

TEXAS ETHICS COMMISSION
P.O. Box 12070, Austin, Texas 78711-2070
(512) 463-5800

Chad M. Craycraft, Chair
Mary K. “Katie” Kennedy, Vice Chair
Randall H. Erben
Chris Flood

Patrick W. Mizell
Richard S. Schmidt
Joseph O. Slovacek
Steven D. Wolens

EXECUTIVE SESSION AGENDA

Date and Time: 1:00 p.m., Thursday, February 27, 2020
Location: Room E1.014, Capitol Extension, Austin, Texas

1. Call to order; roll call.
2. **Executive session pursuant to Section 551.071, Government Code, Consultation with Attorneys, and Section 551.074, Government Code, Personnel Matters; Closed Meeting.**
3. Discussion of pending litigation to seek legal advice relating to the following:
 - A. Cause No. D-1-GN-17-001878: *Texas Ethics Commission v. Michael Quinn Sullivan*, in the 250th Judicial District Court in Travis County, Texas; Cause No. 03-17-00392-CV: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the Third Court of Appeals at Austin, Texas; and Cause No. 18-0580: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the Supreme Court of Texas.
 - B. Cause No. D-1-GN-14-001252: *Empower Texans, Inc. and Michael Quinn Sullivan v. State of Texas Ethics Commission; Natalia Luna Ashley, in her capacity as Executive Director of the Texas Ethics Commission; Tom Ramsay, individually and in his capacity as Commissioner; et al.*; in the 53rd Judicial District Court of Travis County, Texas; and related case, Cause No. 03-17-00770-CV: *Empower Texans, Inc., and Michael Quinn Sullivan v. Tom Ramsay in his individual capacity, et al.*; in the Third Court of Appeals, Austin, Texas.
 - C. Cause No. D-1-GN-15-004455: *Texas Ethics Commission v. Empower Texans, Inc. and Michael Quinn Sullivan*, in the 345th Judicial District Court of Travis County, Texas; and related case, Cause No. 03-16-00872-CV: *Empower Texans, Inc., and Michael Quinn Sullivan v. Texas Ethics Commission*, in the Third Court of Appeals, Austin, Texas.

For more information, contact Anne Temple Peters, Executive Director, at (512) 463-5800.

4. Discussion of personnel matters, including matters specifically related to applicants for, and possible appointment to the position of, General Counsel.
5. **Reconvene in open session and possible appointment by vote on Item 4.**
6. Adjourn.

CERTIFICATION: I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements. Certifying Official & Agency Liaison: Anne Temple Peters, Executive Director.

NOTICE: Under the Americans with Disabilities Act, an individual with a disability must have an equal opportunity for effective communication and participation in public meetings. Upon request, the Texas Ethics Commission will provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, and large print or Braille documents. In determining the type of auxiliary aid or service, the Commission will give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify Margie Castellanos at (512) 463-5800 or RELAY Texas at (800) 735-2989 two days before this meeting so that appropriate arrangements can be made. Please also contact Ms. Castellanos if you need assistance in having English translated into Spanish.

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PUBLIC MEETING AGENDA

Date and Time: 3:30 p.m., Thursday, February 27, 2020
Location: Room E1.014, Capitol Extension, Austin, Texas

1. Call to order; roll call.

ADVISORY OPINIONS

2. Discussion and possible action regarding the extension of deadlines to issue advisory opinions under Section 571.092 of the Government Code.
3. Advisory Opinion Draft No. AOR-629: Whether a city employee violates section 255.003(a) of the Election Code by allowing members of the public to display or distribute political advertising at a city-owned facility during or in connection with a candidate debate or forum if the city-owned facility is rented to and paid for by the sponsor of the candidate debate or forum.

Whether a city employee has knowingly authorized the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a city-owned room that is rented to and paid for by the sponsor of a candidate debate or forum.

Whether a city employee has knowingly authorized the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a corridor outside the city-owned room rented to and paid for by the sponsor of a candidate debate or forum or in the parking lot of the city-owned facility where the candidate debate or forum is being conducted.

For more information, contact Anne Temple Peters, Executive Director, at (512) 463-5800.

This opinion construes Section 255.003(a) of the Election Code.

4. Advisory Opinion Draft No. AOR-630: Whether section 36.07 of the Penal Code or section 253.034(a) of the Election Code prohibits an elected officeholder from accepting from a political committee transportation, lodging, and meals, or reimbursement for expenses for transportation, lodging, and meals, during a regular legislative session to attend and perform official actions at the political committee's meetings.

This opinion construes Section 36.07 of the Penal Code and Section 253.034 of the Election Code.

