

ETHICS UPDATE

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TEXAS PUBLIC POWER ASSOCIATION ETHICS UPDATE

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I. GIFTS TO PUBLIC SERVANTS: TEXAS PENAL CODE RESTRICTIONS AND EXEMPTIONS

Two sections of the Texas Penal Code impose restrictions on donors of gifts to public servants and on the acceptance of gifts by public servants, including locally elected officials and local government employees. Yet, certain exemptions and exceptions allow public officials to accept gifts under particular circumstances.

A. Offering Gifts to Public Servants [Texas Penal Code § 36.09]

Under Section 36.09 of the Texas Penal Code, a person commits an offense if he offers, confers, or agrees to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting. An offense under this section is a Class A misdemeanor.

B. Receipt of Gifts by Public Servants [Texas Penal Code § 36.08]

Section 36.08 of the Texas Penal Code contains seven different restrictions on acceptance of gifts by public servants. The restrictions vary depending on the nature of the public servant's duties. As examples, restrictions address public servants who perform agency functions related to regulation, investigation, and inspections, public servants who have custody of prisoners, public servants who prosecute civil or criminal litigation on behalf of an agency, and public servants who serve as hearing officers in contested cases.¹

1. Provisions Generally Applicable to Locally Elected Officials

Two provisions relate most directly to public servants who serve as elected local government officials or employees. First, section 36.08(d) makes it a Class A misdemeanor offense for a public servant

who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government ... to solicit, accept, or agree 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.

Section 36.08(e) likewise makes it a Class A misdemeanor for 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 decisions to solicit, accept, or agree 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.

2. Gift Conversion Permitted

Under Penal Code section 36.08(i), a public servant who receives an unsolicited benefit that the public servant is prohibited from accepting 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.

C. Exemptions from Restrictions

There are several safe harbor provisions that exempt certain transactions from the strict prohibitions referenced above. Section 36.10 of the Texas Penal Code provides, in pertinent part, that the prohibitions of section 36.08 (receipt of gifts by public servants) and section 36.09 (offering gifts to public servants) do not apply to:

- gifts conferred on account of kinship or a personal, professional or business relationship independent of the official status of the recipient (section 36.10(a)(2));

- a political contribution as defined by Title 15, Election Code (section 36.10(a)(4));

¹ TEX. PENAL CODE ANN. § 36.08 (a), (b), (c), and (g), respectively (Vernon 2003).

- 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** (section 36.10(a)(5));

- **an item with a value of less than \$50, excluding cash or a negotiable instrument** (section 36.10(a)(6)).

- 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 (section 36.10 (b)).

- exemption to donors for the same items **accepted by the public servant as a guest if the donor reports the items in accordance with any law that requires reporting** of such items. (section 36.10(c)).

- a public servant may **dispose of an unsolicited gift that he is prohibited from accepting**, and he can thus avoid criminal sanctions by donating the benefit to a governmental entity authorized to accept the gift or the official may donate it to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes. (section 36.08(i)).

D. Definition of a Public Servant

A public servant is defined under the Penal Code to include any "person elected, selected, appointed, employed, or otherwise designated as ... an officer, employee, or agent" of the "state or a county, municipality or political subdivision of the state or any branch or agency" thereof.²

The prohibition in section 36.08(d) against gifts to "a public servant who exercises discretion" regarding "pecuniary transactions of the government" is not limited to the elected officials who are members of the governmental body that takes official action for the entity. Rather, the Ethics Commission has interpreted this section broadly to conclude that a public servant who advises or makes recommendations to the governmental body taking action exercises discretion for purposes of section 36.08(d) even though the public servant does not participate in the final decision-making. Op. Tex. Ethics Comm'n No. 396 (1998).

E. More on the Guest Exemption

As noted above, section 36.10(c) of the Penal Code provides a "guest exemption" to the donor of certain gifts to public servants. Section 36.10(c) exempts gifts of "food, lodging, transportation, or

entertainment accepted as a guest" provided that, "if the donor is required by law to report those items," the donor reports them in accordance with the applicable law.

