

## ELECTION CODE

### TITLE 15. REGULATING POLITICAL FUNDS AND CAMPAIGNS

#### CHAPTER 253. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

##### SUBCHAPTER B. CANDIDATES, OFFICEHOLDERS, AND POLITICAL COMMITTEES

###### **Sec. 253.034. RESTRICTIONS ON CONTRIBUTIONS DURING AND FOLLOWING REGULAR LEGISLATIVE SESSION.**

(a) During the period beginning on the 30th day before the date a regular legislative session convenes and continuing through the 20th day after the date of final adjournment, a person may not knowingly make a political contribution to:

- (1) a statewide officeholder;
- (2) a member of the legislature; or
- (3) a specific-purpose committee for supporting, opposing, or assisting a statewide officeholder or member of the legislature.

(b) A statewide officeholder, a member of the legislature, or a specific-purpose committee for supporting, opposing, or assisting a statewide officeholder or member of the legislature may not knowingly accept a political contribution, and shall refuse a political contribution that is received, during the period prescribed by Subsection (a). A political contribution that is received and refused during that period shall be returned to the contributor not later than the 30th day after the date of receipt. A contribution made by United States mail or by common or contract carrier is not considered received during that period if it was properly addressed and placed with postage or carrier charges prepaid or prearranged in the mail or delivered to the contract carrier before the beginning of the period. The date indicated by the post office cancellation mark or the common or contract carrier documents is considered to be the date the contribution was placed in the mail or delivered to the common or contract carrier unless proven otherwise.

(c) This section does not apply to a political contribution that was made and accepted with the intent that it be used:

- (1) in an election held or ordered during the period prescribed by Subsection (a) in which the person accepting the contribution is a candidate if the contribution was made after the person appointed a campaign treasurer with the appropriate authority and before the person was sworn in for that office;
- (2) to defray expenses incurred in connection with an election contest; or
- (3) by a person who holds a state office or a member of the legislature if the person or member was defeated at the general election held immediately before the session is convened or by a specific-purpose political committee that supports or assists only that person or member.

(d) This section does not apply to a political contribution made to or accepted by a holder of an office to which Subchapter F applies.

(e) A person who violates this section commits an offense. An offense under this section is a Class A misdemeanor.

###### **Sec. 253.039. CONTRIBUTIONS IN CERTAIN PUBLIC BUILDINGS PROHIBITED.**

(a) A person may not knowingly make or authorize a political contribution while in the Capitol or a courthouse to:

- (1) a candidate or officeholder;
- (2) a political committee; or
- (3) a person acting on behalf of a candidate, officeholder, or political committee.

(b) A candidate, officeholder, or political committee or a person acting on behalf of a candidate, officeholder, or political committee may not knowingly accept a political contribution, and shall refuse a political contribution that is received, in the Capitol or a courthouse.

(c) This section does not prohibit contributions made in the Capitol or a courthouse through the United States postal service or a common or contract carrier.

(d) A person who violates this section commits an offense. An offense under this section is a Class A misdemeanor.

(h) In this section, "courthouse" means any building owned by the state, a county, or a municipality, or an office or part of a building leased to the state, a county, or a municipality, in which a justice or judge sits to conduct court proceedings.

**GOVERNMENT CODE**

**TITLE 3. LEGISLATIVE BRANCH**

**SUBTITLE A. LEGISLATURE**

**CHAPTER 305. REGISTRATION OF LOBBYISTS**

**SUBCHAPTER B. PROHIBITED ACTIVITIES**

**Sec. 305.024. RESTRICTIONS ON EXPENDITURES.**

*[Text of subsection as amended by Acts 2005, 79th Leg., R.S., Ch. 92 (S.B. 1011), Sec. 2]*

(a) Except as provided by Section 305.025, a person registered under Section 305.005 or a person on the registrant's behalf and with the registrant's consent or ratification may not offer, confer, or agree to confer:

(1) to an individual described by Section 305.0062(a)(1), (2), (3), (4), or (5):

(A) a loan, including the guarantee or endorsement of a loan; or

(B) a gift of cash or a negotiable instrument as described by Section 3.104, Business & Commerce Code; or

(2) to an individual described by Section 305.0062(a)(1), (2), (3), (4), (5), (6), or (7):

(A) an expenditure for transportation and lodging;

(B) an expenditure or series of expenditures for entertainment that in the aggregate exceed \$500 in a calendar year;

(C) an expenditure or series of expenditures for gifts that in the aggregate exceed \$500 in a calendar year;

(D) an expenditure for an award or memento that exceeds \$500; or

(E) an expenditure described by Section 305.006(b)(1), (2), (3), or (6) unless the registrant is present at the event.

*[Text of subsection as amended by Acts 2005, 79th Leg., R.S., Ch. 206 (H.B. 1508), Sec. 5]*

(a) Except as provided by Section 305.025, a person registered under Section 305.005 or a person on the registrant's behalf and with the registrant's consent or ratification may not offer, confer, or agree to confer to a member of the legislative or executive branch:

(1) a loan, including the guarantee or endorsement of a loan;

(2) a gift of cash or a negotiable instrument as described by Section 3.104, Business & Commerce Code;

(3) an expenditure for transportation and lodging;

(4) an expenditure or series of expenditures for entertainment that in the aggregate exceed \$500 in a calendar year;

(5) an expenditure or series of expenditures for gifts that in the aggregate exceed \$500 in a calendar year;

(6) an expenditure for an award or memento that exceeds \$500; or

(7) an expenditure described by Section 305.006(b)(1), (2), (3), or (6) unless:  
    (A) the registrant is present at the event; or  
    (B) the expenditure is for a gift of food or beverages required to be reported under Section 305.006(b)(4) in accordance with Section 305.0061(e-1).

(b) Except as provided by Section 305.025, a member of the legislative or executive branch may not solicit, accept, or agree to accept from a person registered under Section 305.005 or from a person on the registrant's behalf and with the registrant's consent or ratification an item listed in Subsection (a).

(c) Notwithstanding Subsection (a), the total value of a joint expenditure under Subsection (a)(2)(B), (C), or (D) may exceed \$500 if each portion of the expenditure:

- (1) is made by a registrant; and
- (2) does not exceed \$500.

**Sec. 305.025. EXCEPTIONS.** Section 305.024 does not prohibit:

(1) a loan in the due course of business from a corporation or other business entity that is legally engaged in the business of lending money and that has conducted that business continuously for more than one year before the loan is made;

(2) a loan or guarantee of a loan or a gift made or given by a person related within the second degree by affinity or consanguinity to the member of the legislative or executive branch;

(3) necessary expenditures for transportation and lodging when the purpose of the travel is to explore matters directly related to the duties of a member of the legislative or executive branch, such as fact-finding trips, including attendance at informational conferences or an event described by Subdivision (4), but not including attendance at merely ceremonial events or pleasure trips;

(4) necessary expenditures for transportation, lodging, food and beverages, and entertainment provided in connection with a conference, seminar, educational program, or similar event in which the member renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory;

(5) an incidental expenditure for transportation as determined by commission rule;

or

(6) a political contribution as defined by Section 251.001, Election Code.

**GOVERNMENT CODE**

**TITLE 5. OPEN GOVERNMENT; ETHICS**

**SUBTITLE B. ETHICS**

**CHAPTER 572. PERSONAL FINANCIAL DISCLOSURE, STANDARDS OF CONDUCT, AND CONFLICT OF INTEREST**

**SUBCHAPTER B. PERSONAL FINANCIAL STATEMENT**

**Sec. 572.026. FILING DATES FOR STATE OFFICERS AND STATE PARTY CHAIRS.**

(a) Not later than April 30 each year, a state officer or a state party chair shall file the financial statement as required by this subchapter.