5. Advisory Opinion Draft No. AOR-631: Whether section 572.069 of the Government Code prohibits a former employee of a state agency from accepting employment from a person, whose bid proposal the employee reviewed on behalf of the agency, when: (1) the agency solicited bid proposals from a list of purportedly eligible vendors provided by another state agency, (2) the person submitted a bid proposal in response to the solicitation from the agency, (3) the person was not eligible by law to enter into the contract with the agency and had been erroneously included in the list of eligible vendors provided by another state agency, and (4) the agency ended the procurement because there were no other bid proposals submitted for the contract.

This opinion construes Section 572.069, Government Code.

6. Draft Advisory Opinion No. AOR-632: Whether a contribution from a federal political committee to a federal "Super PAC" is considered a political expenditure made in connection with an election voted on in Texas for purposes of calculating whether the federal political committee is an out-of-state political committee.

This opinion construes Section 251.001(15) of the Election Code and Section 20.13(c) of the Ethics Commission Rules.

7. Reconsideration of Ethics Advisory Opinion No. EAO-550, adopted on June 28, 2019, and possible adoption of a revised advisory opinion regarding whether a public officer may use government resources for political advertising.

This opinion construes Section 39.02 of the Penal Code and Section 255.003(a) of the Election Code.

8. Adjourn.

CERTIFICATION: I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements. Certifying Official & Agency Liaison: Anne Temple Peters, Executive Director.

NOTICE: Under the Americans with Disabilities Act, an individual with a disability must have an equal opportunity for effective communication and participation in public meetings. Upon request, the Texas Ethics Commission will provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, and large print or Braille documents. In determining the type of auxiliary aid or service, the Commission will give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify Margie Castellanos at (512) 463-5800 or RELAY Texas at (800) 735-2989 two days before this meeting so that appropriate arrangements can be made. Please also contact Ms. Castellanos if you need assistance in having English translated into Spanish.

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ETHICS ADVISORY OPINION NO. ____

[DATE]

ISSUES

Whether a city employee violates section 255.003(a) of the Election Code by allowing members of the public to display or distribute political advertising at a city-owned facility during or in connection with a candidate debate or forum if the city-owned facility is rented to and paid for by the sponsor of the candidate debate or forum.

Whether a city employee has knowingly authorized the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a city-owned room that is rented to and paid for by the sponsor of a candidate debate or forum.

Whether a city employee has knowingly authorized the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a corridor outside the city-owned room rented to and paid for by the sponsor of a candidate debate or forum or in the parking lot of the city-owned facility where the candidate debate or forum is being conducted. (AOR-629)

SUMMARY

1. A city employee does not violate section 255.003(a) of the Election Code by allowing members of the public to display or distribute political advertising at a city-owned facility during or in connection with a candidate debate or forum if the city-owned facility is rented to and paid for by the sponsor of the candidate debate or forum, and if the sponsor uses non-public funds to pay the city fair market value for the use of the city-owned facility.
2. A city employee does not knowingly authorize the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a city-owned room that is rented to and paid for by the sponsor of a candidate debate or forum and the sponsor uses non-public funds to pay the city fair market value for the use of the city-owned room.
3. A city employee does not knowingly authorize the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if

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members of the public display or distribute political advertising in a corridor outside the city-owned room rented to and paid for by the sponsor of a candidate debate or forum or in the parking lot of the city-owned facility where the candidate debate or forum is being conducted, and the city employee takes no action to prevent the display or distribution of the political advertising.

FACTS

The Texas Ethics Commission (“Commission”) has been asked three separate questions by a city employee regarding the application of section 255.003(a) of the Election Code. According to the facts provided for this opinion, the city employee is the chief administrative and executive officer of the city and is responsible for the administration of all city affairs. The city owns facilities that have been used as venues for third parties to sponsor and conduct debates and forums for candidates for public office. The sponsors pay rent to the city to use the facilities and the debates and forums are open to all candidates and to the public. The debates and forums attract candidates and their supporters who wish to display or distribute political advertising materials to members of the public who may be present within a rented meeting room, in a corridor outside a rented meeting room, or in the parking lot outside a city-owned facility where the debate or forum is being conducted. The city does not prepare or pay for any of the political advertising materials, sponsor or conduct the debates, invite or contact candidates, or endorse or oppose any candidates. No city employees participate on work time in the preparation, display, placement, or distribution of any political advertising materials.

ANALYSIS

The city employee asks about the application of section 255.003(a) of the Election Code in three scenarios involving the display or distribution of political advertising on city-owned property. The law at issue in each scenario is section 255.003(a) of the Election Code, which states that “an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising.” We will separately address the application of this law to each scenario.

