STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

July 29, 2009

Opinion No. 09-137

The Rutherford Reader, as Revised, as a Newspaper of General Circulation

QUESTION

Upon reconsideration, does the Rutherford County Reader ("The Reader") qualify as a "newspaper" and/or a "newspaper of general circulation" for purposes of publication of legal notices?

OPINION

After reevaluating The Reader, it is our opinion that The Reader does not qualify as a "newspaper" and/or a "newspaper of general circulation" for purposes of publication of legal notices.

ANALYSIS

This Office previously opined that The Reader does not qualify as a "newspaper" and/or a "newspaper of general circulation" for purposes of the publication of legal notices. Op. Tenn. Att'y Gen. 07-146 (October 19, 2007). In our earlier opinion, we concluded that a paper like The Reader, which provides coverage of some local events but is mainly devoted to advertisements, is not a newspaper of general circulation for the purposes of publishing official or legal notices. Id.

This Office is asked to reconsider its prior opinion, based upon additional factual information provided about The Reader, including two sample issues to review and two issues of The Murfreesboro Post ("The Post") submitted for purposes of comparison.[1] The Reader began publication in 2000 and is published every Thursday in a newspaper format. The Reader is free and available at Rutherford County eating establishments, businesses, driveways, and grocery stores. An article from the Vol. 9, No. 34 sample issue states that The Reader distributes

[1] In Op. Tenn. Att'y Gen. 07-62, this Office opined that The Murfreesboro Post is a "newspaper" or "newspaper of general circulation" for the purposes of publication of most official notices. The Murfreesboro Post is published weekly, intended for circulation among the general public, contains matters of general interest, and is in the form of a newspaper. However, The Murfreesboro Post is not a "newspaper" or "newspaper of general circulation" for the purpose of publishing notices required by the Election Code, because it is not sold for a definite price. Op. Tenn. Att'y Gen. 07-62 (May 7, 2007).

"throughout Rutherford County, Shelbyville, Tullahoma, Manchester, and Woodbury."[2] In addition, *The Reader* is posted in its entirety on the web at www.rutherfordreader.com. *The Reader* has 25,202 online subscribers.

Each issue of *The Reader* provided to this Office has twenty-four pages. The first sample issue provided, Vol. 9, No. 33,[3] has fourteen pages dedicated solely to displaying advertisements and classified advertisements, and the remaining ten pages contain news articles that primarily pertain to local events and people. The second sample issue provided, Vol. 9, No. 34,[4] contains fifteen pages dedicated solely to displaying advertisements and classified advertisements, and the remaining nine pages contain news articles that primarily pertain to local events and people. In comparison, both sample issues of *The Post*, Vol. 3, Issue 23, and Vol. 3, Issue 24,[5] have thirty-two pages with seven and nine pages, respectively, dedicated fully to advertisements, classified advertisements, and legal notices.

The factual information provided includes a comparison sheet between *The Reader* and *The Post*. The comparison sheet states that the "advertising percentage without legals" is fifty-three percent (53%) for *The Reader* and twenty-seven percent (27%) for *The Post*. Further, the number of copies of *The Reader* printed for distribution every week is 12,500. In comparison, *The Post*, as of May 2007, "delivers approximately 45,000 copies of each issue through home delivery to driveways, racks, restaurants, and businesses, and it is available by mail for a yearly subscription of $103.00 per year." Op. Tenn. Att'y Gen. 07-62 (May 7, 2007).

