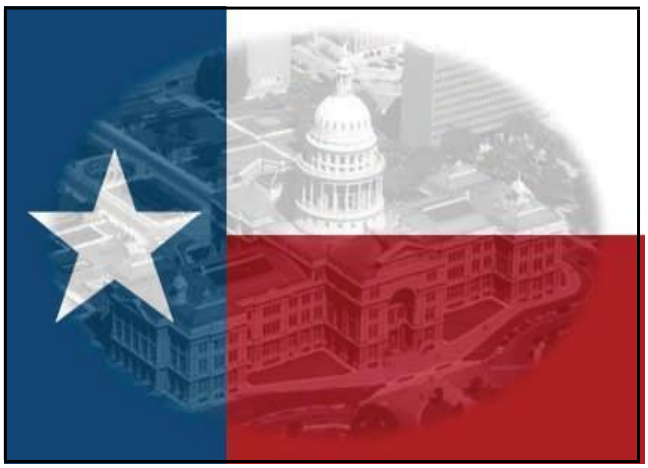
TEXAS ETHICS COMMISSION

BIENNIAL REPORT 2023 – 2024



December 2024

TEXAS ETHICS COMMISSION
BIENNIAL REPORT
2023-2024

A REPORT TO THE OFFICE OF THE GOVERNOR AND THE 89TH LEGISLATURE

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EXECUTIVE DIRECTOR

DECEMBER 2024

TEXAS ETHICS COMMISSION

Table of Contents

TEXAS ETHICS COMMISSION
BIENNIAL REPORT
FY 2023 – 2024

I. ADVISORY OPINIONS.

The Texas Ethics Commission issued 14 advisory opinions in FY 2023 and 18 advisory opinions in FY 2024. The Ethics Advisory Opinion ("EAO") number, issue(s), and summary are listed below. The full opinions are found at **Appendix A**.

EAO #	Issue(s)	Summary
576	Whether candidates for party precinct chair are subject to the campaign treasurer and campaign finance filing requirements of Title 15 of the Texas Election Code.	No. Title 15 of the Texas Election Code requires candidates for public office and certain candidates for state and county party offices to designate campaign treasurers and file campaign finance reports. It does not require candidates for precinct offices of political parties to designate campaign treasurers or file campaign finance reports.
577	Whether an employee of a university system participates in a procurement or contract negotiation for the purposes of Section 572.069 of the Government Code when the employee informally recommends an attorney to provide outside legal services to the university system decision makers, but has no involvement in the formal selection process or negotiating the terms of the contract.	An employee of a university system does not "participate" in a procurement or contract negotiation by informally recommending a lawyer for outside legal services and would not be prohibited from accepting employment from the lawyer's law firm before the second anniversary of the date the employee's outside counsel contract was signed.
578	Whether a government employee's direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation under Section 572.069 of the Government Code. Whether Section 572.069 of the Government Code prohibits a former employee of a state agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations	Direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation. Affiliates are different persons for purposes of Chapter 572 of the Government Code. Therefore, Section 572.069 of the Government Code does not prohibit a former employee of a state agency from accepting employment from an affiliate of a person that was involved in procurements or contract

EAO #	Issue(s)	Summary
	in which the employee participated during his state service.	negotiations in which the employee participated during his state service
579	Whether any of the State's revolving door provisions prohibit a former state employee from accepting certain employment.	The requestor may accept the position. First, he is not a member of his agency's governing body nor is he the agency's executive head, so Section 572.054(a) does not apply. Second, as long as the position does not require him to work on any "particular matter" in which he participated as a state employee, Section 572.054(b) does not prohibit him from accepting the position. Finally, because he did not participate in any procurement or contract negotiation involving the potential employer during his state service, Section 572.069 does not prohibit him from accepting the position.
580	Whether a corporation subject to section 253.094 of the Texas Election Code may provide pro bono legal services to candidates or political committees in Texas for the purpose of challenging in court the interpretation or constitutionality of a Texas law or regulation subject to the jurisdiction of the Texas Ethics Commission.	No. Section 253.094 of the Texas Election Code prohibits corporations from making political contributions to candidates and political committees. Legal services provided without charge to candidates or political committees are in-kind contributions. When those services are given with the intent that they be used in connection with a campaign, they are in-kind campaign contributions. The described legal services would be used in connection with a campaign because the requestor's standing to pursue such a challenge would depend on its client's status as a candidate or political committee subject to the laws administered and enforced by the Commission.
581	Whether a political committee may accept political contributions through a web portal shared with an incorporated association that established and administers the political committee.	Yes. A political committee may accept political contributions that have been processed by a web portal shared with an incorporated association, provided the general-purpose committee complies with applicable recordkeeping and reporting provisions.

EAO #	Issue(s)	Summary
582	Whether a written communication, created by a political subdivision and related to a measure, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising.	No. Assuming the factual statements in the communication are true, the communication provided by the requestor is entirely informational and does not include any advocacy.
583	Whether, under the Judicial Campaign Fairness Act (JCFA), a general-purpose committee may make a maximum "campaign contribution" (up to $25,000) to a state-wide judicial candidate and a maximum "officeholder contribution" (up to an additional $25,000) before a general election.	No. The JCFA prescribes a $25,000 per-election limit on "political contributions" from general- purpose committees to a judicial candidate or officeholder regardless of whether classified as a "campaign contribution" or "officeholder" contribution.
584	Whether expenditures made by a candidate to encourage donations to a local food bank are political expenditures when publicized by the candidate on a social media page that is also used for his campaign.	Yes. Expenditures incurred by a candidate in connection with charitable fundraising are political expenditures if the candidate promotes the activity on his campaign's social media page.
585	Whether Section 253.007 of the Election Code prohibits a former member of the Legislature from engaging in activity that would require registration under Chapter 305 if the former member contributed money from his political funds to a general-purpose political committee more than two years before being required to register. Whether certain political contributions or expenditures made under Section 253.006(3) of the Election Code constitute a violation of Section 253.004 of the Election Code.	The requestor may make political contributions and direct campaign expenditures from a general-purpose committee he controls without violating Sections 253.004, 253.006 and 253.007, provided he waits two years from the last contribution accepted by the political committee accepted from his candidate or officeholder account.
586	Whether the revolving door law prohibition in section 572.069 of the Government Code would prohibit a former employee of a state agency from accepting certain employment.	A former state employee participates on behalf of a state agency in a procurement or contract negotiation by drafting contract terms and having direct communications with a company regarding a potential contract.

EAO #	Issue(s)	Summary
		A former state employee participates on behalf of a state agency in a procurement or contract negotiation with a subcontractor if the subcontractor is identified as providing work in the contract.
587	A member of the Texas Legislature retires at the end of a legislative session. Before the next legislative session, the former legislator: (1) uses title 15 campaign contributions to make a political contribution to legislative candidates; (2) subsequently uses personal funds to reimburse the campaign for the same amount of the contributions; and (3) registers to lobby. May the former legislator lobby members of the Legislature during the two-year period after making the political contribution? May the former legislator cure a violation of Section 253.007 or reduce the two-year waiting period imposed by Section 253.007 by reimbursing his or her campaign with personal funds in an amount that equals the political contributions made? Pursuant to Section 571.173, Government Code, the commission may impose a civil penalty of not more than $5,000 or triple the amount at issue for a violation of law administered and enforced by the commission. What does "the amount at issue" mean for purposes of imposing a penalty for a violation of Section 253.007, Election Code? Does it mean: (1) the amount of political contributions at issue, (2) the maximum amount of income indicated on the person's lobby registration statement, or (3) something else?	Section 253.007, Election Code prohibits a person from engaging in activities that require the person to register under Chapter 305, Government Code during the two-year period after the date the person knowingly makes or authorizes a political contribution to another candidate, officeholder, or political committee from political contributions accepted by the person as a candidate or officeholder. The plain language of Section 253.007 does not permit a person to cure a past violation or reduce the two-year waiting period by reimbursing the person's campaign with personal funds. The "amount at issue" for purposes of Section 253.007 is reserved by the Commission.
588	Whether a member of the legislature may recover personal funds used to pay	Yes. A member of the legislature may take reimbursement from a state-

EAO #	Issue(s)	Summary
	for both a vehicle and gas from a state-issued mileage reimbursement received for travel using a vehicle paid for with a combination of personal funds and political contributions.	reimbursement for fuel purchased with personal funds. If the vehicle is paid for with a combination of personal funds and political contributions, the member may also prorate the remaining amount of the state-reimbursement for wear on the vehicle between his personal account and political account.
589	Whether a judicial candidate or officeholder may accept a political contribution after the normal fundraising period ends if the contribution is made and accepted with the intent that it be used for legal fees and costs arising from an election contest.	Yes. A contribution made and accepted with the intent that it be used to defray expenses incurred in connection with a past election may be accepted after the normal fundraising period ends. Legal fees and costs arising from an election contest are expenses incurred in connection with a contested election.
590	Whether receiving a fee contingent on the sale of services to an independent school district is prohibited by Section 305.022 of the Government Code.	No. The Section 305.022 contingency fee prohibition does not apply to actions of an independent school district
591	Whether a retired district court judge may use political contributions to pay for his and his spouse's headstones or monuments at the State Cemetery of Texas.	A retired district court judge may use political contributions to purchase a headstone or monument for himself and his spouse at the State Cemetery of Texas because the headstones or monuments are related to the requestor's activities as an officeholder and the headstone or monument will be the property of the state.
592	Whether Section 253.007 of the Election Code prohibits a former legislator from engaging in activity requiring lobby registration under various scenarios.	Section 253.007 applies to contributions to all candidates for and holders of non-federal Texas elective offices—not just legislative or state executive branch offices. Once a triggering contribution is made, it cannot be cured by a refund or reimbursement. Section 253.007 also applies to a political contribution made to a political committee regardless of how the political committee ultimately disposes of the contribution.
593	Whether a written communication, created by a political subdivision and related to a measure, constitutes political advertising for purposes of the	The specific communication considered in this opinion is political advertising for purposes of Section 255.003 of the

EAO #	Issue(s)	Summary
	Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a).	Election Code because it advocates for the passage of a measure.
594	Whether a written communication, created by a political subdivision and related to the political subdivision's special election for a sales tax ballot measure, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a).	The specific communication considered in this opinion is not political advertising for purposes of Section 255.003 of the Election Code because it is entirely factual and does not include any advocacy.
595	Whether the Section 572.069 revolving door prohibition prevents a state university employee, who operates a business outside of his university employment, from bidding on behalf of his business on a procurement issued by the university.	Section 572.069 of the Government Code applies only to a "former state officer or employee of a state agency." The requestor is a current employee of the university and therefore is not subject to 572.069. However, the requestor should take care not to violate the standards of conduct for state employees listed in Section 572.051 of the Government Code or Chapter 39 of the Penal Code.
596	Whether expenditures made by a former legislator for general administration of his own campaign account are "direct campaign expenditures" that trigger the Section 253.007 two- year waiting period before engaging in activity that would require registration as a lobbyist.	No. Expenditures made by a candidate or officeholder that benefit only his or her own campaign are not "direct campaign expenditures" and therefore do not trigger the Section 253.007 lobby waiting period.
597	Whether certain communications with a member of the legislative or executive branch to engender goodwill are communications to "influence legislative or administrative action."	A "communication to influence legislative or administrative action" includes any communication to establish (*i.e.* bring about, effect) goodwill that is made for the purpose of later communicating with the member to influence legislation or administrative action. This is true regardless of whether prior feelings of goodwill exist.
598	Whether the Chapter 572 of the Government Code revolving door provisions apply to a former State Board	A former State Board of Education (SBOE) member must wait two years before appearing before or seeking to

EAO #	Issue(s)	Summary
	of Education member's appearing before the Texas Education Agency, the Texas Commissioner of Education, or the Texas Permanent School Fund Corporation.	influence the Permanent School Fund Corporation on behalf of another because the Corporation board contains SBOE members. Tex. Gov't Code § 572.054(a). A former SBOE member must wait two years after ceasing service as an officer before appearing before or seeking to influence the Commissioner of Education on behalf of another because the Commissioner is an officer of the SBOE for purposes of Section 572.054(a). The requestor would be subject to the Section 572.054(a) restriction with respect to Texas Education Agency employees if they were also employees of the SBOE under the common law employee-employer test. Section 572.054(b) would prohibit a former SBOE member from ever receiving compensation for working on contacts in which they participated as a SBOE member even if the SBOE subsequently amended these contracts to make the Permanent School Fund Corporation a party rather than the SBOE
599	Whether a former state employee may provide consulting services to company with which he participated in a procurement during his state service without violating Section 572.069 of the Government Code.	The requestor may provide consulting services to a company with which he participated in a procurement during his state service without violating Section 572.069 provided he does not become an employee of the company.
600	Whether Chapter 572 of the Government Code prohibits a former employee of a regulatory agency from accepting certain employment.	The requestor is not a member of the governing body or the executive head of a regulatory agency, so Section 572.054(a) does not apply. The requestor is not proposing to participate in any particular matter in which he

EAO #	Issue(s)	Summary
		participated as a state employee, so Section 572.054(b) would not prevent the requestor from engaging in his proposed employment. Merely reviewing a contract for conformity with certain form requirements, such as naming the correct party, does not constitute participating in the contract negotiation for purposes of Section 572.069. However, if the requestor gave approval, advice, or recommendation on whether to enter into a contract, or a substantive term of the contract such as how many employees to station at a given facility, he participated in that contract negotiation. If he participated in the contract negotiation, he would have to wait two years from when the contract was signed before accepting employment from any other person involved in that contract negotiation under Section 572.069.
601	How various provisions of title 15 of the Texas Election Code apply to a Texas "purpose trust" formed under Section 112.121, Texas Property Code	A trust is not a separate legal entity and therefore not a distinct "person" for the purposes of determining political committee status and the application of campaign finance rules generally. Therefore, the general campaign finance restrictions and reporting rules apply to the people comprising the trust, i.e., the people funding or making contribution or expenditure acceptance decisions on behalf of the trust. The people providing money to a trust and deciding how money will be spent on behalf of a trust may be treated as a Texas political committee if, just like any other group of people acting in concert, they meet the generally applicable

EAO #	Issue(s)	Summary
		criteria for forming a political committee. A purpose trust comprised entirely of funds from an individual is not subject to the corporate contribution ban under Section 253.093 of the Election Code and may make political contributions to candidates, officeholders, and political committees. A purpose trust that is not a political committee will be subject to the corporate contribution ban if the trust organizes itself as a corporation—even it incorporates for liability purposes only.
602	Whether employees of a state agency may provide a list of preferred items to non-profit entities that would be used in carrying out the agency's mission, if the gifts are not provided to employees for their personal use or enjoyment.	Under the facts presented, the solicitations would be for gifts to the agency rather than individual employees. Therefore, the Penal Code gift restrictions would not apply. Whether an agency may solicit or accept gifts is governed by other law specifically applicable to that agency, over which the Ethics Commission has no interpretive authority.
603	Where must candidates for an appraisal district's board of directors file campaign treasurer appointments and campaign finance reports?	A candidate for an appraisal district's board of directors must file campaign treasurer appointments and campaign finance reports with the clerk or secretary of the appraisal district. If the appraisal district does not have a clerk or secretary, the reports must be filed with the appraisal district's presiding officer.
604	Whether the purchase of a storage trailer is a normal overhead, administrative, or operating cost of a political party such that contributions from a corporation may be accepted and used for its purchase.	The political party may use contributions from corporations to purchase a storage trailer because the trailer is a normal overhead cost.

EAO #	Issue(s)	Summary
605	Whether a state university may provide prizes to randomly selected attendees of sporting events under Chapter 36 of the Penal Code when the recipient of the prize may be a university employee.	Under the facts presented, providing prizes to attendees of sporting events would not be prohibited by Chapter 36 of the Penal Code even if a university employee receives a prize after being selected at random.
606	Whether a Texas Limited Liability Company that is a wholly-owned subsidiary of a Master Limited Partnership that is traded on the New York Stock Exchange is prohibited by Chapter 253 of the Election Code from making certain political contributions.	A Texas Limited Liability Company that is owned by a partnership whose shares are publicly-traded on an exchange is subject to the Chapter 253 corporate contribution prohibition if any share of the partnership is owned by a corporation.
607	Whether an officer or employee of a political subdivision who leases a residence to an employee may allow the employee to place a sign endorsing a candidate or a measure in the yard of the leased residence.	Under the facts presented in this opinion, an officer or employee of a political subdivision does not violate Section 255.003(a) by allowing an employee-tenant to place political advertising outside of a residence owned by the political subdivision.
608	Whether a PFS filer who owns a law firm that holds settlement funds on behalf of a client must report the settlement funds on the filer's personal financial statement filed under Chapter 572 of the Government Code.	Settlement funds held by law firm in trust for client are not the property of the law firm and do not have to be disclosed on a PFS.

II. COMMISSION ACTIVITY SUMMARY

A. Sworn Complaints

During FY 2023 and FY2024, 965 (390 in FY2023 and 575 in FY2024) sworn complaints were filed with the Texas Ethics Commission. The following chart shows the number of sworn complaints processed according to the type of resolution as described in Section 571.073(2) (A)-(G), Government Code.

Type of Resolution	FY 2023	FY 2024
Number of sworn complaints dismissed for noncompliance with statutory form requirements	92	63
Number of sworn complaints dismissed for lack of jurisdiction	110	246
Number of sworn complaints dismissed after a finding of no credible evidence of a violation	30	28
Number of sworn complaints dismissed after a finding of a lack of sufficient evidence to determine whether a violation within the jurisdiction of the Commission has occurred	13	0
Number of sworn complaints dismissed with no finding	0	4
Number of sworn complaints dismissed because report was corrected before jurisdiction was accepted[1]	8	2
Number of sworn complaints resolved by the Commission through an agreed order[2]	127	182
Number of sworn complaints resolved by the Commission through a Final Order	8	5

[1] This includes complaints that are dismissed by operation of law under Section 571.1223 of the Government Code, which requires the Commission to dismiss a complaint to the extent it alleges a statement, registration, or report violates a law or rule if: (1) the respondent has filed a corrected or amended statement, registration, or report before the Commission accepts jurisdiction over the complaint; and (2) the corrected or amended statement, registration, or report remedies the alleged violation.

[2] For purposes of these calculations, an agreed order includes any resolution that requires a respondent's signature.

For those sworn complaints in which the Texas Ethics Commission issued an order finding a violation,[3] the following chart shows the amount of the resulting penalty.

Penalty Amount	Sworn Complaint Orders FY 2023	Sworn Complaint Orders FY 2024
$100.00		1
$150.00	1	
$200.00		1
$250.00	1	1
$300.00	2	1
$400.00	4	2
$500.00	13	7
$600.00	2	
$750.00	2	1
$900.00		1
$1,000.00	10	1
$1,200.00		1
$1,250.00	3	
$1,450.00	1	
$1,500.00		1
$2,500.00	2	4
$3,000.00		1
$3,500.00		1
$5,000.00		2
$10,000.00		2
$12,400.00	1	

[3] For purposes of these calculations, "an order finding a violation" includes an agreed resolution requiring a respondent's signature and a final order that does not require a respondent's signature. This does not include complaints resolved with an Assurance of Voluntary Compliance (AVOC), because such resolutions do not constitute a finding of a violation. For cases in which multiple complaints against the same respondent are resolved through a single order, those orders and penalties are only counted once.

B. Civil Penalties

TEXAS ETHICS COMMISSION

SUMMARY OF FINES FOR LATE FILINGS ASSESSED IN FISCAL YEAR **2023***

CIVIL PENALTIES		HB89 WAIVERS		FINES WAIVED		FINES DUE		PAID IN FULL		PAID - PARTIAL		NOT PAID	
#	$	#	$	#	$	#	$ *	#	$	#	$	#	$
205	$104,500.00	0	$0.00	83	$39,550.00	138	$64,950.00	58	$24,000.00	2	$429.43	80	$40,520.57
307	$369,200.00	0	$0.00	61	$70,500.00	260	$298,700.00	41	$21,900.00	1	$150.00	219	$276,650.00
41	$48,500.00	0	$0.00	16	$23,050.00	29	$25,450.00	6	$1,850.00	1	$100.00	23	$23,500.00
100	$167,900.00	0	$0.00	32	$35,700.00	77	$132,200.00	25	$10,750.00	0	$0.00	52	$121,450.00
2	$1,000.00	0	$0.00	0	$0.00	2	$1,000.00	0	$0.00	0	$0.00	2	$1,000.00
343	$251,100.00	111	$67,600.00	46	$36,600.00	197	$146,900.00	50	$22,800.00	0	$0.00	147	$124,100.00
9	$4,500.00	0	$0.00	5	$2,300.00	6	$2,200.00	5	$1,700.00	0	$0.00	1	$500.00
178	$125,000.00	101	$86,500.00	14	$6,200.00	69	$32,300.00	30	$12,800.00	0	$0.00	39	$19,500.00
27	$15,500.00	0	$0.00	8	$3,850.00	20	$11,650.00	3	$1,150.00	0	$0.00	17	$10,500.00
10	$14,500.00	0	$0.00	6	$12,050.00	6	$2,450.00	5	$1,950.00	0	$0.00	1	$500.00
9	$4,500.00	0	$0.00	3	$1,500.00	6	$3,000.00	2	$1,000.00	0	$0.00	4	$2,000.00
0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
36	$18,000.00	5	$2,500.00	14	$6,700.00	20	$8,800.00	15	$6,300.00	0	$0.00	5	$2,500.00
2	$1,000.00	0	$0.00	1	$500.00	1	$500.00	1	$500.00	0	$0.00	0	$0.00
35	$129,200.00	0	$0.00	10	$7,300.00	28	$121,900.00	7	$12,600.00	1	$73.15	21	$109,226.85
12	$32,900.00	0	$0.00	9	$24,200.00	8	$8,700.00	7	$8,000.00	0	$0.00	1	$700.00
12	$24,000.00	0	$0.00	6	$8,950.00	10	$15,050.00	5	$1,550.00	1	$570.00	5	$12,930.00
0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
91	$220,800.00	3	$12,300.00	39	$103,244.40	68	$105,255.60	39	$40,125.60	0	$0.00	29	$65,130.00
3	$4,800.00	0	$0.00	2	$2,600.00	2	$2,200.00	1	$400.00	0	$0.00	1	$1,800.00
0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
16	$8,000.00	0	$0.00	8	$3,500.00	10	$4,500.00	4	$1,500.00	0	$0.00	6	$3,000.00
0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
1,438	$1,544,900.00	220	$168,900.00	363	$388,294.40	957	$987,705.60	304	$170,875.60	6	$1,322.58	653	$815,507.42

*as of 11/19/2024

TEXAS ETHICS COMMISSION

SUMMARY OF FINES FOR LATE FILINGS ASSESSED IN FISCAL YEAR **2024***

REPORT	CIVIL PENALTIES		HB89 WAIVERS		FINES WAIVED		FINES DUE		PAID IN FULL		PAID - PARTIAL		NOT PAID	
TYPE	#	$	#	$	#	$	#	$	#	$	#	$	#	$
Personal Financial Statements	300	$160,000.00	0	$0.00	103	$48,000.00	226	$112,000.00	54	$20,250.00	1	$150.00	172	$91,600.00
Semiannual Reports														
Candidates/Officeholders	241	$423,900.00	0	$0.00	58	$33,570.00	204	$390,330.00	29	$9,770.00	0	$0.00	175	$380,560.00
Specific-purpose Committees	57	$88,000.00	0	$0.00	7	$13,550.00	52	$74,450.00	5	$1,850.00	0	$0.00	47	$72,600.00
Judicial Candidates/Officeholders	106	$96,100.00	0	$0.00	39	$21,800.00	76	$74,300.00	19	$6,850.00	0	$0.00	57	$67,450.00
Judicial Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
General-purpose Committees	383	$266,600.00	131	$82,700.00	41	$24,180.00	224	$159,720.00	30	$11,220.00	2	$600.00	194	$147,900.00
County Executive Committees	11	$5,500.00	0	$0.00	2	$900.00	10	$4,600.00	0	$0.00	0	$0.00	4	$4,600.00
Monthly Reports														
General-purpose Committees	138	$69,000.00	88	$44,000.00	7	$3,400.00	44	$21,600.00	19	$9,100.00	0	$0.00	25	$12,500.00
30th Day Before Election Reports														
Candidates/Officeholders	36	$18,000.00	0	$0.00	11	$5,050.00	28	$12,950.00	7	$2,450.00	1	$100.00	21	$10,400.00
Specific-purpose Committees	13	$6,800.00	0	$0.00	9	$4,500.00	4	$2,300.00	2	$1,000.00	0	$0.00	2	$1,300.00
Judicial Candidates/Officeholders	7	$3,500.00	0	$0.00	3	$1,300.00	6	$2,200.00	2	$600.00	0	$0.00	4	$1,600.00
Judicial Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
General-purpose Committees	34	$17,000.00	2	$1,000.00	9	$3,850.00	28	$12,150.00	11	$4,450.00	1	$405.00	17	$7,295.00
County Executive Committees	1	$500.00	0	$0.00	1	$500.00	1	$0.00	0	$0.00	0	$0.00	1	$0.00
8th Day Before Election Reports														
Candidates/Officeholders	51	$187,700.00	0	$0.00	16	$21,920.00	47	$165,780.00	15	$4,980.00	3	$1,950.00	32	$158,850.00
Specific-purpose Committees	23	$36,300.00	0	$0.00	13	$16,220.00	16	$20,080.00	7	$3,050.00	0	$0.00	9	$17,030.00
Judicial Candidates/Officeholders	19	$26,300.00	0	$0.00	9	$6,970.00	17	$19,330.00	7	$2,770.00	0	$0.00	10	$16,560.00
Judicial Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
General-purpose Committees	65	$163,300.00	14	$14,600.00	28	$44,530.00	47	$104,170.00	23	$13,370.00	2	$905.00	24	$89,895.00
County Executive Committees	1	$700.00	0	$0.00	1	$600.00	1	$100.00	1	$100.00	0	$0.00	0	$0.00
Daily Pre-election Reports														
Candidates/Officeholders	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
GPAC & SPAC Contributions Reports	2	$1,000.00	0	$0.00	0	$0.00	2	$1,000.00	1	$500.00	0	$0.00	1	$500.00
GPAC Expenditures Reports	1	$500.00	0	$0.00	0	$0.00	1	$500.00	1	$500.00	0	$0.00	0	$0.00
Special Session Reports														
Candidates/Officeholders	21	$10,500.00	0	$0.00	6	$2,650.00	18	$7,850.00	8	$2,850.00	0	$0.00	10	$5,000.00
Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
Totals	1,510	$1,581,200.00	235	$142,300.00	363	$253,490.00	1,052	$1,185,410.00	241	$95,660.00	10	$4,110.00	805	$1,085,640.00

*as of 11/19/2024

III. RECOMMENDATIONS FOR STATUTORY CHANGE.

Each biennium the TEC is required to make recommendations to the Legislature for "any necessary statutory changes." Tex. Gov't Code § 571.073(3). This year the TEC has already identified recommendations for statutory change in its Legislative Appropriations Request, Sunset Self Evaluation Report, and its response to the report issued by the Sunset Advisory Commission's staff. The TEC refers the Legislature to those documents.