City Employee Allows the Display or Distribution of Political Advertising at a City-Owned Facility Rented by a Sponsor

In the first scenario, the city employee asks whether he would violate section 255.003(a) of the Election Code by allowing members of the public to display or distribute political advertising at a city-owned facility during or in connection with a candidate debate or forum if the city-owned facility is rented to and paid for by the sponsor of the candidate debate or forum.

We have stated in prior opinions that, for purposes of section 255.003(a) of the Election Code, the spending of public funds includes the use of a political subdivision’s resources, including money, employees’ work time, facilities, and equipment.¹ Addressing the first scenario, the city-

¹ See Ethics Advisory Opinion Nos. 550 (2019) (officer of a political subdivision may not use employees’ work time or restricted areas of the political subdivision’s facilities for political advertising), 532 (2015) (city officer may not modify city letterhead, created by city staff or with city equipment and which included the city’s intellectual

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owned facility is a city resource, and thus the restriction in section 255.003(a) of the Election Code applies to the city employee's use of that city-owned facility for political advertising. However, the sponsor would be paying the city for the use of that city-owned facility, which would be made available to members of the public for the display or distribution of political advertising during or in connection with the candidate debate or forum. If the sponsor uses non-public funds to pay the city for the use of the city-owned facility, and the amount paid is based on the fair market value² of the use of the city-owned facility, then there would be no spending of public funds for political advertising. Therefore, in our opinion, the city employee does not violate section 255.003(a) of the Election Code by allowing political advertising to be displayed or distributed by members of the public at a city-owned facility during or in connection with a candidate debate or forum if the city-owned facility is rented to and paid for by the sponsor of the candidate debate or forum and the sponsor uses non-public funds to pay the city fair market value for the use of the city-owned facility.

Political Advertising Displayed or Distributed in a City-Owned Room Rented by a Sponsor

In the second scenario, the city employee asks whether he has authorized the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a city-owned room that is rented to and paid for by the sponsor of a candidate debate or forum. This scenario is substantively identical to the first scenario, except that the facts do not indicate that the city employee specifically allows the display or distribution of political advertising. However, regardless of whether the city employee allows the display or distribution of political advertising, public funds would not be spent for political advertising if the sponsor uses non-public funds to pay the city fair market value for the use of the city-owned room. Thus, the city employee would not knowingly authorize the spending of public funds for political advertising under section

property, to create and distribute political advertising letters), 516 (2014) (city officer or employee may not use city funds to purchase and maintain a political advertising sign in a city park as part of an "adopt-a-park" program), 443 (2002) (school district employees may not use work time to distribute a candidate's campaign flyers to a restricted area of the school that is not accessible to the public), 45 (1992) (school district officer or employee may not use the district's internal mail system equipment to distribute political advertising).

² In the absence of a statutory duty to charge for the use of a political subdivision's facility under different terms, the payment of fair market value ensures that public funds are not deemed to have been spent. We have stated in numerous opinions that fair market value is the standard for determining the amount that a person must pay for property or services to avoid receiving a prohibited benefit or discount under the applicable law. *See, e.g.*, Ethics Advisory Opinion Nos. 482 (2008) (the provision of transportation and lodging to a member of the legislative or executive branch is not an expenditure under the lobby law if the member prepays an amount equal to fair market value for the transportation and lodging), 434 (2001) (candidate does not convert political contributions to personal use by using political contributions to pay a niece or nephew for campaign work in an amount based on fair market value of the work performed), 325 (1996) (legislator may receive payment for a piece of real estate without violating the general benefit prohibitions in chapter 36 of the Penal Code as long as the payment reflects the fair market value of the land), 319 (1996) (legislator using political contributions to pay a family member for the use of the family member's assets for campaign or officeholder purposes should be based on fair market value of the use of the asset), 90 (1992) (for purposes of the gift prohibitions under the lobby law, a lobby registrant should use the fair market value of the provision of a hunting lease to determine the value). *See also* 1 Tex. Admin. Code § 20.1(22) (value of an in-kind contribution in the form of a discount is the difference between the fair market value of the goods or services and the amount charged).

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255.003(a) of the Election Code if political advertising is displayed or distributed by members of the public in a city-owned room that is rented to and paid for by the sponsor of a candidate debate or forum and if the sponsor uses non-public funds to pay the city fair market value for the use of the city-owned room.

