



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

May 13, 2008

John Lindback, Director
Office of the Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310

Re: Opinion Request OP-2008-2

Dear Mr. Lindback:

You have asked three sets of questions about the responsibility of the Secretary of State (secretary) to investigate alleged violations of certain election laws that prohibit the making of false statements.^{1/} Your questions and our short answers are set forth below, followed by a discussion of our analysis.

1. ORS 260.532 prohibits promulgating false statements of material fact about a candidate, political committee or measure. ORS 260.555 and 260.715 prohibit making false statements in other specified circumstances. What is the scope of the secretary's duty, if any, to investigate and take action in response to alleged violations of those statutes?

Short Answer: ORS 246.046 and 260.345 impose on the secretary a duty to conduct reasonable investigations into allegedly false statements when the alleged misconduct, if proven, would violate ORS 260.555(1) or 260.715(1). If, after investigation, the secretary determines that a criminal violation has occurred, the secretary must refer the case to this office and request prosecution unless the violation involves the Attorney General or a candidate for Attorney General, or a person or committee supporting or opposing either, in which case the secretary is to appoint another prosecutor. The secretary has no responsibilities with respect to ORS 260.532.^{2/}

2. False statements could be made in (a) election documents, such as candidate filings, voters' pamphlet statements, measure arguments and recall petitions; (b) campaign materials produced by candidates and political committees, including media advertising; (c) election coverage by news media; (d) oral communications, such as speeches and conversations; and (e) government documents, such as ballot titles, explanatory statements, fiscal impact statements, informational material related to a measure, and legislative arguments supporting or opposing a legislative referral. Would complaints about false statements in those situations require investigation and enforcement under statutes within the secretary's jurisdiction?

Short Answer: False statements in the described communications could violate ORS 260.555 or 260.715 if the statements are about the contents, meaning or effect of an initiative, referendum or recall petition and are made to particular individuals by a petition circulator or a person causing the petition to be circulated, or if the statements are contained in a statement, oath or affidavit required to be made under the election laws. The secretary would have investigative and referral responsibilities with respect to alleged violations of either statute. Election coverage provided by the news media does not appear to come within the scope of either statute.

3. What meaning should be given to “false statement” for purposes of ORS 260.555 and 260.715?

Short Answer: The characteristics of a false statement largely have not been addressed by Oregon appellate courts with respect to ORS 260.555 or 260.715. We believe that a court would consider the question of falsity only in relation to statements that represent verifiable facts, not to statements of opinion, and that a court would conclude that a statement may be characterized as false only if it is not possible to draw any reasonable inference from available evidence that the statement is factually correct. Also, with criminal penalties attaching to violation of these statutes, a person may be found guilty of making a false statement only if he or she made the statement knowingly, *i.e.*, knowing that it was false.

DISCUSSION

1. Duty to investigate and take action in response to alleged violations

ORS 260.532(1) addresses the promulgation of false statements of material fact about a candidate, political committee or measure, and specifically states:

No person shall cause to be written, printed, published, posted, communicated or circulated, any letter, circular, bill, placard, poster, photograph or other publication, or cause any advertisement to be placed in a publication, or singly or with others pay for any advertisement, with knowledge or with reckless disregard that the letter, circular, bill, placard, poster, photograph, publication or advertisement contains a false statement of material fact relating to any candidate, political committee or measure.

A candidate or political committee aggrieved by a violation of ORS 260.532(1) may bring a civil action in circuit court for compensatory damages and equitable relief. ORS 260.532(5) and (6). ORS 260.532 provides the sole remedy for a violation. ORS 260.532(10); 260.993(1). The secretary has no authority to impose a civil penalty for violations of ORS 260.532, and, because there is no criminal penalty attached to violating the statute, the secretary lacks authority to refer violations to the Attorney General for prosecution. 42 Op Atty Gen 124, 129 (1981).