1. Corporate Authority v. Representative

In the corporate context, the Ethics Commission has concluded that the guest exemption requires that a person must be present whose position, authority or conduct could create corporate liability for exemplary damages. Op. Tex. Ethics Comm'n No. 90 (1992). Opinion No. 90 cited *Corporate Wings, Inc. v. King*, 767 S.W.2d 485 (Tex. App.-Dallas 1989, no writ) as authority for this proposition. Under *Corporate Wings*, persons who fall under the category of agents whose acts are regarded as acts of the corporation itself include: "(a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom a corporation has confided the management of the whole or a department or division of its business." *Corporate Wings*, 767 S.W.2d at 488.

In another opinion involving a computer equipment company, however, the Commission merely stated that the guest exemption requires that a "representative" of the company must be present. Op. Tex. Ethics Comm'n No. 261 (1995). Similarly, in the case of a university or a city, the Commission has concluded that the presence of "an officer or employee" met the host status requirement. See Op. Tex. Ethics Comm'n No. 69 (1992) (university); No. 75 (1992) (city).

2. Proximity Requirement - Entertainment

In addition, the Ethics Commission has construed the guest exemption to require direct contact with and proximity to the guest during the event. The person hosting a public servant guest need not sit beside the public servant at the entertainment event but the host must be present at the event and be readily accessible to the guest. In the context of a university athletic event at a stadium, the Ethics Commission has stated that it is not necessary "for the individual host to sit next to" the guest, but that the "individual host must have some direct contact" with the guest, and "the guest and host must be in reasonable physical proximity and have easy access to each other during the game." Op. Tex. Ethics Comm'n No. 69 (1992).

² TEX. PENAL CODE ANN. § 1.07(a)(24) and (41).

3. Proximity Requirement - Transportation and Lodging

The Ethics Commission has concluded that transportation and lodging provided to a public servant as part of an event at which the donor is present qualifies for the guest exemption even if the donor is not present at the lodging accommodations where the public servants stay nor during the transportation to and from the event. Op. Tex. Ethics Comm'n No. 261 (1995). The Ethics Commission noted in Opinion 261 that although the "presence" requirement is generally applicable to transportation and lodging, the "donor's presence is not necessary when transportation and lodging are provided in the context of a larger event at which the donor is present." See also, Op. Tex. Ethics Comm'n No. 287 (1995). Note, however, that in at least one case the State has argued that the exceptions for food, lodging, transportation or entertainment accepted as a guest do not apply when the public servant actively solicited those benefits.³

4. Reporting Requirements

As noted above, section 36.10(b) of the Texas Penal Code exempts food, lodging, transportation, and entertainment accepted as a guest, as long as any required report on those items is made in accordance with any applicable law. The following table identifies the reporting requirements known to the authors and their legal source. For most local government officers, local charters, ordinances, policies, and other governance documents should be reviewed for a reporting requirement for a public servant's receipt of food, lodging, transportation, or entertainment accepted as a guest.

(Over 100,000 population)		Government Code, Chapter 159, Subchapter A (<i>judge, commissioners, county attorney</i>)
County (Over 125,000 population)	*	Local Government Code, Chapter 159, Subchapter B (<i>sheriff, tax assessor-collector, county clerk, district clerk, county treasurer, county auditor, purchasing agent</i>)
County Judicial Officers		Local Government Code, Chapter 159, Subchapter C
Municipality	*	*
School District	*	*
Other Governmental Entity	*	*

* Review local charter, ordinances, policies, and any other local governance document for any requirement to report the receipt of food, lodging, transportation, or entertainment accepted as a guest by a public servant.

State Level Reporting. Texas Government Code Chapter 572 ("Chapter 572") provides a comprehensive disclosure scheme that generally applies to legislative and executive branch public servants and lobbyists. Conversely, Texas Government Code Chapter 305 governs expenditure reporting by state registered lobbyists who act as donors of food, transportation, lodging, and entertainment.