(b) An individual who is appointed to serve as a salaried appointed officer or an appointed officer of a major state agency or who is appointed to fill a vacancy in an elective office shall file a financial statement not later than the 30th day after the date of appointment or the date of qualification for the office, or if confirmation by the senate is required, before the first committee hearing on the confirmation, whichever date is earlier.

(c) An individual who is appointed or employed as the executive head of a state agency shall file a financial statement not later than the 45th day after the date on which the individual assumes the duties of the position. A state agency shall immediately notify the commission of the appointment or employment of an executive head of the agency.

(d) An individual required to file a financial statement under Subsection (a) may request the commission to grant an extension of not more than 60 days for filing the statement. The commission shall grant the request if it is received before the filing deadline or if a timely filing or request for extension is prevented because of physical or mental incapacity. The commission may not grant more than one extension to an individual in one year except for good cause shown.

**Sec. 572.027. FILING DATES FOR CANDIDATES.**

(a) An individual who is a partisan or independent candidate for an office as an elected officer shall file the financial statement required by this subchapter not later than the later of:

(1) the 60th day after the date of the regular filing deadline for an application for a place on the ballot in the general primary election; or

(2) February 12.

(b) If the deadline under which a candidate files an application for a place on the ballot, other than the regular filing deadline for an independent candidate, or files a declaration of write-in candidacy falls after the date of the regular filing deadline for candidates in the general primary election, the candidate shall file the financial statement not later than the 30th day after that later deadline. However, if that deadline falls after the 35th day before the date of the election in which the candidate is running, the candidate shall file the statement not later than the fifth day before the date of that election.

(c) An individual who is a candidate in a special election for an office as an elected officer shall file the financial statement not later than the fifth day before the date of that election.

(d) An individual nominated to fill a vacancy in a nomination as a candidate for a position as an elected officer under Chapter 145, Election Code, shall file the financial statement not later

than the 15th day after the date the certificate of nomination required by Section 145.037 or 145.038, Election Code, is filed.

## **SUBCHAPTER C. STANDARDS OF CONDUCT AND CONFLICT OF INTEREST PROVISIONS**

### **Sec. 572.051. STANDARDS OF CONDUCT; STATE AGENCY ETHICS POLICY.**

(a) A state officer or employee should not:

(1) accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct;

(2) accept other employment or engage 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;

(3) accept 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;

(4) make personal investments that could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the public interest; or

(5) intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another.

(b) A state employee who violates Subsection (a) or an ethics policy adopted under Subsection (c) is subject to termination of the employee's state employment or another employment-related sanction. Notwithstanding this subsection, a state officer or employee who violates Subsection (a) is subject to any applicable civil or criminal penalty if the violation also constitutes a violation of another statute or rule.

(c) Each state agency shall:

(1) adopt a written ethics policy for the agency's employees consistent with the standards prescribed by Subsection (a) and other provisions of this subchapter; and

(2) distribute a copy of the ethics policy and this subchapter to:

(A) each new employee not later than the third business day after the date the person begins employment with the agency; and

(B) each new officer not later than the third business day after the date the person qualifies for office.

(d) The office of the attorney general shall develop, in coordination with the commission, and distribute a model policy that state agencies may use in adopting an agency ethics policy under Subsection (c). A state agency is not required to adopt the model policy developed under this subsection.

(e) Subchapters E and F, Chapter 571, do not apply to a violation of this section.

(f) Notwithstanding Subsection (e), if a person with knowledge of a violation of an agency ethics policy adopted under Subsection (c) that also constitutes a criminal offense under another law of this state reports the violation to an appropriate prosecuting attorney, then, not later than the 60th day after the date a person notifies the prosecuting attorney under this subsection, the prosecuting attorney shall notify the commission of the status of the prosecuting attorney's

investigation of the alleged violation. The commission shall, on the request of the prosecuting attorney, assist the prosecuting attorney in investigating the alleged violation. This subsection does not apply to an alleged violation by a member or employee of the commission.

**Sec. 572.052. REPRESENTATION BY LEGISLATORS BEFORE STATE AGENCIES; CRIMINAL OFFENSE.**

(a) A member of the legislature may not, for compensation, represent another person before a state agency in the executive branch of state government unless the representation:

- (1) is pursuant to an attorney-client relationship in a criminal law matter; or
- (2) involves the filing of documents that involve only ministerial acts on the part of the commission, agency, board, department, or officer.

(b) A member of the legislature commits an offense if the member violates this section. An offense under this subsection is a Class A misdemeanor.

**Sec. 572.053. VOTING BY LEGISLATORS ON CERTAIN MEASURES OR BILLS; CRIMINAL OFFENSE.**

(a) A member of the legislature may not vote on a measure or a bill, other than a measure that will affect an entire class of business entities, that will directly benefit a specific business transaction of a business entity in which the member has a controlling interest.

(b) In this section, "controlling interest" includes:

- (1) an ownership interest or participating interest by virtue of shares, stock, or otherwise that exceeds 10 percent;
- (2) membership on the board of directors or other governing body of the business entity; or
- (3) service as an officer of the business entity.

(c) A member of the legislature commits an offense if the member violates this section. An offense under this subsection is a Class A misdemeanor.

**Sec. 572.054. REPRESENTATION BY FORMER OFFICER OR EMPLOYEE OF REGULATORY AGENCY RESTRICTED; CRIMINAL OFFENSE.**

(a) A former member of the governing body or a former executive head of a regulatory agency may not make any communication to or appearance before an officer or employee of the agency in which the member or executive head served before the second anniversary of the date the member or executive head ceased to be a member of the governing body or the executive head of the agency 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.

(b) A former state officer or employee of a regulatory agency who ceases service or employment with that agency on or after January 1, 1992, may not represent any person or receive 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.

(c) Subsection (b) applies only to:

- (1) a state officer of a regulatory agency; or

(2) a state employee of a regulatory agency who is compensated, as of the last date of state employment, at or above the amount prescribed by the General Appropriations Act for step 1, salary group 17, of the position classification salary schedule, including an employee who is exempt from the state's position classification plan.

(d) Subsection (b) does not apply to a rulemaking proceeding that was concluded before the officer's or employee's service or employment ceased.

(e) Other law that restricts the representation of a person before a particular state agency by a former state officer or employee of that agency prevails over this section.

(f) An individual commits an offense if the individual violates this section. An offense under this subsection is a Class A misdemeanor.

(g) In this section, the comptroller and the secretary of state are not excluded from the definition of "regulatory agency."

(g-1) For purposes of this section, the Department of Information Resources is a regulatory agency.

(h) In this section:

(1) "Participated" means to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action.

(2) "Particular matter" means a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding.

## PENAL CODE

### TITLE 8. OFFENSES AGAINST PUBLIC ADMINISTRATION

#### CHAPTER 36. BRIBERY AND CORRUPT INFLUENCE

##### **Sec. 36.07. ACCEPTANCE OF HONORARIUM.**

(a) A public servant commits an offense if the public servant solicits, accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties.

(b) This section does not prohibit a public servant from accepting transportation and lodging expenses in connection with a conference or similar event in which the public servant renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory, or from accepting meals in connection with such an event.

(b-1) Transportation, lodging, and meals described by Subsection (b) are not political contributions as defined by Title 15, Election Code.

(c) An offense under this section is a Class A misdemeanor.

##### **Sec. 36.08. GIFT TO PUBLIC SERVANT BY PERSON SUBJECT TO HIS JURISDICTION.**

(a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

(b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.

(c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.

(d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

(e) A public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.

(f) A member of the legislature, the governor, the lieutenant governor, or a person employed by a member of the legislature, the governor, the lieutenant governor, or an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from any person.

(g) A public servant who is a hearing examiner employed by an agency performing regulatory functions and who conducts hearings in contested cases commits an offense if the public servant solicits, accepts, or agrees to accept any benefit from any person who is appearing before the agency in a contested case, who is doing business with the agency, or who the public servant knows is interested in any matter before the public servant. The exception provided by Sec. 36.10(b) does not apply to a benefit under this subsection.