Political Advertising Displayed or Distributed in a City-Owned Corridor or Parking Lot

In the third scenario, the city employee asks whether he has authorized the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a corridor outside the city-owned room rented to and paid for by the sponsor of a candidate debate or forum, or in the parking lot of the city-owned facility where the candidate debate or forum is being conducted. This scenario is distinguishable from the first two scenarios in that the political advertising would be displayed or distributed in locations that are separate from the specific location that is rented by the sponsor. Thus, the use of the corridor and the parking lot would be considered the “spending of public funds” for purposes of section 255.003(a) of the Election Code. However, whether the city employee would be deemed to have authorized the spending of public funds for political advertising in this scenario depends upon the city employee’s specific actions.

According to the facts provided, the debate or forum is “open to all candidates and to the public” and the display or distribution of political advertising, to the extent that it occurs, would be conducted by members of the public, not by the city employee or any other city employee on city work time. The facts do not indicate that the city employee would take any action to prevent or allow the display or distribution of political advertising by members of the public in the corridor or parking lot, and we assume for purposes of this opinion that the city employee would take no such action. The issue, therefore, is whether the city employee would “knowingly ... authorize the spending of public funds for political advertising” by taking no action to prevent members of the public to display or distribute political advertising in the corridor or parking lot near the city-owned room that is rented by a sponsor who allows the public to access the city-owned room.

Our prior opinions regarding the spending or the authorization of the spending of public funds for political advertising have addressed scenarios in which an officer or employee of a political subdivision takes specific actions with the political subdivision’s resources to create or distribute political advertising.³ The scenario before us in this opinion, however, is distinguishable from those prior scenarios in that the city employee does not take any specific action with city resources to create or distribute political advertising. The actions are taken instead by members of the public who display or distribute political advertising. A city employee taking no action in preventing the display or distribution of political advertising does not equate to the city employee “knowingly ... authoriz[ing] the spending of public funds for political advertising.”

Furthermore, we are guided in this instance by the legislative policy stated in our enabling legislation at section 571.001 of the Government Code, which is to “protect the constitutional privilege of free suffrage by regulating elections and prohibiting undue influence while also protecting the constitutional right of the governed to apply to their government for the redress of

³ See *supra* note 1 (summarizing prior advisory opinions).

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grievances.”⁴ To achieve that purpose, we are directed to construe the law to achieve certain objectives, including “to enhance the potential for individual participation in electoral and governmental processes[] and to ensure the public’s confidence and trust in its government.”⁵ Our interpretation of section 255.003(a) of the Election Code in this instance furthers this policy, as we do not think the legislature intended section 255.003(a) of the Election Code to require an officer or employee of a political subdivision to prevent the display or distribution of political advertising by members of the public. Therefore, in our opinion, the city employee does not knowingly authorize the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a corridor outside the city-owned room rented to and paid for by the sponsor of a candidate debate or forum or in the parking lot of the city-owned facility where the candidate debate or forum is being conducted, and the city employee takes no action to prevent the display or distribution of the political advertising.⁶

⁴ Gov’t Code § 571.001.

⁵ *Id.* §§ 571.001(4),(5).

⁶ We do not conclude that a city employee must always allow the display or distribution of political advertising, but only that the city employee does not authorize the spending of public funds in the circumstances before us.

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ETHICS ADVISORY OPINION NO. ____

*[DATE]***ISSUE**

Whether section 36.07 of the Penal Code or section 253.034(a) of the Election Code prohibits an elected officeholder from accepting from a political committee transportation, lodging, and meals, or reimbursement for expenses for transportation, lodging, and meals, during a regular legislative session to attend and perform official actions at the political committee's meetings. (AOR-630)

SUMMARY

Neither section 36.07 of the Penal Code nor section 253.034(a) of the Election Code prohibits an elected officeholder from accepting from a political committee transportation, lodging, and meals, or reimbursement for expenses for transportation, lodging, and meals, during a regular legislative session to attend and perform official actions at the political committee's meetings provided that the officeholder renders services at the meeting that are not merely perfunctory.

FACTS

The requestor of this opinion is an elected officeholder who is subject to the moratorium on accepting political contributions during a regular legislative session. The officeholder is also a member of a political committee. The officeholder wishes to (1) attend a multi-day meeting or series of meetings of the political committee to participate in panel discussions, subcommittee meetings, receptions, dinners, luncheons, and speeches, and (2) perform official actions directly related to the political committee's mission and purpose. The officeholder asks that we assume the participation and official actions are services that are not merely perfunctory. The officeholder would like to accept from the political committee transportation, lodging, and meals, or reimbursement for expenses for transportation, lodging, and meals, during a regular legislative session to attend the meeting or series of meetings and perform the official actions.

ANALYSIS

The relevant laws that we must consider are section 36.07 of the Penal Code and section 253.034 of the Election Code, which restrict certain officeholders from accepting benefits in certain circumstances.