You also ask about the secretary’s investigative and enforcement responsibilities under ORS 260.555(1) and ORS 260.715(1). Like ORS 260.532, both address the making of false statements. ORS 260.555(1) states:

No person attempting to obtain signatures on, or causing to be circulated, an initiative, referendum or recall petition, shall knowingly make any false statement regarding the contents, meaning or effect of the petition to any person who signs it, attempts to sign it, is requested to sign it or requests information concerning it.

ORS 260.715(1) states: “A person may not knowingly make a false statement, oath or affidavit when a statement, oath or affidavit is required under the election laws.”

A fourth statute, ORS 260.345, is relevant to determining the secretary’s responsibilities with regard to ORS 260.555(1) and 260.715(1). ORS 260.345(3) states:

Upon receipt of a complaint under subsection (1) or (2) of this section [relating to election law or rule violations] the Secretary of State * * * immediately shall examine the complaint to determine whether a violation of an election law or rule has occurred and shall make any investigation the Secretary of State * * * considers necessary.

If, “after an investigation,”^{3/} the secretary believes there has been a statute or rule violation, ORS 260.345(4) provides for only two courses of action.^{4/} If the violation is subject to a criminal penalty, the secretary must refer the matter to the Attorney General for prosecution unless the violation involves the Attorney General or a candidate for Attorney General or a person or committee supporting or opposing either, in which case the secretary is to appoint another prosecutor. ORS 260.345(4)(a); 260.993.^{5/} Because the violation of either ORS 260.555(1) or ORS 260.715(1) is a Class C felony, ORS 260.993(2), the investigative and referral responsibilities imposed on the secretary under ORS 260.345 apply to complaints that the secretary receives about alleged violations of either statute. Moreover, if the secretary does not receive a complaint but nonetheless has “reason to believe that a violation of an election law or rule has occurred,” the secretary is obligated to “proceed promptly as though * * * [he] had received a complaint.” ORS 260.345(8).

In addition to the responsibilities imposed under ORS 260.345, the secretary has a duty to investigate election law violations under ORS 246.046, which states:

The Secretary of State and each county clerk shall diligently seek out any evidence of violation of any election law.

The secretary’s investigatory obligations under this statute appear to differ very little from those imposed by ORS 260.345.^{6/} A distinction could be drawn based on the proactive nature of the secretary’s charge under ORS 246.046 to “seek out” evidence of violations.^{7/} We have previously interpreted this provision as requiring the secretary “to investigate any irregularities in the election laws and where such investigation produces sufficient facts to convince [the secretary] that a violation has occurred such facts should be brought to the attention of the appropriate district attorney.”^{8/} 30 Op Atty Gen 76 (1960) (construing *former* ORS 260.540, now codified at ORS 246.046). We further concluded that the secretary’s responsibility to investigate in any particular case depends on the facts of that case and that the phrase

“‘diligently seek out evidence’ is a relative term, the requirements of which vary from case to case within the demands of reasonableness.” *Id.*

In determining whether an investigation is reasonable under the circumstances, we believe the secretary may take into consideration such matters as the investigative resources available to the secretary and the likelihood of a successful enforcement action. Thus, if initial review of a complaint is sufficient for the secretary to conclude that a reasonable investigation of the stated allegation probably will not yield proof of a violation of an election law enforced by the secretary, we believe the secretary may forego any investigation. Likewise, if during an investigation it becomes evident that the investigation probably will not yield sufficient proof of a violation for which the secretary has enforcement authority, the secretary may, and in most instances should, discontinue the office’s investigative efforts.

Despite the broadly stated obligations placed on the secretary by ORS 260.345(3) and 246.046 to investigate possible election law violations, we conclude that neither statute requires the secretary to investigate complaints of alleged violations of ORS 260.532(1).^{9/} The reason for this is that the remedies stated in ORS 260.532, permitting an aggrieved candidate or political committee to bring suit, are the exclusive remedies for violation of ORS 260.532(1). ORS 260.532(10). Because there is no remedy to be pursued by a government entity, there would be no way for the state to act on the results of the secretary’s investigation. Therefore, if it is clear from the face of a complaint, or if it becomes clear during the course of an investigation, that an allegedly false statement could only constitute a violation of ORS 260.532(1), the secretary may determine that no further investigation is “necessary” within the meaning of ORS 260.345(3), and, likewise, discontinue any investigation begun under ORS 246.046. However, if the alleged misconduct would also violate a law for which the secretary *does* have enforcement or referral authority, the secretary has a duty to investigate the complaint to the extent reasonably necessary to enable the secretary to determine whether there has been such a violation. *See* 42 Op Atty Gen at 132 n 3 (conduct violating ORS 260.532 may also violate other election laws).