(h) An offense under this section is a Class A misdemeanor.

(i) A public servant who receives an unsolicited benefit that the public servant is prohibited from accepting under this section may donate the benefit to a governmental entity that has the authority to accept the gift or may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.

### **Sec. 36.10. NON-APPLICABLE.**

(a) Sections 36.08 (Gift to Public Servant) and 36.09 (Offering Gift to Public Servant) do not apply to:

(1) a fee prescribed by law to be received by a public servant or any other benefit to which the public servant is lawfully entitled or for which he gives legitimate consideration in a capacity other than as a public servant;

(2) a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient;

(3) a benefit to a public servant required to file a statement under Chapter 572, Government Code, or a report under Title 15, Election Code<sup>1</sup>, that is derived from a function in honor or appreciation of the recipient if:

(A) the benefit and the source of any benefit in excess of \$50 is reported in the statement; and

(B) the benefit is used solely to defray the expenses that accrue in the performance of duties or activities in connection with the office which are nonreimbursable by the state or political subdivision;

(4) a political contribution as defined by Title 15, Election Code;

(5) a gift, award, or memento to a member of the legislative or executive branch that is required to be reported under Chapter 305, Government Code;

(6) an item with a value of less than \$50, excluding cash or a negotiable instrument as described by Section 3.104, Business & Commerce Code;

(7) an item issued by a governmental entity that allows the use of property or facilities owned, leased, or operated by the governmental entity;

(8) transportation, lodging, and meals described by Section 36.07(b); or

(9) complimentary legal advice or legal services relating to a will, power of attorney, advance directive, or other estate planning document rendered:

(A) to a public servant who is a first responder; and

(B) through a program or clinic that is:

(i) operated by a local bar association or the State Bar of Texas; and

(ii) approved by the head of the agency employing the public servant, if the public servant is employed by an agency.

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<sup>1</sup> V.T.C.A., Election Code § 251.001 et seq.

(b) Section 36.08 (Gift to Public Servant) does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donee is required by law to report those items, reported by the donee in accordance with that law.

(c) Section 36.09 (Offering Gift to Public Servant) does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donor is required by law to report those items, reported by the donor in accordance with that law.

(d) Section 36.08 (Gift to Public Servant) does not apply to a gratuity accepted and reported in accordance with Section 11.0262, Parks and Wildlife Code. Section 36.09 (Offering Gift to Public Servant) does not apply to a gratuity that is offered in accordance with Section 11.0262, Parks and Wildlife Code.

(e) In this section, "first responder" means:

- (1) a peace officer whose duties include responding rapidly to an emergency;
- (2) fire protection personnel, as that term is defined by Section 419.021, Government Code;
- (3) a volunteer firefighter who performs firefighting duties on behalf of a political subdivision and who is not serving as a member of the Texas Legislature or holding a statewide elected office;
- (4) an ambulance driver; or
- (5) an individual certified as emergency medical services personnel by the Department of State Health Services.

## **CHAPTER 39. ABUSE OF OFFICE**

### **Sec. 39.02. ABUSE OF OFFICIAL CAPACITY.**

(a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly:

- (1) violates a law relating to the public servant's office or employment; or
- (2) misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.

(b) An offense under Subsection (a)(1) is a Class A misdemeanor.

(c) An offense under Subsection (a)(2) is:

- (1) a Class C misdemeanor if the value of the use of the thing misused is less than \$100;
- (2) a Class B misdemeanor if the value of the use of the thing misused is \$100 or more but less than \$750;
- (3) a Class A misdemeanor if the value of the use of the thing misused is \$750 or more but less than \$2,500;
- (4) a state jail felony if the value of the use of the thing misused is \$2,500 or more but less than \$30,000;
- (5) a felony of the third degree if the value of the use of the thing misused is \$30,000 or more but less than \$150,000;
- (6) a felony of the second degree if the value of the use of the thing misused is \$150,000 or more but less than \$300,000; or
- (7) a felony of the first degree if the value of the use of the thing misused is \$300,000 or more.

(d) A discount or award given for travel, such as frequent flyer miles, rental car or hotel discounts, or food coupons, are not things of value belonging to the government for purposes of this section due to the administrative difficulty and cost involved in recapturing the discount or award for a governmental entity.

(e) If separate transactions that violate Subsection (a)(2) are conducted pursuant to one scheme or continuing course of conduct, the conduct may be considered as one offense and the value of the use of the things misused in the transactions may be aggregated in determining the classification of the offense.

(f) The value of the use of a thing of value misused under Subsection (a)(2) may not exceed:

- (1) the fair market value of the thing at the time of the offense; or
- (2) if the fair market value of the thing cannot be ascertained, the cost of replacing the thing within a reasonable time after the offense.

**TEXAS ADMINISTRATIVE CODE**

**TITLE 1. ADMINISTRATION**

**PART 2. TEXAS ETHICS COMMISSION**

**CHAPTER 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES**

**§22.13. Contributions in the Capitol Prohibited.**

In §253.039 of the Election Code, the term “Capitol” includes the Capitol Building and the Capitol Extension, and any office that is being used as the official capitol office for a member of the legislature, the governor, the lieutenant governor, or the secretary of state.

# STATE ETHICS ADVISORY COMMISSION

## ADVISORY OPINION 1984-20

Re: If an office-holder is seeking an appointment to another office, may he use his office stationery, secretary, and typewriter for his letter of application?

This opinion responds to a request (AOR 1984-16) from the Public Servant Standards of Conduct Advisory Committee for a State Ethics Advisory Commission opinion. The request was received by the Commission at its meeting on January 13, 1984, and relates to the following issue:

If an office-holder is seeking an appointment to another office, may he use his office stationery, secretary, and typewriter for his letter of application?

Tex. Penal Code Ann. § 39.01 (a) (Vernon Supp. 1983-1984) states:

(a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm another, he intentionally or knowingly:

(1) violates a law relating to his office or employment; or

(2) misapplies any thing of value belonging to the government that has come into his custody or possession by virtue of his office or employment.

An office-holder's office stationery, secretary, and typewriter are things of value belonging to the government that have come into his custody or possession by virtue of his office.

"Misapplication" means an improper, illegal, wrongful, or corrupt use or application of funds, property, etc. Jewett v. U.S., 100 F. 840 (Mass. C.C.A. 1900); Ferguson v. State, 80 Tex. Crim. 383, 189 S.W. 271 (1916).

An office-holder's office stationery, secretary, and typewriter are to be used for purposes connected with his office. Applying for appointment to another office is not a purpose that is connected with his office. Therefore, it is improper for an office-holder to use his office stationery, secretary, and typewriter for such a purpose. Such use of these things may be considered a misapplication of them in violation of § 39.01 (a) if done knowingly with intent to obtain a benefit.

Section 1.07(a)(6) of the Penal Code defines "benefit" as used in section 39.01 to mean:

anything reasonably regarded as economic gain or economic advantage, including benefit to any other person in whose welfare the beneficiary is interested.

The office-holder has the intent to obtain an appointment to the other office. Whether or not that other office is a benefit, as defined above, is a question of fact. However, it is the opinion of this Commission that under these circumstances a misapplication does not occur when an official writes a recommendation for any person, including himself, to another state office.

This opinion does not address whether the activity presented by the question may constitute a violation of Tex. Penal Code Ann. §§ 31.03 or 31.04 (Vernon 1974), These sections prohibit theft of property or services.

### SUMMARY

An office-holder commits an offense under § 39.01 (a) if with intent to obtain a benefit, he intentionally or knowingly uses his office stationery, secretary, and typewriter for a letter of application seeking an appointment to another office outside state government. Under these

circumstances a misapplication does not occur when an official writes a recommendation for any person, including himself, to another state office.