In addition, the TEC makes the following recommendations for statutory change not covered in the above-listed materials.

1. Decouple detailed lobby reporting from the legislative per diem.

Under current law, any increase to the legislative per diem means a lobbyist can spend more money on food, drink, entertainment, lodging, or transportation without disclosing the name of the official who benefitted from the expenditure. This is because the detailed reporting threshold for lobby expenditures is always 60 percent of the amount of the legislative per diem. Gov't Code § 305.0061. If the Legislature wants to authorize the TEC to increase the per diem without reducing lobby disclosures, it must amend Section 305.0061 of the Government Code.

The Texas Constitution requires the TEC to set the per diem to which members of the legislature and the lieutenant governor are entitled. Tex. Const. art. III, §§24(a), 24a(e). The TEC must ensure the per diem reflects "reasonable estimates of costs" associated with working away from home in Austin during the legislative session. *Id.* The per diem rate may be raised or lowered biennially, but may exceed not an amount pegged to the per diem rate for federal employees. *Id.*

Instead of tying a detailed lobby reporting threshold to the per diem, the Legislature may set the threshold in statute or authorize the TEC to set the threshold by rule, independent of the per diem.

2. Clarify direct campaign expenditure reporting for non-political committees.

There is currently a gap in disclosure requirements for express advocacy expenditures made by non-PAC groups.

Current law requires political committees (defined as two or more people with a principal purpose of accepting political contributions or making political expenditures) to disclose their political expenditures. Similarly, current law also requires a single person acting alone who makes expenditures on express political advocacy (*e.g.*, a billboard expressly advocating the election of a candidate without the prior consent or approval of the candidate) to disclose the amount of those expenditures. Tex. Elec. Code § 254.261. This is called "direct campaign expenditure" reporting, or DCE reporting.

However, the DCE reporting obligation is limited to "a person not acting in concert with *another person*". *Id.* § 254.261(a). That means if there are multiple people working together to make the political expenditure, but they do not qualify as a political committee (*i.e.*, because they do not have the requisite "principal purpose"), then the group arguably has no reporting obligation.

Because the expenditure is made independently from any candidate or political committee, it is also not reported by the benefitting candidate or committee. This leaves a gap in reporting where the political expenditure is completely unreported.

If the DCE reporting statute tracked the definition of a DCE it would require reporting by "a person not acting in concert with a candidate, officeholder, or political committee" and close this gap in reporting.

Proposed language:

SUBCHAPTER J. REPORTING BY CERTAIN PERSONS MAKING DIRECT CAMPAIGN EXPENDITURES

Sec. 254.261. DIRECT CAMPAIGN EXPENDITURE EXCEEDING $100.

(a) A person not acting in concert with [~~another person~~] a candidate, officeholder, or political committee who makes one or more direct campaign expenditures in an election [~~from the person's own property~~] shall comply with this chapter as if the person were the campaign treasurer of a general-purpose committee that does not file monthly reports under Section 254.155.

(b) A person is not required to file a report under this section if the person is required to disclose the expenditure in another report required under this title within the time applicable under this section for reporting the expenditure.

(c) This section does not require a general-purpose committee that files under the monthly reporting schedule to file reports under Section 254.154.

(d) A person is not required to file a campaign treasurer appointment for making expenditures for which reporting is required under this section, unless the person is otherwise required to file a campaign treasurer appointment under this title.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 576

September 29, 2022

ISSUE

Whether candidates for party precinct chair are subject to the campaign treasurer and campaign finance filing requirements of Title 15 of the Texas Election Code. **(AOR-667.)**

SUMMARY

No. Title 15 of the Texas Election Code requires candidates for public office and certain candidates for state and county party offices to designate campaign treasurers and file campaign finance reports. It does not require candidates for precinct offices of political parties to designate campaign treasurers or file campaign finance reports.

FACTS

The requestor is a precinct officer of a political party. He asks if party precinct officers or candidates for party precinct office are required to file campaign finance reports under Title 15.

ANALYSIS

State law requires "candidates" for nomination or election to "public office" to appoint a campaign treasurer and report campaign contributions and expenditures. Tex. Elec. Code §§ 252.001, 254.031.

The Election Code does not define "public office." But from context, it is clear that party offices are *not* public offices. For example, chapter 257—which addresses political parties—states that candidates for *state* chair and certain candidates for *county* chair of a political party are "subject to the requirements of this title that apply to a candidate for public office." Tex. Elec. Code § 257.005. If the positions of state or county chair were public offices, then this provision would be unnecessary. And, if the Commission were to require all candidates for party office to file campaign finance reports, it would undermine the Legislature's clear intent to apply those requirements to only certain party offices. Furthermore, while not within the interpretive jurisdiction of the Texas Ethics Commission, section 172.089 clearly distinguishes "party offices" from "public offices," stating that, "the party offices of county chair and precinct chair

shall be listed on the primary election ballot *after the public offices*." Tex. Elec. Code § 172.089 (emphasis added).

The requestor cites several statutes that he believes indicate that precinct party offices are "public officers." First, the requestor cites subsection 251.001(16) of the Election Code, which defines "political advertising" as "a communication supporting or opposing a candidate for nomination or election to a public office *or office of a political party,* a political party, a public officer, or a measure..." Tex. Elec. Code § 251.001(16) (emphasis added). But while this definition indicates that Title 15's regulations on *political advertising* apply to candidates for party offices, the question posed by this requestor is whether party precinct chairs are subject to Title 15's *reporting requirements*. As explained in the preceding paragraph, these requirements are expressly limited to certain enumerated party offices, not including precinct offices.

Next, the requestor references section 252.005 of the Election Code, which establishes that "[a]n individual must file a campaign treasurer appointment for the individual's own candidacy with […] (2) the county clerk, if the appointment is made for candidacy for a county office, *a precinct office*, or a district office other than one included in Subdivision (1)." Tex. Elec. Code § 252.005 (emphasis added). However, this subsection's reference to "precinct office" merely indicates that candidates for a precinct's *public* office—such as a constable—are subject to Title 15's reporting requirements.

Finally, the requestor raises subsection 32.054(a) in Title 3 of the Election Code, which addresses Election Officers and Observers. This subsection establishes that a person is ineligible to serve as election judge if they are related to "an opposed candidate for a public office *or a party office* in any precinct in which the office appears on the ballot." Tex. Elec. Code 32.054(a) (emphasis added). Again, this law clearly distinguishes between public and party offices, further buttressing our conclusion. If party offices were public offices, it would have been unnecessary for the Legislature to include the phrase "or a party office." In any event, a person's eligibility to serve as an election judge is irrelevant to the question posed by this requestor.

For all the foregoing reasons, we conclude that Title 15 does not require candidates for party precinct chair to appoint a campaign treasurer or report their campaign contributions or expenditures.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 577

September 29, 2022

ISSUE

Whether an employee of a university system participates in a procurement or contract negotiation for the purposes of Section 572.069 of the Government Code when the employee informally recommends an attorney to provide outside legal services to the university system decision makers, but has no involvement in the formal selection process or negotiating the terms of the contract. **(AOR 665.)**

SUMMARY

An employee of a university system does not "participate" in a procurement or contract negotiation by informally recommending a lawyer for outside legal services and would not be prohibited from accepting employment from the lawyer's law firm before the second anniversary of the date the employee's outside counsel contract was signed.

FACTS

The requestor is employed by the University of Texas Systems (UTS). She asks whether she may accept employment with a law firm that provides outside legal counsel to the same division of the UT Systems where she is currently employed.

The requestor, knowing that UTS needed outside counsel for real estate work, sent an email to an assistant general counsel informing him that an attorney they had both previously worked with at another public university was now in private practice. The requestor told the assistant general counsel that the hourly rates charged by the former colleague's firm were in line with UTS's parameters and the former colleague was "smart."

The requestor set up a Zoom call to reintroduce the former colleague to the assistant general counsel. Following that call, the former colleague submitted an application and was ultimately approved as outside counsel of UTS.

The requestor was not involved in the contract solicitation, negotiating the terms of the contract, or approving the application.

The outside counsel contract between UTS and the former colleague's law firm was signed with a commencement date of October 1, 2021.

ANALYSIS

Section 572.069 prohibits former state officers and employees who participated on behalf of a state agency in a procurement or contract negotiation with a person from accepting employment from that person before the second anniversary of the date the contract is signed or the procurement is terminated or withdrawn. Tex. Gov't Code § 572.069.

The question here is whether the requestor "participated" in a procurement or negotiation for outside legal counsel by speaking positively of an attorney's work and setting up an informal reintroduction when the attorney's law firm had not yet applied to provide outside counsel services.

Section 572.069 does not define the term "participated." However, the term is defined in a companion revolving door law, as "to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action." Tex. Gov't Code § 572.054(h)(1). The Commission applies the definition of "participated" in Section 572.054 when construing Section 572.069. Tex. Ethics Comm'n Op. No. 568 (*citing* Tex. Gov't Code § 311.011(b) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.")).

We have held that a requestor participated in a procurement on behalf of a state agency by scoring and evaluating bid proposals for a contract to provide information technology services, even though the requestor did not participate any further in the request for proposal or participate in negotiation with vendors or the vendor selection. Tex. Ethics Comm'n Op. No. 545 (2017). We have also held that a high-ranking employee of a state agency did not participate in a procurement when he was informed of the status of the procurement but had no other involvement.

In our opinion, the former state employee did not participate in a procurement on behalf of a state agency merely by introducing a prospective applicant to another employee of UTS. Here, the requestor had no role in setting the contract requirements, evaluating the applicant, negotiation the terms, or ultimately selecting the applicant. The requestor had no authority to make a selection or direct the agency decision makers in their selection of outside counsel. The requestor also does not serve in a supervisory or management role over any of the employees involved in the selection process. The requestor only stated a former colleague was "smart" and set up a meeting with a person who was part of the UTS evaluation team.

We think merely commenting on a former colleague's intelligence before that person has even applied to be approved as outside counsel is too *de minimis* of an action to be considered "making a recommendation" or "giving advice" in a procurement. This is especially true when, as is the case here, the employee making the introduction has no authority over the selection

process or the employees making the selection. Therefore, we do not believe the requestor "participated" in the procurement with the law firm.

Accordingly, Section 572.069 of the Government Code would not prohibit the former state employee from accepting employment from the law firm before the second anniversary of the date the employee's outside counsel contract was signed.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 578

September 29, 2022

ISSUES

Whether a government employee's direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation under Section 572.069 of the Government Code.

Whether Section 572.069 of the Government Code prohibits a former employee of a state agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the employee participated during his state service. **(AOR-668.)**

SUMMARY

Direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation.

Affiliates are different persons for purposes of Chapter 572 of the Government Code. Therefore, Section 572.069 of the Government Code does not prohibit a former employee of a state agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the employee participated during his state service.

FACTS

The requestor is currently employed with the Employees Retirement System of Texas (ERS) as an investment advisor. The requestor developed two portfolios of investments for ERS that ERS now plans to open to outside investment through partnership with an outside mutual fund company. ERS and the mutual fund company would share profits from the fund. The mutual fund company selected by ERS would then independently contract with affiliated registered investment advisers or registered investment sub-advisors to help make decisions about which securities to include in the mutual fund's portfolio.

The requestor is not responsible for the ultimate decision to choose a mutual fund company as a partner, the final terms of a deal, and whether and at what level to fund the mutual fund. However, the requestor has directly communicated with mutual fund companies regarding the terms of a potential agreement with ERS. The requestor has relayed information to mutual fund

companies about the terms ERS would like and reported back to ERS decision makers with what the mutual companies would agree to.

The requestor asks whether section 572.069 of the Texas Government Code would prohibit him from accepting prospective employment with the mutual fund company that contracts with ERS to run the mutual fund, or an affiliate company of the mutual fund company.

The requestor states that if unable to work for the mutual fund company, his prospective employment would be as a registered investment adviser or registered investment sub-advisor for a separate company hired by the mutual fund company. The prospective employer would be organized as distinct and separate company from the mutual fund company with a separate tax identification number.

ANALYSIS

Section 572.069 prohibits former state officers and employees who participated on behalf of a state agency in a procurement or contract negotiation from accepting employment from any person involved in that procurement or contract negotiation for two years after the contract is signed or the procurement is terminated or withdrawn. Tex. Gov't Code § 572.069.

The requestor developed the portfolios that would form the base of the mutual fund offered under a partnership with a mutual fund company. He also communicated directly with mutual fund companies about the terms ERS seeks for the partnership and the terms the mutual fund companies would require. We think it is clear the requestor has participated in a procurement or contract negotiation on behalf of ERS with the mutual fund companies the requestor has discussed potential contractual terms. As a consequence, the requestor may not accept employment from a mutual fund company in which he engaged in contract negotiations before the second anniversary of the date the contract is signed or the procurement is terminated or withdrawn. *Id.*

The requestor asks whether he may accept employment with an affiliate company to a mutual company with which he engaged in contract negotiations. The answer to that question turns on whether the affiliate of the mutual fund company is a distinct "person," for purposes of section 572.069.

Chapter 572 of the Government Code defines "person" as "an individual or business entity" and defines "business entity" as "any entity recognized by law through which business for profit is conducted, including a sole proprietorship, partnership, firm, corporation, holding company, joint stock company, receivership, or trust." Tex. Gov't Code §§ 572.002(2), 572.002(7).

In Tex. Ethics. Comm'n Op. No. 572 (2022), we held that "the law does not prohibit an individual from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the requestor participated during her state service." We relied on the definition of "affiliate" in state law to determine that two affiliates are distinct persons for purposes of Chapter 572 of the Government Code. *Id.* (citing Tex. Bus. Org. Code § 1.002(1)).

Here, the definition of an affiliate company to a mutual fund company compels the same conclusion. The request states that the mutual fund company would contract with an investment advisor or sub-advisor to manage the fund's securities portfolio. The advisors or sub-advisors are considered "affiliated persons" to the mutual fund company. The Investment Company Act of 1940, which regulates the organization of companies, including mutual funds, defines an "affiliated company" as an "affiliated person." 15 U.S.C § 80a-2(a)(2). An "'affiliated person' *of another person* means," in part "any person directly or indirectly owning, controlling or holding with power to vote, 5 per centum or more of the outstanding securities *of such other person*." 15 U.S.C § 80a-2(a)(3).

In other words, by definition, an affiliate company to a mutual fund company is a distinct person from the mutual fund company. Regardless of the federal definition, the requestor stated that the advisor or sub-advisor would be organized as a distinct and separate company from the mutual fund company with a separate tax identification number indicating the affiliate is a separate person. We assume those facts to be true.

The affiliate of the mutual fund company is a separate person from the mutual fund company, and the requestor has not participated in procurement or contract negotiation with the affiliate of the mutual fund company. Therefore, we must conclude Section 572.069 does not prohibit an individual from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the requestor participated during his state service.

Consequently, the requestor may accept the prospective employment with affiliates of the mutual fund company selected by ERS.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 579

September 29, 2022

ISSUE

Whether any of the State's revolving door provisions prohibit a former state employee from accepting certain employment. **(AOR-670.)**

SUMMARY

The requestor may accept the position. First, he is not a member of his agency's governing body nor is he the agency's executive head, so Section 572.054(a) does not apply. Second, as long as the position does not require him to work on any "particular matter" in which he participated as a state employee, Section 572.054(b) does not prohibit him from accepting the position. Finally, because he did not participate in any procurement or contract negotiation involving the potential employer during his state service, Section 572.069 does not prohibit him from accepting the position.

FACTS

The requestor is a state employee who is considering whether to accept a position in the private sector. In his current position, he has no working relationship with the potential employer. He does not review any contractual deliverables submitted by the potential employer to his state agency, nor does he exercise any judgment regarding the potential employer's performance or payment.

The requestor previously held a different position with the same state agency; however, in that capacity he "had no individual nor management responsibility for procurement of" the services provided by the potential employer. Nor was he involved in the selection or oversight of the potential employer.

ANALYSIS

<u>The requestor is not subject to Section 572.054(a) of the Texas Government Code.</u>

Section 572.054(a) of the Texas Government Code prohibits a "former member of the governing body or a former executive head of a regulatory agency" from making any communication to or appearance before an officer or employee of the agency in which the member or executive head

served for two years after leaving their position with the agency." Tex. Gov't Code § 572.054(a). The requestor is neither a member of the governing body nor an executive head of a regulatory agency. Therefore, Section 572.054(a) does not prohibit the requestor from accepting any potential employment.

Section 572.054(b) prohibits the requestor from working on certain "particular matters," but does not prohibit the requestor from accepting employment.

Section 572.054(b) prohibits former state officers and employees of regulatory agencies from receiving any compensation for services rendered on behalf of any person "regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility." Tex. Gov't Code § 572.054(b). In short, this law prohibits a former state employee from working on a "matter" the former state employee "participated" in as an employee of the state agency. *Id*.

The Government Code defines "particular matter" as "a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding." *Id*. at § 572.054(h)(2). The Commission has previously opined that Section 572.054(b) does not prohibit former state employees from working in subject areas or for employers with which they became familiar in the course of their state employment. Tex. Ethics Comm'n Op. No. 364 (1997).

Here, the requestor has asked whether any of the state's revolving door statutes prohibits him from "accepting a position with" a certain employer. Section 572.054(b) does not prohibit former state employees from accepting a position with any employer; it merely prohibits them from working on certain "particular matters." Tex. Gov't Code § 572.054(b). As long as the position does not require him to work on any particular matter in which he participated as a public servant, Section 572.054(b) does not prohibit him from accepting the position.

Because the requestor did not participate in a procurement or contract negotiation with the potential employer, Section 572.069 does not prohibit him from accepting the position.

The final revolving door provision, Section 572.069 of the Texas Government Code, prohibits former state officers and employees who "participated on behalf of a state agency in a procurement or contract negotiation involving a person" from accepting employment with that person for a certain period of time. Tex. Gov't Code § 572.069.

Here, the requestor says that during his state service he "had no individual nor management responsibility for" the relevant procurement, the agency's selection, or any oversight of the vendor's performance. Taking these facts as true, we conclude that the requestor did not participate on behalf of a state agency in a procurement or contract negotiation involving the potential employer. Consequently, Section 572.069 does not prohibit him from accepting the position.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 580

December 14, 2022

ISSUE

Whether a corporation subject to section 253.094 of the Texas Election Code may provide pro bono legal services to candidates or political committees in Texas for the purpose of challenging in court the interpretation or constitutionality of a Texas law or regulation subject to the jurisdiction of the Texas Ethics Commission. ***(AOR-660)***

SUMMARY

No. Section 253.094 of the Texas Election Code prohibits corporations from making political contributions to candidates and political committees. Legal services provided without charge to candidates or political committees are in-kind contributions. When those services are given with the intent that they be used in connection with a campaign, they are in-kind campaign contributions. The described legal services would be used in connection with a campaign because the requestor's standing to pursue such a challenge would depend on its client's status as a candidate or political committee subject to the laws administered and enforced by the Commission.

FACTS

The requestor, a nonprofit, tax-exempt corporation under Section 501(c)(3) of the Internal Revenue Code, requests an opinion regarding the application of Texas law to the provision of pro bono legal services to candidates or political committees in Texas for the purpose of challenging in court the interpretation or constitutionality of a Texas law or regulation subject to the jurisdiction of the Texas Ethics Commission (the "Commission"). Specifically, the requestor asks whether its proposed provision of pro bono legal services to candidates or political committees constitutes a "political contribution," "contribution," "campaign contribution," or "officeholder contribution" as those terms are defined by Texas law.

The requestor says that it represents "citizens, nonprofit organizations, and candidates in litigation around the country." It does not accept fees from its clients. However, it employs staff attorneys, pays other fees and costs in connection with the litigation, and often retains outside counsel on behalf of its clients.

ANALYSIS

Pro-bono legal services provided to a candidate or political committee are in-kind contributions.

The Election Code defines a "contribution" as any "transfer of money, goods, services, or any other thing of value." Tex. Elec. Code § 251.001(2). Contributions need not be monetary; they can take the form of in-kind goods or services paid for by contributors. *Id*. at §§ 251.001(2); 251.001(21) (defining "in-kind contribution").

The requestor contends that its pro bono legal services are not in-kind contributions because of Commission rule 20.66, which says that a "discount to a candidate, officeholder or political committee" is not an in-kind contribution if "the terms of the transaction reflect the usual and normal practice of the industry and are typical of the terms that are offered to political and non-political persons alike." See 1 Tex. Admin. Code § 20.66. But the requestor arrives at that conclusion by too-narrowly defining the "industry" in which it operates to include only those legal service providers who do not charge their clients. In our opinion, the relevant industry here is the legal services industry, not the nonprofits-that-offer-pro-bono-legal-services-for-public-interest-litigation industry. The legal services provided by the requestor have a value, even if the requestor does not charge for them. The requestor's staff attorneys are paid for their time, and the requestor says it often retains outside counsel and pays fees or other costs in connection with the litigation. These are in-kind contributions. *See Id*. at § 20.1(19).

Pro-bono legal services provided to a candidate or political committee are in-kind *campaign* contributions if they are given with the intent that they be used "in connection with" a campaign.

Texas does not prohibit corporations from making any contributions, only "political contributions," which includes "campaign contributions." Tex. Elec. Code § 253.094 (prohibiting corporations from making political contributions); *Id*. at § 251.001(5) (defining political contribution). A "campaign contribution" is any "contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure." *Id*. § 251.001(3).