County Level Reporting. Chapter 572 has limited application to counties. Chapter 159 of the Texas

Type of Public Servant	Donor Reporting Requirement	Donee Reporting Requirement
State (Legislative & Executive Branch)	Government Code, Chapter 305	Government Code, Chapter 572
County	*	Local

³ *Smith v. State*, 959 S.W.2d 1, 22-23 (Tex. App. – Waco 1997, pet. ref'd). Because the court of appeals found that the defendant's evidence was insufficient to support his 36.10 defenses, the court did not reach the State's argument. Therefore, it remains an open question whether the State's contention is correct that the exception for food, lodging, transportation or entertainment accepted as a guest does not apply when the public official solicits those benefits.

Local Government Code requires Chapter 572 reporting for county judges, county commissioners, and county attorneys in counties with populations of 100,000 or more and for county judicial officers in counties of all sizes.⁴ Under Subchapter C of Chapter 159, the commissioners court in counties with populations of 125,000 or more may adopt by order a financial disclosure reporting system for county officers, precinct officers, county judicial officers, candidates for those offices, and county employees.⁵

In 1992, the Texas Ethics Commission issued Advisory Opinion No. 106, in which it ruled that county officials in certain counties may be subject to the disclosure requirements of Local Government Code Chapter 159 (applicable to counties with populations in excess of 500,000 at the time). Subsequently, in its Advisory Opinion No. 261, the Texas Ethics Commission determined that county officials may accept such benefits in connection with a demonstration of computer equipment to the county officials by a computer equipment vendor without running afoul of the general prohibitions on acceptance of gifts. Again, in this opinion, the Texas Ethics Commission made reference to the safe harbor provision in section 36.10(b). (Op. Tex. Ethics Comm'n No. 261 (1995)).

Thus, if a county public servant receives a benefit as a guest, then the question is whether the benefit must be reported. Our firm has talked informally with a representative of the Texas Ethics Commission who has advised us that the staff of the Ethics Commission interprets section 36.10(b) as providing a safe harbor if the county official is either (1) not required to report the benefit because he or she is from a county with a population of less than 100,000 and not subject to Chapter 159 of the Texas Local Government Code or (2) from a county subject to Chapter 159 who does report the benefit as required.⁶

Under the rationale expressed by the representative of the Ethics Commission, a county official in a county with a population of fewer than 100,000 that would not come within the ambit of Chapter 159, Texas Local Government Code, would be able to rely on the safe harbor provision of section 36.10(b) in accepting the benefit.

⁴ TEX. LOC. GOV'T CODE ANN. § 159.051, *et seq.*

⁵ TEX. LOC. GOV'T CODE ANN. § 159.031, *et seq.*

⁶ The Ethics Commission would also view a county imposed reporting requirement in a county not subject to Chapter 159, Texas Local Government Code, to require that a report be filed in order to come within the safe harbor of section 36.10(b) of the Texas Penal Code.

Local Level Reporting. Local governments, as permitted by law, may adopt local reporting requirements applicable to locally elected officials and the employees of the local government.

F. Acceptance of an Honorarium [Texas Penal Code § 36.07]

A public servant commits an offense if he/she 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.⁷ Violation of this statute is a Class A misdemeanor.⁸ Section 36.07 of the Penal Code does NOT, however, 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 these services are more than merely perfunctory, or from accepting meals in connection with an event.⁹

II. BRIBERY AND CORRUPT INFLUENCE

Public servants are prohibited from either gaining or bestowing benefits derived from their public position. TEX. PENAL CODE § 36.01 *et seq.* Prohibited are benefits as consideration for the recipient's decision, opinion, recommendation, vote, or violation of a duty imposed by law. It is no defense that the public servant was not yet in office, has left office, or that the decision, opinion, recommendation, vote, or other exercise of discretion has already occurred. A benefit does not constitute a bribe if it is not offered or accepted as consideration for some official act. Op. Tex. Ethics Comm'n No. 60 (1992).