2. False statements in particular communications

The second question requests guidance about how to determine when the secretary has a statutory obligation to investigate complaints and take further action based on allegedly false statements made in the following communications: (1) election documents such as candidate filings, voters’ pamphlet statements, measure arguments and recall petitions; (2) campaign materials produced by candidates and political committees, including media advertising; (3) news media statements; (4) oral communications; (5) government documents such as ballot titles, explanatory statements, fiscal impact statements, informational material related to a measure, and legislative arguments.

To answer this question, we consider the secretary’s responsibilities upon receiving a complaint about allegedly false statements that would violate either ORS 260.555(1) or 260.715(1), the primary statutes concerning false statements for which the secretary has enforcement obligations.^{10/} As already discussed, the secretary is not responsible for enforcing ORS 260.532. Therefore, while false statements made in the types of communications that you have specified would likely violate that statute, we do not discuss those violations.

a. ORS 260.555(1) (false statements regarding initiative, referendum or recall petition)

As already discussed, ORS 260.555(1) prohibits the chief petitioner or any individual who circulates an initiative, referendum or recall petition from knowingly making false statements concerning its contents, meaning or effect to any person who signs, attempts to sign or is requested to sign, or who requests information about the petition. Among the means by which a false statement could be transmitted, you ask about “campaign materials * * * including media advertising * * * [and] oral communications, such as speeches and conversations.” With regard to oral communications, it would constitute a violation of ORS 260.555(1) for a petition circulator to knowingly make a false statement in discussing the petition with a person who may sign or ask for information about the petition.

A petition circulator also may violate the statute by distributing campaign materials that he or she knows contain a false statement about the contents, meaning or effect of the petition to a person who signs, attempts to sign, is requested to sign or requests information about the petition. Likewise, we believe that a chief petitioner could violate the statute by providing campaign materials to the circulator for distribution, knowing that they contained the false statement. The distributed campaign materials could be reproductions of materials originally disseminated in a speech or via media advertisement. However, false statements made in media advertising or speeches to groups could potentially violate ORS 260.555(1) only if the advertising or speech itself included a request to the listeners, readers or viewers to sign the subject petition. Because a violation of ORS 260.555(1) in such a circumstance would be very dependent on the facts of the specific situation, we recommend that the secretary consult with the Department of Justice in the event he becomes aware of a potential violation occurring in such a setting.

The election and government documents described in this question generally relate to candidates and measures before the voters, rather than petitions. Because these communications generally are not directed toward petition signers or potential signers and do not deal with the content, meaning or effect of petitions, we believe they are unlikely to present a possible violation of ORS 260.555(1). Finally, although the news media may issue statements advocating support or rejection of a petition, they generally are not actively involved in circulating or gathering signatures on the petition. Thus, news media statements also are unlikely to violate ORS 260.555(1).

The secretary has a statutory duty to conduct a reasonable investigation of any complaint alleging a violation of ORS 260.555(1). ORS 246.046, 260.345(3). If, based on the investigation, the secretary concludes that there has been a violation, the secretary must refer the case to the Attorney General and request prosecution, or appoint another prosecutor if the violations involve the Attorney General. ORS 260.345(4)(a).

b. ORS 260.715(1) (false statement required under the election laws)

ORS 260.715(1) applies only to statements, oaths and affidavits that are provided in response to an election law requirement. Thus, oral communications and news media communications will not violate ORS 260.715(1).