The Supreme Court of Texas has determined that the phrase "in connection with" is an expansive term that is satisfied even by "indirect, 'tenuous,' or 'remote' relationships." *Cavin v. Abbott*, 545 S.W.3d 47, 70 (Tex. App.—Austin 2017, no pet.) (citing *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 901 (Tex. 2017)), *but see* Osterberg v. Peca, 12 S.W.3d 31, 51 (Tex. 2000) (construing "in connection with a campaign" to mean only expenditures to fund express electoral advocacy in the context of direct campaign expenditures made by a non-candidate). The Commission has previously interpreted this phrase to encompass litigation costs not only for lawsuits that are directly related to campaign activity, but also lawsuits that have a more indirect relationship to a person's status as a candidate. *See* Tex. Ethics Comm'n Op. No. 329 (1996) (pro bono legal services for lawsuit brought under section 253.131 of the Election Code); Tex. Ethics Comm'n Op. No. 533 (2015) (pro bono legal services for defending against a defamation lawsuit).

The requestor asserts that Commission rule 20.1(18) limits what "in connection with a campaign" means for purposes of the Election Code's definition of campaign contribution. It

does not. Rule 20.1(18) relates to campaign *expenditures*, not campaign contributions. *See* Tex. Ethics Comm'n Op. No. 574 (2022).

The Commission's prior opinions on the personal use of political contributions are relevant to this request.

This request does not ask us to interpret the Election Code's prohibition on the personal use of political contributions, but the Commission's prior opinions on that law are relevant here because, like the definition of campaign contribution, the definition of "personal use" depends on what is and is not "connected" to a campaign. Tex. Elec. Code § 253.0035(d) (defining "personal use" as a use that primarily furthers individual or family purposes "not connected with the performance of duties or activities as a candidate for or holder of a public office."). If legal services are "connected with the performance of duties or activities as a candidate for or holder of a public office," then a candidate or officeholder may properly use their political contributions to defray the costs of those services. In our opinion, if legal expenses are "connected with" a campaign for purposes of the personal-use restriction, then they must also be incurred "in connection with" a campaign for purposes of the prohibition on corporate contributions. *Compare* Tex. Elec. Code § 253.035 *with id*. at § 251.001(3). Put another way, if a candidate is permitted to use his campaign funds to pay for litigation, a third-party's payment of the same litigation costs must constitute campaign contributions.

In interpreting the personal-use restriction, the Commission has taken a broad view of the legal expenses that are connected with a campaign. See Tex. Ethics Comm'n Op. No. 105 (1992) (defending a lawsuit to collect on a campaign loan); Tex. Ethics Comm'n Op. No. 222 (1994) (responding to a grievance filed with the State Bar alleging violations in connection with campaign material); Tex. Ethics Comm'n Op. No. 433 (2001) (defense of charges brought by the Texas State Commission on Judicial Conduct); Tex. Ethics Comm'n Op. No. 498 (2011) (defamation lawsuit brought by former judge in his status as a candidate).

Most relevant to this request, the Commission found that an individual may use political contributions to pay the expenses of responding to a sworn complaint filed with the Texas Ethics Commission. Tex. Ethics Comm'n Op. No. 219 (1994). That would continue to be true even if a candidate or committee challenges the interpretation or constitutionality of the law in response to such a complaint. Such a challenge, when presented as a defense to an alleged violation of law, would be as connected to the campaign as the alleged violation itself.

Lawsuits that depend on a plaintiff's status as a candidate or political committee are connected to a campaign.

The requestor says it intends to provide pro bono legal services to candidates or political committees in Texas for the "sole purpose" of challenging in court the interpretation or constitutionality of a Texas law or regulation subject to the jurisdiction of the Texas Ethics Commission. However, courts have no jurisdiction to decide an "abstract question of law without binding the parties" and "remedying an actual or imminent harm." *Tex. Assn. of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (considering standing before evaluating the constitutionality of generally applicable laws); *see also, Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000). A litigant must have standing to pursue a claim. *DaimlerChrysler*

Corp. v. Inman, 252 S.W.3d 299, 304 (Tex. 2008) ("A court has no jurisdiction over a claim made by a plaintiff without standing to assert it."). Standing "focuses on the question of who may bring an action." *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 442 (Tex. 1998). The general test for standing in Texas is whether there is a real controversy between the parties that will actually be determined by the judgment sought. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

In our opinion, if a person's standing to bring a lawsuit depends on his status as a candidate or political committee subject to the laws administered and enforced by the Commission, then the lawsuit is connected with a campaign. This is most obviously true when a candidate or committee presents such a legal challenge in response to the Commission's enforcement of a law under its jurisdiction. *See* Tex. Ethics Comm'n Op. No. 219 (1994) (legal costs of responding to a sworn complaint filed with the Texas Ethics Commission are connected with a campaign). However, it would be equally true if a candidate or committee challenged a law under the Ethics Commission's jurisdiction as a plaintiff under the Uniform Declaratory Judgments Act. *See* Tex. Civ. Prac. & Rem. Code § 37.001 *et. seq.*; *City of Dallas v. Albert*, 354 S.W.3d 368, 378 (Tex. 2011) ("The Declaratory Judgments Act does not enlarge a court's jurisdiction; it is a procedural device for deciding cases already within a court's jurisdiction."); *Stop 'N Go Markets, Inc. v. Exec. Sec. Sys., Inc.*, 556 S.W.2d 836, 837 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (recognizing "[a] justiciable controversy does not exist and an advisory opinion is being sought if a party requests a court to render a declaratory judgment premised upon the happening of a future, hypothetical event").

In conclusion, a legal action that depends on a person's status as a candidate is connected with a campaign, and pro bono legal services provided to a candidate in connection with such litigation constitute contributions for purposes of the Texas Election Code. Tex. Elec. Code § 251.001(3). Consequently, such pro bono legal services may not be provided to a candidate by a corporation. *Id*. at § 253.094.

<u>This opinion does not prohibit candidates from filing any claim, including to challenge the laws under the TEC's jurisdiction.</u>

Nothing in this opinion should be construed to prevent candidates from challenging the Commission's interpretation or constitutionality of any law. Instead, it merely applies Texas's ban on corporate contributions and finds that when a person's standing to sue is premised on his status as a candidate, the litigation is connected with that person's campaign. *See* Tex. Elec. Code § 251.001(3).

The consequences of this finding are not as dramatic as some critics have suggested. Candidates may file lawsuits to challenge the law. They may accept pro bono representation to challenge the law. Alternatively, they may use their political contributions to pay for such litigation. *See* Tex. Ethics Comm'n Op. No. 219 (1994). They may even be represented by corporations, as long as they pay a fair market rate for the representation.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 581

December 14, 2022

ISSUE

Whether a political committee may accept political contributions through a web portal shared with an incorporated association that established and administers the political committee. ***(AOR-671.)***

SUMMARY

Yes. A political committee may accept political contributions that have been processed by a web portal shared with an incorporated association, provided the general-purpose committee complies with applicable recordkeeping and reporting provisions

FACTS

The requestor (the "Parent Organization") is an incorporated trade association that administers several other legal entities, including a general-purpose political committee. The Parent Organization and related entities receive payments though their respective websites.

The Parent Organization would like to have credit card payments flow to a single primary bank account through a single credit card web portal. The primary account where payments would initially be deposited would be owned by the Parent Organization. Payments for an entity other than the Parent Organization, such as contributions to the political committee, would then be transferred out of the primary account to the other entity's account.

This means if the Parent Organization receives contributions to the political committee by credit card, the transaction would be processed by the Parent Organization's single credit card web portal and deposited in the primary account. The Parent Organization would then transfer the cash to the political committee's bank account on a monthly basis. The Parent Organization states it will keep records necessary for the political committee to comply with its reporting obligations. The Parent Organization's payment processing system will allow it to identify which payments belong to each of its related entities, including the political committee.

The requestor asks if such a proposal is permissible under title 15 of the Election Code.

ANALYSIS

We believe the requestor's proposal would comply with Texas law, provided the general-purpose committee complies with the recordkeeping and reporting provisions of title 15 of the Election Code and commission rules.

The legal question raised is whether the requestor's proposal would involve a prohibited corporate contribution to the political committee. A corporation is permitted to finance the costs of establishing and administering a general-purpose committee, as well as the costs of soliciting contributions to the committee from the stockholders, employees, or members of the incorporated entity. Tex. Elec. Code §§ 253.094, 253.100; see also Tex. Ethics Comm'n Op. Nos. 163, 132 (1993). Consistent with past advisory opinions, we believe the use of the Parent Organization to process contributions to the general-purpose committee is a permissible administrative expense.[1]

In Ethics Advisory Opinion No. 181 (1994), the Commission dealt with a lower-tech version of the same question.. In EAO 181, a corporation asked whether it may accept a single check with a portion earmarked by the contributor to the corporation and another portion earmarked to the corporation's political committee. The corporation would deposit the check in its corporate account and then write a check to the political committee for the amount the contributor earmarked for the committee. *Id*. We held "the fact that the contributions would flow through the incorporated association's general account before being deposited in the general-purpose committee's account would not violate the prohibition on corporate political activity." *Id.* The corporation was allowed to act as a conduit for its political committee provided it kept adequate records so the political committee could accurately report the contribution. *Id; see also* Tex. Ethics Adv. Op. No. 108 (1992) (holding a political contribution does not become a prohibited corporate contribution just because a corporation acted as an intermediary in disbursing the funds to their ultimate recipient).

Here, the facts are essentially the same as EAO 181—only the technology has changed. Instead of using checks, the transfer of funds would occur electronically. The procedure suggested would not violate section 253.094 of the Election Code if the corporate Parent Organization's only role is to act as a conduit for contributions to the political committee. The Parent Organization must also provide to the political committee records sufficient for the political committee to properly disclose the contributions. *See* Tex. Elec. Code §§ 253.001(a) (prohibiting contributions in the name of another); 254.001 (prescribing record keeping requirements), 254.031 (prescribing general reporting requirements), and 254.151 (prescribing additional reporting requirements).

[1] We assume the political contributions that are the subject of this request are from the Parent Organization's "solicitable class" or were not made in response to a solicitation funded by the Parent Organization.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 582

December 14, 2022

ISSUE

Whether a written communication, created by a political subdivision and related to a measure, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising. ***(AOR-672)***

SUMMARY

No. Assuming the factual statements in the communication are true, the communication provided by the requestor is entirely informational and does not include any advocacy.

FACTS

The requestor, the superintendent of an independent school district, requests an opinion on whether a written communication constitutes political advertising for purposes of Section 255.003(a) of the Texas Election Code. The one-page communication provides information about an upcoming Voter Approved Tax Rate Election ("VATRE").

The communication explains what a VATRE is generally, identifies the consequences of the specific VATRE presented to the district's voters, and provides information about voting periods and locations. It states that the VATRE's passage would increase revenue to be used for the district's operations, including salaries, curriculum, and facility maintenance. It identifies the district's tax rate for 2022 and compares it to what the rate would be in 2023 should the VARTE be adopted.

ANALYSIS

Officers and employees of political subdivisions are prohibited from "knowingly spend[ing] or authoriz[ing] the spending of public funds for political advertising." Tex. Elec. Code § 255.003(a).

"Political advertising" means, in relevant part, a communication *supporting or opposing* a measure that appears in a pamphlet, circular, flier, billboard, or other sign, bumper sticker, or similar form of written communication. Tex. Elec. Code § 251.001(16) (emphasis added).

As in many of our prior opinions applying Section 255.003(a), the communication considered in this request contains factual information that may affect whether voters will support or oppose the passage of a measure. *See, e.g.* Tex. Ethics Comm'n Op. No. 565 (2021). However, "[t]he

Election Code does not prohibit political subdivisions from spending public funds to enable voters to make informed decisions." Tex. Ethics Comm'n Op. No. 559 (2021); *see also* Tex. Elec. Code § 255.003(b).

The communication does not include a "motivational slogan or call to action." Tex. Ethics Op. No. 559 (2021). Nor does the communication include any "express advocacy" as defined by the Commission's rules. *See id*. (citing 1 Tex. Admin Code § 20.1(18)). When viewed as a whole, the communication does not appear advocate for the passage or defeat of the measure.

Assuming the information contained within the communication is true,[1] the Commission concludes that it does not support or oppose the measure. Therefore, Sections 255.003(a) and 255.003(b-1) of the Election Code does not prohibit the district from spending public funds to create and distribute the communication.

[1] The Commission's authority to issue advisory opinions does not permit factfinding, nor is there an opportunity for adverse parties to participate in the process. When a requestor asks whether a communication constitutes political advertising, we must assume that the information conveyed in the communication is true and accurate. We do not foreclose the possibility that *false* statements of fact—even without any accompanying express advocacy—may constitute political advertising for purposes of Section 255.003(a).

In addition, an officer or employee of a political subdivision is prohibited from spending or authorizing the spending of public funds for a communication describing a measure if the communication contains information that: (1) the officer or employee knows is false; and (2) is sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure. Tex. Elec. Code § 255.003(b-1).

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 583

December 14, 2022

ISSUE

Whether, under the Judicial Campaign Fairness Act (JCFA), a general-purpose committee may make a maximum "campaign contribution" (up to $25,000) to a state-wide judicial candidate and a maximum "officeholder contribution" (up to an additional $25,000) before a general election. ***(AOR 673)***

SUMMARY

No. The JCFA prescribes a $25,000 per-election limit on "political contributions" from general-purpose committees to a judicial candidate or officeholder regardless of whether classified as a "campaign contribution" or "officeholder" contribution.

FACTS

The requestor represents a general-purpose political committee. The requestor asks whether the general-purpose committee, which did not contribute to an incumbent state-wide judicial candidate in a primary election, may make a $25,000 campaign contribution and a $25,000 officeholder contribution after the primary election but before the general election.

ANALYSIS

The requestor asks whether a statewide judicial candidate may accept up to $50,000 from a general-purpose committee in a general election if the contributions are classified as $25,000 in campaign contributions and $25,000 in officeholder contributions. The answer is no. The JCFA sets a limit on "political contributions" made by a general-purpose political committee to a statewide judicial candidate at $25,000 per election. Tex. Elec. Code § 253.157(a-1)(1). This is true regardless of whether the political contributions are classified as campaign or officeholder contributions.

Under the JCFA, a statewide judicial candidate or officeholder "may not knowingly accept political contributions from a general-purpose committee that, in the aggregate, exceed . . . $25,000" in connection with an election in which the judicial candidate's name appears on the ballot. *Id.* (emphasis added).

A "political contribution" is a "campaign contribution" or "officeholder contribution." *Id.* § 251.001(5).[1] The plain text of the statute does not allow general-purpose committee to classify contributions made for a general election as both campaign and officeholder contributions to effectively double its contribution limit in a general election. *Id.* § 253.157(a-1)(1). This is true regardless of whether the general-purpose committee contributed in the primary election or not. Tex. Elec. Code §§ 253.1621(a) (classifying the primary and general elections as separate elections for the purposes of contribution limits); 253.152(2) (generally attributing a contribution to the next election after the contribution for the purpose of contribution limits).

The requestor also asks whether a general-purpose committee may make an officeholder contribution to defray officeholder costs already expended by the incumbent judicial candidate so that the contribution is attributable to a past election's contribution limit.

The answer, again, is no. Although the JCFA allows for certain political contributions to be attributable to a past election for the purposes the limits on political contributions, the contributions must be made to defray past election debts—not officeholder expenses. *See id.* § 253.153(b).

Generally, a judicial candidate or officeholder may only accept political contributions during a campaign fundraising window, which ends the 120th day after the date of the election in which the candidate or officeholder last appeared on the ballot. Tex. Elec. Code § 253.153(a)(2). However, a judicial candidate or officeholder may accept a political contribution outside the fundraising window if the contribution is made and accepted with the intent that it be used to defray expenses incurred in connection with an election, including the repayment of any debt, that occurred between the date the application for a place on the ballot or for nomination by convention was required to be filed and election day. Elec. Code § 253.153(b). The contribution must be so designated in writing. *See id.* § 253.152(2).

The requestor seeks to rely on the exception allowing certain contributions to be attributed to a past election to make an "officeholder contribution" that would otherwise put the general-purpose committee over the contribution limit for the general election. That is not allowed. The exception allowing attribution to a past election applies only to contributions made to defray "expenses incurred in connection with an election." *Id.* § 253.153(b). Officeholder contributions by definition do not apply to expenses incurred in connection with an election. *Id.* § 251.001(4). Therefore, a general-purpose committee may not effectively double its

[1] A "campaign contribution" is "a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure." *Id.* § 251.001(3). Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution. *Id.* § 251.001(3).

An "officeholder contribution" is "a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that: (A) are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office; and (B) are not reimbursable with public money." *Id.* § 251.001(4).

contribution limit in a general election by classifying its contributions to an incumbent judicial candidate as both campaign and officeholder contributions.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 584

December 14, 2022

ISSUE

Whether expenditures made by a candidate to encourage donations to a local food bank are political expenditures when publicized by the candidate on a social media page that is also used for his campaign. ***(AOR 677)***

SUMMARY

Yes. Expenditures incurred by a candidate in connection with charitable fundraising are political expenditures if the candidate promotes the activity on his campaign's social media page.

FACTS

The requestor, the mayor of a city in Texas, requests an advisory opinion on whether he may make certain expenditures without violating title 15 of the Election Code, and, if so, whether they must be reported as political expenditures. Specifically, he would like to make an offer on his campaign's Facebook account that involves giving lottery tickets to anyone that donates goods to the local foodbank.

If permitted, the requestor would pay for the lottery tickets out of personal funds, but he would use the same Facebook page he uses to campaign for office to publicize the offer. The Facebook page is not a part of any taxpayer or city system, and no public funds would be used to fund or promote the activity.

ANALYSIS

The requestor's threshold question is whether the described promotion is permitted under title 15. The answer is yes. Officers and employees of political subdivisions are prohibited from "knowingly spend[ing] or authoriz[ing] the spending of public funds for political advertising." Tex. Elec. Code § 255.003(a). But the requestor says no public funds will be spent on the promotion. His plan is to purchase the lottery tickets with personal funds and to publicize the promotion on a Facebook account that is neither controlled nor paid for by public funds. Assuming no city equipment or paid time is used, the activity is not prohibited by section 255.003(a). *See, e.g.* Tex. Ethics Comm'n Op. No. 550 (2019).

Having determined that the requestor may carry out his plan, we consider whether it would implicate any of title 15's reporting or disclosure requirements. Under title 15, candidates must report their political expenditures. *See* Tex. Elec. Code § 254.031(a)(3). Political expenditures

include both campaign expenditures and officeholder expenditures. *Id*. at § 251.001(10). And campaign expenditures are any expenditure made by any person in connection with a campaign for elective office or on a measure. *Id*. at § 251.001(7).

Here, there appears to be no *direct* benefit to the requestor's campaign. The candidate is not soliciting donations to his campaign. Instead, he is spending money to solicit donations to a charity. However, the Supreme Court of Texas has determined that the phrase "in connection with" is an expansive term that is satisfied even by "indirect, 'tenuous,' or 'remote' relationships." *Cavin v. Abbott*, 545 S.W.3d 47, 70 (Tex. App.—Austin 2017, no pet.) (citing *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 901 (Tex. 2017)); *but see Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex. 2000) (construing "in connection with a campaign" to mean only expenditures to fund express electoral advocacy in the context of direct campaign expenditures made by a non-candidate).

Furthermore, the Commission has found similar expenditures—which have the indirect benefit of raising the candidate's profile or standing in the community—are connected with a campaign, even where there is no direct financial benefit to the campaign. *See, e.g.* Tex. Ethics Comm'n Op. No. 102 (1992) (advertisement in third-party publication congratulating a sports team that identifies a candidate or public officer as such is political advertising). Here, the expenditure's connection to a campaign is even closer than in EAO 102 because the requestor is using his campaign social media to promote the activity. Because the candidate's expenditures for this promotion are campaign expenditures, they must be reported in accordance with the requirements of title 15.

The post on the candidate's Facebook page would not require a political advertising disclosure statement provided he does not pay to promote the post and his profile page clearly and conspicuously displays the full name of the candidate. *See* Tex. Elec. Code § 255.001; 1 Tex. Admin. Code § 26.1(c).

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 585

February 16, 2023

ISSUE

Whether Section 253.007 of the Election Code prohibits a former member of the Legislature from engaging in activity that would require registration under Chapter 305 if the former member contributed money from his political funds to a general-purpose political committee more than two years before being required to register.

Whether certain political contributions or expenditures made under Section 253.006(3) of the Election Code constitute a violation of Section 253.004 of the Election Code. (AOR 674.)

SUMMARY

The requestor may make political contributions and direct campaign expenditures from a general-purpose committee he controls without violating Sections 253.004, 253.006 and 253.007, provided he waits two years from the last contribution accepted by the political committee accepted from his candidate or officeholder account.

FACTS

The requestor is a former legislator who asks how Sections 253.006 and 253.007 of the Election Code apply to him after transferring political contributions he accepted as a candidate and officeholder from his candidate/officeholder (C/OH) account to a general-purpose committee (the GPAC). The requestor does not explicitly state he will control the GPAC. However, such control is implied by his statement that once registered as a lobbyist he "intends to *authorize* political contributions and expenditures from the GPAC."

ANALYSIS

In 2019, the 86th Legislature passed H.B. 2677 seeking to "clarify that a registered lobbyist may not use political contributions to advance his or her lobby efforts."[1] H.B. 2677 included Sections

[1] *Author's/Sponsors Statement of Intent*, H.B. 2677, available at https://capitol.texas.gov/tlodocs/86R/analysis/pdf/HB02677E.pdf#navpanes=0

253.006 and 253.007 of the Election Code which limit a former candidate or officeholder's ability to use their own political contributions to facilitate their lobbying career. [2]

Section 253.007 imposes a two-year waiting period before a former candidate or officeholder may engage in activity requiring registration as a lobbyist under Chapter 305 of the Government Code from the last time the former candidate or officeholder made a political contribution or direct campaign expenditure from a political contribution the former candidate of officeholder "accepted . . . as a candidate of officeholder."[3]

In Ethics Advisory Opinion No. 575, we addressed whether a former candidate or officeholder could transfer their contributions to a political committee they controlled to avoid triggering the Section 253.007 restrictions on the lobbying activity. Tex. Ethics Comm'n. Op. No. 575 (2022). We held that "candidates and officeholders cannot avoid the restrictions of section 253.007 by transferring the political contributions they accepted as a candidate or officeholder to political committees they control." *Id.* This is because "even after being transferred to a committee" those funds were still "accepted by the person as a candidate or officeholder" due to the transferor's continued control over the funds. *Id.* (citing Tex. Elec. Code § 253.007).

A "transfer" or a "contribution" from a former officeholder to a political committee controlled by the former officeholder candidate is a legal fiction akin to person moving money from their right pants pocket to left. To effect the transfer, a former candidate or officeholder needs to do little more than file a GPAC registration form and report the "transfer" as an expenditure on the Candidate/Officeholder campaign finance report and a contributions on their political committee campaign finance report. There are almost no organizational requirements for a political

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[2] Because the statutes are codified in Chapter 253 of the Election Code, it is also a violation of Section 253.004 for a person to knowingly violate Section 253.006 or 253.007. Tex. Elec. Code § 253.004(a) ("A person may not knowingly make or authorize a political expenditure in violation of [Chapter 253].")

[3] The law reads in full:

Sec. 253.007. PROHIBITION ON LOBBYING BY PERSON MAKING OR AUTHORIZING CERTAIN POLITICAL CONTRIBUTIONS AND DIRECT CAMPAIGN EXPENDITURES.

(a) In this section, "administrative action," "communicates directly with," "legislation," "member of the executive branch," and "member of the legislative branch" have the meanings assigned by Section 305.002, Government Code.

(b) Notwithstanding any other provision of law and except as provided by Subsection (c), a person who knowingly makes or authorizes a political contribution or political expenditure that is a political contribution to another candidate, officeholder, or political committee, or direct campaign expenditure, from political contributions accepted by the person as a candidate or officeholder may not engage in any activities that require the person to register under Chapter 305, Government Code, during the two-year period after the date the person makes or authorizes the political contribution or direct campaign expenditure.