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Honorarium Prohibition

Section 36.07 of the Penal Code states, in relevant part:

(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.¹

Penal Code § 36.07.

According to the facts presented in this request, the officeholder would participate in the meetings and provide services, at least in part, in the officeholder's capacity as a public servant. Thus, the honorarium prohibition in section 36.07(a) of the Penal Code would prohibit the officeholder from accepting the transportation, lodging, and meals, or the reimbursement for expenses for transportation, lodging, and meals, except as provided by section 36.07(b).

The exception under section 36.07(b) applies if transportation, lodging, and meals, or the reimbursement for expenses for transportation, lodging, and meals, are "in connection with a conference or similar event in which the public servant renders services."² The term "conference" is not defined in the Penal Code and we therefore construe that term according to

¹ "Political contribution" means a campaign contribution or an officeholder contribution. Elec. Code § 251.001(5). "Campaign contribution" means a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution. *Id.* § 251.001(3). "Officeholder contribution" means a contribution to an officeholder or political committee that is offered or given with the intent that it be used to defray expenses that are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office and are not reimbursable with public money. *Id.* § 251.001(4).

² *See, e.g.*, Ethics Advisory Opinion Nos. 273 (1995) (a legislator may accept expenses for travel, lodging, and meals in connection with a speaking engagement), 54 (1992) (a state agency employee may accept lunch from a nonprofit organization provided during a speaking engagement in connection with a conference or similar event), 18 (1992) (a member of the legislative or executive branch of state government may accept payment for transportation, meals, and lodging expenses incurred in a speaking engagement at a nonprofit organization meeting), and 17 (1992) (a legislator may accept direct provision of, or reimbursement for, expenses for transportation, lodging, and meals incurred in connection with a speaking engagement at a conference or similar event).

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the rules of grammar and common usage.³ Black’s Law Dictionary defines “conference,” in part, as a convention or a “meeting held to deliberate on a subject and [usually] decide how to proceed.” Black’s Law Dictionary 360 (10th ed. 2014). We also determined in Ethics Advisory Opinion No. 401 that the honorarium exception in section 36.07(b) of the Penal Code applies to expenses paid or provided to a state officer in connection with the officer’s appearance at a fundraiser to give a speech in support of a candidate for state or federal office. Ethics Advisory Opinion No. 401 (1998). Thus, in our opinion, a “conference or similar event” in section 36.07(b) of the Penal Code includes a political committee’s multi-day meeting or series of meetings. Additionally, the officeholder would be rendering services that are the same as or similar to addressing an audience or engaging in a seminar, which are examples provided by section 36.07(b). Therefore, section 36.07(a) would not prohibit the officeholder from accepting from the political committee transportation, lodging, and meals, or the reimbursement for expenses for transportation, lodging, and meals, to enable such participation.

Moratorium on Accepting Political Contributions During a Regular Legislative Session

Section 253.034 of the Election Code prohibits certain officeholders, including a statewide officeholder or a member of the legislature, from knowingly accepting a political contribution that is received 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. However, section 36.07(b-1) of the Penal Code expressly states that transportation, lodging, and meals described by section 36.07(b) are not political contributions. Because, as discussed above, the transportation, lodging, and meals at issue, or the reimbursement for expenses for transportation, lodging, and meals, are subject to the exception provided in section 36.07(b) of the Penal Code, they are not political contributions. Therefore, section 253.034(b) of the Election Code, applicable to the officeholder, would not prohibit the officeholder from accepting from the political committee the transportation, lodging, and meals, or the reimbursement for expenses for transportation, lodging, and meals, in these circumstances.

³ Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Gov’t Code § 311.011(a). *See also* Black’s Law Dictionary at 405 (defining a convention, in part, as an “assembly or meeting of members belonging to an organization or having a common objective”).

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ETHICS ADVISORY OPINION NO. ____

*[DATE]***ISSUE**

Whether section 572.069 of the Government Code prohibits a former employee of a state agency from accepting employment from a person, whose bid proposal the employee reviewed on behalf of the agency, when: (1) the agency solicited bid proposals from a list of purportedly eligible vendors provided by another state agency, (2) the person submitted a bid proposal in response to the solicitation from the agency, (3) the person was not eligible by law to enter into the contract with the agency and had been erroneously included in the list of eligible vendors provided by another state agency, and (4) the agency ended the procurement because there were no other bid proposals submitted for the contract. (AOR-631)

SUMMARY

In the narrow circumstances addressed in this opinion, section 572.069 of the Government Code does not prohibit a former employee of a state agency from accepting employment from a person, whose bid proposal the employee reviewed on behalf of the agency, when: (1) the agency solicited bid proposals from a list of purportedly eligible vendors provided by another state agency, (2) the person submitted a bid proposal in response to the solicitation from the agency, (3) the person was not eligible by law to enter into the contract with the agency and had been erroneously included in the list of eligible vendors provided by another state agency, and (4) the agency ended the procurement because there were no other bid proposals submitted for the contract.