The election documents, campaign materials and government documents described in this question may include some statements that are required under the election laws. *See, e.g.*, ORS 249.031 (contents of nominating petition or declaration of candidacy), 250.045(4) (statement regarding payment of petition circulators), 251.085 (required portion of candidate's statement in voters' pamphlet), 260.039 (candidate's statement of organization), 260.042 (political committee's statement of organization), 260.044 (statement of expenditures), ORS 260.058, 260.063, 260.068 and 260.073 (candidate and PAC statements of contributions and expenditures), Or Const, Art II, § 18(3) (reasons for recall petition). A person who knowingly includes a false statement of fact in any such required statement, oath or affidavit would violate ORS 260.715(1). The secretary has a statutory duty to conduct a reasonable investigation of any complaint alleging a violation of ORS 260.715(1) with regard to these communications. ORS 246.046, 260.345(3). If, based on the investigation, the secretary determines that a violation has occurred, the secretary must refer the case to the Attorney General and request prosecution, or appoint another prosecutor if the violations involve the Attorney General. ORS 260.345(4)(a).^{11/}

3. Meaning of "false statement"

The third question asks how the secretary should interpret the term "false statement" in ORS 260.555(1) and 260.715(1). As already discussed, the legislature has provided criminal penalties for the violation of these statutes, distinguishing them from ORS 260.532.^{12/} While only one case speaks to what constitutes a "false statement" for purposes of ORS 260.715, *State v. Huntley*, 82 Or App 350, 356, 728 P2d 868 (1986), and no case addresses the point with respect to ORS 260.555, Oregon appellate courts have had numerous occasions to consider what constitutes a "false statement" in the context of ORS 260.532. Although these precedents do not necessarily reflect how the courts would interpret either criminal statute, we believe that they provide some basic guidance as to the courts' consideration of false statements. Therefore, we draw on them in answering this question. Under ORS 260.532(1), the Oregon Supreme Court has consistently held that statements are not false "if any reasonable inference can be drawn from the evidence that the statement is factually correct or that the statement is merely an expression of opinion." *Comm. of 1000 v. Eivers*, 296 Or 195, 202, 674 P2d 1159 (1983), *see also Thornton v. Johnson*, 253 Or 342, 362, 453 P2d 178, 454 P2d 647 (1969), *Mosee v. Clark*, 253 Or 83, 87, 453 P2d 176 (1969). Although the Court's conclusion in these cases does not control interpretation of ORS 260.555(1) or 260.715(1), we believe it unlikely a court would find evidence of falsity sufficient to prove violation of ORS 260.555(1) or 260.715(1) if any reasonable interpretation or inference of fact would make the statement true, or would show the statement to be one of opinion rather than fact.

Also, under both ORS 260.555 and 260.715, a person is criminally liable for making a false statement only if he or she made the statement "knowingly," *i.e.*, with knowledge that the statement was not true. It would not be sufficient to prove that the person should have known

that the statement was false. See *State v. Neel*, 8 Or App 142, 493 P2d 740 (1972) (to prove “knowingly” the state must prove actual knowledge). The Oregon Court of Appeals has held that a person who makes a false statement while being “unsure about the truth or falsity” of the statement or only having had “reason to know” that the statement was false, has not *knowingly* made a false statement for purposes of the perjury statute.^{13/} *State v. Park*, 120 Or App 294, 297-298, 852 P2d 872 (1993). However, in *Park*, the court also concluded that a person’s knowledge of the falsity of his statement could be inferred from the evidence presented by the state. *Id.* at 298. This means that the state can use circumstantial evidence to prove a person knew the statement he or she made to fulfill an election law requirement was false. In practice, the question of whether a particular statement is a “false statement” is likely to hinge upon the strength of the state’s evidence that the person who made the statement knew that it was false.