(c) Subsection (b) does not apply to a person who:

(1) communicates directly with a member of the legislative or executive branch only to influence legislation or administrative action on behalf of:

(A) a nonprofit organization exempt from federal income taxation under Section 501(a), Internal Revenue Code of 1986, as an organization described by Section 501(c)(3) of that code;

(B) a group of low-income individuals; or

(C) a group of individuals with disabilities; and

(2) does not receive compensation other than reimbursement for actual expenses for engaging in communication described by Subdivision (1).

committee. The lack of statutory controls on the internal governance of a political committee allows a former candidate or officeholder to continue to exercise complete control over their previous candidate/officeholder funds they re-label as political committee funds. We opined that sanctioning such easy circumvention "would strip section 253.007 of any meaning" and that "state law demands that we presume the Legislature intended to enact an effective statute." Tex. Ethics Adv. Op. No. 575 (2022) (citing Tex. Gov't Code § 311.021(2)).

The requestor asks the Commission to reconsider Ethics Advisory Opinion No. 575. He points to section 253.006, the plain language of which indicates that the Legislature did intend to allow a former candidate or officeholder to engage in lobby activity and continue to make a political contributions and direct campaign expenditures from a political committee the former candidate or officeholder controlled. In the requestor's view, the former candidate or officeholder would simply need to wait two years after making the transfer of his campaign funds to a GPAC before engaging in lobby activity. After the two-year wait, the former candidate or officeholder would be free to make political contributions from the political committee account and continue to engage in lobby activity.

Section 253.006 states:

> Notwithstanding any other provision of law, a person required to register under Chapter 305, Government Code, may not knowingly make or authorize a political contribution or political expenditure that is a political contribution to another candidate, officeholder, or political committee, or direct campaign expenditure, from political contributions accepted by:
>
> (1) the person as a candidate or officeholder;
>
> (2) a specific-purpose committee for the purpose of supporting the person as a candidate or assisting the person as an officeholder; or
>
> (3) a political committee that accepted a political contribution from a source described by Subdivision (1) or (2) during the two-year period immediately before the date the political contribution or expenditure was made.

Subdivision (3) appears to authorize a former candidate or officeholder to be a registered lobbyist and make political contributions from a political committee he controls two years after transferring his candidate/officeholder political contributions to the committee. Tex. Gov't Code § 253.006(3). Subdivision (3) must contemplate that the former candidate or officeholder controls the political committee because the law only applies to expenditures knowingly made or authorized by the former candidate or officeholder. *Id.* The former candidate or officeholder necessarily controls the committee to "make or authorize" an expenditure for the committee. Subdivision (3) then authorizes the former candidate or officeholder to make contributions and direct campaign expenditures from such a political committee two years after the political committee accepted contributions from the former candidate of officeholder's own political contributions or political contributions from the registrant's specific-purpose committee. *Id.*

The requestor argues a contrary interpretation would nullify subdivision (3) and "create a conflict between two contemporaneously adopted statutory provisions: permissible activity under § 253.006 triggers a violation of § 253.007."

The argument follows that under a plain and ordinary reading of HB 2677, a person can leave office and contribute money to a GPAC, do nothing with the GPAC for two years, make no political contributions or lobby expenditures during the same time period, and then register as a lobbyist. At which time, political expenditures from COH and SPAC accounts would still be prohibited, but the making of the same from GPAC accounts would be permissible under Section 253.006(3) of the Election Code and Section 305.029(b) of the Government Code, which effectively restates Section 253.006 in the Government Code.

When construing a statute, the Texas Supreme Court counsels that "we begin with its language, drawing the Legislature's intent from the words chosen when possible." *Phillips v. Bramlett*, 288 S.W.3d 876, 880 (Tex. 2009) (citing *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006)). Legislative intent is determined "from the entire act and not just its isolated portions." *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). One must "try to give effect to all the words of a statute, treating none of its language as surplusage when reasonably possible." *Id. (quoting Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005)).

Considering Section 253.007 in light of 253.006 compels the conclusion that the Legislature intended to permit a former candidate or officeholder to transfer their political contributions to a political committee, wait two years, register as a lobbyist and use the new political committee to make political contributions and direct campaign expenditures.

Both Section 253.007 and 253.006 tie a restriction to the use of political contributions "accepted by the person as a candidate or officeholder." *Compare* Tex. Elec. Code § 253.006(1) *with id.* § 253.007(b). However, Section 253.006 treats a political contribution transferred to a political committee by a former candidate or officeholder in subdivision (3) differently than a contribution "accepted by the person as a candidate or officeholder" in subdivision (1). Section 253.006(3) clearly contemplates a former candidate or officeholder transferring his own contributions to a political committee he controls and then being able to use those contributions to make political contributions regardless of whether he is lobbyist (provided he waits two years). It impossible to give effect to that provision and hold that a similar contribution would from a candidate-controlled political committee would violate Section 253.006(1) and trigger the 253.007 waiting period.

Therefore, the requestor may make political contributions and direct campaign expenditures from a general-purpose committee he controls without violating Sections 253.004, 253.006 and 253.007, provided he waits two years from the last contribution the political committee accepts from his C/OH account.

Our job is to give effect to the Legislature's intent drawing from the words it chose. *Bramlett*, 288 S.W.3d at 880. In this case, it is now clear the Legislature chose to allow an easy route for a former candidate or officeholder to convert a lifetime prohibition on using their political contributions to make political contributions as a lobbyist to a two-

year wait. All an officeholder-turned lobbyist needs to do is transfer their candidate officeholder contributions to a general-purpose committee they control.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 586

February 16, 2023

ISSUE

Whether the revolving door law prohibition in section 572.069 of the Government Code would prohibit a former employee of a state agency from accepting certain employment. **(AOR 678.)**

SUMMARY

A former state employee participates on behalf of a state agency in a procurement or contract negotiation by drafting contract terms and having direct communications with a company regarding a potential contract.

A former state employee participates on behalf of a state agency in a procurement or contract negotiation with a subcontractor if the subcontractor is identified as providing work in the contract.

FACTS

The requestor is a former employee of the Texas Department of Transportation ("TxDOT" or the "department"). He asks whether he may accept employment at two different companies ("Firm 1" and "Firm 2").

During the requestor's employment with TxDOT, he was a "Team Lead" in charge of four TxDOT project managers. The requestor also served as a project manager on his own projects. The requestor states that all of his work for TxDOT was presented to another layer of TxDOT management for acceptance or rejection.

Some of the project managers he led managed outside consultants who performed project work. As Team Lead and project manager, the requestor was involved in some aspects of the contracting with Firm 1 and Firm 2.

Dealings with Firm 1

Firm 1 had an active contract with TxDOT when the requestor joined the department. At the request of a TxDOT supervisor, the requestor was involved in a contract negotiation with Firm 1 for a supplemental agreement to add additional "scope and fee" to the contract. While serving as interim project manager, the requestor coordinated with a TxDOT contracts manager and Firm 1 to ensure everything the TxDOT supervisor wanted was in the supplemental agreement. The requestor described is work on the contract as follows:

> Coordination in this situation consisted of setting up meetings, taking notes on decisions the schematic supervisor made, ensuring those notes were included in the contract, giving information on similarities between this project and others, comparing this contract to other contracts, and giving the contract a first review before passing it along to the schematic supervisor for further review and approval. The position was supposed to act as a go between between the schematic supervisor and Firm 1, but in this particular case Firm 1 repeatedly communicated directly with the schematic supervisor instead. When it came to discretion and independent decision making, my role was advisory in terms of "I think we should change this" or "I think this is appropriate", but never the ability to say "this is what we are going to do" or firmly make a decision.

The requestor stated he did not recall negotiating anything related to the fee. The supplemental agreement was then executed.

Dealings with Firm 2

Firm 2 was a sub-consultant for another firm (Firm 3). During the requestor's employment Firm 3 had active contract with TxDOT, managed by a project managers on the requestor's team. A TxDOT supervisor requested the project manager add a supplemental agreement to the original contract that included additional "scope and fee." The requestor provided guidance to the project manager on how to negotiate, gave a rough approximation to the project manager of what the requestor believed the fee should be, attended a scoping meeting with the project manager, Firm 3, and other supervisors. The requestor also provided quality control reviews regarding the scope and fee of the supplement agreement. The requestor left TxDOT while the supplemental contract was being negotiated and does not know the specific terms of the final agreement. The requestor states Firm 2 was not a signee on the contract or any supplemental agreement. However, Firm 2 was listed as a providing services on the contract and supplemental agreements.

ANALYSIS

Legal Standard:

Section 572.069 of the Government Code states:

> A former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept employment from that person before the second anniversary of the date the contract is signed or the procurement is terminated or withdrawn.

Tex. Gov't Code § 572.069.

Section 572.069 does not define the word "participated." However, we have applied the definition found in a companion revolving door law to Section 527.069. Tex. Ethics Comm'n Op. No. 568 (2021). We do so again. *See* Tex. Gov't Code § 311.011(b) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). "Participated" means "to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action." Tex. Gov't Code § 572.054(h)(1).

The former state employee participated on behalf of a state agency in a procurement or contract negotiation involving Firm 1.

We have held that "direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation." Tex. Ethics Comm'n Op. No. 578 (2022). We have also held that a requestor participated in a procurement on behalf of a state agency by scoring and evaluating bid proposals for a contract to provide information technology services, even though the requestor did not participate any further in the request for proposal or participate in negotiation with vendors or the vendor selection. Tex. Ethics Comm'n Op. No. 545 (2017). However, a former employee does not participate in a procurement when a former state employee's only involvement is merely being kept informed of the status the procurements. Tex. Ethics Comm'n Op. No. 568 (2021).

A former state employee "participates" in a contract negotiation or procurement by making a "recommendation" or "giving advice." Tex. Gov't Code § 572.054(h)(1). Here, the requestor participated in the contract negotiation through his involvement in reviewing the contract, drafting contract terms, and giving advice and recommendations to his supervisor regarding contract terms. The requestor is therefore prohibited from accepting employment from Firm 1 for two years after the date the contract with Firm 1 was executed.

The former state employee participated on behalf of a state agency in a procurement or contract negotiation involving Firm 2, because Firm 2 was identified as providing services in the agreement.

The revolving door prohibition is triggered by participating in a procurement or contract negotiation "involving a person." Tex. Gov't Code § 572.069. Here, the requestor participated in the supplement agreement procurement with Firm 3 by providing guidance to the project manager on how to negotiate, giving a cost estimate, and attending a meeting involving the scope of the project with Firm 3 and other TxDOT employees.

The relevant question is whether the procurement involved Firm 2, a sub-contractor working on the contract between TxDOT and Firm 3.

A contract that identifies a subcontractor as performing work "involves" the identified subcontractor for purposes of Section 572.069. Ethics Comm'n Op. No. 545 (2017) (holding a former employee of a state agency would be prohibited from accepting employment from a subcontractor identified in a proposed contract which the former employee evaluated and scored).

The requestor states that Firm 2 was identified as providing work under the first agreement and the supplemental agreement with which the requester was involved. Therefore, consistent with Ethics Advisory Opinion No. 545, the contract negotiation involved Firm 2. Consequently, the requestor is prohibited from accepting employment from Firm 2 for two years after the date supplement agreement was signed or the procurement was withdrawn.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 587

February 16, 2023

Having determined that it would be in the public interest, the Texas Ethics Commission issues the following opinion on its own initiative pursuant to Section 571.094, Government Code.

ISSUES

A member of the Texas Legislature retires at the end of a legislative session. Before the next legislative session, the former legislator: (1) uses title 15 campaign contributions to make a political contribution to legislative candidates; (2) subsequently uses personal funds to reimburse the campaign for the same amount of the contributions; and (3) registers to lobby. May the former legislator lobby members of the Legislature during the two-year period after making the political contribution?

May the former legislator cure a violation of Section 253.007 or reduce the two-year waiting period imposed by Section 253.007 by reimbursing his or her campaign with personal funds in an amount that equals the political contributions made?

Pursuant to Section 571.173, Government Code, the commission may impose a civil penalty of not more than $5,000 or triple the amount at issue for a violation of law administered and enforced by the commission. What does "the amount at issue" mean for purposes of imposing a penalty for a violation of Section 253.007, Election Code? Does it mean: (1) the amount of political contributions at issue, (2) the maximum amount of income indicated on the person's lobby registration statement, or (3) something else? (AOR 679-CI)

SUMMARY

Section 253.007, Election Code prohibits a person from engaging in activities that require the person to register under Chapter 305, Government Code during the two-year period after the date the person knowingly makes or authorizes a political contribution to another candidate, officeholder, or political committee from political contributions accepted by the person as a candidate or officeholder.

The plain language of Section 253.007 does not permit a person to cure a past violation or reduce the two-year waiting period by reimbursing the person's campaign with personal funds.

The "amount at issue" for purposes of Section 253.007 is reserved by the Commission.

FACTS

The Commission assumes the following facts for purposes of this opinion. A former member of the Texas Legislature retires at the end of a legislative session. Before the next legislative session, the former legislator: (1) uses title 15 campaign contributions to make a political contribution to legislative candidates; (2) subsequently uses personal funds to reimburse the campaign for the same amount of the contribution; and (3) engaged in activity that required registration under Chapter 305.

ANALYSIS

Section 253.007 prohibits a former member of the Legislature from engaging in activities that require registration as a lobbyist for two years after using title 15 funds to make political contributions to legislative candidates.

The Legislature enacted Section 253.007, Election Code in response to concerns "about the revolving door of candidates and officeholders becoming lobbyists immediately after losing an election or retiring from office."[1] Among other things, Section 253.007 prohibits a person from engaging in activities that require the person to register under Chapter 305, Government Code during the two-year period after the date the person knowingly makes a political contribution to a candidate, officeholder, or political committee from political contributions accepted by the person as a candidate or officeholder. Tex. Elec. Code § 253.007(b).

Chapter 305 requires a person to register as a lobbyist if he or she receives—or is entitled to receive under an agreement—an amount of compensation that exceeds an annually-adjusted threshold to communicate directly with a member of the legislative or executive branch for the purpose of influencing legislation or administrative action. Beginning on January 1, 2023, that threshold is $1,760 in a calendar quarter. Tex. Gov't Code § 305.003(a)(2); 1 Tex. Admin. Code § 18.31; *see also* Tex. Gov't Code § 305.001(3) (defining compensation as "money, service, facility, or other thing of value or financial benefit that is received or is to be received in return for or in connection with services rendered or to be rendered").

Section 253.007 thus prohibits a former member of the Legislature from receiving—or being entitled to receive under an agreement—over $1,760 in a calendar quarter to lobby current members of the Legislature if the former member has used political contributions he or she accepted as a candidate or officeholder to make political contributions to others within the past two years.

Section 253.007 does not permit a person to cure a past violation or reduce the two-year waiting period by reimbursing his or her campaign with personal funds.

Some laws under the Commission's jurisdiction expressly allow for past violations to be cured or remedied by subsequent action. For example, a statement, registration, or report required to be filed with the Commission is not considered to be late if the person files a corrected report within

[1] https://capitol.texas.gov/tlodocs/86R/analysis/pdf/HB02677H.pdf#navpanes=0

14 business days and any error or omission in the report as originally filed was made in good faith. Tex. Gov't Code § 571.0771.

However, many other violations cannot be cured. For example, the return of an illegal corporate contribution after knowing acceptance does not undo the violation. *See, e.g., In re Fernandez,* SC-3120241 (2012) (finding a violation of the corporate contribution prohibition even after the respondent returned the illegal contribution).[2]

Here, the plain language of Section 253.007 does not permit a reimbursement from personal funds to a campaign to change the source of funds used in the initial contribution. The two-year waiting period is triggered once a former candidate or officeholder "makes or authorizes a political contribution or political expenditure that is a political contribution" from his own political contributions. A "contribution" is a "direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer." Tex. Elec. Code § 251.001(2). Therefore, the triggering event is complete once the former officeholder effects the transfer of his own political contributions to another candidate, officeholder or political committee.

Notwithstanding the conclusion that a reimbursement does not cure a past violation of Section 253.007, it may be relevant for the Commission's consideration of the appropriate penalty for the violation. By law, the Commission is required to consider several factors in assessing a penalty, including "actions taken to rectify the consequences of the violation." Tex. Gov't Code § 571.177.

The "amount at issue" for purposes of Section 253.007 is reserved by the Commission.

Pursuant to Section 571.173, Government Code, the Commission may impose a civil penalty of not more than $5,000 or triple the amount at issue for a violation of law administered and enforced by the commission. However, that leaves unanswered what "the amount at issue" means for purposes of imposing a penalty for a violation of Section 253.007.

This is a question of first impression for the Commission. Some may argue that the amount at issue is the amount of political contributions made by the former legislator from his or her title 15 funds within two years of engaging in activities that require registration. But Section 253.007 does not prohibit making political contributions. Rather, it prohibits a person who has made certain contributions from engaging "in any activities that require the person to register" for two years. Therefore, the amount at issue may be the total amount of lobby activity prohibited by Section 253.007 (*i.e.*, the amount of lobby compensation and expenditures).

[2] Available at https://www.ethics.state.tx.us/data/enforcement/sworn_complaints/2012/3120241.pdf

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 588

June 28, 2023

ISSUE

Whether a member of the legislature may recover personal funds used to pay for both a vehicle and gas from a state-issued mileage reimbursement received for travel using a vehicle paid for with a combination of personal funds and political contributions. *(AOR 681)*.

SUMMARY

Yes. A member of the legislature may take reimbursement from a state-reimbursement for fuel purchased with personal funds. If the vehicle is paid for with a combination of personal funds and political contributions, the member may also prorate the remaining amount of the state-reimbursement for wear on the vehicle between his personal account and political account.

FACTS

The requestor is a member of the legislature who leases a vehicle he uses for both personal and political purposes. He pays for the lease with a combination of political and personal funds paid in an amount proportional to each use, which is 70% political and 30% personal.

The requestor asks the Commission to assume the following fact pattern:

> An officeholder uses his personal debit card to pay for gas while traveling to and from Austin from the district and keeps his receipts. [We assume all the fuel is consumed during official state travel]. He submits mileage reimbursement to the state at the end of every month to cover gas receipts as well as wear and tear on the vehicle.

The requestor asks, because the vehicle cost is being split between political and personal funds, is it permissible to be personally reimbursed for the cost of fuel and a portion of the state mileage reimbursement for wear on the vehicle?

ANALYSIS

The Election Code prohibits the conversion of political contributions to personal use. Tex. Elec. Code § 253.035(d). However, the use of political contributions to purchase or lease a vehicle to perform duties connected with holding a public office is a permissible use of political funds. *See id*; Tex. Ethics Comm'n Op. No. 204 (1994) ("EAO 204"). It is also permissible for a candidate or officeholder to use a combination of political and personal funds to purchase or lease a vehicle provided the proportion of political funds used to pay for the vehicle does not exceed the proportion the vehicle is used for political rather than personal purposes. Tex. Ethics Comm'n Op. No. 430 (2000).

If an individual uses a combination of political contributions and personal funds to purchase, operate, and maintain an asset, the individual must make sure that political contributions are not converted to personal use. *Id.*; Tex. Elec. Code § 253.035. Any interest, rebates, refund, or reimbursement resulting from the use of an asset paid for with political contributions belongs to the campaign and must not be converted to personal use.

Therefore, the requestor may take personal reimbursement for the expenses directly attributable to personal funds, including the purchase of gas with personal funds and the vehicle wear-and-tear proportional to his personal investment in the vehicle.[1] Any reimbursement attributable to the campaign's ownership interest in the vehicle must be paid into the officeholder's political fund. Tex. Ethics Comm'n Op. No. 347 (1996); EAO 204, note 1. The amount deposited in the campaign account should be disclosed on Schedule K (used to report credits, interest, rebates, refund, or reimbursement resulting from the use of an asset purchased with political contributions) of the campaign finance report.

[1] The requestor asserts that the gas receipts will accurately reflect the amount of gas used for state travel. We assume this to be true. However, as a practical matter, in most cases it will be difficult to identify with precision how much gas in tank was used for political rather than personal purpose relying solely on gas receipts. We think a better method of calculating the amount of fuel consumed by political travel is to divide the miles driven for political purposes by the vehicle's average miles per gallon and multiply the quotient by the price of a gallon of gas at the time.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 589

June 28, 2023

ISSUE

Whether a judicial candidate or officeholder may accept a political contribution after the normal fundraising period ends if the contribution is made and accepted with the intent that it be used for legal fees and costs arising from an election contest. *(AOR 682, 683)*

SUMMARY

Yes. A contribution made and accepted with the intent that it be used to defray expenses incurred in connection with a past election may be accepted after the normal fundraising period ends. Legal fees and costs arising from an election contest are expenses incurred in connection with a contested election.

FACTS

The Commission received similar requests for an advisory opinion from two incumbent judges who are subject to legal challenges to the results of the November 8, 2022 election. The petitions for an election contest seek to have the challengers declared the winner or for new elections to be ordered.

Judicial candidates generally cannot accept political contributions later than 120 after their last election day. The window to accept political contributions closed on March 8, 2023, for judicial candidates who last appeared on the November 2022 ballot.

The requestors have incurred substantial expenses for legal fees and other related costs to defend against the election contests after the fundraising window closed. The requestors expect to continue to incur expenses as the election contests are litigated. The requestors ask whether they may accept political contributions beyond the normal fundraising period to pay for expenses incurred after the normal fundraising period ended and for future expected expenses directly related to the election contests.

ANALYSIS

The Judicial Campaign Fairness Act limits the time period during which a judicial candidate or officeholder[1] may accept political contributions. Tex. Elec. Code § 253.153.

The last day a judicial candidate may accept a contribution is generally the 120th day after the date of the election in which the candidate or officeholder last appeared on the ballot. *Id.* § 253.153(a)(2).

However, a candidate may continue to raise political contributions to cover expenses incurred in connection with a past election after the fundraising window has closed. *See* Tex. Elec. Code § 253.153(b).

The relevant part of Section 253.153 reads in full:

> (b) Subsection (a)(2) [ending the fundraising period 120 days after the candidate's last election day] does not apply to a political contribution that was made and accepted with the intent that it be used to defray expenses incurred in connection with an election, including the repayment of any debt that is:
>
> (1) incurred directly by the making of a campaign expenditure during the period beginning on the date the application for a place on the ballot or for nomination by convention was required to be filed for the election in which the candidate last appeared on the ballot and ending on the date of that election; and
>
> (2) subject to the restrictions prescribed by Sections 253.162 and 253.1621.

The plain language of Section 253.153(b) allows a candidate to accept political contributions after the normal fundraising period to pay for expenses arising "in connection with an election." Subdivision (b)(1) includes a specific example of permissible expenses included in the exception—debt incurred during the fundraising period. The inclusion of a specific example does not modify the plain language of the exception that applies to "expenses incurred in connection with an election." Legal fees for an election contest are expenses incurred in connection with the contested election. Therefore, a candidate may accept contributions to defray costs associated with an election contest even if the costs are actually incurred after the close of the fundraising window.

Fundraising for an election contest has always been allowed as an exception to the judicial fundraising moratorium. The Judicial Campaign Fairness Act, which created the judicial fundraising moratorium, included an exception allowing fundraising to finance election contests after normal fundraising window closed. Acts 1995, 74th Leg., ch. 763, Sec. 1, eff. June 16, 1995, codified as subchapter F, Chapter 235, Election Code. In 2009, the Legislature expanded

[1] For the sake of brevity this opinion will refer to a "candidate" rather than a "candidate or officeholder", but the term should be understood to encompass both judicial "candidates and officeholders" as it relates to the temporal fundraising limit.

the election contest exception to apply to all expenses incurred in connection with the past election rather than just an "election contest." Acts 2009, 81st Leg., R.S., Ch. 1329 (H.B. 4060), Sec. 1, eff. September 1, 2009. The legislature did so by deleting the word "contest" from the phrase "in connection with an election contest." There is no indication that the legislature intended to end the exception for fundraising for election contests while it otherwise greatly expanded the exception to the fundraising moratorium.

Contributors must designate in writing contributions applicable to a past election.

A contribution to a judicial candidate applies to the candidate's next election in time unless designated in writing for a particular election. *See* Tex. Elec. Code § 253.152(2). So, for a judicial candidate to accept a contribution outside of the normal fundraising period, the contribution must be designated in writing for the previous election.