FACTS

The Texas Ethics Commission has been asked whether the “revolving door” law in section 572.069 of the Government Code would prohibit a former employee (“the employee”) of a state agency (“the agency”)¹ from accepting employment from a person (“the person”) whose bid proposal the employee reviewed when employed by the agency. The employee states that the agency solicited bid proposals to procure a contract for information technology services in July

¹ The agency is the Texas Department of Public Safety, which is a state agency. Gov’t Code § 572.002(10)(A) (defining “state agency” in relevant part as a department in the state executive branch with statewide authority and created by the Texas Constitution or state statute).

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2017 while the employee was employed by the agency. The agency sent the solicitation to the vendors included on a list maintained by another state agency of vendors eligible to enter into a contract with the State of Texas for information technology services. The other state agency had erroneously included the person on the list as an eligible vendor, but the person's eligibility for the contract had expired in March 2017. The person then submitted a bid proposal to the agency in response to the solicitation, and there were no other bid proposals submitted for the contract. The employee's role in the procurement was to review and recommend the bid proposals for the contract as part of an evaluation team.² While the employee was reviewing the person's bid proposal, the agency discovered that the person's eligibility for contracts for information technology services had expired prior to the solicitation. The other state agency responsible for maintaining the current list of persons who were eligible to submit bids for the contract had not notified the employee's agency that the person was not eligible for the contract. The employee states that the person would not have been able to sign the contract with the agency, that it should have never been allowed to receive or respond to the solicitation for bid proposals, and that it was included on the list of eligible vendors because of an oversight by the other state agency. The agency discontinued the solicitation because it determined that the person could not have entered into the contract and there were no other bidders for the contract. The employee ended employment with the agency in December 2018 and the person subsequently offered employment to the employee, who asks whether he may accept that employment.

ANALYSIS

At the time the agency was procuring the contract, section 572.069 of the Government Code stated:

A former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept employment from that person before the second anniversary of the date the officer's or employee's service or employment with the state agency ceased.

Gov't Code § 572.069 (effective through August 31, 2017).³

² The chief financial officer for the agency submitted a statement regarding the request for this opinion that stated that the staff in the employee's division had no interaction with the person because the person did not have an active contract with the State of Texas for information technology services.

³ The statute was amended, effective September 1, 2017, to prevent a former employee of a state agency from accepting employment before the second anniversary of the date the "*contract is signed or the procurement is terminated or withdrawn.*" (emphasis added). Acts 2017, 85th Leg., R.S., Ch. 556 (S.B. 533), § 1 (effective September 1, 2017). However, the prior version of the statute applies in these circumstances because the amending legislation states that the changes in law apply only in relation to a contract for which a state agency first advertises or otherwise solicits bids, proposals, offers, or qualifications on or after September 1, 2017. *Id.* at § 17(c).

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According to the facts before us, the agency solicited bid proposals from a list of vendors, including the person, to procure information technology services, and the person responded by submitting a bid proposal. The prohibition in section 572.069 of the Government Code applies to an employee who “participated ... in a procurement or contract negotiation involving [the] person.” To construe that statute, we must consider the meaning of “participated” for purposes of that statute. Section 572.069 of the Government Code does not define the term “participated;” however, it is defined in section 572.054 of the Government Code, a companion revolving door law, as “to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action.”⁴ It is reasonable to rely on the meaning of “participated” in section 572.054 when construing section 572.069, and we therefore apply that meaning here.⁵

As an official responsibility, the employee reviewed and evaluated the person’s bid proposal. A state agency employee who reviews and evaluates a bid proposal for a procurement would generally “participate” in that procurement. However, another state agency erroneously listed the person as an eligible vendor for the contract. As a result of that error, the employee’s agency sent a solicitation for bid proposals to the person and, in response, the person submitted the bid proposal. No additional bid proposals were submitted in the procurement. To the extent that the employee “participated” in the procurement, the employee would not have participated but for the other state agency’s error.

To construe section 572.069 of the Government Code, we must also consider the common usage of the term “involving.”⁶ The verb “involving” is not defined for purposes of that statute, but the infinitive form of the verb (“involve”) is defined in one standard dictionary as “to engage as a participant” and “to oblige to take part,”⁷ and in a second standard dictionary as “to include someone or something in an activity.”⁸ A person who submits a bid proposal in response to an agency’s solicitation in a procurement would generally be “involved” in that procurement. As discussed above, the person who submitted the bid proposal was not eligible to enter into the contract with the agency, and the agency could not have legally considered the bid proposal in its procurement process. To the extent that the procurement “involved” the person, any

⁴ Gov’t Code § 572.054(h)(1).