A few examples may be helpful in understanding the elements of a false statement. The statements in the left column may qualify as false statements for purposes of ORS 260.555 and 260.715, while the statements in the right hand column could not:^{14/}

May qualify as a false statement

Could not qualify as a false statement

“The office holder is a convicted felon”

“The office holder is corrupt”

“The candidate voted against Senate Bill 99”

“The candidate does not support education”

“The petitioner has never held public office”

“The petitioner doesn’t know anything about politics”

To summarize, a “false statement” for purposes of ORS 260.555 and 260.715 is one purporting to be a statement of fact that is not susceptible to being reasonably interpreted as true or as an opinion. The person making a false statement is criminally liable only if he or she makes the statement knowing it to be false.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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^{1/} You have asked for confidential advice on a related question, which we address in a second letter.

^{2/} The secretary may wish to consult this office if he has questions about other statutes prohibiting false statements in the election context. For example, ORS 260.695(8) prohibits any person from making a false statement about the person’s inability to mark a ballot.

^{3/} As the attorney for the secretary, the Attorney General may assist with whatever investigation the secretary considers necessary.

^{4/} While ORS 260.345(3) imposes on the secretary the responsibility to “make any investigation” he considers necessary in relation to a complaint that a person has violated an election law or rule, the statute does not specify the factors to be considered in determining whether an investigation is “necessary.”

^{5/} If the violation is not subject to a criminal penalty, the secretary must determine whether to impose a civil penalty. ORS 260.345(4)(b); 260.995.

^{6/} As originally enacted in 1957, the predecessor statute to the current ORS 260.345 pertained only to violations arising under a prescribed set of statutes, all of which pertained to the filing of statements about campaign finances, while the statute that preceded the current ORS 246.046 applied to “any” violation of “any provision of the election laws.” Or Laws 1957, ch 643 § 1 and ch 644 § 10.

^{7/} With neither statute currently limiting the secretary’s investigatory activities to specific types of violations, the substantive difference between the investigatory duties imposed on the secretary by ORS 246.046 and 260.345 is, if anything, one of degree.

^{8/} Before 1971, district attorneys were responsible for prosecuting election law violations. *Former* ORS 260.540. The 1971 Legislative Assembly transferred that authority to the Attorney General. Or Laws 1971, ch 749, §§ 27- 28.

^{9/} This conclusion is consistent with those stated in 42 Op Atty Gen 124.

^{10/} An analysis of all potential circumstances that may appear to be based on false statements in the communications described in this question is outside the scope of this opinion. The secretary may wish to consult this office for guidance in applying the principles addressed in this opinion to specific factual situations.

^{11/} ORS 260.345(4) provides:

If the Secretary of State believes after an investigation under subsection (3) of this section that a violation of an election law or rule has occurred, the secretary:

(a) In the case of a violation that is subject to a penalty under ORS 260.993, immediately shall report the findings to the Attorney General and request prosecution. If the violation involves the Attorney General, a candidate for that office or a political committee or person supporting or opposing the Attorney General or a candidate for that office, the Secretary shall appoint another prosecutor for that purpose; or

(b) In the case of a violation not subject to a penalty under ORS 260.993, may impose a civil penalty under ORS 260.995.

^{12/} While the Oregon Supreme Court has termed ORS 260.352 a “penal statute,” its violation does not carry a criminal penalty. *Mutual of Enumclaw Ins. Co. v. McBride*, 295 Or 398, 405, 667 P2d 494 (1983).

^{13/} The Court of Appeals has concluded that a criminal prosecution under ORS 260.715(1) is a variant of a prosecution for perjury. *Huntley*, 82 Or App at 356. In that case, the defendant candidate for state office was convicted of making false statements in the material he submitted to the Secretary of State for publication in the Oregon Voters’ Pamphlet. In describing his educational background, the defendant had listed two college degrees that he, in fact, had not received. *Huntley*, 82 Or App at 352.

^{14/} These examples are intended to provide general guidance for determining whether a statement is one of fact or opinion. We recognize that in some cases it may be difficult to distinguish between a statement of fact and an opinion. If there is substantial doubt as to the nature of a particular statement, the statement generally should be treated as one of opinion rather than fact. For advice in specific cases, we recommend that the secretary consult this office.