Contributions to judicial candidates are also subject to individual limits "in connection with each election." Tex. Elec. Code § 253.155, .157. If designated for a past election, a contribution will apply towards that election's contribution limit, even if made and accepted after the election. For example, an individual who had already contributed the maximum amount for an election would not be able to designate a subsequent contribution for that election, should there be an election contest. However, an individual who makes a maximum contribution designated for an election would be able to make another maximum contribution for the next election in which the candidate appears on the ballot.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 590

September 27, 2023

ISSUE

Whether receiving a fee contingent on the sale of services to an independent school district is prohibited by Section 305.022 of the Government Code. *(AOR-686).*

SUMMARY

No. The Section 305.022 contingency fee prohibition does not apply to actions of an independent school district.

FACTS

The requestor is a company that sells educational services. The requestor seeks to enter into a contingency fee arrangement with other businesses to facilitate the sale of educational services to independent school districts (ISDs) and individual public schools. Under the agreement, the requestor would receive a percentage fee for each sale its clients make to an ISD and individual Texas public schools.

ANALYSIS

Chapter 305 of the Government Code ("the Lobby Code") generally regulates lobbying of the legislature and state officials and employees. Tex. Gov't Code § 305.001.

At issue is the Lobby Code's specific provision that prohibits a person from retaining or employing another person to "influence legislation or administrative action for compensation that is totally or partially contingent on . . . the outcome of any *administrative action*." *Id.* § 305.022(a) (emphasis added).

The definition of "administrative action" includes only actions taken by the legislature or "a state agency or executive branch office," *Id.* § 305.002(1); *see also, id.* § 305.002(4) (defining "member of the executive branch" as "an officer, officer-elect, candidate for, or employee of any state agency, department, or office in the executive branch of state government."). Therefore, actions taken by units of government besides the legislature, state agency, or executive branch office of state government are beyond the reach of Section 305.022.

As a general rule, statewide jurisdiction is implicit in the term "state agency or department" as used in the Lobby Code. Tex. Ethics Comm'n Op. No. 101 (1992). The commission has long

held that a political subdivision is not a state agency or in the executive branch of state government. Tex. Ethics Comm'n Op. No. 178 (1993) ("A metropolitan transit authority is a political subdivision, not a state agency"); Tex. Ethics Comm'n Op. No. 106 (1992) (finding a county is a political subdivision, not "one of the branches of 'state' government").

We reached this conclusion because "[t]he definitions of 'member of the legislative branch' and 'member of the executive branch' make clear that those terms refer to the legislative and executive branches of 'state' government," not political subdivisions. Tex. Ethics Comm'n Op. No. 106 (1992). For example, Section 305.003(b-1) of the Government Code lists an "employee of a political subdivision" separately from "a member of the judicial, legislative, or executive branch of state government" when providing an exception to lobby registration. *See also* Tex. Gov't Code § 305.026 (defining "political subdivision" to include a "school district").

At least for the purposes of the Lobby Code, an ISD is a political subdivision and not a state agency or member of the executive branch of state government. *Id.* § 305.026; see generally, Chapter 11, Texas Education Code. Therefore, the Section 305.022 contingent fee restriction does not apply to actions taken by an ISD or individual public school belonging to an ISD.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 591

September 27, 2023

ISSUE

Whether a retired district court judge may use political contributions to pay for his and his spouse's headstones or monuments at the State Cemetery of Texas. *(AOR-687).*

SUMMARY

A retired district court judge may use political contributions to purchase a headstone or monument for himself and his spouse at the State Cemetery of Texas because the headstones or monuments are related to the requestor's activities as an officeholder and the headstone or monument will be the property of the state.

FACTS

The requestor is a retired district court judge who plans to be buried at the Texas State Cemetery upon his death. His spouse also has a burial plot reserved at the same cemetery.

The Texas State Cemetery was founded in 1851 "to honor those individuals who have made a significant impact on the history of Texas." Texas State Cemetery, Texas State Preservation Board, 2018 Strategic Master Plan. The cemetery serves as "the final resting place of Governors, Senators, Legislators, Congressmen, Judges and other legendary Texans who have made the state what it is today," according to its Website. The cemetery also serves as a museum, offering guided tours to school groups and the general public.

Only former state legislators, elected state officials, and other people who made a significant contribution to Texas history and culture are eligible for burial at the cemetery. Tex. Gov't Code § 2165.256. The spouse of such a notable Texan is also eligible for burial at the Texas State Cemetery. *Id.*

It is customary for the headstone or monument to provide information regarding the officeholder, elected or appointed positions held, and dates served. The information contained on the headstones and monuments helps the Texas State Cemetery illustrate the historical and cultural aspects of Texas.

The cemetery is administered by the State Preservation Board and the State Cemetery Committee. Each monument and headstone is subject to review of the State Cemetery Committee and must comply with regulations promulgated by the State Preservation Board. The

monuments or headstones are typically purchased by the estate of the person interred but become the property of the state. 13 Tex. Admin. Code § 71.11(e).

The requestor asks whether he may use his unexpended political contributions to purchase the monument or headstone for both himself and his spouse.

ANALYSIS

Title 15 of the Election Code prohibits the personal use of political contributions. Tex. Elec. Code § 253.035.

"Personal use" means a use that "primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office." *Id.* § 253.035(d). Personal use does not include "payments made to defray ordinary and necessary expenses incurred in connection with activities as a candidate or in connection with the performance of duties or activities as a public officeholder." *Id.* § 253.035(d)(1).

In Ethics Advisory Opinion No. 199 the Commission held "an expenditure to purchase a portrait of a retiring judge for the county courthouse where the judge presided is connected to the duties and activities associated with the office and is therefore a permissible use of political contributions." Tex. Ethics Comm'n Op. No. 199 (1994).

A headstone or monument at the state cemetery for a retired judge is analogous to a portrait hung in a county courthouse in that the requestor's headstone or monument would become state property to be viewed by the public.

The headstone is also related to the requestor's activities as an officeholder. The requestor is only eligible for a plot due to his state service. The headstone itself will also note the duration and type of service provided by the requestor and be displayed at a public cemetery among other notable Texans. Importantly, the headstones will be the property of the state. The requestor's spouse is also only eligible for burial in the Texas State Cemetery due to the requestor's state service. The headstone of the spouse also provides a fuller picture the state official's life in furtherance of the educational mission of the Texas State Cemetery. For those reasons, the purchase of a headstone for a plot at the state cemetery for the requestor and his spouse is not a personal use.

We also note that even if the purchase of a headstone is not a conversion to personal use, six years after ceasing to become a candidate or officeholder or filing a final report, whichever is later, all unexpended political funds must be disposed of in specific statutorily prescribed ways. Tex. Elec. Code §§ 254.203, .204. Purchasing a headstone or monument is not one of the approved expenditures.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 592

September 27, 2023

ISSUE

Whether Section 253.007 of the Election Code prohibits a former legislator from engaging in activity requiring lobby registration under various scenarios. *(AOR-688).*

SUMMARY

Section 253.007 applies to contributions to all candidates for and holders of non-federal Texas elective offices—not just legislative or state executive branch offices. Once a triggering contribution is made, it cannot be cured by a refund or reimbursement. Section 253.007 also applies to a political contribution made to a political committee regardless of how the political committee ultimately disposes of the contribution.

FACTS

The requestor is a former legislator who made several political contributions in 2022 from a specific-purpose committee that he controlled. The requestor used his specific-purpose political committee to make political contributions to two local candidates, one statewide executive branch candidate, general-purpose political committees and a county executive committee of a political party. The requestor sought and received reimbursements of his SPAC's political contributions from two local candidates and the statewide candidate. The requestor states he reimbursed his specific-purpose political committee with personal funds for some of the contributions for which he did not receive a refund.

The request states that despite not being required to the register as a lobbyist under Chapter 305 of the Government Code, the requestor nevertheless registered as a lobbyist "out of an abundance of caution."

ANALYSIS

Section 253.007 of the Election Code prohibits a person from engaging in activities that require the person to register as a lobbyist under Chapter 305 of the Government Code during the two-year period after the date the person knowingly makes a political contribution to a candidate, officeholder, or political committee from political contributions accepted by the person as a candidate or officeholder. Tex. Elec. Code § 253.007(b).

The Section 253.007 waiting period also applies to expenditures made by a candidate-controlled specific-purpose committee. Tex. Ethics Comm'n Op. No. 575 (2002).

The requestor asks a series of questions regarding the scope of Section 253.007 and whether triggering contributions can be refunded to shorten the two-year waiting period. Each question is addressed specifically below after a discussion of the general contours of the law.

Section 253.007 applies to contributions to all candidates for and holders of non-federal Texas elective offices—not just legislative or state executive branch offices.

Section 253.007 applies, in relevant part, to certain contributions made to a "candidate, officeholder, or political committee." The Election Code definition of a "candidate" applies to all elective public offices in the state, excluding federal office. Tex. Elec. Code §§ 251.001(1) (defining candidate) 252.005; 251.006 (generally excluding federal offices from Title 15 regulation). The plain language of Section 253.007 does not limit its reach to contributions made to legislative or state executive branch officer holders or candidates. Nor does it limit its reach to only political committees that make contributions to legislative or state executive branch officeholders or candidates.

Once a triggering contribution is made, it cannot be cured by a refund or reimbursement.

Earlier this year we were asked whether a candidate or officeholder could personally reimburse their campaign account to "cure" a past violation or to shorten the two-year waiting period. Tex. Ethics Comm'n Op. No. 587 (2023) ("EAO No. 587"). We held that Section 253.007 did not provide for exceptions to "cure" a past violation or shorten the two-year waiting period after a triggering contribution was made. *Id.* The same is true of a refund of a triggering contribution. The two-year waiting period is triggered once a former candidate or officeholder "makes or authorizes a political contribution or political expenditure that is a political contribution" from political contributions accepted by the candidate or officeholder. Tex. Elec. Code § 253.007. The triggering event is complete once the former officeholder effects the transfer of political contributions to another candidate, officeholder or political committee. See EAO 587. Nothing in the Election Code provides a way to reverse the expenditure to end the two-year waiting period.

With the basic framework of Section 253.007 established, we turn to the requestor's specific questions.

> **Question 1**: Is a former legislator prohibited from engaging in activity requiring registration before *the legislative branch* if a specific-purpose committee supporting that person made, during the preceding two years, contributions from political funds to a constable candidate, a justice court candidate, and a candidate for land commissioner?

Yes. The two-year waiting period is triggered by a contribution made to a candidate or officeholder regardless of the level of office sought (excluding federal office) when the contribution is made from a former candidate or officeholder's political contributions. Tex. Elec.

Code § 253.007; see also Tex. Ethics Comm'n Op. No. 575 (2002) (applying § 253.007 to candidate-controlled specific-purpose political action committees).

> **Question 2**: Does the answer to Question 1 change if the specific-purpose committee was reimbursed with the lawmaker's personal funds *and* each candidate refunded the contributions to the committee?

No. The plain language of Section 253.007 provides no exception or way to shorten the waiting period once a triggering contribution is made.

> **Question 3**: Is a former legislator prohibited from engaging in activity requiring registration if a specific-purpose committee supporting that person made, during the preceding two years, contributions from political funds to a general-purpose committee that is not controlled by the former legislator?

Yes. The plain language of 253.007 applies to contributions made to "a political committee." A general-purpose political committee is included in the definition of "political committee." Tex. Elec. Code § 251.001(12), (14).

> **Question 4**: Is a former legislator prohibited from engaging in activity requiring registration if a specific-purpose committee supporting that person made, during the preceding two years, contributions from political funds to a political party's county executive committee?

Yes, if the county executive committee meets the definition of a political committee. A county executive committee will often meet the definition of a political committee, which is "two or more persons acting in concert with a principal purpose of accepting political contributions or making political expenditures." Tex. Elec. Code 251.001(12).

The treatment of county executive committees of a political party as a type of general-purpose political committee is apparent throughout Title 15. *See id.* §§ 253.031(d) (applying a higher political committee registration threshold to "a political party's county executive committee that accepts political contributions or makes political expenditures"); 254.161 (applying notice requirements to "a general-purpose committee other than the principal political committee of a political party or a political committee established by a political party's county executive committee"); 257.001 ("The state or county executive committee of a political party may designate a general-purpose committee as the principal political committee for that party in the state or county, as applicable.").

> **Question 5**: Is a former legislator prohibited from engaging in activity that requires registration if a specific-purpose committee supporting that person made, during the preceding two years, a contribution from political funds to a political committee that never supported/opposed a candidate before dissolving?

Yes. The two-year waiting period is triggered by the candidate-controlled specific-purpose committee making a contribution to a political committee from contributions accepted by the

candidate-controlled specific-purpose committee. Tex. Elec. Code § 253.007; s*ee* also EAO No. 587. The law provides no exception if the recipient committee dissolves before making use of the triggering contribution.

> **Question 6**: Does Election Code § 253.007 apply to a person that voluntarily registered as a lobbyist despite not engaging in activity requiring registration (by remaining below the 40-hour threshold)?

Section 253.007 prevents a person from "engag[ing] in any activit[y]" that would require registration as a lobbyist—not the act of registering. Whether a person engaged in activity that requires registration is a fact question that cannot be resolved in an advisory opinion. Assuming the person actually did not engage in activity requiring registration as a lobbyist, the person would not violate 253.007 by gratuitously registering as a lobbyist.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 593

September 27, 2023

ISSUE

Whether a written communication, created by a political subdivision and related to a measure, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a). *(AOR-689).*

SUMMARY

The specific communication considered in this opinion is political advertising for purposes of Section 255.003 of the Election Code because it advocates for the passage of a measure.

FACTS

The requestor is a superintendent of an independent school district that put a voter-approved tax rate election ("VATRE") on the November 2023 ballot. The requestor asks whether a proposed communication would violate the prohibition on an officer or employee approving the spending of public funds for political advertising.

The communication is a video that uses animated text and images to present questions and answers about the VATRE. The communication explains that the VATRE will be used to add money to the school district's general fund.

The video contains the question "Why do we need a VATRE?" which it answers by citing the state's recapture system, inflation, "COVID-19 Costs," and increase in property values that outpaced growth in student enrollment.

The video also explains the cost of the VATRE and notes that it will have no additional cost to "those over 65." The video provides a table with the current tax rate and amount for a typical home under the current tax structure, the tax structure for next year if the VATRE fails, and the tax structure if the VATRE passes. The table shows a tax savings to the tax payer with the VATRE and a greater tax savings with no VATRE from the "current" tax structure. The video explains that an owner of a typical home can expect property taxes to be reduced even though the VATRE would raise the tax rate imposed by the ISD due to property tax relief legislation passed by the 88th legislature.

We assume that facts contained in the communication are true.

ANALYSIS

Officers and employees of political subdivisions are prohibited from "knowingly spend[ing] or authoriz[ing] the spending of public funds for political advertising." Tex. Elec. Code § 255.003(a). However, Section 255.003(a) does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure. Tex. Elec. Code § 255.003(b).

"Political advertising" means, in relevant part, a communication *supporting or opposing* a measure that appears in a pamphlet, circular, flier, billboard, or other sign, bumper sticker, or similar form of written communication. Tex. Elec. Code § 251.001(16) (emphasis added).

We view the communication as a whole when determining whether a communication supports or opposes a measure. Tex. Ethics Comm'n Op. No. 476 (2007). However, any amount of express advocacy, a motivational slogan, or call to action is impermissible even if the communication is otherwise factual. *See* Tex. Ethics Comm'n Op. No. 559 (2021).

"[T]he Election Code does not prohibit political subdivisions from spending public funds to enable voters to make informed decisions." Tex. Ethics Comm'n Op. No. 582 (2022) (quoting Tex. Ethics Comm'n Op. No. 559 (2021)). A communication may contain factual information that may affect whether voters will support or oppose the passage of a measure without advocating for or against the measure. *See, e.g.* Tex. Ethics Comm'n Op. No. 565 (2021); Tex. Ethics Comm'n Op. No. 582 (2022).

However, the communication at issue contains statements that are not factual and advocate for the passage of the VATRE. One question asked during the video is "Why is the VATRE necessary?" The question itself assumes the necessity for the increased tax rate. The communication then offers justifications. The VATRE being necessary is not a fact; it is a question for the voters to decide. Framing questions to assume the VATRE is necessary and then providing justifications is advocacy. The communication also emphasizes that taxes overall will go down for homeowners despite the increase from the VATRE, and actually writes "Yes" in a test bubble on the screen, after asking whether the VATRE should be approved.

When viewed as a whole, the communication advocates for the passage of the measure. Therefore, Section 255.003(a) prohibits an officer or employee from knowingly spending or authorizing the spending of public funds for its distribution or publication.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 594

September 27, 2023

ISSUE

Whether a written communication, created by a political subdivision and related to the political subdivision's special election for a sales tax ballot measure, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a). *(AOR-690).*

SUMMARY

The specific communication considered in this opinion is not political advertising for purposes of Section 255.003 of the Election Code because it is entirely factual and does not include any advocacy.

FACTS

The requestor represents a city that has called a special election for November 7, 2023, regarding a sales tax ballot measure. The city wishes to publish "educational materials with factual descriptions of the ballot measure to help voters make informed decisions." The requestor included a proposed communication attached with the request.

The communication includes:

- The election and early voting dates;
- A statement that "while the City Council voted in favor of calling the Special election to place the proposition before the voters, the City . . . as an entity does not advocate for or against passage or any proposition";
- Contact information for the city and county elections administrators;
- The ballot language;
- The history of various tax rates set by the city;
- The legal authority for making tax rate changes.

We assume that facts contained in the communication are true. (**Appendix 1**)

ANALYSIS

Under Section 255.003(a) of the Election Code, an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. Tex. Elec. Code § 255.003(a). Section 255.003(a) does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure. Tex. Elec. Code § 255.003(b).

"Political advertising" means, in relevant part, a communication *supporting or opposing* a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id*. at § 251.001(16) (emphasis added).

A significant factor "in determining whether a particular communication supports or opposes a public officer [or measure] is whether the communication provides information … without promotion of the public officer [or measure]." Tex. Ethics Comm'n Op. No. 476 (2007). For example, in Ethics Advisory Opinion No. 211, we concluded that an informational brochure was not a political advertisement—despite identifying the incumbent in the letterhead—because it "merely describe[d] the duties" of the public office and did not reference the incumbent "in a way that would lead one to believe that the purpose of the brochure was to support the incumbent." Tex. Ethics Comm'n Op. No. 211 (1994).

No matter how much factual information about the purposes of a measure election is included in a communication, *any amount* of advocacy is impermissible under Section 255.003(a). Tex. Ethics Comm'n Op. No. 564 (2021).

When viewed in its entirety, the communication is informational and does not support or oppose any candidate or measure. The proposed communication does not include any express advocacy, motivational slogan, or call to action. Viewed as a whole, the communication is not a statement of support or opposition, but rather a factual description of the measure presented to the voters. The communication does emphasize that the changes in the tax rates "d[o] not increase the current combined rate of all local sales and use taxes in the City." However, highlighting a particularly salient fact does not necessarily equate to advocacy for the measure.

In conclusion, the proposed communication does not constitute political advertising and does not advocate passage or defeat of a measure. Consequently, Section 255.003(a) of the Election Code does not prohibit an officer or employee of the political subdivision from using public funds to create and distribute the written communication.

DRAFT

Explanation of November 2023 Special Election Sales Tax Ballot Measure

Introduction

The City of Bastrop has called a special election on November 7, 2023, regarding a sales tax ballot measure. Early voting starts on October 23, 2023.

All registered voters of the City may cast a vote on the ballot measure. Voters can vote FOR or AGAINST the ballot measure. The proposed measure will be adopted if approved by a majority of the qualified voters at the election held for that purpose.

Below is the proposition and a brief explanation of why it is offered for consideration.

The City of Bastrop provides this explanation for voters as *educational material, only*. While the City Council voted in favor of calling the Special Election to place the proposition before the voters, the City of Bastrop as an entity does not advocate for or against passage of any proposition.

For information regarding voter registration and polling times and locations, you may contact either the City Secretary or the Bastrop County Elections Administrator:

City of Bastrop, City Secretary
1311 Chestnut Street
Bastrop, Texas 78602
(512) 332-8800
citysec@cityofbastrop.org
https://www.cityofbastrop.org/page/cs.election

Bastrop County Elections
804 Pecan Street
Bastrop, Texas 78602
(512) 581-7160
elections@co.bastrop.tx.us
https://www.bastropvotes.org/

Proposition A

Proposition A: "Without increasing the current combined rate of all local sales and use taxes imposed by the City of Bastrop, the adoption of a local sales and use tax within the City of Bastrop for the promotion and development of new and expanded business enterprises and any other purpose authorized by Texas Local Government Code Chapter 505, as amended, at the rate of one-eighth of one percent (0.125%), which is a reduction from the current local sales and use tax for this purpose at a rate of one-half of one percent (0.50%), and the adoption of an additional local sales and use tax within the City of Bastrop at the rate of three-eighths of one percent (0.375%) to provide revenue for maintenance and repair of municipal streets and any other purpose authorized by Texas Tax Code Chapter 327, as amended."

Explanation: Proposition A asks voters to vote FOR or AGAINST changes to the City's local sales and use tax rates which would at the same time:

(1) Reduce the current sales tax rate dedicated to funding the Bastrop Economic Development Corporation (the "EDC Sales Tax") from 0.50% to 0.125%, and

(2) Adopt a new street maintenance and repair tax (the "Street Maintenance Sales Tax") at a rate of 0.375%.

The proposed change *does not increase the current combined rate* of all local sales and use taxes in the City.

The proposed change keeps the same combined rate while reallocating the individual tax rates to reduce the amount dedicated to economic development purposes (the EDC Sales Tax) and to provide a new source of tax revenues dedicated to fund city street maintenance and repair (the Street Maintenance Sales Tax).

If the voters pass Proposition A, the City would submit the tax rate changes to the Texas Comptroller to take effect on April 1, 2024, so that the sales and use tax rates in the City would change as follows:

Tax	**Current Rate**	**Proposed Rate**
City of Bastrop, General Sales Tax (adopted 1967)	1.00%	1.00%
City of Bastrop, EDC Sales Tax (adopted 1967; proposed reduction in 2024)	0.50%	0.125%
City of Bastrop, Street Maintenance Sales Tax (proposed adoption in 2024)	0.00%	0.375%
Subtotal of Combined City Sales Tax Rates	*1.50%*	*1.50%*
County of Bastrop	0.50%	0.50%
Subtotal of Combined Local Sales Tax Rates	*2.00%*	*2.00%*
State of Texas	6.25%	6.25%
Total Combined Sales Tax Rates	*8.25%*	*8.25%*

In 1995 the voters of the City approved the EDC Sales Tax at a rate of 0.50% to be used for the promotion and development of new or expanded business enterprises and any other purpose authorized by Section 4B, Article 5190.6, of the Development Corporation Act of 1979, as amended (which has subsequently been codified in Texas Local Government Code Chapters 501 through 507). In accordance with the referenced state law, the EDC Sales Tax funds the Bastrop Economic Development Corporation's activities as a Type B economic development corporation. Under Texas Local Government Code Section 505.2566, the EDC Sales Tax Rate may be reduced to any rate that is an increment of one-eighth of one percent (0.125%) by an election for that purpose under Texas Tax Code Chapter 321.

Texas Tax Code Section 321.409 allows for combined ballot propositions regarding

municipal sales and use taxes, so that the voters may at the same time vote to reduce a municipal sales tax and by the same proposition adopt another municipal sales tax, as long as the total combined sales tax rate of all local government taxing entities (including the City and the County) does not exceed 2.00%.

Texas Tax Code Chapter 327 allows the City to adopt a Street Maintenance Sales Tax at a tax rate that is an increment of one-eighth of one percent (0.125%) by an election for that purpose under the procedures of Texas Tax Code Chapter 321. In accordance with state law, the Street Maintenance Sales Tax may be used to fund maintenance and repair of city streets or sidewalks in existence on the date of the election adopting the tax. Once in effect, the Street Maintenance Sales Tax must be reauthorized by the voters in subsequent elections every four years, or else it expires.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 595

September 27, 2023

ISSUE

Whether the Section 572.069 revolving door prohibition prevents a state university employee, who operates a business outside of his university employment, from bidding on behalf of his business on a procurement issued by the university. *(AOR-691).*

SUMMARY

Section 572.069 of the Government Code applies only to a "former state officer or employee of a state agency." The requestor is a current employee of the university and therefore is not subject to 572.069. However, the requestor should take care not to violate the standards of conduct for state employees listed in Section 572.051 of the Government Code or Chapter 39 of the Penal Code.