The term "law" under the statute may include any rule or regulation adopted by a municipality. In *Tweedy v. State*, 722 S.W.2d 30 (Tex. App. - Dallas 1986, pet. ref'd), for example, a defendant received a sentence of five years' confinement and a one thousand dollar fine for offering two hundred dollars to a city construction inspector if the inspector would allow defendant and defendant's crew to dig trenches, lay pipe, and backfill the trenches without the inspector examining the work. The city's work specifications required that none of the work mentioned above could commence until the city inspector had given his prior approval.

⁷ TEX. PENAL CODE § 36.07(a).

⁸ *Id.* at § 36.07(c).

⁹ *Id.* at § 36.07(b).

Defendant argued that because the city had adopted its work specifications by resolution rather than by ordinance, defendant had not attempted to cause the city construction inspector to violate a "duty imposed by law" within the meaning of the statute. The appellate court disagreed, holding that even a municipal resolution had the force of law within the meaning of the bribery statute.¹⁰

Note that the bribery statute focuses on a defendant's mental intent, making it an offense for a public servant to intend to accept a benefit as consideration for a violation of a duty imposed by law, even if the violation of law never actually occurs.¹¹ In *Cerda v. State*, 750 S.W.2d 925 (Tex. App. - Corpus Christi 1988, pet. ref'd), for example, defendant received a sentence of five years' confinement and a \$3,500 fine for having agreed to destroy government records. Cerda argued that the indictment against him failed to state an offense because Cerda never actually destroyed any records. The court disagreed, holding that an offense under section 36.02 is complete *once there is an agreement to violate a legal duty imposed by law*, even if the violation never actually occurs.

Similarly, a public servant violates the bribery statute by soliciting a bribe, even if the other party is not aware of a solicitation. In *Martinez v. State*, 696 S.W.2d 930 (Tex. App. - Austin 1985, pet. ref'd), for example, a police officer was convicted of soliciting and accepting \$150 from a motorist in exchange for not issuing a traffic ticket. At trial, the motorist, who was an undocumented immigrant with limited English skills, testified that he did not pay the officer with the understanding that the officer would take care of the tickets. The court held that despite the motorist's apparent lack of understanding of the transaction, the offense of bribery had taken place:

We hold that where it is alleged the accused offered or solicited a benefit as consideration for an official act, it is not necessary for the State to prove the party to whom the offer was made accepted the proposition or even understood the unlawful nature of the proposition; proof that the offer or solicitation was made by the accused with the purpose to promote or facilitate the exchange of the

benefit for the official action is all that is required.¹²

In a recent opinion, the Corpus Christi Court of Appeals discussed whether the "benefit" allegedly offered in violation of the statute was limited to "pecuniary gain."¹³ There, a county commissioner was charged with allegedly promising to vote for a candidate for the office of constable in return for the candidate's agreement to hire particular individuals as deputies. On appeal, the defense argued that the evidence at trial of the "benefit" allegedly conferred -- *i.e.*, the promise of a job -- was insufficient to establish a pecuniary gain. The majority of the court of appeals disagreed, holding that the Texas bribery statute was broad enough to include "anything reasonably regarded" as a benefit. In that case, the court held that the definition of "anything reasonably regarded" as a benefit was broad enough to include the county commissioner's vote and the offer of a job.¹⁴

Violation of the bribery law is a second degree felony, punishable by imprisonment for not less than two years or more than twenty years. A fine not to exceed \$10,000 may also be imposed. In addition, conviction of a bribery offense would make a person ineligible to hold office in the State of Texas. TEX. CONST. art. XVI, § 5.

III. GIFT AND TAXABLE INCOME DISCLOSURES UNDER CHAPTER 176 OF THE TEXAS LOCAL GOVERNMENT CODE

A. Overview

In 2005, the Texas Legislature enacted H.B. 914, which creates a set of conflicts disclosure requirements for local government officials and the vendors who contract or do business with local governments. Subsequently codified as Chapter 176 of the Texas Local Government Code, H.B. 914 requires an affected official to file a "conflicts disclosure statement" that identifies any business or employment relationships between the official and

¹² *Martinez*, 696 S.W.2d at 933.

