of bail bond sureties. *Id.* § 1704.109(a).² State law requires a “list

¹*See* Letter from Honorable Ryan Guillen, Chair, House Comm. on Resolutions Calendars, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (rec’d May 1, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinions-rqs> (“Request Letter”).

²Bail bond sureties operating in counties without a bail bond board are governed by Code of Criminal Procedure articles 17.11 and 17.13, which authorize regulation of bail bond sureties by the sheriff and the judges within the county. *See* TEX. CODE CRIM. PROC. arts. 17.11, .13. Because the question asks specifically about provisions in chapter 1704, this opinion is limited to those counties subject to that chapter.

of each licensed bail bond surety and each licensed agent of a corporate surety in a county [to] be displayed at each location where prisoners are examined, processed, or confined.” *Id.* § 1704.105(b).

You explain that in some other states, custodial authorities contract with third parties to provide informational signboards within their jail facilities. Request Letter at 1. The third-party contractors invite licensed bail agents in the county to list their information on the signboards, possibly for a fee. *See id.* You suggest that the third-party contractor may pay a fee to the local governmental entity for the ability to install the signboard. *See id.*

You tell us that Texas bail bond boards “have expressed concerns about individual jails using informational signboards” due to a statutory prohibition against bail bond sureties soliciting business inside places of detainment. *Id.* Subsection 1704.304(c) of the Occupations Code provides: “A bail bond surety or an agent of a bail bond surety may not solicit bonding business in a police station, jail, prison, detention facility, or other place of detainment for persons in the custody of law enforcement.” TEX. OCC. CODE § 1704.304(c). You ask whether this section prohibits a third-party contractor from installing inside a jail facility a signboard with information about available bail bond services. Request Letter at 1.

Both chapter 1704 and prior opinions from this office recognize a distinction between advertising and solicitation. *See* TEX. OCC. CODE § 1704.109(a) (authorizing regulation of solicitation *or* advertisements); Tex. Att’y Gen. Op. Nos. GA-1019 (2013) at 2, GA-0502 (2007) at 2. In this context, the common understanding of “solicit” is “to approach with a request or plea,” whereas “advertise” means “to make generally known” or “to announce publicly especially by a printed notice” WEBSTER’S 3D NEW INT’L DICTIONARY 31, 2169 (2002). The term “solicit” implies a personal petition to an individual to do a particular thing. *See* Tex. Att’y Gen. Op. No. GA-0502 (2007) at 2. Under certain facts, an advertisement could rise to the level of a solicitation, but generally advertising is not tantamount to solicitation. Tex. Att’y Gen. Op. No. GA-1019 (2013) at 3 (concluding that magazine advertising distributed to specific detainees could, depending on the facts, constitute unlawful solicitation in violation of section 1704.304(c)).

Absent specific information about a particular signboard, we cannot conclusively determine the status of its contents as a solicitation. But your general description of the signboards suggests that they are advertisements only and do not involve any personal petition to a specific detainee that would give rise to a solicitation. Thus, based on the description provided, a court would likely conclude that subsection 1704.304(c) does not prohibit a county from allowing a third-party contractor to install inside a jail facility a signboard with information about available bail bond services.

Section 1704.105 requires that a “list of each licensed bail bond surety and each licensed agent of a corporate surety in a county . . . be displayed at each location where prisoners are examined, processed, or confined.” TEX. OCC. CODE § 1704.105(b). A third-party contractor’s provision of a signboard providing bail bond service information will not alleviate the independent duty for county officials to ensure compliance with this section. Furthermore, whether county bail bond board rules permit the installation of such a signboard is a separate question that must be analyzed on a county-by-county basis.

You also question whether subsection 1704.304(c) poses constitutional concerns by denying First Amendment rights to commercial speech. Request Letter at 1–2. You suggest that subsection 1704.304(c) could involve the same constitutional concerns raised by the Fifth Circuit Court of Appeals in *Pruett v. Harris County Bail Bond Board*, 499 F.3d 403 (5th Cir. 2007); see also Request Letter at 1–2. *Pruett* involved a challenge by two bail bondsmen to a different provision in chapter 1704 that prohibited any solicitation by a bondsman regarding an outstanding warrant, unless the subject of the warrant was a previous customer of the bondsman. *Pruett*, 499 F.3d at 408. The bondsmen also challenged a portion of the statute prohibiting in-person or phone solicitation within twenty-four hours after an arrest. *Id.* at 414. The court concluded these restrictions too broadly limited commercial speech and ordered the bail bond board to more narrowly tailor the restrictions to satisfy the First Amendment. *Id.* at 414–15.

Pruett involved efforts by the bondsmen to solicit business from specific detainees or individuals with outstanding warrants and government restrictions on their ability to do so. As discussed above, use of the signboard does not appear to involve solicitation but only more general advertising. While the First Amendment limits the restrictions government may place on commercial speech, including advertising, your question raises a different issue—whether local officials must affirmatively provide a forum for advertising inside their detention facilities. The Supreme Court recognized that the First Amendment “does not guarantee the right to communicate one’s views at all times and places” or in any manner. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). It also explained that “a prison is most emphatically not a ‘public forum.’” *Jones v. N. C. Prisoners’ Labor Union*, 433 U.S. 119, 136 (1977). “The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration.” *Id.* at 125. The First Amendment does not guarantee access to a jail or detention facility for purposes of public communication simply because the State owns or controls the facility. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985). Rather, “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” *Perry Educ. Ass’n v. Perry Local Educ’rs Ass’n*, 460 U.S. 37, 46 (1983). Thus, the First Amendment does not impose any duty on a public official with control over a detention facility to provide a public forum for third-party contractors to install and maintain an informational signboard in the facility.

S U M M A R Y

Subsection 1704.304(c) of the Occupations Code prohibits a bail bond surety from soliciting business in a police station, jail, prison, detention facility, or other place of detention for persons in the custody of law enforcement. Based on the description provided, a court would likely conclude that a signboard installed inside a jail facility by a third party providing information about available bail bond services does not amount to a solicitation and is therefore not prohibited under subsection 1704.304(c).

The First Amendment does not impose any duty on a public official with control over a detention facility to provide a public forum for third-party contractors to install and maintain an informational signboard in the facility.

Very truly yours,



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