FACTS

The requestor has been employed in various capacities at the same university where he currently works as a senior advisor. The requestor has reduced his work hours for the university to three quarters time in order to pursue outside consulting projects. The outside projects are undertaken by a consulting firm where he is the Managing Principal and Executive Director. The consulting firm specializes in executive searches for universities. The requestor states he disclosed his outside employment and consulting services to his university in accordance with university policy.

The state university that employs the requestor has submitted a request for quotes (RFQ) for consulting services to help select the next university president. The requestor would like to submit a bid to provide consulting services through his consulting firm.

The requestor further states that he did not influence or work on the RFQ and would not have any involvement with scoring the bid. The facts submitted with the request do not indicate whether advising or participating in the executive search fits within his job description or expectations as a senior advisor employed by the university.

ANALYSIS

Chapter 572 of the Government Code contain three revolving door provisions—all of which apply to a former officer or employee of a state agency. Tex. Gov't Code §§ 572.054(a), 572.054(b), 572.069.

The requestor asks whether the revolving door provision that bars a "former state officer or employee of a state agency" who participated in a procurement involving a person from accepting employment for two years after the contract is signed or the procurement is terminated prevents him from bidding on the RFQ through his consulting firm and, if awarded, working on the project. *Id.* § 572.069. It does not.

In this case, the requestor has not yet exited the revolving door. As a current employee, the requestor is not a "former officer or employee" of a state agency. Tex. Gov't Code § 572.069. Therefore, Section 572.069 would not prohibit the requestor from bidding on, and if granted, receiving compensation for working on the RFQ while he maintains employment at the university.

Although the law cited in the request does not apply to the requestor because he plans on maintaining employment at the university, other Government Code and Penal Code provisions do apply to the conduct of current state employees.

Section 572.051 of the Government Code lists certain conduct in which a state officer or employee "should not" engage. The "should nots" include "accept[ing] other employment or engag[ing] in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position; . . .[or] accept[ing] other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties." Tex. Gov't Code § 572.051(a)(2), (3). Both of these provisions are potentially implicated by a senior advisor employed by a university bidding on and ultimately receiving additional compensation for providing "consulting" services to the same university.

Each state agency is also required to adopt a written ethics policy consistent with Section 572.051 and violating that policy or Section 572.051 may subject the state employee to termination. *Id.* § 572.051(b), (c).

The Texas Penal Code also makes it a criminal offense for a public servant to use or disclose nonpublic information that he has access to by means of his office or employment with an intent to gain a benefit, such as winning a competitive contract. Tex. Penal Code § 39.06(b).

The effect of an advisory opinion is to provide a defense to prosecution or civil penalty if reasonably relied upon. *Id.* § 571.097(a). Based on the limited facts presented we cannot offer that protection to the requestor with respect to Chapter 572 of the Government Code and Chapter 39 of the Penal Code.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 596

December 18, 2023

ISSUE

Whether expenditures made by a former legislator for general administration of his own campaign account are "direct campaign expenditures" that trigger the Section 253.007 two-year waiting period before engaging in activity that would require registration as a lobbyist. *(AOR-692).*

SUMMARY

No. Expenditures made by a candidate or officeholder that benefit only his or her own campaign are not "direct campaign expenditures" and therefore do not trigger the Section 253.007 lobby waiting period.

FACTS

The requestor is a former legislator who is not running for re-election. The requestor has used campaign contributions he accepted as an officeholder or candidate for small expenditures related to the maintenance of his campaign account or "residual items" from his past political campaigns. Examples of the expenditures include bank fees, paying for storage of campaign assets until they can be disposed of, and paying for the maintenance of campaign email accounts so the emails are not lost.

The requestor has not used his campaign contributions to make contributions to another candidate or committee, or to make direct campaign expenditures supporting other candidates or measures.

ANALYSIS

Section 253.007 of the Election Code prohibits a person from engaging in activities that require the person to register under Chapter 305 of the Government Code during the two-year period after the date the person knowingly makes or authorizes certain political contributions or makes a "direct campaign expenditure[] from political contributions accepted by the person as a candidate or officeholder." Tex. Elec. Code § 253.007.

A "direct campaign expenditure" is "a campaign expenditure that does not constitute a campaign

contribution by the person making the expenditure." *Id.* § 251.001(8). "A campaign expenditure does not constitute a contribution by the person making the expenditure to a candidate or officeholder if the expenditure is made without the prior consent or approval of the candidate or officeholder on whose behalf the expenditure is made." *Id.*

An expenditure made by a candidate or officeholder to benefit only his or her own campaign is not a contribution, which seems to fit the first part of the definition of direct campaign expenditure. However, the reference to prior consent or approval from the benefitting candidate in second half of the definition evidences a clear legislative intent that a direct campaign expenditure is an expenditure to benefit someone other than the person making the expenditure.

The relevant part of the definition of "direct campaign expenditure" states that an expenditure is not a contribution to a candidate or officeholder if it is made without the prior consent or approval of the candidate who benefits from the expenditure. *Id.* A candidate cannot knowingly make an expenditure for his or her own benefit without his or her own consent or approval. Therefore, by definition, an expenditure made by a candidate to benefit only him or herself cannot be a direct campaign expenditure. Accordingly, an expenditure by a candidate or officeholder that only benefits that candidate or officeholder's campaign, including expenditures associated with winding up their own account, would not trigger the Section 253.007 waiting period.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 597

December 18, 2023

ISSUE

Whether certain communications with a member of the legislative or executive branch to engender goodwill are communications to "influence legislative or administrative action." *(AOR-694).*

SUMMARY

A "communication to influence legislative or administrative action" includes any communication to establish (*i.e.* bring about, effect) goodwill that is made for the purpose of later communicating with the member to influence legislation or administrative action. This is true regardless of whether prior feelings of goodwill exist.

FACTS

The requestor is a "former legislator who wishes to conduct his activities in a manner that ensures compliance with the Texas lobby law and the Commission's advisory opinions and rules." To that end, the requestor asks whether communications to "maintain" goodwill with a state official are considered communications to influence legislative or administrative action for the purpose of Chapter 305 of the Government Code (the lobby law).

ANALYSIS

The lobby law generally regulates direct communications with "one or more members of the executive branch to influence legislation or administrative action." Tex. Gov't Code § 305.003(a)(1).

Since nearly its inception, the Texas Ethics Commission has considered communications to generate goodwill with legislative or executive branch officials to be made to "influence legislation or administrative action." Tex. Ethics Comm'n Op. No. 4 (1992); *See also* Tex. Ethics Comm'n Op. No. 34 (1992) (weekly "parties are communications to generate goodwill toward the host on the part of members of the legislative branch. Such communications are therefore to influence legislative action"); Tex. Ethics Comm'n Op. No. 46 (1992); Tex. Ethics Comm'n Op. No. 94 (1992).

The Commission has used different terms to describe communications made to engender or generate goodwill in advisory opinions, including "to create goodwill" or to "generate or maintain" goodwill. Tex. Ethics Comm'n Op. Nos. 467 (2006), 517 (2014), 113 (1993).

In 2015, the 84th Legislature codified the Commission's interpretation regarding goodwill communications by adding Section 305.002(2-a) to the Lobby Code, which reads:

> "Communicates directly with a member of the legislative or executive branch to influence legislation or administrative action" or any variation of the phrase includes establishing goodwill with the member for the purpose of later communicating with the member to influence legislation or administrative action.

Act of May 27, 2015, 84th Leg., R.S., ch. 1262, 2015 Tex. Gen. Laws 4272, (codified at Tex. Gov't Code § 305.002(2-a)).

The requestor contends that by using the word "establishing" with respect to goodwill, the legislature meant to exclude communications made to "maintain" goodwill. To further his argument, the requestor points to a dictionary definition of "establish" to mean "bring about, effect."

The requestor seems to conceptualize goodwill as a fixed binary where either goodwill exists or does not. In his view, once he has established goodwill with a member of the legislature, a subsequent communication meant to engender further feelings of goodwill is to "maintain," not establish, goodwill. As a consequence, he contends a communication to "maintain" goodwill is not covered by the lobby law. This is not so.

Goodwill is not a fixed state. Instead, it is an "*attitude"* or "a kindly *feeling* of approval or support." Merriam-Webster Dictionary Online available at https://www.merriam-webster.com/dictionary/goodwill; *See also Oxford English Dictionary* available at https://www.oed.com/search/dictionary/?scope=Entries&q=Goodwill. Attitudes and feelings can be fleeting and subject to change in response to changed circumstances or even just the passage of time.

Goodwill is also not a binary that is either established or not. One can have strong or weak feelings of goodwill toward a person. Even if some feelings of goodwill can be said to be "established," subsequent communications may "bring about" or "effect" more or stronger positive feelings. If those communications to bring about more feelings of goodwill are made for the purpose of later communicating with the member to influence legislation or administrative action, they are regulated as lobby communications. Tex. Gov't Code § 305.002(2-a). The idea of goodwill not existing as a binary, but as a feeling that can be added to or subtracted from, is consistent with how the term "goodwill" is used in other contexts. For example, in business, "goodwill" is "a term encompassing all intangible value associated with a business" that is routinely quantified and assigned a monetary value. *See, e.g., Welder v. Green*, 985 S.W.2d 170, 179 (Tex. App.—Corpus Christi 1998, pet. denied).

Under the plain language of the statute, whether a communication is made to influence legislation or administrative action turns on the lobbyist's purpose in making the communication. As properly understood, a "communication to influence legislative or administrative action" includes any communication to establish (i.e. bring about, effect) goodwill that is *made for the purpose* of later communicating with the member to influence legislation or administrative action. This is true regardless of whether prior feelings of goodwill exist.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 598

December 18, 2023

ISSUE

Whether the Chapter 572 of the Government Code revolving door provisions apply to a former State Board of Education member's appearing before the Texas Education Agency, the Texas Commissioner of Education, or the Texas Permanent School Fund Corporation. *(AOR-685).*

SUMMARY

A former State Board of Education (SBOE) member must wait two years before appearing before or seeking to influence the Permanent School Fund Corporation on behalf of another because the Corporation board contains SBOE members. Tex. Gov't Code § 572.054(a).

A former SBOE member must wait two years after ceasing service as an officer before appearing before or seeking to influence the Commissioner of Education on behalf of another because the Commissioner is an officer of the SBOE for purposes of Section 572.054(a).

The requestor would be subject to the Section 572.054(a) restriction with respect to Texas Education Agency employees if they were also employees of the SBOE under the common law employee-employer test.

Section 572.054(b) would prohibit a former SBOE member from ever receiving compensation for working on contacts in which they participated as a SBOE member even if the SBOE subsequently amended these contracts to make the Permanent School Fund Corporation a party rather than the SBOE.

FACTS

The requestor is a former member of the Texas State Board of Education (SBOE). The requestor asks a series of questions involving the revolving door provisions in Chapter 572 of the Government Code and their applicability to the SBOE and three related entities, the Commissioner of Education (Commissioner), the Texas Education Agency (TEA), and the Texas Permanent School Fund Corporation (Corporation).

Texas Education Agency

The Texas Education Agency is comprised of agency staff and the Commissioner. Tex. Educ. Code §§ 5.001, 7.002(a). The Commissioner is the TEA's "executive officer." Tex. Educ. Code § 7.055(b)(1), (2). As TEA's executive officer, the Commissioner is responsible for managing the powers and duties of the TEA laid out in Section 7.021 of the Education Code. The Legislature provides an appropriation for the TEA.

The Commissioner of Education

The Commissioner is the "educational leader of the state," appointed to a four year term of office as the "executive officer" of the TEA and the "executive secretary" of the SBOE by the governor, with the advice and consent of the senate. Tex. Educ. Code §§ 7.051, .052, .055(b)(1), (2). The Commissioner is only removable by the governor with the advice and consent of senate. *Id.* § 7.053.

As the executive secretary of the SBOE, the Commissioner both carries out duties imposed by the SBOE and advises and assists the SBOE with carrying out its duties. *See* Tex. Educ. Code §§ 7.055(b)(3), 7.102(b).

The SBOE

The SBOE is comprised of 15 elected members. Tex. Educ. Code § 7.101. Under the heading of "officers," the Education Code specifies that the chair of the SBOE is appointed by the governor with the advice and consent of the senate. Tex. Educ. Code § 7.107. The SBOE elects its own vice chair and a secretary. *Id.*

The SBOE has no staff. The Commissioner is its executive secretary and TEA provides staff for the SBOE. The SBOE must carry out the duties assigned to it in the Education Code "with the advice and assistance of the [C]ommissioner." Tex. Educ. Code § 7.102(b).

The Legislature does not provide an appropriation for the SBOE. The SBOE has four standing committees, one of which is the Committee on School Finance/Permanent School Fund. *See* SBOE Operating Rules § 1.2. At issue here is the SBOE's duty to manage and distribute the Permanent School Fund (PSF) through its own control or through a corporation it created to manage the fund. *See* Tex. Educ. Code ch. 43, Tex. Const. art. 7, §§3(b), 5.

The Corporation

The PSF was created in 1845 as a perpetual fund to support the state's public schools. Until 2021, the SBOE administered the Texas Permanent School Fund. In 2021, the Legislature authorized the SBOE to form a corporation and delegate to it the authority to manage the PSF. *See* Tex. Educ. Code § 43.052. The SBOE formed the Corporation on December 1, 2021, and effective January 1, 2023, transferred the PSF's assets to the Corporation. The SBOE also transferred all contracts relating to the PSF to the Corporation, which were amended to specify that the contracts were now with the Corporation, despite initially being executed with the SBOE. Finally, the SBOE also delegated the authority to manage the PSF to the Corporation.

A nine-member board of directors governs the Corporation. Tex. Educ. Code § 43.053(a).

However, the SBOE still exercises some degree of control. Five members of the Corporation's directors must be SBOE members, appointed by the SBOE. *Id.* § 43.053(a)(1). Any changes to the articles of incorporation or the Corporation's bylaws must be approved by the SBOE. Tex. Educ. Code § 43.063(a), (b). Currently, the Corporation's staff is composed of both new hires and individuals who were previously employed by TEA to manage the PSF. The Legislature does not provide an appropriation for the Corporation.

ANALYSIS

Chapter 572 of the Texas Government Code contains three different "revolving door" provisions applicable to former state officers or employees. Tex. Gov't Code §§ 572.054(a), 572.054(b), and 572.069.

The First Revolving Door Applies to the Requestor

Section 572.054(a) prohibits a former member of the governing body or former executive head of a regulatory agency, for two years after ceasing to be a member or executive head of a regulatory agency from, "mak[ing] any communication to or appearance before an officer or employee of the agency in which the member or executive head served … if the communication or appearance is made: (1) with the intent to influence; and (2) on behalf of any person in connection with any matter on which the person seeks official action." Tex. Gov't Code § 572.054(a).

As a former member of the SBOE, the requestor is subject to Section 572.054(a). The requestor asks whether he must wait two years from ceasing to be an SBOE member before making communications or appearing before the Corporation, Commissioner, or TEA employees.

The answer to each depends on the relationship between the SBOE, the Commissioner, the Corporation, and the TEA. The overlapping structure and responsibilities of each make this a novel question. Even the TEA's own organization chart reflects the ambiguity by placing the SBOE on its organizational chart, level with the Commissioner, but with arrows touching no other part of the chart.[1]

Communications with the Corporation

The requestor must wait two years before appearing before or seeking to influence the Corporation on behalf of another because the Corporation board contains SBOE members.

Section 572.054 prohibits certain communications or appearances before "*an officer or employee* of the agency in which the member . . .served." Tex. Gov't Code § 572.054(a). Although the SBOE and Corporation are separate entities, five SBOE members sit on the Corporation's board. Appearing before the Corporation will therefore inevitably require the requestor to appear before "an officer . . . of the agency in which the member . . . served." *Id.*

[1] https://tea.texas.gov/about-tea/welcome-and-overview/tea-organization-chart.pdf.

Communications with the Commissioner

The requestor must wait two years before appearing before or seeking to influence the Commissioner on behalf of another because the Commissioner is an officer of the SBOE.

Chapter 572 of the Government Code defines a "state officer" as "an elected officer, an appointed officer, a salaried appointed officer, an appointed officer of a major state agency, or the executive head of a state agency." Tex. Gov't Code § 572.002(12).

An appointed officer is, in relevant part, "an officer of a state agency who is appointed for a term of office specified by the Texas Constitution or a statute of this state." Tex. Gov't Code § 572.002(1).

In our opinion, the Commissioner is an officer of the SBOE for purposes of Chapter 572 because he is appointed to a term of service as the "executive secretary" of the SBOE. Tex. Educ. Code § 7.055(b)(2); *see also* Tex. Ethics Comm'n Op. No. 381 (1997) (EAO 381) (finding a salaried, solitary gubernatorial appointee who serves for a specific term pursuant to statute and oversees an agency's daily operation is an "appointed officer"). As executive secretary, the Commissioner plays an integral role for the SBOE. The Commissioner provides staff for the SBOE through the TEA and the SBOE is required to carry out its duties "with the advice and assistance of the [C]ommissioner." Tex. Educ. Code § 7.102(b). Similar to the appointed official in EAO 381, the Commissioner is an officer of the SBOE.

Communications with TEA employees

As noted above, Section 572.054(a) prohibits certain communications or appearances "before an officer or *employee* of the agency in which the member or executive head served." Whether Section 572.054(a) would apply to communications or appearances before TEA employees turns on whether some or all TEA employees can be considered employees of the SBOE.

The SBOE does not have staff. Instead, the TEA provides administrative staff to the SBOE. However, in interpreting the terms "employee" or "employed," in Chapter 572, we have applied the common law test of employment. Tex. Ethics Comm'n Op. No. 545 (2017). Generally, an employer's right or ability to control the manner and means by which an individual renders services is sufficient to establish an employment relationship. *See id.*

An individual also may be the employee of more than one employer. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 538 (Tex. 2002). An individual is an employee of two or more joint employers if: (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each control or supervise such rendering of services. Restatement (Third) of Employment Law: Employees of Two or More Employers § 1.04(b) (2015).

The requestor would be subject to the Section 572.054(a) restriction with respect to TEA employees if they were also employees of the SBOE under the common law employee-employer test. Whether TEA employees are also employees of the SBOE depends on specific facts not provided in the advisory opinion request. We are not able to resolve disputed facts in an advisory opinion. 1 Tex. Admin. Code § 8.3(d).

Revolving Door #2

The requestor next asks whether the revolving door prohibition that generally prohibits a former state officer or employee from receiving compensation for working on the same particular matter in which the officer or employee participated as a state officer applies to contracts that were originally entered into by the SBOE, but amended to be contracts with the Corporation. The requestor specifically asks:

> Does Texas Government Code § 572.054(b) prohibit former SBOE members from ever receiving compensation under contracts in which they participated when the contracts were with the SBOE if the contracts were subsequently amended to be contracts with the Corporation?

For the reasons stated below, Section 572.054(b) would prohibit such activity.

Section 572.054(b) prohibits *all* former state officers and employees of regulatory agencies from receiving any compensation for services rendered on behalf of any person "regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility." Tex. Gov't Code § 572.054(b).

The statutory definition of "particular matter" is "a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding." Tex. Gov't Code § 572.054(h)(2). We have previously opined that the "term 'particular matter' refers to a particular proceeding rather than to a particular subject matter …." Tex. Ethics Comm'n Op. No. 496 (2011). Similarly, former state employees are not prohibited from working in subject areas or for employers with which they became familiar in the course of their state employment. *Id*. (citing Tex. Ethics Comm'n Op. No. 364 (1997)). Furthermore, in Ethics Advisory Opinion No. ("EAO") 397, we determined that "[s]eparate contracts are separate 'matters' for purposes of the revolving door provision in Government Code section 572.054(b)." Tex. Ethics Comm'n Op. No. 397 (1998).

The facts provided by the requestor presume that the requestor participated in the contracts that the SBOE later transferred to the Corporation. In this case, it is irrelevant whether the original contract with the SBOE and the amended contract with the Corporation are different particular matters. Even if the amended contract is a different particular matter, the SBOE member would have participated in that matter by effecting the transfer as a board member. Therefore, the requestor would be prohibited from receiving compensation under contracts in which they participated as a SBOE member regardless of whether the contract was subsequently transferred to the Corporation.

Revolving Door #3

Finally, the requestor asks whether the third revolving door provision, related to procurements and contract negotiations, applies to previously executed investment transactions conducted by the Corporation that were ratified by the SBOE.

Section 572.069 prohibits all former state officers and employees who "participated on behalf of a state agency in a procurement or contract negotiation" from accepting employment from a

"person" involved in that procurement or contract negotiation for two years after the contract is signed or the procurement is terminated or withdrawn. Tex. Gov't Code § 572.069.

The Government Code does not define procurement or contract negotiation. However, we have looked to the State of Texas Procurement and Contract Management Guide, published by the Texas Comptroller of Public Accounts, which identifies "common characteristics between all procurements," including "defin[ing] the business need," "select[ing] the vendor that provides the best value to the State," and "ensur[ing] that the awarded contract complies with applicable procurement law and contains provisions that achieve the procurement objectives." Tex. Ethics Comm'n Op. No. 571 (2022).[2] We have emphasized that a procurement involves an agency's acquisition of goods and services. *Id.*

Although Section 572.069 does not define the word "participated," we have previously applied the definition found in a companion revolving door law prohibition, Section 572.054. *See* Tex. Ethics Comm'n Op. Nos. 568 (2021), 586 (2023). We apply that same definition here. "Participated" means "to have taken action as an officer or employee through *decision*, *approval*, *disapproval*, recommendation, giving advice, investigation, or similar action." Tex. Gov't Code § 572.054(h)(1) (emphasis added).

The requestor asks whether ratification by the SBOE of previously executed investment transactions constitutes participation in a procurement under Section 572.069. The SBOE often votes to ratify the purchase and sale of investments executed by the PSF staff. The requestor asserts that the SBOE never engaged in contract negotiations for these purchases and sales before voting to ratify the transactions.

The purchase or sale of investments clearly constitutes a procurement or contract negotiation. Ratification is a form of approval by the SBOE of these procurements or contract negotiations. *See* 572.054(h)(1) (participation includes decision, approval, or disapproval). Therefore, regardless of the involvement in the contract negotiations before ratification, the requestor participated in a procurement for each transaction subject to a ratification vote for purposes of Texas Government Code § 572.069.

[2] https://comptroller.texas.gov/purchasing/docs/96-1809.pdf

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 599

December 18, 2023

ISSUE

Whether a former state employee may provide consulting services to company with which he participated in a procurement during his state service without violating Section 572.069 of the Government Code. *(AOR-695).*

SUMMARY

The requestor may provide consulting services to a company with which he participated in a procurement during his state service without violating Section 572.069 provided he does not become an employee of the company.

FACTS

The requestor is a former employee of a state agency, who during his state employment, participated in procurements involving several businesses. The requestor is now part-owner of a consulting business. The consulting business seeks to contract with one or more businesses that were involved in procurements in which the requestor participated in during his state service.[1]

The requestor asks whether he may provide consulting services to a covered business through his consulting company.

ANALYSIS

Chapter 572 of the Government Code includes three revolving door prohibitions applicable to certain former state employees. At issue in this request is Section 572.069, which states:

> A former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept

[1]For the sake of brevity, a business with which the requestor participated in a procurement as a statement employee will be referred to as a "covered business."

> employment from that person before the second anniversary of the date the contract is signed or the procurement is terminated or withdrawn.

Tex. Gov't Code § 572.069.

The requestor states that he participated in a procurement with a business to which he now seeks to provide consulting services through a company he owns. Therefore, the revolving door prohibition would apply if he accepts "employment" from the business to which he provides consulting services.

We have interpreted the term "employment" in Chapter 572 consistent with the common law test of employment. Tex. Ethics Comm'n Op. No. 545 (2017) ("When a statute uses the terms 'employee' or 'employed,' or otherwise refers to an 'employment' relationship, courts [and the Commission] will use the common law test of employment unless the statute dictates otherwise.").

Under the common law test, generally, an individual renders services as an employee of an employer if:

> (1) The individual acts, at least in part, to serve the interests of the employer;
> (2) The employer consents to receive the individual's services; and
> (3) The employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson.