¹³ See *Valencia v. State*, No. 13-02-020-CR, 2004 WL 1416239, at *3-4 (Tex. App. - Corpus Christi, June 24, 2004) (not designated for publication).

¹⁴ *Id.* The Texas Ethics Commission has also determined that "benefits may include gifts to public servants from cities or counties, as well as from individuals and private businesses. Op. Tex. Ethics Comm'n No. 187 (1994).

¹⁰ See TEX. PENAL CODE ' 36.02(a)(3); *Tweedy*, 722 S.W.2d at 31.

¹¹ TEX. PENAL CODE ' 36.02(a)(3).

any vendor who contracts or seeks to contract for the sale or purchase of property, goods or services with the local governmental entity.¹⁵

In addition, the official must identify certain gifts that the official or the official's family member¹⁶ have received from a vendor during the preceding twelve months, other than gifts of food, lodging, transportation or entertainment accepted as a guest, that have an aggregate value of more than \$250.¹⁷ Vendors are subject to their own set of disclosure requirements.¹⁸ In the accompanying bill analysis to H.B. 914, the Legislature stated that its goal in creating these requirements was to "improve public confidence in governmental actions."¹⁹

Because of many questions raised by Chapter 176, the Legislature enacted a number of changes during the 2007 Regular Session to attempt to clarify the scope and mechanics of the law.²⁰

B. Local Government Officers

The term "local government officer" includes both members of the governing body of a local governmental entity and the director, administrator or other person designated as the executive officer of the local governmental entity.²¹ The local governmental entity may choose to extend the statute's reporting requirements to other employees of the local governmental entity.²²

C. Records Administrator

Each local governmental entity must have a "records administrator" (e.g., the city clerk or another designated individual) who is responsible for receiving and maintaining the conflicts disclosure

statements.²³ In addition, the records administrator must maintain a list of local government officers and must make the list available to the public and to any vendor who may be required under the statute to file a disclosure.²⁴ In 2007 the act was amended to allow the local governmental entity to extend the requirements of the law to any employee of the entity who has the authority to approve contracts on behalf of the entity. The 2007 amendments also required the entity to create and maintain a list of the identified employees and make it available upon request to the public.

D. Local Government Officer Disclosures

A local government officer must file a conflicts disclosure statement with respect to a vendor doing business with the local government if

the vendor *enters into a contract with* the local government entity or

the local government *is considering entering into a contract with* the vendor

AND

a vendor has an employment or other business relationship with *the local government officer or the officer's family member that results in the officer or family member receiving taxable income (other than investment income that exceeds \$2,500, during the 12-month period preceding the date that the officer becomes aware that a contract has been executed or that the local governmental entity is considering such a contract with the vendor);* or

the vendor has given to *the officer or officer's family member gifts in excess of \$250 (not food, lodging, transportation or entertainment received as guest) in the 12 months preceding the date that the officer becomes aware of the vendor's executed contract or that the local government is considering doing business with the person.*²⁵

¹⁵ TEX. LOC. GOV'T CODE §§ 176.002, .176.003.

¹⁶ "Family member" means a person related to another person within the first degree by consanguinity or affinity. *Id.* at 176.001(2).

¹⁷ *Id.* at § 176.003(a)(2)(B).

¹⁸ *Id.* at § 176.006.

¹⁹ House Comm. on Urban Affairs, Bill Analysis, Tex. H.B. 914, 79th Leg., R.S. (2005).

²⁰ Acts 2007, 80th Leg., ch. 226.

²¹ *Id.* at § 176.001(4).

²² *Id.* at § 176.005(a).

²³ *Id.* at § 176.003(b).

²⁴ *Id.* at § 176.007.

²⁵ *Id.* at § 176.003 (a).

The Texas Ethics Commission has promulgated a disclosure form ("Form CIS") for local government officials. It is available at the Commission's website as a .pdf document at <http://www.ethics.state.tx.us/forms/CIS.pdf>. A copy of the form is attached.