W. Page Keeton, Chairman  
State Ethics Advisory Commission  
Adopted this 14th day of September, 1984.



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 164

*September 2, 1993*

*Whether a state agency may allow state employees to use state time or equipment to look for other employment. (AOR-180)*

The Texas Ethics Commission has been asked whether a state agency may allow state employees to use state time or equipment to look for other employment. In the situation described, the state employees are losing their jobs because of new legislation governing the activities of the state agency.

An employee of a state agency commits an offense if he or she knowingly misapplies anything of value belonging to the government, acquired by virtue of his or her office or employment, in order to obtain a benefit. Penal Code § 39.01(a)(2). In the situation described, state employees would be using things of value belonging to the state (state time and state equipment) to obtain benefits (paying jobs). See V.T.C.S. art. 5165(a) (full-time state employees shall work 40 hours a week). The question raised is whether such use would be a "misapplication" of state time and equipment.

A use of agency time and equipment that did not serve an agency purpose would be a misapplication of things of value belonging to the state. See generally Tex. Const. art. III, §51 (state funds may not be used for private purposes). As a general rule, a state employee would not be serving an agency purpose by searching for other employment. But see State [Ethics Advisory Opinion No. 20](#) (1984) (misapplication does not occur if officeholder uses office stationery, secretary, and typewriter to write a recommendation for any person to another state office). There may, however, be special circumstances--for example, the reorganization of an entire agency--in which an agency's board determines that a limited use of agency resources to help agency employees find new employment would serve an agency purpose. Whether such circumstances exist in the situation at hand is a fact question to be resolved, in the first instance, by the agency's board.

An individual state employee who is using state resources to search for a new job in a way that has been expressly authorized by the agency's board would not, as an individual, be misapplying state property.

### SUMMARY

As a general rule, a state employee would not be serving an agency purpose by searching for other employment. An individual state employee who is using state resources to search for a new job in a way that has been expressly authorized by the agency's board would not, as an individual, be misapplying state property.



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 193

*March 25, 1994*

*Whether a member of the legislature may use state resources to perform "routine [legislative] duties" for constituents in a geographical area that will become part of his district in 1995. (AOR-217)*

A member of the legislature has asked the Texas Ethics Commission whether he may use state resources to perform "routine [legislative] duties" for constituents in a geographical area that will become part of his district in 1995. Specifically, the legislator asks about constituent casework, meetings with members of a community in regard to a project that requires a state permit, and traveling to the area to "discuss concerns which may require legislative solutions."

The Ethics Commission has authority to interpret specified statutes. Gov't Code § 571.061. The provision subject to the Commission's interpretation that is relevant to the question raised is section 39.01 of the Penal Code, which prohibits the misapplication of state resources. It is a matter for the legislature, subject to constitutional limitations, to determine whether legislators may use state resources to provide various services to constituents. *See* Tex. Const. art. III, § 51 (prohibition on the use of state funds for private purposes). In the absence of any applicable legislative restriction, we see no basis for distinguishing between a legislator's use of state resources to assist a resident of the district from which the legislator was elected and his use of state resources to assist a person who lives elsewhere in Texas. Thus a legislator may, without violating section 39.01 of the Penal Code, use state resources to provide the type of legislative assistance he provides to residents of his current district to a person who lives in a geographical area that will become part of the legislator's district in 1995.

### SUMMARY

A member of the legislature may use state resources to provide the type of legislative assistance he provides to residents of his current district to a person who lives in a geographical area that will become part of the legislator's district in 1995.



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 386

*December 12, 1997*

*Whether an officeholder may use a state-owned computer to electronically file campaign finance reports with the Texas Ethics Commission. (AOR-425)*

The Texas Ethics Commission has been asked whether an officeholder may use a state-owned computer to electronically file campaign finance reports with the Texas Ethics Commission. Penal Code section 39.02 provides that a public servant commits an offense if the public servant misuses government property, services, personnel, or any other thing of value belonging to the government, or violates a law relating to his or her office, if the public servant does so with the intent to obtain a benefit or harm or defraud another. Penal Code § 39.02(a). Section 39.01(2) of the Penal Code defines "misuse" as dealing with government property contrary to:

- (A) an agreement under which the public servant holds the property;
- (B) a contract of employment or oath of office of a public servant;
- (C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or
- (D) a limited purpose for which the property is delivered or received.

In [Ethics Advisory Opinion No. 172](#) (1993) we stated that use of state equipment or state employees to handle campaign contributions would be a misuse of government property, services, and personnel. We noted in that opinion that the Appropriations Act contains riders prohibiting the use of appropriated funds for other than state purposes or to affect the outcome of an election. *See* General Appropriations Act, 75th Leg., ch. 1452, art. IX, §§ 5 (Political Aid and Legislative Influence Prohibited), 12 (Limitations on Use of Appropriated Funds), 149 (State Property Use for State Purposes Required), 1997 Tex. Sess. Law Serv. 5535, 6355, 6364, 6422; *see also* Tex. Const. art. III, § 51 (prohibition on the use of state funds for private purposes). Similarly, use of state computers and personnel for other campaign purposes, such as the preparation of campaign reports required under Title 15 of the Election Code, would be a misuse of state property.<sup>1</sup>

### SUMMARY

The use of state computers or personnel to prepare campaign reports for officeholders would be a misuse of government property.

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<sup>1</sup> In [Ethics Advisory Opinion No. 260](#) (1995), we stated that it is a matter for the legislature, subject to constitutional limitations, to determine the appropriate uses of legislative resources, such as laptop computers, and to determine whether there are circumstances in which legislators may use state property for personal use and reimburse the state for any costs incurred by the state.



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 395

*February 13, 1998*

*Whether a state employee may use a state-owned telephone to make a personal long-distance telephone call if no charge is incurred by the state. (AOR-433)*

The Texas Ethics Commission has been asked whether a state employee may use a state-owned telephone to make a personal long-distance telephone call if the call is not charged to the state. In a 1993 opinion, we stated that a state employee's incidental use of state telephones to place personal local calls that do not result in additional costs or damage to the state is not a misapplication of government resources under Penal Code section 39.02(a)(2). [Ethics Advisory Opinion No. 134](#) (1993).<sup>1</sup> Similarly, a state employee's incidental use of state telephones to place long-distance personal calls is not a misapplication of government resources as long as the calls do not result in any charges to the state. A state employee must, of course, comply with any applicable agency rules regarding the use of agency telephones.

### SUMMARY

A state employee's incidental use of state telephones to place long-distance personal calls is not a misapplication of government resources as long as the calls do not result in any charges to the state.

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<sup>1</sup> Section 39.02 was renumbered from 39.01 in September 1993. Acts 1993, 73d Leg., ch. 900, § 1.01. [Ethics Advisory Opinion No. 134](#) (1993) construes section 39.01(a)(2) before it was renumbered to 39.02(a)(2).

# TEXAS ETHICS COMMISSION

P.O. Box 12070, Capitol Station  
Austin, Texas 78711-2070

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## ETHICS ADVISORY OPINION NO. 431

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*October 13, 2000*

*Whether a legislator may use state resources to gather legislative information for use at a campaign fundraiser. (AOR-476)*

The Texas Ethics Commission has been asked to consider whether a legislator may use legislative staff members to gather legislative information for the legislator's use at a campaign fundraiser.

A member of the legislature may not misuse a thing of value belonging to the state with the intent to obtain a benefit or with the intent to harm or defraud another. Penal Code § 39.02. The work time of state employees is a thing of value belonging to the state. Ethics Advisory Opinion Nos. 172, 164 (1993). Thus, the issue raised here is whether using legislative staff members to gather legislative information for use at a campaign fundraiser is a misuse of state resources.