⁵ *Id.* § 311.011(b) (words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly).

⁶ *Id.* § 311.011(a) (words and phrases shall be read in context and construed according to the rules of grammar and common usage).

⁷ The Merriam-Webster.com Dictionary (involve), available at <https://www.merriam-webster.com/dictionary/involve> (last visited Jan 24, 2020).

⁸ Cambridge Academic Content Dictionary (involve), available at <https://dictionary.cambridge.org/us/dictionary/english/involve#> (last visited Jan 24, 2020).

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involvement would have resulted from the erroneous listing of the person as an eligible vendor by another state agency.

The meaning of the terms “participated” and “involving” under section 572.069 of the Government Code are pertinent but not dispositive in determining whether the employee has participated in a procurement involving the person. To aid statutory construction, we may consider the object sought to be attained by the statute, legislative history, and the consequences of a particular construction.⁹ The legislature enacted section 572.069 of the Government Code in Senate Bill 20, which amended the state’s contracting procedures by adding requirements that included contract transparency and reporting, best value standards in purchasing, vendor performance measures, conflict of interest prohibitions for state agency personnel, and ethics training for state agency purchasing personnel, among others.¹⁰ The purpose of the bill, according to the statement of intent for the bill, is to “reform state agency contracting by clarifying accountability, increasing transparency, and ensuring a fair competitive process.”¹¹ The stated legislative intent of chapter 572 of the Government Code is that a state employee:

may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the ... employee’s duties in the public interest.¹²

In our opinion, the purposes of accountability, transparency, and ensuring a fair competitive process that underlie Chapter 572 of the Government Code, including section 572.069 at issue here, do not support the application of the revolving door prohibition in this particular instance. The revolving door law is intended to prohibit an employee of a state agency from using his or her position in the agency to unduly influence the procurement process and obtain a benefit from an employer who was involved in that process. In this particular instance, the employee participated and the person became involved in the procurement only as a result of an error caused by another agency, and the employee’s agency ended the procurement because the person was not eligible by law to obtain the contract sought in the procurement. We may conclude that the legislature did not intend this statute to prohibit the employee from accepting employment from the person under these particular circumstances. Therefore, section 572.069 of the Government Code does not prohibit a former employee of a state agency from accepting employment from a person, whose bid proposal the employee reviewed on behalf of the agency, when: (1) the agency solicited bid proposals from a list of purportedly eligible vendors provided

⁹ Gov’t Code §§ 311.023(1),(3),(5).

¹⁰ Act of June 1, 2015, 84th Leg., R.S., ch. 326 (S.B. 20), § 4 (eff. September 1, 2015).

¹¹ Sen. Comm. on Finance, Bill Analysis, Tex. S.B. 20, 84th Leg., R.S. (2015).

¹² Gov’t Code § 572.001(a).

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by another state agency, (2) the person submitted a bid proposal in response to the solicitation from the agency, (3) the person was not eligible by law to enter into the contract with the agency and had been erroneously included in the list of eligible vendors provided by another state agency, and (4) the agency ended the procurement because there were no other bid proposals submitted for the contract.

ETHICS ADVISORY OPINION NO. ____

[DATE]

ISSUE

Whether a contribution from a federal political committee to a federal “Super PAC” is considered a political expenditure made in connection with an election voted on in Texas for purposes of calculating whether the federal political committee is an out-of-state political committee. (AOR-632)

SUMMARY

A contribution from a federal political committee to a federal “Super PAC” is considered a political expenditure made in connection with an election voted on in Texas for purposes of calculating whether the federal political committee is an out-of-state political committee only if the committee earmarks or designates the contribution to be used to support or oppose a candidate or measure in an election voted on in Texas. Contributing to a Super PAC for a general or unspecified purpose is not considered a political expenditure made in connection with an election voted on in Texas for purposes of calculating whether the federal political committee is an out-of-state political committee.

FACTS

The requestor of this opinion is a federal political committee (“the committee”) that files reports with the Federal Election Commission (“the FEC”). The committee states that it makes contributions to state and local candidates in Texas as an out-of-state political committee and that it complies with reporting requirements under the Texas Election Code and Ethics Commission Rules by sending a letter to the Texas Ethics Commission (“the Commission”) specifying where the committee’s reports may be found.¹ The committee would like to make contributions to certain federal political committees, informally known as “Super PACs,”² which are required to file

¹Section 254.1581 of the Texas Election Code requires an out-of-state political committee that accepts political contributions and makes political expenditures to file with the Commission a copy of reports filed with the FEC or other filing authority, as applicable. Section 20.13 of the Ethics Commission Rules states that an out-of-state political committee that files electronically in another jurisdiction may comply with section 254.1581 of the Texas Election Code by sending a letter to the Commission specifying where its electronic reports may be found on the other filing authority’s website.