E. Deadlines and Penalty for Noncompliance by Local Government Officers

The disclosure statement must be filed not later than 5 p.m. on the 7th business day after the date that the officer becomes aware of facts that require the filing of the statement.²⁶ An officer commits a Class C misdemeanor if the officer knowingly violates the disclosure requirements.²⁷ It is a defense to prosecution that the officer filed the statement not later than 7 business days after the date the person received notice of the alleged violation.²⁸

F. Vendor Disclosures

Vendors are also required to make disclosure statements under Chapter 176. The vendor disclosure requirements apply to any person who (1) has a business relationship with a local governmental entity with whom he is has contracted or is expecting to contract and (2) has an employment or other business relationship with an officer of the local governmental entity or a family member of the officer; or, has given an officer one or more gifts with an aggregate value of \$250 in a 12-month period. Governmental entities (i.e., the state, political subdivisions of the state, the federal government, or a foreign government) and their employees are not subject to the disclosure requirements.

The questionnaire, Form CIQ29, asks the person to:

1. Describe each affiliation or business relationship the person has with each local government officer of the local governmental entity;
2. Identify each affiliation or business relationship described in number (1) above with respect to which the local government

²⁶ *Id.* at §176.003(b).

²⁷ *Id.* at §§ 176.003(c).

²⁸ *Id.* at §176.003(d).

²⁹ The form is likely to be amended to conform the document to the amendments in the 2007 legislation.

officer receives, or is likely to receive, taxable income from the person filing the questionnaire;

3. Identify each affiliation or business relationship described in number (1) above with respect to which the person filing the questionnaire receives, or is likely to receive, taxable income that:
 - a. Is received from, or at the direction of, a local government officer of the local governmental entity; and
 - b. Is not received from the local governmental entity;
4. Describe each affiliation or business relationship with a corporation or other business entity with respect to which a local government officer of the local governmental entity:
 - a. Serves as an officer or director;
 - b. Holds an ownership interest of 10 percent or more;
5. Describe each affiliation or business relationship with an employee or contractor of the local governmental entity who makes recommendations to a local government officer of the local governmental entity with respect to the expenditure of money;
6. Describe each affiliation or business relationship with a person who:
 - a. Is a local government officer; and
 - b. Appoints or employs a local government officer of the local governmental entity that is the subject of the questionnaire; and
7. Describe any other affiliation or business relationship that might cause a conflict of interest.³⁰

G. Deadline and Penalties for Noncompliance by Vendors

A vendor must file a completed conflict of interest questionnaire with a public entity's records administrator no later than the 7th day after the date the person:

- (1) begins contract discussions or negotiations to enter into a contract with a local governmental entity; or
- (2) submits an application, response to a request for proposals or bids, correspondence, or

³⁰ *Id.* at 176.006(c).

another writing related to a potential agreement with the entity.³¹

In addition to this initial disclosure questionnaire, a questionnaire must be filed with the appropriate records administrator no later than the 7th business day after the date of an event that would make a statement in a previously filed questionnaire incomplete or inaccurate.³²

A person is not required to file an updated questionnaire in a year if the person has filed a questionnaire on or after June 1, but before September 1 of that year.³³ It is a defense to prosecution that the person filed the required questionnaire not later than the 7th business day after the date the person received notice of the violation.³⁴

The Texas Ethics Commission's Form CIQ is available as a .pdf document at the Commission's website at <http://www.ethics.state.tx.us/forms/CIQ.pdf>.

H. Permitted Electronic Filing by Vendors

On May 15, 2006, the Texas Ethics Commission approved an electronic Form CIQ that had been submitted by the Texas Municipal League. There may be amendments to the form that may be required as a result of the recent legislative changes.