The Texas Constitution requires that public funds be used for public purposes. Tex. Const. art. III, § 51 (prohibiting use of state funds for private purposes), art. VIII, § 3 (taxes may be collected for public purposes only). A candidate's efforts to influence the outcome of an election involve the candidate's private interests, not the interests of the government. Ethics Advisory Opinion No. 172 (1993); *see also* Attorney General Opinion Nos. DM-431 (1997), JM-685 (1987) (both holding that governmental entity may not pay costs in connection with election contest involving government officeholder). Because work performed to further an individual's campaign does not serve a public purpose, it is a misuse of state resources for a legislator to use legislative staff members to gather information for use at a campaign fundraiser.

We note that any candidate may use publicly available government information for campaign purposes, and an inherent advantage of incumbency is knowledge of what kind of government information is available to the public. The lawful advantages of incumbency do not, however, extend to the use of the work time of government employees or other government resources to gather or otherwise prepare information for campaign purposes.

#### **SUMMARY**

It is a misuse of state resources for a legislator to use legislative staff members to gather information for use at a campaign fundraiser.



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 522

*December 2, 2014*

*Whether an employee of a member of the Texas Legislature may, at the direction of the member and as a regular part of the employee's job duties, drive the member between the member's Austin residence and the Capitol and drive the member for personal appointments and errands. (AOR-590)*

The Texas Ethics Commission has been asked whether an employee of a member of the Texas Legislature may, at the direction of the member and as a regular part of the employee's job duties, drive the member between the member's Austin residence and the Capitol and drive the member for personal appointments and errands. The requestor of this opinion provides the following hypothetical situation:

[T]he member for personal reasons does not care to operate a motor vehicle and, to avoid doing so, has established a standing policy in which his Capitol staff, from the chief of staff on down to the scheduler, all take turns driving him to his Capitol office on workday mornings and back to his home in the evenings according to a regular schedule. Additionally, staff occasionally drive the member to midday personal appointments, such as to the member's barber or dentist. The question is whether the conduct described in this hypothetical scenario violates a provision of Chapter 39, Penal Code ... and, if so, whether staff become complicit in the violation by acquiescing in the member's request.

The requestor has also stated that the member of the legislature does not ordinarily reside in Travis County, that the member maintains an Austin residence for legislative purposes, and that the employee's time spent driving the member is time for which the employee is compensated (i.e., state work time).

The work time of state employees is a thing of value belonging to the state. Ethics Advisory Opinion No. 431 (2000). Section 39.02 of the Penal Code states that a public servant may not, with intent to obtain a benefit or with intent to harm or defraud another, violate a law relating to the public servant's office or employment or misuse a thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment. Penal Code § 39.02(a).<sup>1</sup> The issue before us is whether the use of a legislative employee's work time to transport a member of the legislature for the purposes described in the request would constitute a misuse of government property.

As we have indicated in previous opinions, the legislature is the appropriate body to determine whether, subject to constitutional limitations, a particular use of legislative resources is permissible.<sup>2</sup> However, we have recognized that public funds and other state resources must be used for public purposes. Tex. Const. art. III, §§ 50, 51; art. VIII, § 3. See also Ethics Advisory Opinion No. 372 (1997).<sup>3</sup> Whether any particular activity furthers a public purpose depends upon the specific facts. Tex. Att'y Gen. Op. No. JM-516 (1986).

Whether a legislative employee's work time is used for public or private purposes depends on the specific activities in which the employee is engaged during that time. The use of a legislative employee's work time for purely personal activities would not further a state purpose and would constitute a misuse.<sup>4</sup> Similarly, directing a legislative employee to spend work time for improper purposes constitutes a misuse. Ethics Advisory Opinion

Nos. 431 (2000), 209 (1994), 190 (1994), 172 (1993) (a legislator may not use state equipment and employees for personal or campaign purposes).

In our opinion, driving a member of the legislature for the member's personal appointments and errands may generally further a personal purpose. However, it is possible for an employee to be simultaneously engaged in state-related activities while driving (e.g., discussing legislative business) or waiting for a member to conduct other business (e.g., reviewing legislation). We can also imagine emergencies or other extenuating circumstances in which an employee's time spent driving a member between the member's home and Capitol office may further public purposes (e.g., legitimate security concerns).<sup>5</sup> Ultimately, however, the legislature is the appropriate body to determine whether, subject to constitutional limitations, a particular use of legislative resources is permissible.

The legal value of an advisory opinion is to provide a defense to prosecution for activities that, in the opinion of the commission, are not in violation of the laws under the commission's jurisdiction. Gov't Code § 571.097. Under the facts presented, we cannot provide such a defense for the activity in question.<sup>6</sup>

### SUMMARY

The work time of state employees is a thing of value belonging to the state and may not be misused by state employees or members of the legislature. The use of a legislative employee's work time for purely personal activities would not further a state purpose and would constitute a misuse. The legislature is the appropriate body for determining whether, subject to constitutional limitations, a particular use of legislative resources is permissible.

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<sup>1</sup> A "benefit" is anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested. Penal Code § 1.07(7). "Misuse" means to deal with property contrary to: (A) an agreement under which the public servant holds the property; (B) a contract of employment or oath of office of a public servant; (C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or (D) a limited purpose for which the property is delivered or received. *Id.* § 39.01(2).

<sup>2</sup> See Ethics Advisory Opinion Nos. 386 (1997) (use of state computers and personnel to electronically file campaign finance reports for officeholders), 366 (1997) (legislative employees posting information to an Internet website in the normal course of business), 260 (1995) (member of the legislature using a state computer for personal purposes), 209 (1994) (legislator using state employees and resources to mail certain correspondence).

<sup>3</sup> Other state laws and policies adopted by state governmental bodies impose additional restrictions on the use of state resources. See, e.g., General Appropriations Act, Acts 2013, 83rd R.S., ch. 1411, art. X, § 1. See also Chapter 660, Gov't Code (providing restrictions on travel expenses for state officers and employees). We cannot issue an advisory opinion interpreting the Texas Constitution or other laws outside the commission's jurisdiction. Ethics Advisory Opinion Nos. 366 (1997), 209 (1994).

<sup>4</sup> A legislator's use of staff during the hours of their state employment and the use of a legislator's office facilities, supplies, and equipment should be related to the purposes of the legislator's office. State Ethics Advisory Opinion No. 84-10 (1984).

<sup>5</sup> Cf. Tex. Att'y Gen. Op. No. JM-879 (1988) (stating that a county commissioner's travel between home and office may be reasonably related to county business in exceptional circumstances), Tex. Att'y Gen. Op. No. H-992 (1977) (stating that county commissioners' travel between home and office is not official travel subject to reimbursement in normal circumstances).

<sup>6</sup> We have stated that the incidental personal use of state equipment during working hours in specific circumstances would not violate section 39.02(a)(2) of the Penal Code if the use does not result in additional costs to the state. See, e.g., Ethics Advisory Opinion Nos. 395 (1998), 372 (1997), 172 (1993), 134 (1993) (separately addressing a legislative employee's use of work time to track a legislator's overall schedule and state employees' incidental personal use of phones, electronic mail, and Internet connections with no additional costs to the state). Under the facts presented, the use of work time to drive the member would be a regular part of the employee's job duties, and thus would not be incidental.



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 541

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*February 15, 2017*

*Whether a gift card to an online retailer is considered to be cash or a negotiable instrument for purposes of section 36.10(a)(6) of the Penal Code, and related questions. (AOR-619)*

The Texas Ethics Commission has been asked whether a gift card to an online retail store is considered cash or a negotiable instrument for purposes of section 36.10(a)(6) of the Penal Code, and other related questions.

### **Background**

The requestor of this opinion is an employee of a state agency that contracted with an information technology company (“IT company”) to provide paperless filing software to the agency. The IT company also provided to agency employees a training program for the filing software, and employees participated in the training during agency work hours. The requestor states that the IT company would like to give each agency employee who completed the training program a gift card to an online retailer with a value ranging from \$20 to \$60. The gift card could be used to purchase goods or services from the retailer in an amount equal to its value. The requestor asks us to assume that the IT company is not required to register as a lobbyist under Chapter 305 of the Government Code and is not regulated by the agency, and that the only law at issue in this opinion is section 36.10(a)(6) of the Penal Code.