Restatement (Third) of Employment Law: Conditions for Existence of Employment Relationship § 1.01(a) (2015). Under the "right to control" test, an employer's right or ability to control the manner and means by which an individual renders services is sufficient to establish an employment relationship. *See* Tex. Att'y Gen. Op. No. GA-0292 at 4 (2005) (test to determine whether a person is an employee rather than independent contractor is whether the employer has a right to control the progress, details, and methods of operations of the work); *see also* Tex. Att'y Gen. Op. No. DM-409, at 5 (1996) (considering whether employer has right to control details of work).

In applying this test, we have looked to the actual relationship between the former state employee and the potential employer. In Ethics Advisory Opinion No. 572, a former state agency employee was employed by a staffing company. The former state agency employee sought to be placed by the staffing company with a business with which he had participated in a procurement as a state employee. Like this request, the requestor in EAO 572 sought to provide "consulting services" to the business. We held that even though the requestor was an employee of the staffing company, he would be an employee of the business where he was placed as well, because that business would have the right or ability to control the manner and means by which the requestor would render services.

In this case, regardless of whether the business contracts with a company owned by the requestor, the requestor will be subject to the Section 572.069 restriction if he enters into an employment relationship with a covered business. The facts the requestor provided indicate that he would not be employed by the covered business. The requestor stated that the "clients do not control the manner and means by which the services are rendered as they do not prescribe the specific methods,

techniques, processes, or approaches used to deliver the services." For the purpose of this opinion we assume those facts to be true. *See* Tex. Ethics Comm'n Op. No. 582 (2022.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 600

December 18, 2023

ISSUE

Whether Chapter 572 of the Government Code prohibits a former employee of a regulatory agency from accepting certain employment. *(AOR-696).*

SUMMARY

The requestor is not a member of the governing body or the executive head of a regulatory agency, so Section 572.054(a) does not apply. The requestor is not proposing to participate in any particular matter in which he participated as a state employee, so Section 572.054(b) would not prevent the requestor from engaging in his proposed employment. Merely reviewing a contract for conformity with certain form requirements, such as naming the correct party, does not constitute participating in the contract negotiation for purposes of Section 572.069. However, if the requestor gave approval, advice, or recommendation on whether to enter into a contract, or a substantive term of the contract such as how many employees to station at a given facility, he participated in that contract negotiation. If he participated in the contract negotiation, he would have to wait two years from when the contract was signed before accepting employment from any other person involved in that contract negotiation under Section 572.069.

FACTS

The requestor currently works in a supervisory role in the Outstationed Worker Program (OWP) of the Texas Health and Human Services Commission. The OWP provides staff to healthcare facilities to make determinations as to whether patients of the healthcare facilities qualify for benefits administered by the state. The state then invoices the healthcare facilities for the cost of the workers provided by the state. The requestor described his role as it relates to OWP contracts as follows:

> [S]ince these are Revenue Generating contracts and the fact they are boilerplate contracts and all the contract managers do is fill in the name of the contractor (recipient) and list the contractor's Primary. Legal, Signatory and IT

> Representatives. It is not like we are negotiating the terms. The terms are all set and every contractor receives the same template and the same wording. No negotiation take place by the contract managers or myself as to content of the contract but only the names and how many units and the facilities that we will cover. . . . . I see every contract. Before sending them my boss has to approve on HHSC side along with five others in Senior Leadership. The contract managers under me draw up the contracts and I check them for accuracy but we never change the terms of the contract since legal, program and 10 other areas must approved the template prior to legal approving it for us. Once approved, we use the same template for all the contractors. There price is also constant for all 220 contracts. . . . No negotiations are done by the contract manager. I touch them all but just to make sure they have not been changed and all the contractor's information is listed correctly.

The requestor plans on leaving the Texas Health and Human Services Commission to be employed by a company that operates several medical facilities that has several existing OWP contracts. The requestor states the company wants his help in expanding. He expects to "help to manage the payments to the state each month as well as the vast work involved with the determination of eligibility at all their sites and quality control of the work each day." The requestor states that the functions he would perform for the company "are completely different from what I work with daily [at HHSC] in writing and delivering services to the contractors by managing the contracts and collecting the funds." He further stated, "I will not be handling the [OWP] contracts at all for them."

ANALYSIS

Chapter 572 of the Texas Government Code contains three different "revolving door" provisions. *See* Tex. Gov't Code §§ 572.054(a), 572.054(b), and 572.069. The first of these provisions, section 572.054(a), applies only to "[a] former member of the governing body or a former executive head of a regulatory agency." Tex. Gov't Code § 572.054(a). Because the requestor is neither a member of HHSC's governing body nor the agency's executive head, this provision does not prohibit him from accepting any potential employment.

The second revolving door provision prohibits *all* former state officers and employees of regulatory agencies from receiving any compensation for services rendered on behalf of any person "regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility." Tex. Gov't Code § 572.054(b).

This law prohibits a former state employee from working on a "particular matter" the former state employee "participated" in as an employee of the state agency.

"Particular matter" is defined as "a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding." Tex. Gov't Code § 572.054(h)(2).

Former state employees are not prohibited from working in subject areas or for employers with which they became familiar in the course of their state employment. *Id*. See also Tex. Ethics Comm'n Op. No. 364 (1997). Instead, the "term 'particular matter' refers to a particular proceeding rather than to a particular subject matter …." Tex. Ethics Comm'n Op. No. 496 (2011). Furthermore, in Ethics Advisory Opinion ("EAO) No. 397, the Commission determined that "[s]eparate contracts are separate 'matters.'" Tex. Ethics Comm'n Op. No. 397 (1998).

Based on the facts presented by the requestor, he would not be prohibited by Section 572.054(b) from accepting prospect employment. The requestor states he would not work on existing OWP contracts. Rather, he would be helping with the company's operations and expansion. These are not the same particular matters that he worked on as an HHSC employee. Nor would the requestor be prohibited by Section 572.054(b) in helping the prospective employee secure new contracts with the state because different contracts are different particular matters. Tex. Ethics Comm'n Op. No. 397 (1998).

The third revolving door provision, section 572.069, prohibits all former state officers and employees who "participated on behalf of a state agency in a procurement or contract negotiation" from accepting employment from "a person" involved in that procurement or contract negotiation for two years after the date the contract is signed or the procurement is terminated or withdrawn. Tex. Gov't Code § 572.069.

Unlike section 572.054(b), this provision does not merely prohibit former state agency employees from working on particular matters in their new employment. Instead, it prohibits former state agency employees from accepting *any* employment from certain persons for two years, even if the private employment is unrelated to anything they worked on during their state service.

Section 572.069 does not define the term "participated." However, we have relied on the meaning of "participated" in Section 572.054 when construing Section 572.069, and apply that meaning here. *See* Tex. Ethics Comm'n Op. No. 568 (2021). "Participated" means "to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action." Tex. Gov't Code 572.054(h)(1).

The requestor stated he was a supervisor in the OWP, which entered into contracts with healthcare providers. Unlike typical state contracts where the state pays for goods or services, with the OWP contracts, the state receives revenue for providing services to a private business. Although it is not clear whether these arrangements are "procurements," they are contracts and therefore covered by Section 572.069.

We have not addressed in an advisory opinion the scope of the term "participation" in contract negotiation that was not also a procurement. However, we have held that a supervisor did not "participate" in a procurement on behalf of a state agency merely by keeping informed of the status of agency procurements. Tex. Ethics Comm'n Op. No. 568 (2021). But scoring and evaluating a bid proposal is participating in a procurement. Tex. Ethics Comm'n Op. No. 545 (2017).

The term "contract negotiation" is not defined in Chapter 572. To "negotiate" is "to confer with another so as to arrive at the settlement of some matter." Merriam Webster Dictionary Online *available at https://www.merriam-webster.com/dictionary/negotiate.* A state employee does not

need to have personal contact with the counterparty to participate in a contract negotiation. A state employee participates in a negotiation by providing, among other things, approval, disapproval, or recommendation. *See* Gov't Code § 572.054(h)(1).

The requestor states his only involvement in the contract was to ensure that it was in the correct form, named the correct parties, and included the correct contact information. The facts do not indicate that he made contact with or discussed the terms of the contract with the counterparty. Nor did the requestor have the authority to change the terms of the contract. Merely reviewing a contract for conformity with certain form requirements, such as naming the correct party, does not constitute participating in the contract negotiation. As such, Section 572.069 would not prohibit the requestor from accepting immediate employment with a company if he only conducted a form review for a contract with HHSC.

However, it is not clear from the request whether the requestor gave approval, advice, or a recommendation on whether to enter into a contact with a given facility or the number of employees to station at a given facility. If the requestor gave approval, advice, or recommendation on whether to enter into a contract at all, or a substantive term of the contract such as how many employees to station at a given facility, he participated in that contract negotiation. As a consequence, he would have to wait two years from when the contract was signed before accepting employment from any person involved in that contract negotiation under Section 572.069.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 601

March 20, 2024

ISSUE

How various provisions of title 15 of the Texas Election Code apply to a Texas "purpose trust" formed under Section 112.121, Texas Property Code. *(AOR-697).*

SUMMARY

A trust is not a separate legal entity and therefore not a distinct "person" for the purposes of determining political committee status and the application of campaign finance rules generally. Therefore, the general campaign finance restrictions and reporting rules apply to the people comprising the trust, i.e., the people funding or making contribution or expenditure acceptance decisions on behalf of the trust.

The people providing money to a trust and deciding how money will be spent on behalf of a trust may be treated as a Texas political committee if, just like any other group of people acting in concert, they meet the generally applicable criteria for forming a political committee.

A purpose trust comprised entirely of funds from an individual is not subject to the corporate contribution ban under Section 253.093 of the Election Code and may make political contributions to candidates, officeholders, and political committees.

A purpose trust that is not a political committee will be subject to the corporate contribution ban if the trust organizes itself as a corporation—even it incorporates for liability purposes only.

FACTS

The requestor asks various questions relating to the application of campaign finance rules to an unincorporated Texas "purpose trust."

Texas law defines a trust as:

> a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property:

(A) for the benefit of another person; or
(B) for a particular purpose, in the case of a [purpose trust].

Tex. Prop. Code § 111.004(4) (defining "express trust"); *see also Ray Malooly Tr. v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006).

A "purpose trust" is a unique type a trust created by the 88th Legislature. Acts 2023, 88th Leg. R.S., Ch. 112 (H.B. 2333), Sec. 2., codified as Subchapter F of Chapter 112, Tex. Property Code. Typically, a trust requires an identifiable beneficiary to be effective. However, a "purpose trust" may be "created for a noncharitable purpose without a definite or definitely ascertainable beneficiary." Tex. Prop. Code § 112.121(a).

Under Texas law, a purpose trust has the following characteristics:

- It is enforced by one or more trust enforcers named in the trust instrument;
- Its trust enforcers are fiduciaries required to enforce the purpose and terms of the trust;
- Its trust enforcers are entitled to reasonable compensation;
- The trust instructions may provide for successor trust enforcers; and
- If a purpose trust ends up with no trust enforcer, a court properly exercising jurisdiction shall appoint one.

See Tex. Prop. Code § 112.121 *et seq.*

The requestor is considering creating a purpose trust under Section 112.121 of the Property Code. He plans to use at least some trust assets to make political expenditures and political contributions to Texas candidates and officeholders. The requestor states the trust's only source of funds and assets would be "[the requestor's] personal funds and assets, including shares of stock in corporations that are held by [the requestor] personally, as well as any investment income the trust may earn from its funds and assets" and would not accept any corporate funds.

The purpose of the requestor's trust would be "bringing about civic betterments and social improvements." The requestor believes it would "qualify as a social welfare entity under Section 501(c)(4) of the Internal Revenue Code."

ANALYSIS

The requestor asks a series of questions regarding the application of title 15 of the Election Code to a trust. Most of the questions turn on whether a trust is treated as distinct and singular "person." For the reasons explained below, a trust is not a distinct, singular person for purposes of campaign finance. In essence, the trust form is ignored and the normal campaign finance restrictions and reporting rules apply to the trust's constituent parts: the people funding the trust and making decisions about funding or how to spend the trust assets.

Unlike a corporation, a trust is not a separate legal entity.

In Texas, "the term 'trust' refers not to a separate legal entity but rather to the fiduciary relationship governing the trustee with respect to the trust property." *Juhl*, 186 S.W.3d at 570

(citing *Huie v. DeShazo*, 922 S.W.2d 920, 926 (Tex. 1996) (holding that treating trust rather than trustee as attorney's client "is inconsistent with the law of trusts")).

This stands in contrast to a corporation, which is a distinct legal entity. Texas' Third Court of Appeals has held that a corporation acting alone did not have standing to challenge the law related to political committees because the corporation was a single person, not a group of persons. *Tex. Home Sch. Coalition Ass'n v. Tex. Ethics Comm'n*, No. 03-17-00167-CV, 2018 Tex. App. LEXIS 9075, at *10 (Tex. App.—Austin Nov. 7, 2018, no pet.) (mem. op.). A federal district court reached the same conclusion. *Lake Travis Citizens Council v. Ashley*, No. 1:14-CV-994-LY, 2016 U.S. Dist. LEXIS 151797, at *4-5 (W.D. Tex. 2016) ("[TEC] argues that [nonprofit corporation] is not at risk of regulation as a political committee because it is a nonprofit corporation and therefore treated as a singular person, not a group of persons, under the Texas Election Code. *See* Tex. Gov't Code § 311.005(2). The court agrees.").

Both courts turned to the Texas Code Construction Act's definition of "person" to reach the conclusion that a corporation is a singular person. *Tex. Home Sch. Coalition Ass'n*, 2018 Tex. App. LEXIS 9075, at *10; *Lake Travis*, 2016 U.S. Dist. LEXIS 151797, at *4-5. Subsequent to these opinions, the 86th Legislature amended the statutory political committee definition reviewed by the courts by deleting the phrase "group of persons" and replacing it with "two or more persons." Acts 2019, 86th Leg., R.S., Ch. 1127 (H.B. 2586), Sec. 1, *codified at* Tex. Elec. Code § 251.001(12). The amendment does not substantively affect the analysis.

As defined by the Code Construction Act, "'person' includes corporation, organization, government or governmental subdivision or agency, business trust, estate, *trust*, partnership, association, and any other legal entity." Tex. Gov't Code § 311.005(2) (emphasis added). The requestor asserts that just like a "corporation," a "trust" is a "person" under the Code Construction Act and therefore cannot meet the political committee definition of "two or more persons" when acting alone.

In *Juhl*, the Court expressly rejected the argument, raised by this requestor, that a trust should be treated a separate legal entity because the Code Construction Act definition of "person" includes a "trust." *Juhl, 186 S.W.3d at 570.* The Court opined:

> The definitions in the Code Construction Act apply unless other statutes or contexts require a different definition. Tex. Gov't Code § 311.005(2). The most relevant code - the Texas Trust Code - explicitly defines a trust as a relationship rather than a legal entity. *See* Tex. Prop. Code § 111.004(4).

Id. Not only is a trust defined as a relationship rather than an entity in the Property Code, "trust" does not appear in the definition of a "person" in the Property Code. Tex. Prop. Code § 111.004(10). The definitions in the Property Code, as interpreted by the Texas Supreme Court, require a different definition of "trust" than that in the Code Construction Act. *See Juhl, 186 S.W.3d at 570.* Therefore, a trust is not a distinct and singular person.

For the purposes of title 15, the trust form is generally ignored, and the normal campaign finance and reporting rules are applied to the trust's constituent parts.

The individuals contributing to or making contribution or expenditure decisions for a trust may be treated as a political committee if the group has a principal purpose making political expenditures or accepting political contributions.

A political committee is "*two or more persons* acting in concert with a principal purpose of accepting political contributions or making political expenditures." Tex. Elec. Code § 251.001(12) (emphasis added).

The law does not specify what two or more persons must do to "act in concert." However, the phrase "in concert" is commonly defined as simply acting together. Merriam-Webster.com Dictionary, s.v. "concert," accessed February 27, 2024, https://www.merriam-webster.com/dictionary/concert. There are also few organizational requirements of a political committee. It must appoint a campaign treasurer responsible for filing reports disclosing political contributions and expenditures. Tex. Elec. Code § 252.001. It must also disclose the person appointing the treasurer and the name of each person who determines to whom the committee makes contributions or the name of each person who determines for what purposes the committee makes expenditures. *Id.* § 252.003, .0031.

Therefore, whether a trust is a political committee requires the same analysis applicable to any group of people acting in concert. In the context of a trust, the trust donor(s) and the people responsible for deciding how trust assets are spent (presumably the trustee or trust enforcers) would constitute the people comprising a political committee if making political expenditures or accepting political contributions is a principal purpose of the trust. As defined by TEC rule, the trust would have such a principal purpose if making Texas political expenditures comprises more than 25 percent of its annual expenses. *See* 1 Tex. Admin. Code § 20.1(17) (defining "principal purpose" in part when "the group expends more than 25 percent of its annual expenses to make political expenditures within a calendar year."); *see also id.* §20.18(A)(iv) (defining a political expenditure, in part, as making a political contribution to a candidate officeholder or political committee).

The trust form is disregarded for purposes of campaign finance reporting.

The requestor asks whom should be identified as the contributor by a recipient of a political contribution from the trust.

A candidate, officeholder, or political committee must report the "full name" of political contributions made by electronic transfer in any amount or made by other means above a threshold amount. Tex. Elec. Code § 254.031(a)(1), (1-a). The law prohibits a person from making a contribution in the name of or on behalf of another unless the person discloses in writing to the recipient the name and address of the person actually making the contribution. *Id.* § 253.001.

Therefore, the identity of the contributor is not only an important fact the recipient must know for proper disclosure, but also information the trust must know to follow the law.

Again, the trust form is generally ignored and the normal reporting rules apply. If the trust is comprised of two or more people and has a principal purpose of accepting political contributions

or making political expenditures, it must file and report as a political committee. But if the trust does not constitute a political committee (either because it lacks the necessary principal purpose or involves only a single person acting alone), then recipients of its contributions must disclose the trust donor as the contributor, and any qualifying direct campaign expenditures made by the trust must be disclosed in the name of the trust donor. It would also be permissible to disclose the name of the trust donor with the notation that it was provided through a trust (e.g. Joe Smith (through the Joe Smith Purpose Trust)).

Under the facts presented, a purpose trust would not be subject to the ban on corporate contributions.

Corporations are generally prohibited from making political contributions to candidates. *See* Tex. Elec. Code § 253.094 ("[a] corporation or labor organization may not make a political contribution that is not authorized by [Subchapter D, of Chapter 253]"). Subchapter D does not authorize corporate or labor organization contributions to candidates or officeholders and allows corporations or labor organizations to contribute to political committees in only limited circumstances.

The corporate contribution restriction does not apply to all business forms. Instead, it "applies only to corporations that are organized under the Texas Business Corporation Act, the Texas For-Profit Corporation Law, the Texas Non-Profit Corporation Act, the Texas Nonprofit Corporation Law, federal law, or law of another state or nation." Tex. Elec. Code § 253.091.

A trust is not a corporation organized under one of the laws specified in Section 253.091. Therefore, a purpose trust consisting of only the funds of an individual and not accepting any corporate funds would not be considered a corporation under Section 253.091.

The corporate contribution restriction also applies to certain associations, whether incorporated or not, including "trust companies." *Id.* § 253.093(a). However, a trust is different from a "trust company." A trust company is a company that acts as a trustee. *See* Trust Company Definition, Black's Law Dictionary 121 (3rd Pocket ed. 1996); *see also* 10 Am. Jur. 2d Banks § 11 (defining a trust company as "a corporation, usually engaged in a general banking business, and in particular as a compensated trustee of funds or property. A bank for purposes of regulation.").

A trust company acts as a trustee on behalf of a trust, but it is not itself a trust. A trust is therefore not considered organized as a corporation under Section 253.091 and is not one of the types of associations subject to the contribution restriction regardless of organization. As a consequence, a purpose trust comprised entirely of funds from an individual is not subject to the corporate contribution ban under Section 253.093 and may make political contributions to candidates, officeholders and political committees.[1]

[1] The requestor does not ask and we do not reach the applicability of the corporate contribution restriction to trusts other than a purpose trust comprised entirely of funds from an individual.

A purpose trust that incorporates will be subject to the corporate contribution prohibition if it is not a political committee incorporating for liability purposes only.

The requestor asks whether the purpose trust would still be able to make contributions to candidates and unrestricted contributions to political committees if it incorporates for liability purposes only.

The requestor proposes stating in the trust's Certificate of Formation "that it is incorporating for liability purposes only, and that its principal purpose is to bring about civic betterments and social improvements (which may, in some instances, entail making political contributions pursuant to the purpose and terms of the trust)."

The Election Code allows a "political committee the only purpose of which is accepting political contributions and making political expenditures" to incorporate for liability purposes only without being subject to the restriction on corporate contributions. Tex. Elec. Code § 253.092. A political committee may avail itself of this exception by "providing in its official incorporation documents that it is a political committee that is incorporating for liability purposes only, and that its only principal purpose is to accept political contributions and make political expenditures." Tex. Admin. Code § 24.1(d).

Political committees are generally subject to registration and periodic reporting obligations to disclose all political contributions accepted by the political committee and spent by the political committee. *See generally*, Tex. Elec. Code, Chapters 252, 254.

The plain text of the statute applies the exception to only (1) "a political committee" (2) "the only principal purpose of which is accepting political contributions and making political expenditures." *Id.* We decline to extend the statutory exception beyond entities expressly identified by the legislature. Therefore, if the purpose trust is not a political committee with its only principal purpose of accepting political contributions and making political expenditures, it would not be able to incorporate for liability purposes only and still make political contributions to candidates and officeholders or unrestricted political contributions to political committees.

However, if the trust instrument establishes the trust to have as its only principal purpose accepting political contributions and making political expenditures and the trust is a political committee, it would be able to incorporate for liability purposes only and continue to make political contributions under Section 253.092.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 602

March 20, 2024

ISSUE

Whether employees of a state agency may provide a list of preferred items to non-profit entities that would be used in carrying out the agency's mission, if the gifts are not provided to employees for their personal use or enjoyment. *(AOR-698).*

SUMMARY

Under the facts presented, the solicitations would be for gifts to the agency rather than individual employees. Therefore, the Penal Code gift restrictions would not apply. Whether an agency may solicit or accept gifts is governed by other law specifically applicable to that agency, over which the Ethics Commission has no interpretive authority.

FACTS

The requestor represents a division of a state agency that investigates reports of alleged abuse, neglect, or financial exploitation of a certain population of individuals. The agency also provides short-term or emergency services to remedy substantiated cases of abuse, neglect or financial exploitation. Certain non-profit entities wish to assist the agency in its care of its clients. The requestor proposes providing a list of items that would be most beneficial to the agency in carrying out its mission. The requestor states that solicitations would be for gifts that would not be used by employees for their personal use or enjoyment and that the gifts would be used in carrying out the agency's powers and duties.

ANALYSIS

Absent an exception, a public servant is generally prohibited from soliciting or accepting "any benefit" from a person subject to the public servant's jurisdiction. *See* Tex Gov't Code §§ 36.08; 36.10 (providing exemptions to the general prohibition). However, gifts that primarily benefit the agency, rather than an employee of the agency are considered gifts to the agency. Tex. Ethics Comm'n Op. 31 (1992); *see also* Atty Gen, Op. JH-1309 at 4-5 (1978) (noting that an officer or employee may accept gifts on behalf of agency if agency has authority to accept gifts). *But see* Tex. Ethics Comm'n Op. 62 (1992) ("A consumable gift unrelated to an agency's mission would not be a gift to an agency.").

Providing a list of preferred items to a potential donor is soliciting a benefit. However, the requestor states the solicitation would be for items that would benefit the agency in providing

care to its clients and the items would not be for employees' personal use or enjoyment. Under the requestor's facts, the gifts would benefit the agency not the employees of the agency. Therefore, the proposed solicitations are for gifts to the agency rather than gifts to an employee of the agency. *See* Tex. Ethics Comm'n Op. 62 (1992), 31 (1992).

Whether an agency may solicit or accept gifts is not governed by Chapter 36 of the Penal Code or Chapter 305 of the Government Code (related to lobbying). Tex. Ethics Comm'n Ops. 62, 31. Instead, it is governed by other law specifically applicable to that agency, over which the Ethics Commission has no interpretive authority. Tex. Ethics Comm'n Op. 62 (1992), 31 (1992); Tex. Att'y Gen. Op. JM-684 (1987), JH-1180 (1978) (regarding statutory authority of state agencies to accept gifts).