I. Implementation Concerns

Following House Bill 914's effective date on January 1, 2006, a myriad of implementation questions and concerns arose for local government officers. State representatives Beverly Wooley and John Smithee formally requested an Attorney General's opinion to assist local governmental entities and their vendors in complying with the new law, submitting ten specific questions for the Attorney General's consideration.³⁵ Additionally, Commissioner of Education Shirley J. Neeley submitted five more questions for consideration and referred to the Attorney General another four

questions posed by a law firm representing various school districts.³⁶

The Attorney General responded to these inquiries on August 2, 2006 in Texas Attorney General Opinion No GA-0446. In his opinion, the Attorney General clarifies as follows:

- The phrase "contracts or seeks to contract for the sale or purchase of property, goods, or services with a local governmental entity" encompasses one who agrees to, makes, or arranges for, or inquires for, asks for or requests from a local governmental entity a promise created legal obligations concerning the sale or purchase of property, real or personal, and any goods and services. The legislature subsequently redefined the concept to clarify that it means "enters" or seeks to enter into a contract..."³⁷
- A "business relationship" is a connection between two or more parties based on a commercial activity of one of the parties. This definition was codified in amendments to Section 176.001(1-a)
- An "affiliation" is an association between persons or between a person and an organization outside of a "business relationship." The legislative changes in 2007 did not address the AG's definition and thus it may still be applicable.
- A personal or business interest bearing savings account or loan which generated taxable income to either the person subject to chapter 176 or the local government officer would fall within the scope of chapter 176. The legislation defined investment income at Section 176.001(2-b) and exempted investment income from consideration in Section 176.003(a)(2).
- Chapter 176 includes professional services contracts. The amendments to the legislation in 2007 clarified that professional services were included.³⁸

³¹ *Id.* at 176.006(a).

³² *Id.* at 176.006(d).

³³ *Id.* at 176.006(e).

³⁴ *Id.* at 176.006(g).

³⁵ RQ-0451-GA, Opinion Request from Representative Beverly Woolley, Chairman of House Committee on Calendars and Representative John Smithee, Chairman of the House Committee on Insurance, February 13, 2006.

³⁶ Opinion Request from Commissioner of Education, Shirley J. Neely, Ed. D., March 2, 2006; Opinion Request from Jason Scott, Schwartz & Eichelbaum, P.C., February 15, 2006.

³⁷ See amended Section 176.002(a)(1).

³⁸ *Id.* at 176.001(6) as amended.

- Partnerships, corporations, and other corporate bodies are “persons” subject to chapter 176. As applied to a corporate or legal entity, chapter 176.002’s disclosure requirements apply to only the legal entity that is the “person” contracting or seeking to contract with the local government entity.
- A local governmental entity does not have an affirmative duty (a) to require vendors to comply with, (b) to enforce, or (c) to notify vendors of the reporting requirements of Chapter 176. A contract between a local government and a vendor who fails to comply with chapter 176 is not void. This was codified at Section 176.006(h) and (i).
- These and many of the other questions raised about the original version of Chapter 176 appear to have been clarified by HB 1491.

J. Legislative Amendments

At the time this paper was originally prepared and presented last spring at the Annual Bickerstaff Local Government Seminar, legislation was then pending affecting Chapter 176. As is reflected in this revised version of the paper, HB 1491 was enacted amending substantial portions of Chapter 176.

IV. SUBSTANTIAL INTEREST DISCLOSURES UNDER CHAPTER 171 OF THE TEXAS LOCAL GOVERNMENT CODE

The general purpose Chapter 171 of the Texas Local Government Code is to prevent public officials from using their positions in public service for hidden personal pecuniary benefit. Chapter 171 prohibits a local public official from knowingly participating in a vote or decision on a matter involving a business entity³⁹ or real property in which the official has a *substantial interest* if it is reasonably foreseeable that an action on the matter would confer an economic benefit on the business entity or will have an economic effect on the value of the property that is distinguishable from its effect on the public.⁴⁰ If

³⁹ The statute applies to non-profit as well as for-profit entities, so employment by a spouse, for example, in a non-profit entity would require disclosure. See TEX. LOC. GOV=T CODE ANN. § 171.001(2) (Vernon 1999 & Supp. 2002).