With the exception of the definition in the Election Code, Tenn. Code Ann. §§ 2-1-101, *et seq*., the terms "newspaper" and "newspaper of general circulation" are not defined in state statutes. Op. Tenn. Att'y Gen. 09-65 (April 23, 2009); Op. Tenn. Att'y Gen. 00-160 (October 17, 2000). The Election Code, however, does define the term "newspaper of general circulation" and lists the requirements for meeting that definition. The publication must bear a title or name, be regularly issued at least as frequently as once a week for a definite price, and must have a second-class mailing privilege. It must be not less than four pages, must be published continuously during the immediately preceding one-year period, and must be published for the dissemination of news of general interest. Finally, it must be circulated generally in the political subdivision in which it is published and in which notice is to be given. Tenn. Code Ann. § 2-1-104(a)(13). Because *The Reader* is free and, therefore, not issued for a "definite price" and does not appear to have a second-class mailing privilege, it does not qualify as a "newspaper of general circulation" under the Election Code. Op. Tenn. Att'y Gen. 09-65 (April 23, 2009); Op. Tenn. Att'y Gen. 07-146 (Oct. 19, 2007).

With respect to the statutes in which the terms "newspaper" or "newspaper of general circulation" are not defined, three criteria have been established in order for a publication to

[2] The information provided with the request does not state where or how *The Reader* is made available in Shelbyville, Tullahoma, Manchester and Woodbury.

[3] Issue of March 12-18, 2009.

[4] Issue of March 19-25, 2009.

[5] This Office was provided with the March 22, 2009, and March 29, 2009, issues.

satisfy the requirements of those statutes. Op. Tenn. Att'y Gen. 04-064 (April 15, 2004); Op. Tenn. Att'y Gen. 00-160 (October 17, 2000). First, the publication should be available in all parts of the county. Second, it should be published at least weekly. Third, it should contain news of general interest to the public. Op. Tenn. Att'y Gen. 09-65 (April 23, 2009); Op. Tenn. Att'y Gen. 06-091 (May 16, 2006); Op. Tenn. Att'y Gen. 04-064 (April 15, 2004); Op. Tenn. Att'y Gen. 93-19 (March 11, 1993).

These criteria are supported by *Cook v. McCullough*, 1989 WL 155926 (M.S. Tenn. App. Dec. 29, 1989), *p.t.a. denied* (1990). In that case, the Court of Appeals determined that *The Nashville Record* was a newspaper for purposes of publication of tax sale notices pursuant to Tenn. Code Ann. § 67-5-2502. The Court of Appeals stated: "*The Nashville Record* is a 'newspaper' within the sense of the applicable statute. It is published weekly. It is intended for circulation among the general public. It contains matters of general interest. It is in the form of a newspaper." *Cook v. McCullough*, 1989 WL 155926 at *7.

As stated in our prior opinion, *The Reader* is published weekly and is available throughout Rutherford County; therefore, it complies with the first two requirements noted above. Op. Tenn. Att'y Gen. 07-146 (Oct. 19, 2007). However, it appears that a problem still persists with fulfilling the third requirement, which mandates coverage of news of general interest to the public. Although *The Reader* does provide pages of coverage of some local events, sports, and opinion columns, over half of its content is still devoted to display and classified advertisements. Since the issuance of the 2007 opinion, the paper has removed a statement from the interior of the issues claiming that the paper is a "free classified and paid advertising publication serving Rutherford County." Nevertheless, an examination of the paper reveals that publishing classified and paid advertisements remains the primary objective of *The Reader*. As demonstrated below, courts have found that papers with advertising as their primary focus, like *The Reader*, are not "newspapers" and/ or "newspapers of general circulation." Op. Tenn. Att'y Gen. 07-146 (Oct. 19, 2007).

In *Shoppers Guide Publishing Co., Inc. v. Woods*, 547 S.W.2d 561, 563 (Tenn. 1997), the Tennessee Supreme Court considered whether the publisher of an advertising tabloid was a "newspaper" for purposes of exemption from sales taxation. The Court held that the publisher was not entitled to the exemption. *Shoppers Guide Publishing Co., Inc.*, 547 S.W.2d at 563. In so holding, the Court relied on a revenue regulation that defined "newspaper," as well as several cases from this and other jurisdictions that have addressed the question of what constitutes a "newspaper." *Id*. The Court cited *Pope v. Craft*, 1 Tenn. App. 356, 365 (1925), which defined "newspaper," in part, as a "publication containing a narrative form of certain events and occurrences published regularly." *Id*.