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 603

March 20, 2024

ISSUE

Where must candidates for an appraisal district's board of directors file campaign treasurer appointments and campaign finance reports? *(AORs-699, 701).*

SUMMARY

A candidate for an appraisal district's board of directors must file campaign treasurer appointments and campaign finance reports with the clerk or secretary of the appraisal district. If the appraisal district does not have a clerk or secretary, the reports must be filed with the appraisal district's presiding officer.

FACTS

An appraisal district is a political subdivision of the state, responsible for appraising property in the district for ad valorem tax purposes of each taxing unit that imposes ad valorem taxes on property in the district. Tex. Tax Code § 6.01. The 88th Legislature, during its second special session, added election requirements to appraisal district board of directors in a county with population of 75,000 or more. Acts 2023, 88th Leg., 2nd C.S., Ch. 1 (S.B. 2), Sec. 5.03, (codified at Tex. Tax Code § 6.0301).

Under the newly passed legislation, an appraisal district in a county with a population of 75,000 or more is governed by a board of nine directors. The board is composed of both appointed and elected directors. Three directors are elected by majority vote at the general election for state and county officers by the voters of the county in which the district is established.

The commission has received several questions from appraisal districts, county clerks, and candidates, including two formal advisory opinion requests regarding the proper filing authority for candidates for an appraisal district board of directors.

ANALYSIS

The law generally requires a candidate to file their campaign treasurer appointment with the unit of government to which they are seeking election. Tex. Elec. Code. § 252.005. For an individual seeking elective office of a political subdivision, campaign finance reports are filed with "the

clerk or secretary of the governing body of the political subdivision or, if the political subdivision has no clerk or secretary, with the governing body's presiding officer." *Id.*

Campaign finance reports are filed by candidates, officeholders, or specific-purpose committees supporting a candidate or officeholder with the same filing authority the treasurer appointment is filed. Tex. Elec. Code §§ 254.066, .097, .130.

"An appraisal district is a political subdivision of the state," distinct from a county. Tex. Tax Code § 6.01(c).

Since a candidate for elective office of a political subdivision office files campaign treasurer appointments and campaign finance reports with the political subdivision, and an appraisal district is a political subdivision, a candidate for an appraisal district's board of directors files his or her campaign treasurer appointments and campaign finance reports with the appraisal district.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 604

March 20, 2024

ISSUE

Whether the purchase of a storage trailer is a normal overhead, administrative, or operating cost of a political party such that contributions from a corporation may be accepted and used for its purchase. *(AOR-700).*

SUMMARY

The political party may use contributions from corporations to purchase a storage trailer because the trailer is a normal overhead cost.

FACTS

The requestor represents a county political party. She asks whether a county political party may accept contributions from a corporation to purchase a storage trailer that will be used to store "campaign and other political party items."

ANALYSIS

The law allows a political party to accept corporate or labor contributions[1] for limited purposes. Tex. Elec. Code § 253.104. A political party may use contributions from a corporation only to: "(1) defray normal overhead and administrative or operating costs incurred by the party; or (2) administer a primary election or convention held by the party." *Id.* § 257.002(a).

The phrase "normal overhead and administrative or operating costs" covers "items such as expenditures for office space, utilities, and other usual costs of operating an organization." Tex. Ethics Op. No. 272 (1995).

"Overhead" is not defined in statute but is generally known to mean "business expenses (such as rent, insurance, or heating) not chargeable to a particular part of the work or product." Merriam-Webster.com Dictionary, "Overhead." Merriam-Webster, https://www.merriam-webster.com/dictionary/overhead. Accessed 20 Feb. 2024.

[1] The requestor asked about the permissibility of a political party accepting contributions from a corporation. For that reason we will refer only to corporate contributions. However, the restrictions applicable to a political party's acceptance and use of corporate contributions applies equally to contributions from a labor organization.

In Advisory Opinion No. 176, the TEC opined that purchasing a permanent party headquarters is a normal overhead expense for which corporate contributions may be used. Tex. Ethics Comm'n Op. No. 176 (1993). However, costs associated with the printing and distribution of brochures soliciting donations to and membership in the party is not a "normal overhead and administrative or operating cost." Tex. Ethics Comm'n Op. No. 272 (1995). The key distinction is whether the expense is attributable to general ongoing operational costs as opposed to spending more directly attributable to expenditures advocating in connection with an election. *See id.*

A permanent storage trailer to hold the various items owned by a political party is akin to a party's headquarters. The use of a storage space for the various items a political party accumulates fits squarely within the definition of "overhead" in that it is not directly attributable to a single activity of the party. This is true regardless of whether the party chooses to lease temporary storage space or purchase a trailer or some other more permanent storage solution. Therefore, the party may use contributions from corporations to purchase a storage trailer.

We note certain conditions apply to the timing and manner of a political party's acceptance of corporate contributions. Corporate contributions must be maintained in a separate account. *Id.* § 257.002(b). The party must file reports of contributions to and expenditures from this separate account as if the party chairman were the campaign treasurer of a political committee and as if the contributions or expenditures were political contributions or expenditures. *Id.* § 257.003. The party may not accept corporate contributions or use corporate contributions during the period beginning on the 60th day before the date of the general election for state and county officers and continuing through the day of the election. *Id.* § 257.004(a).

The political party may use contributions from corporations to purchase a storage trailer used for general storage of the party's items provided they abide by the provisions generally applicable to the acceptance of corporate money by a political party.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 605

March 20, 2024

ISSUE

Whether a state university may provide prizes to randomly selected attendees of sporting events under Chapter 36 of the Penal Code when the recipient of the prize may be a university employee. *(AOR-702).*

SUMMARY

Under the facts presented, providing prizes to attendees of sporting events would not be prohibited by Chapter 36 of the Penal Code even if a university employee receives a prize after being selected at random.

FACTS

The requestor represents a state university's athletic department. During breaks at sporting events the university conducts "mini games" that can result in the participant receiving a prize, such as a $100 gift card. The participants are chosen randomly from the spectators by the athletic department's interns. The spectators could include university employees or students who in turn could be chosen for the games. However, enrollment as a student or employment status is not a condition of being selected and not determined at any time during the selection process or event.

The requestor asks whether providing gifts to a university employee or student would be prohibited by Chapter 36 of the Texas Penal Code.

ANALYSIS

In our opinion, Chapter 36 of the Penal Code would not prohibit a university from providing small gifts to a university employee for participating in a mini game at a sporting event provided the employee is selected randomly and without respect to his or her employment status.[1]

Chapter 36 of the Penal Code contains a number of prohibitions against public servants accepting benefits from persons subject to their jurisdiction, absent exception. Tex. Penal Code § 36.08. For example, section 36.08(a) prohibits a public servant from accepting a benefit from a person

[1] The provision of a gift to a student as proposed in this opinion would not implicate the Penal Code because a person's status as a student, standing alone, does not make them a "public servant." Tex. Penal Code. § 1.07(a)(41).

the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

It is possible that a university employee in attendance may have oversight over the athletic department of the university. *See* Tex. Ethics Op. Nos. 118 (1993) (Section 36.08(a) could apply even when the gift giver and recipient are in the same agency); 100 (1992) ("Whether a state employee may accept a prize depends on the nature, value, and context of the prize."). However, even if Section 36.08(a) could be implicated by a certain gifts to a university employee, it would not prohibit such a gift under these facts. This is because 36.08 does not apply to a "gift or other benefit conferred on account of . . . business relationship independent of the official status of the recipient." Tex. Penal Code § 36.10(a)(2).

The requestor states the participants are chosen randomly from attendees of sporting events. The ticket for entry to the sporting event creates a business relationship independent of the official status of potential university employee in attendance. So long as the participants are chosen randomly, or without respect to employment status, any prize given for participation in a "mini game" would be based on an independent business relationship.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 606

June 18, 2024

ISSUE

Whether a Texas Limited Liability Company that is a wholly-owned subsidiary of a Master Limited Partnership that is traded on the New York Stock Exchange is prohibited by Chapter 253 of the Election Code from making certain political contributions. **(***AOR-693).*

SUMMARY

A Texas Limited Liability Company that is owned by a partnership whose shares are publicly-traded on an exchange is subject to the Chapter 253 corporate contribution prohibition if any share of the partnership is owned by a corporation.

FACTS

The requestor is a Texas Limited Liability Company formed under the Texas Limited Liability Company Act and is managed by its sole member, which is another LLC (Parent 1).

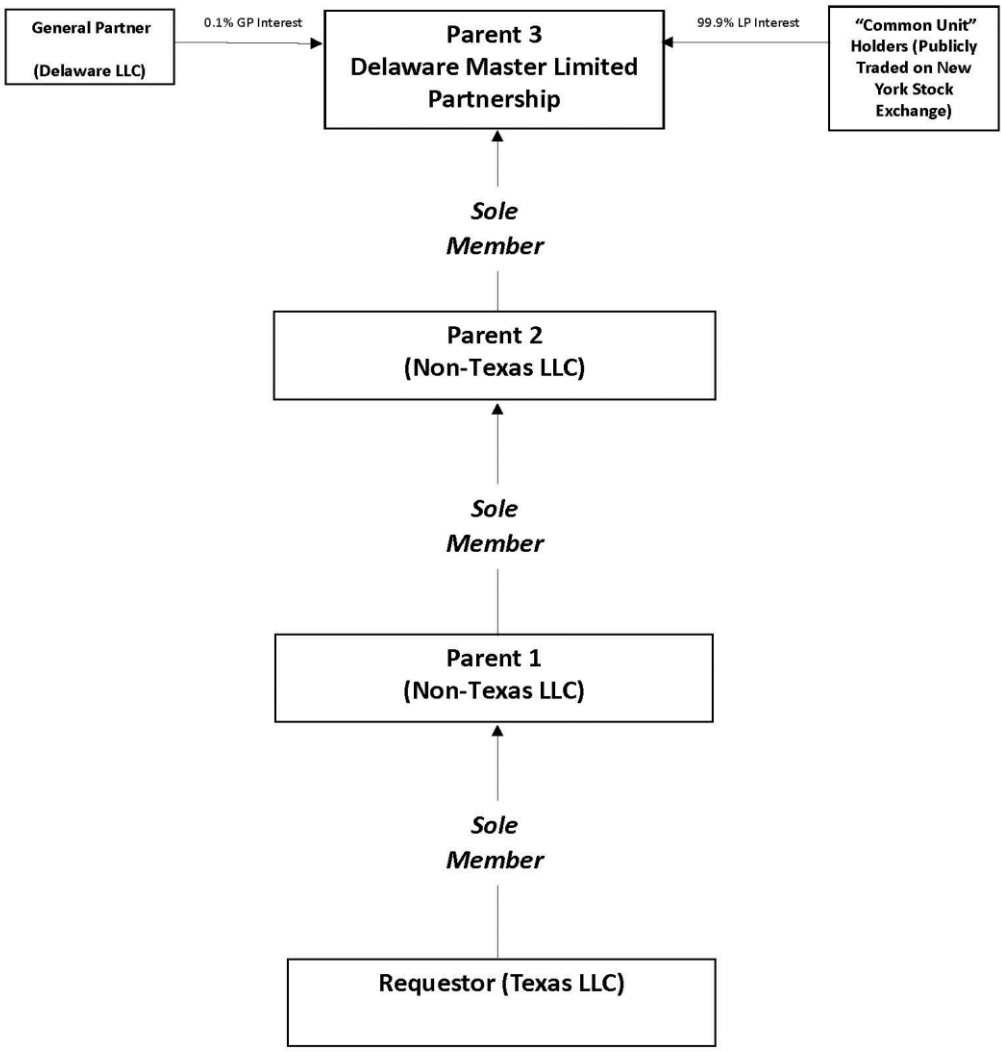
Parent 1 is an LLC formed under a different state's laws and is managed by its sole member, another LLC (Parent 2).

Parent 2 is an LLC formed under a different state's laws and is managed by its sole member, another LLC (Parent 3).

Parent 3 is a Delaware Master Limited Partnership. Parent 3 was formed under the Delaware Revised Uniform Partnership Act and is managed by its different LLC that serves as its general partner (General Partner). The chain of ownership is illustrated below.

Parent 3 is a master limited partnership. A "master limited partnership is a limited partnership whose interests, called 'common units,' are publicly traded." *Williams v. Pipe Pros, LLC*, No. 6:20-CV-00057, 2021 U.S. Dist. LEXIS 46406, at *3 n.2 (S.D. Tex. 2021) (internal citation omitted). "Master limited partnerships are similar to traditional limited partnerships in that they have limited partners, known as 'unitholders,' who provide capital, and a general partner who manages the partnership's affairs. Such partnerships differ, however, from traditional limited partnerships in that master limited partnerships are publicly traded." *Id.*

The requestor states the board of directors of the General Partner has ultimate management authority over the General Partner, and the entire chain of entities, including the requestor. All of the General Partner's board members are individuals.



ANALYSIS

The Texas Election Code generally prohibits corporations from making political contributions or expenditures. Tex. Elec. Code § 253.094. The corporate contribution restriction does not apply to all business forms. Instead it "applies only to corporations that are organized under the Texas Business Corporation Act, the Texas For-Profit Corporation Law, the Texas Non-Profit Corporation Act, the Texas Nonprofit Corporation Law, federal law, or law of another state or nation." *Id.* § 253.091. The prohibition also applies to the following associations, whether incorporated or not, including: banks, trust companies, savings and loan associations or companies, insurance companies, reciprocal or inter insurance exchanges, railroad companies, cemetery companies, government-regulated cooperatives, stock companies, and abstract and title insurance companies. *Id.* § 253.093.

The question often arises, as it does here, whether a business association that is not organized as a corporation is nevertheless subject to the corporate contribution restriction if it has corporate ownership.

In Advisory Opinion No. 215 the TEC held that a "partnership including one or more corporate partners is subject to the same restrictions on political activity that apply to corporations." Tex. Ethics Comm'n Op. No 215 (1994), affirmed by Tex. Ethics Comm'n Op. No. 221 (1994). The TEC reasoned that "if a joint venture owned in part by a corporation made political contributions, corporate funds would be used to finance political activity." *Id.*

In EAO 221, the TEC was asked to reconsider EAO 215 under the following facts:

> (a) the corporate partners play no decision making role in, or exercise any control over . . . political contributions/expenditures;
>
> (b) the non-corporate agent or employee of the partnership exercising control over such political contributions/expenditures is not an officer, employee or agent of any of the corporate partners;
>
> (c) contributions/expenditures are made only from partnership profits and not from contributions from corporate partners;
>
> (d) there are valid business reasons for the use of the partnership entity by the corporate partners and such use is not merely a subterfuge for circumvention of section 253.094 of the Election Code; and
>
> (e) the partnership is not an association described in Section 253.093 of the Texas Election Code.

Tex. Ethics Comm'n Op. No. 221 (1994). The TEC found that "[n]one of the factors listed above would permit a partnership with corporate partners to make political contributions or expenditures." *Id.* The TEC similarly held that a limited liability company is subject to the corporate contribution restriction if it "is owned, in whole or in part, by an entity subject to the restrictions in Election Code chapter 253, subchapter D." Tex. Ethics Comm'n Op. No 383 (1997).

The requestor is wholly owned by a master limited partnership that is organized as a Delaware limited partnership under the Delaware Revised Uniform Partnership Act. The Master Limited Partnership ("MLP") is traded daily on the New York Stock Exchange. Anyone—including corporations—may buy or sell units of the MLP. Ownership interest in the MLP changes daily.

Following the TEC's past decisions, any amount of corporate ownership of an LLC will subject the LLC to the corporate contribution restriction. Applying that precedent to this request compels the conclusion that state law prohibits the requestor from making political contributions if any share of the MLP is owned by a corporation.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 607

June 18, 2024

ISSUE

Whether an officer or employee of a political subdivision who leases a residence to an employee may allow the employee to place a sign endorsing a candidate or a measure in the yard of the leased residence. ***(AOR-706)***

SUMMARY

Under the facts presented in this opinion, an officer or employee of a political subdivision does not violate Section 255.003(a) by allowing an employee-tenant to place political advertising outside of a residence owned by the political subdivision.

FACTS

The requestor represents an Independent School District ("ISD"). The ISD owns multiple residences to facilitate employees living in district. In keeping with the purpose of the residences, the ISD prefers to rent to employees. When there are not enough employees who desire to live in ISD-owned residence, the ISD will occasionally either: 1) permit a former employee to continue leasing District-owned property, or 2) permit a member of the public to lease the property. The ISD is presently renting a residence to one non-employee. The ISD charges the same rental rate regardless of the resident's employment status.

At issue here is an ISD-owned single-family residence that is leased to one of its employees. The employee-tenant wishes to place political advertising signs in the yard of the ISD-owned property. The request asks the TEC to assume the following facts regarding the lease arrangement:

1. The ISD withholds the rent for the property from the employee's paycheck each month.
2. The ISD charges the market rental rate it charges to non-employees.
3. The property leased by the employee of the ISD is a single-family residence in which the employee resides.
4. The ISD's lease agreement with the employee is silent as to the placement of signs on the leased property.

5. The ISD does not direct, encourage, or otherwise condone the placement of the political advertising.

ANALYSIS

We start by noting that requestors for this opinion are the trustees of an ISD. A requestor may seek an advisory opinion about how the law applies to the requestor regarding an actual or hypothetical set of facts. Tex. Gov't Code § 571.091. The TEC does not issue opinions for requestors asking whether a third-party's conduct violates the law. *Id.*; 1 Tex. Admin. Code § 8.5. The requestor is not the employee leasing the ISD-owned property. Therefore, this opinion is limited to whether an ISD official would violate the law by allowing the employee to place political advertising at his or her ISD-owned residence.

"An officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising." Tex. Elec. Code § 255.003(a).

For purposes of section 255.003(a) of the Election Code, the spending of public funds includes the use of a political subdivision's resources, including money, employees' work time, facilities, and equipment. *See* Ethics Advisory Opinion Nos. 550 (2019) (officer of a political subdivision may not use employees' work time or restricted areas of the political subdivision's facilities for political advertising), 443 (2002) (school district employees may not use work time to distribute a candidate's campaign flyers to a restricted area of the school that is not accessible to the public), 45 (1992) (school district officer or employee may not use the district's internal mail system equipment to distribute political advertising).

But not all uses of a political subdivision property to display political advertising constitute a violation of Section 255.003(a). In EAO 552, the TEC held that a city employee does not violate Section 255.003(a) of the Election Code by allowing members of the public to display or distribute political advertising at a city-owned facility during or in connection with a candidate debate or forum when certain conditions are met. Relevant to the holding in EAO 552 were the facts that the city-owned facility was rented to and paid for by the sponsor of the candidate debate or forum and the sponsor used non-public funds to pay the city its standard rental rate. The TEC further held that a city employee does not violate Section 255.003(a) by taking no action to prevent the display or distribution of the political advertising in a room rented by a member of the public or in corridors outside the city-owned room rented to and paid for by the sponsor of a candidate debate. *Id.*

Similar to the public space rented in EAO 552, the ISD makes residences available to employees and non-employees alike on the same terms (although it gives preference to ISD employees), the residences are leased at market rates from non-public funds, and the employee-tenant enjoys all the rights that a non-employee would during the duration of the lease. The facts presented by the requestor indicate also that the ISD has no formal or informal policy directing or controlling the display of any messages outside the ISD-owned residences. For these reasons, the ISD-owned residences function as an individual's private property. As such, under the facts presented in this opinion, an ISD official does not violate Section 255.003(a) by allowing a resident-employee to place political advertising outside of a residence owned by the ISD.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 608

June 18, 2024

ISSUE

Whether a PFS filer who owns a law firm that holds settlement funds on behalf of a client must report the settlement funds on the filer's personal financial statement filed under Chapter 572 of the Government Code. ***(AOR-708)***

SUMMARY

Settlement funds held by law firm in trust for client are not the property of the law firm and do not have to be disclosed on a PFS.

FACTS

The requestor is a judge who owned a law firm before taking office. Before taking the bench, the requestor secured a monetary settlement for a client. The requestor remitted payment by check to the client. However, the client notified the requestor that he or she did not want the money and would not cash or deposit the check. The requestor states the law firm has ceased operations and no longer maintains any assets or has liabilities. The only remnant of the requestor's law firm is the client's settlement funds that remain in the firm's Interest on Lawyers Trust Accounts (IOLTA) account. The remaining funds are exclusively the property of a client, and no portion of the remaining funds are subject to any fees or claims for future or past service by the requestor or the requestor's firm.

A lawyer is required to keep client funds in a separate account. Tex. Disciplinary Rules of Professional Conduct Rule 1.14. An IOLTA account is a type of client trust account to hold client funds that is authorized by the state bar when "the beneficiary's funds are nominal or only expected to be held for a short period of time." *A Lawyer's Guide to Client Trust Accounts*, State Bar of Texas, January 2024 at 7 (citing Tex. State Bar R. art. XI, § 5; Rules Governing the Operation of the Texas Access to Justice Foundation, § 4). The IOLTA account bears the tax identification number of the Texas Access to Justice Foundation to whom interest earned on the account accrues.

The requestor states the firm has no lawful authority to dispose of the funds other than to safeguard them until paid to the client (or ultimately surrendered to the Comptroller as unclaimed property).

The requestor asks whether she must disclose the client funds held in trust by her former firm on her personal financial statement as either occupational income, or an asset or liability of her law firm.

ANALYSIS

A state officer must file a Personal Financial Statement ("PFS") that includes "an account of the financial activity" for the preceding calendar year of the filer, and the filer's spouse and dependent children if the filer had actual control over that activity. Tex. Gov't Code § 572.023(a). The requirements to disclose occupational income, retainers, and assets and liabilities of certain businesses owned by the filer, are all potentially implicated by this request. *Id.* § 572.023(b)(1), (9).

Settlement funds held in trust for a client are not required to be reported as occupational income or a retainer.

A PFS filer must disclose all sources of occupational income and certain retainers, identified by employer, or if self-employed, by the nature of the occupation. *Id.* § 572.023(b)(1).

Occupational income is "income derived from *current* occupational activity." Tex. Ethics Comm'n Op. No. 392 (1998). The settlement funds belong to the client and are distinct from money owed to the requestor as a fee for service. Unlike a fee earned for service, merely holding funds in a trust for a client is not occupational income and would not trigger reporting as such. Similarly, settlement funds held in trust for a client cannot be considered a retainer (i.e., a payment for future services) because the attorney has no right to the settlement funds.

Settlement funds held in trust for a client are not required to be reported as an asset or liability of a business.

A PFS filer must identify by "by description and the category of the amount of all assets and liabilities" of a business entity that the filer held a 50 percent or more interest during the reporting year. Here, the settlement funds held in trust for a client are not an asset or liability of the law firm, and therefore the requestor is not required to disclose the funds on her PFS.

Settlement funds held in trust for a client by a law firm are not the property of the law firm. Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct requires an attorney to "hold funds and other property belonging in whole or in part to clients or third persons" in a separate account. "The policy behind Rule 1.14 is to safeguard funds that *do not belong to the lawyer*." *A Lawyer's Guide to Client Trust Accounts,* State Bar of Texas, January 2024 at 3 (emphasis added).

Since client settlement funds held by a law firm do not belong to the law firm and can only be paid to the client (until surrendered to the Comptroller as unclaimed property), they are not "assets" of the firm for the purposes of Chapter 572. Therefore, a PFS filer is not required to report a client's settlement funds as an asset of the business.

Similarly, client settlement funds in the custody of a law firm are not liabilities of the firm for purposes of Chapter 572. The term "liability" is not defined by Chapter 572 of the Government Code. However, the term is generally used to describe a legal obligation to pay a third party. Black's Law Dictionary, Free 2nd Edition ("The state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility.").

The firm does have an obligation to remit the settlement funds to the client (and has already attempted to do so). However, rather than a traditional business liability, the requestor is holding the client's settlement funds as a fiduciary for the client. The funds are kept in a separate account from all operational accounts of the firm or personal accounts of the requestor. The account bears the tax identification number of a third-party nonprofit that benefits from the income earned on the account. Because the settlement funds are being held on behalf of the client by the firm, they do not need to be reported as a liability of the law firm under Chapter 572 of the Government Code.