⁴⁰ Further, the statute prohibits a public official from acting as a surety for (1) a business entity that has work, business or a contract with the governmental entity or (2) any official bond

there will be a special economic effect, the statute requires the official to *file an affidavit* stating the nature and extent of the official’s interest in the business entity or property before a vote is taken or decision is made involving the matter.⁴¹ The affidavit must be filed with the official recordkeeper of the governmental entity.⁴² In addition to filing an affidavit, the public official is required to *abstain from further participation in the matter*.⁴³

Where an official is disqualified from voting, the number of members is reduced prior to determining whether any required majority or super-majority is achieved.⁴⁴ If the official fails to abstain, any action is voidable, but only if the measure would not have passed without the vote of the person who had a conflict.⁴⁵

A. “Substantial Interest”

An official has a “substantial interest” if, at the time when the governmental body takes up the matter, he/she: (1) owns 10% or more of the voting shares of the business; (2) owns either 10% or more, or \$15,000 or more of the fair market value of the business; (3) receives more than 10% of the person’s gross income from the business; or (4) has an equitable interest in real property with a fair market value of \$2,500 or more.⁴⁶

For example, in a situation where a city council member owned property in an area considered for tax abatement, the member could not vote on the tax abatement plan where the property received a special economic benefit from the plan.⁴⁷ Second, consider a public school trustee employed by a software company that is bidding on a project outsourced from the district’s purchasing department. If the trustee receives more than 10% of his gross income from the business, then the affidavit and abstention procedures apply to him.

A public official is also considered to have a “substantial interest” in a matter if a person related to the official in the first degree by consanguinity

required of an officer or employee of the governmental entity. See *id.* at § 171.003.

⁴¹ See *id.* at § 171.004(a).

⁴² See *id.* at § 171.004(b).

⁴³ See *id.* at § 171.004(a).

⁴⁴ See *Hannan v. City of Coppell*, 583 S.W.2d 817, 818 (Tex. Civ. App. BDallas 1979, writ ref’d n.r.e.).

⁴⁵ See TEX. LOC. GOV’T CODE ANN. § 171.006 (Vernon 1999).

⁴⁶ See *id.* at § 171.002.

⁴⁷ See Op. Tex. Att’y Gen. No. JC-0155 (1999) (clarified by Op. Tex. Att’y Gen. No. JC-0236 (2000)).

(blood) or affinity (marriage), has a substantial interest in the business or real property.⁴⁸ Thus, if the daughter of a local public official earns a small income, yet it is substantial to her as it exceeds 10% of her gross income, then her father, as a local public official, must file an affidavit before any action can be taken that will have a special effect on the business that employs the daughter.⁴⁹

B. Special Requirements for Budget Adoption

There are special procedural requirements for budgetary matters when a conflict of interest exists, beyond the filing of the affidavit and abstention. Members of the governing body must vote separately on any item involving a budget item specifically dedicated to a contract with a business entity in which the official has a substantial interest.⁵⁰ However, if a budget item does not include the specific day-to-day expenditures that involve the conflict, then no conflict exists unless the governmental body later approves the individual invoices.⁵¹

C. Enforcement

Compliance with the conflict of interest provisions is important. A violation of chapter 171 is a criminal act punishable as a Class A misdemeanor⁵² and the Texas Supreme Court has said that the rule prohibiting public officials from conflicted transactions should be scrupulously enforced.⁵³

⁴⁸ See TEX. LOC. GOV=T CODE ANN. ' 171.002 (Vernon 1999 & Supp. 2002).

⁴⁹ See Op. Tex. Att=y Gen. No. JC-0063 (1999).

⁵⁰ See TEX. LOC. GOV=T CODE ANN. ' 171.005 (Vernon 1999).

⁵¹ See Op. Tex. Att=y Gen. No. LO-98-112 (1998).

⁵² See TEX. LOC. GOV=T CODE ANN. ' 171.003(b) (Vernon 1999 & Supp. 2002).

⁵³ See *City of Edinburgh v. Ellis*, 59 S.W.2d 99, 100 (1933).