### **Penal Code Restrictions**

Section 36.08 of the Penal Code, in relevant part, prohibits a state employee who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government from accepting any benefit from a person the state employee knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his or her discretion. Penal Code

§ 36.08(d).<sup>1</sup> Under the requestor’s facts, the gift card would be offered to agency employees by the IT company that is interested in a contract with the agency. Therefore, we assume that the employees exercise discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government and that section 36.08(d) of the Penal Code prohibits the employees from accepting a benefit from the IT company.<sup>2</sup>

A “benefit” includes “anything reasonably regarded as pecuniary gain or pecuniary advantage.” *Id.* § 36.01(3). The gift card to an online retailer is a benefit. *See* Ethics Advisory Opinion Nos. 97 (1992) (an engraved clock worth \$50 is a benefit), 60 (1992) (a \$60 restaurant meal is a benefit). However, there is an exception to the prohibitions in section 36.08 of the Penal Code for “an item with a value of less than \$50, *excluding cash* or a negotiable instrument as described by Section 3.104, Business & Commerce Code.” *Id.* § 36.10(a)(6) (emphasis added).<sup>3</sup> The issue in this opinion is whether the gift cards are “cash” for purposes of that exception. If the gift cards are considered “cash,” then the exception would not permit the agency employees to accept the gift cards.

### **Meaning of “Cash” in Section 36.10 of the Penal Code**

The Penal Code does not define the term “cash,” and we are not aware of another Texas statute defining the term. However, in *Hardy v. State*, the Supreme Court of Texas examined the meaning of “cash” when considering whether a gift certificate to a retailer valued at five dollars was a “noncash merchandise prize” under section 47.01(4)(B) of the Penal Code.<sup>4</sup> *Hardy v. State*, 102 S.W.3d 123 (Tex. 2003). In *Hardy*, the court defined “cash” as either “ready money (as coin, specie, paper money, an instrument, token, or anything else being used as a medium of exchange)” or “money or its equivalent paid immediately or promptly after purchasing.” 102 S.W.3d at 131 (quoting Webster’s Third New Int’l Dictionary 346 (1961)) (internal quotations omitted). The court stated that the gift certificates were “an equivalent of money” redeemable for merchandise that “may be used in precisely the same manner as five-dollar bills.” *Id.* The court reasoned that the gift certificates did not qualify as “noncash merchandise prizes” because they operated “in the same manner as legal tender in a retail establishment.” *Id.* at

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<sup>1</sup> *See also* § 36.09, Penal Code (a person may not offer a benefit to a public servant who he knows is prohibited by law from accepting it).

<sup>2</sup> The facts presented by the requestor do not implicate either the bribery or honoraria provisions in chapter 36 of the Penal Code. Penal Code §§ 36.02(a), 36.07. Thus, we consider only the application of the gift prohibitions in section 36.08 of the Penal Code to the requestor’s circumstances.

<sup>3</sup> Section 36.10 of the Penal Code includes several additional exceptions to the benefit prohibitions in section 36.08. However, the requestor limits this opinion to section 36.10(a)(6), and we therefore do not address the possible application of other exceptions.

<sup>4</sup> Section 47.01(4)(b) of the Penal Code provides an exception to the definition of a gambling device for certain machines that reward players “exclusively with noncash merchandise prizes, toys, or novelties.” Penal Code § 47.01(4)(B).

132. Thus, the court held that the gift certificates were rewards of “‘cash’ or its equivalent.” *Id.* See also Tex. Att’y Gen. Op. No. GA-0812 (2010) (concluding gift certificates redeemable only at bingo establishments are not noncash prizes because they are redeemable for merchandise that would otherwise cost money); Tex. Att’y Gen. Op. No. GA-0527 (2007) (concluding that a stored-value card is a money equivalent because the amount of value stored on the card equates to an amount or value that can be exchanged for merchandise).

Regarding the gift cards to the online retailer, the question is whether the gift cards are considered “cash” for purposes of section 36.10(a)(6) of the Penal Code. We note that the legislature did not define the term “cash,” but we think it is reasonable to interpret it in a manner consistent with the *Hardy* opinion. Accordingly, we think the term “cash” includes a gift card that operates in the same manner as legal tender in a retail establishment, including an online retailer, and that equates to an amount or value that can be exchanged for merchandise or services of an equivalent value that otherwise would have cost money. Thus, in our opinion, a gift card is considered to be cash for purposes of section 36.10(a)(6) of the Penal Code.<sup>5</sup> Therefore, the state employees may not accept the gift cards offered by the IT company under that exception.

The requestor also asks whether a prepaid debit card is cash for purposes of section 36.10(a)(6) of the Penal Code. We do not see any material distinction between a prepaid debit card that can be used at a variety of retail establishments and a gift card that is limited to a specific retail establishment. Thus, a prepaid debit card is also cash for purposes of section 36.10(a)(6) of the Penal Code.<sup>6</sup>

## SUMMARY

A prepaid debit card or gift card is considered to be cash for purposes of section 36.10(a)(6) of the Penal Code.

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<sup>5</sup> Because we conclude that a gift card is “cash” for purposes of section 36.10(a)(6) of the Penal Code, we do not address whether a gift card is a “negotiable instrument as described by Section 3.104, Business & Commerce Code.” *Id.* § 36.10(a)(6).

<sup>6</sup> We conclude that a prepaid debit card or gift card is considered to be cash for purposes of section 36.10(a)(6) of the Penal Code, and we therefore do not need to address the requestor’s remaining questions.



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 550

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*June 28, 2019\**

### ISSUE

*Whether a public officer may use government resources for political advertising. (SP-14)*

### BACKGROUND

The Texas Ethics Commission (“Commission”) has been asked on numerous occasions about the permissibility of a public officer’s<sup>1</sup> use of government resources for political advertising. For example, we have been asked whether a public officer may be interviewed in his or her government office for use in a campaign video.

In the circumstances described above, the government resources come into the public officer’s custody or possession by virtue of holding the public office.

### SUMMARY

A public officer, including a statewide officer, legislator, county officer, municipal officer, or school district officer, would be prohibited from using government resources, such as the officer’s office in a government building, to create a photograph, video, or other communication for political advertising because the officer has custody or possession of the government resources by virtue of holding the public office.

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<sup>1</sup> “Public officer” includes an officer of the state or a county, municipality, city, or political subdivision, as defined in section 1.07(a) of the Penal Code and section 1.005 of the Election Code. This opinion applies to a state officer who is a district officer of the state government, such as a legislator (*see* Elec. Code § 1.005(4)), or who is a statewide officer (*see id.* § 1.005(19)). This opinion also applies to an officer of a county, city, school district, or other subordinate self-governing entity. *See id.* § 1.005(13).

\* The Commission voted to reconsider and amend this opinion by striking a footnote limiting the scope of the opinion. That change took effect June 1, 2020.

## ANALYSIS

The Commission, on its own initiative, issues this advisory opinion to address whether a public officer may use government resources, such as the public officer's office, to create a photograph, video, or other communication for political advertising. We also address whether a public officer may similarly use government resources that are equally accessible to the public. To resolve this question, we must address sections 39.02(a)(2) and 39.02(a)(1) of the Penal Code and section 255.003(a) of the Election Code, which restrict the use of government resources for political advertising.

### Use of Government Resources for Political Advertising

#### *Section 39.02(a)(2), Penal Code*

Section 39.02(a)(2) of the Penal Code states that a public servant may not, with intent to obtain a benefit<sup>2</sup> or harm or defraud another, intentionally or knowingly “misuse[] government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.” Penal Code § 39.02(a)(2). A public servant, as defined in the Penal Code, includes a public officer, among other enumerated persons.<sup>3</sup> Because the questions addressed by the Commission relate to public officers, this opinion applies to that class of public servants.