The Court also cited with favor *Green v. Home News Publishing Co.*, 90 So.2d 295 (Fla. 1956). *Id*. That case dealt specifically with the issue of whether a publication devoted primarily to commercial advertising was a "newspaper" within the meaning of the sales tax act. *Id*. The Florida Supreme Court held that it was not and stated:

> The 'Shopper Advertiser' unquestionably has for its principal purpose the advertising of business concerns in the area and not the dissemination of news. It is, in practical effect,

> simply an advertising 'give-away,' even though a modicum of local news and other material found in newspapers is included.

Id. (quoting *Green*, 90 So.2d at 297).

We also note that the Florida Court of Appeals revisited *Green* when it considered whether another advertising paper, nearly identical to *The Reader*, was a "newspaper" and, therefore, exempt from sales tax. *Dept. of Revenue v. Skop*, 383 So.2d 678, 680 (Fla. Ct. App. 1980). In finding that it was not a "newspaper," the court stated:

> Of the samples reviewed by this court, approximately 85% of the publication was devoted to advertising. Of the remaining approximately 15%, some of it was devoted to local news and some to recipes, horoscopes and the like. We must therefore hold, as did the Supreme Court in *Green*, that the Metro News unquestionably has for its principal purpose the advertising of business concerns in the area and not the dissemination of news. Although perhaps not called a 'shopper,' it is in practical effect simply an advertising giveaway.

Skop, 383 So.2d at 680.

Similarly, in *Simpson v. City of Highwood*, 23 N.E.2d 62, 65 (Ill. 1939), the Illinois Supreme Court held that a publication that had some general news content was not a "newspaper" within the meaning of a statute relating to publication of legal notices because it was "more of the nature of a handbill or circular for the benefit of its advertisers than a newspaper." *See* Op. Tenn. Att'y Gen. 07-146 (Oct. 19, 2007). Further, the Arizona Court of Appeals has held that a publication that has as its fundamental purpose the distribution of advertisements to the public does not constitute a "newspaper" as that term is commonly understood. *Arizona Dept. of Revenue v. Great Western Publishing Co.*, 3 P.3d 992, 995 (Ariz. Ct. App. 1999).

Consistent with these cases, this Office has previously opined that a community advertising paper lacking any meaningful news content is not a newspaper of general circulation for the purpose of publishing statutorily required public notices. Op. Tenn. Att'y Gen. 82-470 (October 12, 1982). Similarly, we have opined that a shopper that provided coverage of some local events, but was primarily devoted to advertisements, was not a newspaper of general circulation for the purposes of publishing official or legal notices. Op Tenn. Att'y Gen. 93-19 (March 11, 1993).

These cases construe "newspaper" and/ or "newspaper of general circulation" to apply to a paper to which the general public resorts in order to be informed of the news of the day, thus making it more probable that legal notices will be brought to the attention of the general public. *See* 66 C.J.S. Newspapers § 4 (2007). Even though an advertising paper may have extensive circulation in certain local communities, it is not the type of publication that the general public would customarily look to for news of current events. Op. Tenn. Att'y Gen. 07-146 (Oct. 19, 2007). And inclusion of a few items of local interest does not change the fundamental character of the publication. *Id*. Further, the 2008 U.S. Census Bureau estimated in 2008 that Rutherford

County had a population of 249,270. *See* http://quickfacts.census.gov/qfd/states /47/47149.html. *The Reader* distributes 12,500 copies every week in Rutherford County and surrounding areas, only enough for roughly five percent (5%) of Rutherford County's growing population. Consequently, it is not probable that legal notices will be sufficiently available to the general public through the distribution of *The Reader*. Finally, over half of *The Reader* continues to consist of paid and classified advertisements, and, therefore, in our opinion, *The Reader* does not qualify as a "newspaper" and/ or a "newspaper of general circulation" for the purpose of publishing legal notices.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

STEVEN A. HART
Special Counsel

Requested by:

The Honorable Bill Ketron
State Senator
13 Legislative Plaza
Nashville, Tennessee 37243-0213