A “misuse” means:

[T]o deal with government property contrary to:

- (A) an agreement under which the public servant holds the property;
- (B) a contract of employment or oath of office of a public servant;
- (C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or
- (D) a limited purpose for which the property is delivered or received.

*Id.* § 39.01(2).

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<sup>2</sup> “Benefit” is defined, in pertinent part, as “anything reasonably regarded as economic gain or advantage.” Penal Code § 1.07(a)(7).

<sup>3</sup> “Public servant” also includes an employee or agent of government, a juror or grand juror, an arbitrator or referee, a notary public, and a candidate for nomination or election public office. Penal Code § 1.07(a)(41).

The use of government resources for an individual public servant's benefit is a misuse contrary to the state constitutional requirements that public money be used for a public purpose. Tex. Const. art. III, §§ 51, 52(a).<sup>4</sup> Therefore, the use of government resources for an individual public servant's private campaign purposes would be a misuse. Section 39.02(a)(2) of the Penal Code applies only to a misuse of government resources that have "come into the public servant's custody or possession by virtue of the public servant's office or employment." A public officer would have custody or possession<sup>5</sup> of an office or other government resources by virtue of having exclusive control over those resources as a public officer. The public officer's use of a government office, which is restricted to the custody or possession of that officer, for political advertising would confer a benefit to the individual public servant for private campaign purposes and would violate section 39.02(a)(2) of the Penal Code.

Regarding government resources, such as the public area of a government facility, in our opinion, such an area would not be in the "custody or possession" of a public officer. Such an area would be equally accessible to those not having custody or possession of the government resources. Therefore, section 39.02(a)(2) of the Penal Code would not prohibit a public officer from using the public areas of a government building to create a communication for political advertising.

Regarding the specific example about which we have been asked, a public officer occupying the public officer's government office would have custody or possession of the government office by virtue of holding the public office. The government office would not be equally accessible to the public. We conclude that section 39.02(a)(2) would prohibit the public officer from using the public officer's government office to create any communication for political advertising, such as an interview for a campaign video. In our opinion, the best practices for public officers are to remove themselves from government facilities and decline to use other government resources, of which they have custody or possession, for campaign activity, including political advertising. We

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<sup>4</sup> Tex. Const. art. III, §§ 51 (legislature may not authorize grant of public money to any individual, association, municipal or other corporation), 52(a) (legislature may not authorize any county, city, town or other political corporation or subdivision of the state to grant public money or thing of value in aid of or to any individual, association, or corporation). *See also* Ethics Advisory Opinion Nos. 386 (1997) (use of state equipment or state employees to handle campaign contributions or prepare campaign finance reports for officeholders is a misuse of government resources), 172 (1993) (state employees' work time may not be used to handle campaign contributions or expenditures); Gov't Code § 556.004 (prohibiting use of legislatively appropriated money and other resources for campaign purposes); *Texans Uniting for Reform & Freedom v. Saenz*, 319 S.W.3d 914 (Tex. App. – Austin 2010), *petition denied*, 2011 Tex. LEXIS 59 (Tex., Jan. 14, 2011) (legislature intended section 556.004 of the Government Code to prohibit state officers and employees from using their official authority to affect the result of an election, to affect the nomination of a candidate, or to achieve purposes similar in kind or nature to achieving or aiding the nomination or election of candidates); Attorney General Opinion Nos. DM-431 (1997), JM-685 (1993) (both holding that governmental entity may not pay costs in connection with election contest involving government officeholder), MW-36 (1979) (public body has no authority to contribute public funds to or on behalf of an individual or organization).

<sup>5</sup> "Custody" is defined as "[t]he care and control of a thing or person for inspection, preservation, or security." Black's Law Dictionary 467 (10th ed. 2014). "Possession" is defined as "[t]he fact of having or holding property in one's power; the exercise of dominion over property," and "[t]he right under which one may exercise control over something to the exclusion of all others." *Id.* at 1351. In the Penal Code, "possession" is more generally defined as "actual care, custody, control, or management." Penal Code § 1.07(a)(39).

conclude that public officers may permissibly use government resources that are equally accessible to the general public, and they should relocate to publicly accessible areas, when creating photographs, videos, or other communications for political advertising.

*Section 39.02(a)(1), Penal Code*

Section 39.02(a)(1) of the Penal Code states that a public servant may not, with intent to obtain a benefit or harm or defraud another, intentionally or knowingly “violate[] a law relating to the public servant’s office or employment.” Penal Code § 39.02(a)(1).<sup>6</sup> Section 39.02(a)(2) of the Penal Code and the constitutional requirement to use public money for a public purpose are laws relating to the public officer’s office or employment. Therefore, in our opinion, a public officer would violate section 39.02(a)(1) of the Penal Code by using government resources of which the officer has custody or possession, including the government office, to create a photograph, video, or other communication for political advertising.

We caution that additional legal restrictions may apply to the use of any government resources, including other state or local laws or policies, and such restrictions may constitute law relating to a public servant’s office or employment under section 39.02(a)(1) of the Penal Code. This prohibition has a wide application and “allows for a vast array of potential means of committing the offense.” *State v. Martinez*, 548 S.W.3d 751, 759 (Tex. App. – Corpus Christi – Edinburg 2018), *reh’g denied*, 2018 Tex. App. LEXIS 5042 (Tex. App. – Corpus Christi – Edinburg June 11, 2018) (indictment alleging an offense under this provision must specify which law or laws relating to the public servant’s office or employment were allegedly violated). We cannot address the application of laws or policies that are outside our jurisdiction for an advisory opinion.<sup>7</sup> Accordingly, we cannot provide assurance that section 39.02(a)(1) of the Penal Code, depending upon all applicable laws, would not prohibit a public officer from using other government resources that are generally accessible to the public to create a photograph, video, or other communication for political advertising.

*Section 255.003(a), Election Code*

Section 255.003(a) of the Election Code states, in pertinent part, that an officer of a political subdivision may not knowingly “spend or authorize the spending of public funds for political advertising.” Elec. Code § 255.003(a).<sup>8</sup> The “spending” of public funds includes the use of a

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<sup>6</sup> “Law relating to a public servant’s office or employment” means a law that specifically applies to a person acting in the capacity of a public servant and that directly or indirectly: (A) imposes a duty on the public servant; or (B) governs the conduct of the public servant. *Id.* § 39.01(1). “Law” means the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute. *Id.* § 1.07(a)(30).

<sup>7</sup> See Gov’t Code § 571.091 (specifying the laws the commission may consider in an advisory opinion).

<sup>8</sup> Section 255.003(a) of the Election Code applies to an officer of a political subdivision. “Political subdivision” includes a county, city, or school district or any other government entity that possesses authority for subordinate self-government through officers selected by it. Elec. Code § 1.005(13)(C). By contrast, section 39.02 of the Penal Code applies to any public servant. *See supra*, n. 4 (defining “public servant”).

political subdivision employee's work time or a political subdivision's equipment or facilities.<sup>9</sup> "Political advertising" is defined, in pertinent part, as a communication supporting or opposing a candidate for nomination or election to a public office or a public officer that is published or broadcast in return for consideration or appears in various forms of writing or on an Internet website. *Id.* § 251.001(16).

For purposes of section 255.003(a) of the Election Code, we have concluded that the use of a facility maintained by a political subdivision, in an area that was restricted to its employees, required government resources to operate while in that restricted area, and therefore violated section 255.003(a) of the Election Code.<sup>10</sup> Furthermore, we have found violations of section 255.003(a) of the Election Code on numerous occasions since the statute was enacted where public officers controlled the access to certain government resources.<sup>11</sup>

## CONCLUSION

Section 39.02(a)(2) of the Penal Code prohibits a public officer from using government resources, of which the officer has custody or possession, to create a photograph, video, or other communication for political advertising. In addition, section 255.003(a) of the Election Code prohibits a public officer, who is also an officer of a political subdivision, from using government resources, such as restricted areas of government facilities, for political advertising. These statutes do not prohibit a public officer from using government resources that are equally accessible to the public for political advertising. Section 39.02(a)(1) of the Penal Code may, depending on all applicable laws, prohibit a public officer from using publicly accessible government resources for political advertising.

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<sup>9</sup> See, e.g., Ethics Advisory Opinion No. 443 (2002) (placement of campaign flyers in a school district teachers' lounge would involve the spending of public funds where school district employees were required to transport the flyers to an area of the school that was not accessible to the public), Ethics Advisory Opinion No. 45 (1992) (distribution of political advertising using school district equipment or school district employees on school district time would be the spending of public funds where an already existing internal mail system was used); Attorney General Opinion No. KP-177 (2018) (this statute prohibits the use of school district staff, facilities, or other resources where school districts electronically distributed links to Internet websites that were partisan in nature).

<sup>10</sup> Ethics Advisory Opinion No. 443 (2002).

<sup>11</sup> See, e.g., *In re Brooks* (SC-3180260) (2018) (use of a county-owned vehicle dedicated to the officer's use), *In re Wilson* (SC-31712183) (2018) (use of a county Facebook page maintained by the officer), *In re Joiner* (SC-31605137) (2017) (use of newsletter headlined as from officer's desk), *In re Hawkins* (SC-31011409) (2012) (use of space in a city utility bill), *In re Downs* (SC-240588) (2004) (use of space in a city water bill), *In re McRae* (SC-240226) (2004) (use of city letterhead), *In re Clark* (SC-240225) (2004) (use of city letterhead), *In re Bowman* (SC-240218) (2004) (use of emergency services district letterhead), *In re Lord* (SC-230963) (2004) (use of city-contracted video production), *In re Williams, et. al.* (SC-211170) (2001) (use of space in city water bill and airtime on city cable channel), *In re Morgan* (SC-210541) (2001) (use of internal mail system), and *In re Williams* (SC-991032) (1999) (use of special edition of sheriff's report).



# TEXAS ETHICS COMMISSION



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## ETHICS ADVISORY OPINION NO. 556

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*June 19, 2020*

### ISSUE

*Whether a registered lobbyist can be “present”<sup>1</sup> at an event via videoconference technology.*  
**(AOR-635)**

### SUMMARY

No. To be “present” for purposes of Texas Government Code Sections 305.006(f) or 305.024(a), a registered lobbyist must share a physical location with the recipient of the expenditure.

### FACTS

The requestor is a registered lobbyist who seeks clarification from the Commission regarding the meaning of the word “present” as it is used in Chapter 305 of the Texas Government Code. Specifically, Chapter 305 prohibits lobbyists from making certain expenditures to communicate directly with members of the legislative or executive branch, including expenditures on food or beverages, unless the lobbyist is “present at the event.” Tex. Gov’t Code §§ 305.006(f), 305.024(a).

The requestor asks whether a registered lobbyist may be “present” for purposes of Chapter 305 by meeting with legislators remotely via videoconferencing software such as Zoom or Apple FaceTime. The requestor asks us to assume that the lobbyist organizes, pays for, and attends the virtual meeting that includes food and/or beverages.

### ANALYSIS

Section 305.006 of the Texas Government Code requires every registered lobbyist to file periodic reports of expenditures made to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action. Tex. Gov’t Code §§ 305.006(a)-(b). These expenditures must be reported by category, including: “(1)

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<sup>1</sup> Tex. Gov’t Code §§ 305.006(f), 305.024(a) (as amended by Chapters 92 (S.B. 1011) and 206 (H.B. 1508), Acts of the 79<sup>th</sup> Legislature, Regular Session, 2005).

transportation and lodging; (2) food and beverages; (3) entertainment; (4) gifts, other than awards and mementos; (5) awards and mementos; and (6) expenditures made for the attendance of members of the legislative or executive branch at political fund-raisers or charity events.” *Id.* § 305.006(b).

However, expenditures for certain categories—including food and beverage—are generally prohibited “unless the registrant is present at the event.” *Id.* § 305.006(f) (“An expenditure described by Subsection (b)(1), (2), (3), or (6) may not be made or accepted unless the registrant is present at the event.”); *see also Id.* § 305.024(a) (providing that a lobbyist may not offer, confer, or agree to confer to a member of the legislative or executive branch an expenditure described by Sections 305.006(1), (2), (3), or (6) unless present at the event).

All of our prior opinions discussing the presence requirement have assumed the physical presence of the registered lobbyist. *See, e.g.,* Tex. Ethics Comm’n Op. Nos. 113 (1993), 92 (1992), 89 (1992), and 4 (1992). Because we have not yet addressed the question, we look to other jurisdictions for guidance. The significant majority are in agreement; when a statute or rule requires a person to be “present,” it requires a physical presence,<sup>2</sup> unless there is an express exception that applies.<sup>3</sup>

For example, the Texas Open Meetings Act expressly allows members of governmental bodies to participate remotely in meetings “by videoconference call,” but only if the presiding officer is “physically present at one location of the meeting that is open to the public during the open portions of the meeting.” Tex. Gov’t Code § 551.127. Conversely, Chapter 305 of the Texas Government Code does not include any such express exceptions to the requirement that a lobbyist be present when making certain expenditures to communicate with members of the legislative and executive branches of government.

We understand the circumstances during this particular time in history are unique. Over the past several months, the Governor has declared a state of disaster due to the COVID-19 pandemic and has issued several emergency proclamations ordering Texas citizens to minimize social gatherings and to avoid restaurants, bars, and stores.

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<sup>2</sup> *See, e.g., United States v. Navarro*, 169 F.3d 228, 236 (5<sup>th</sup> Cir. 1999), cert. denied 528 U.S. 845 (1999) (construing “present” as used in Federal Rule of Criminal Procedure 43 and holding that “the common-sense understanding of the definition is that a person must be in the same place as others in order to be present.”); *accord United States v. Williams*, 641 F.3d 758, 764-65 (6<sup>th</sup> Cir. 2011); *United States v. Torres-Palma*, 290 F.3d 1244, 1245-48 (10<sup>th</sup> Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 301, 303-04 (4<sup>th</sup> Cir. 2001); *United States v. Salim*, 690 F.3d 115, 122 (2<sup>nd</sup> Cir. 2012) (“every federal appellate court to have considered the question has held that a defendant’s right to be present requires physical presence and is not satisfied by participation through videoconference.”).

<sup>3</sup> *See, e.g.,* Federal Rule of Civil Procedure 43(a), which expressly allows judges to “permit [presentation of] testimony in open court by contemporaneous transmission from a different location,” but only upon a showing of good cause.

However, in the absence of an express statutory exception to the common-sense meaning of presence, or a lawful executive order suspending the requirement that a lobbyist be present,<sup>4</sup> it is our opinion that a lobbyist cannot satisfy Chapter 305's presence requirement using videoconference software.

However, food or beverage with a value of \$90 or less, which is delivered by mail or common contract carrier to a location other than the Capitol Complex, is a gift not subject to the presence requirement. Tex. Gov't Code §§ 305.0061(e-1), 305.006(b)(4); 1 Tex. Admin. Code § 18.31(a) (adjusting threshold from \$50 to \$90). An expenditure for such a gift is subject to the \$500 aggregate calendar year limit, rather than the allowance for an unlimited amount that may be spent on food or beverages that meets the presence requirement. *Id.* § 305.024(a).

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<sup>4</sup> Under Texas Government Code Section 418.016, the Governor has the authority to suspend any regulatory statute prescribing the procedures for conduct of state business if strict compliance would prevent, hinder, or delay necessary action in coping with a disaster. Governor Abbott has exercised that authority to suspend certain provisions of law during the pandemic, but he has not suspended any portion of Sections 305.006(f) or 305.024(a).