² The FEC describes a “Super PAC,” which is also known as an “independent expenditure only committee,” as, in part, a political committee that makes only independent expenditures that may solicit and accept unlimited

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reports with the FEC and are functionally identical to direct campaign expenditure-only committees³ under Title 15 of the Texas Election Code. The committee states that it does not know with certainty whether or how much of its contributions to a Super PAC will be spent on elections voted on in Texas. The recipient Super PACs may support or oppose candidates in only one election or in multiple elections and states. The recipient Super PACs may focus on presidential candidates in elections that will be voted on in all 50 states or on United States House and Senate candidates in elections that will be voted on in any state.

The committee states that it has no control over a Super PAC's use of any contribution from the committee and receives no binding assurance on how or where a Super PAC will spend the contributions. The committee acknowledges that it may have an expectation as to what a Super PAC is likely to do based on past actions or public statements, but states that those expectations are neither enforceable nor certain to be fulfilled. The committee asserts that its contributions to Super PACs should not be considered political expenditures in connection with an election voted on in Texas for purposes of calculating whether the committee is an out-of-state political committee.

ANALYSIS

The question presented by the committee concerns the definition of "out-of-state political committee" and how a contribution made by the committee to a Super PAC affects the committee's status as an out-of-state political committee. A political committee's status as an out-of-state political committee determines whether the political committee may accept political contributions or make political expenditures in connection with a state or local election in Texas without appointing a campaign treasurer who is required to file campaign finance reports under Title 15 of the Texas Election Code.

Requirements for Out-of-state Political Committees

Generally, a political committee must file a campaign treasurer appointment before accepting more than \$870 in political contributions, or making or authorizing more than \$870 in political

contributions from individuals, corporations, labor organizations and other political committees. *See* Fed. Election Comm'n Advisory Opinion 2010-11 (July 22, 2010).

³ A direct campaign expenditure-only committee is a political committee authorized to accept political contributions from corporations and labor organizations under section 253.105(a) of the Texas Election Code if the committee: (1) is not established or controlled by a candidate or officeholder; (2) makes or intends to make direct campaign expenditures; (3) does not make political contributions to a candidate, an officeholder, a specific-purpose committee established or controlled by a candidate or officeholder, or a political committee that makes or intends to make political contributions to a candidate, an officeholder, or a specific-purpose committee established or controlled by a candidate or an officeholder; and (4) has filed an affidavit with the Commission stating the committee's intention to operate as described by (2) and (3).

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expenditures, in connection with a state or local elective office or a measure in Texas.⁴ Once a political committee files a campaign treasurer appointment, the person appointed as campaign treasurer must subsequently file campaign finance reports to disclose the political committee's political contributions and political expenditures.⁵

An out-of-state political committee is not required to file a campaign treasurer appointment under Title 15 of the Texas Election Code.⁶ Section 251.001(15) of the Texas Election Code defines an "out-of-state political committee" as:

[A] political committee that:

(A) makes political expenditures outside this state; and

(B) in the 12 months immediately preceding the making of a political expenditure by the committee inside this state (other than an expenditure made in connection with a campaign for a federal office or made for a federal officeholder), makes 80 percent or more of the committee's total political expenditures in any combination of elections outside this state and federal offices not voted on in this state.⁷

Section 20.13(c) of the Ethics Commission Rules explains the practical application of the above definition by setting out the calculation that a political committee must make to determine whether it is an "out-of-state political committee" each time the political committee plans to make a political expenditure in Texas, other than an expenditure in connection with a campaign for a federal office or an expenditure for a federal officeholder, as follows:

(1) Before making the expenditure (other than an expenditure in connection with a campaign for a federal office or an expenditure for a federal officeholder), the committee must calculate its total political expenditures made during the 12 months immediately preceding the date of the planned expenditure. This total does not include the planned political expenditure triggering the calculation requirement.

⁴ Elec. Code § 253.031(a); 1 Tex. Admin. Code §§ 18.31(a), 20.301(a), 20.401(a). Before January 1, 2020, the threshold requiring a campaign treasurer appointment was \$500. *See also* Ethics Advisory Opinion No. 513 (2013) (title 15 of the Texas Election Code regulates political contributions and political expenditures made in connection with a state or local office or a measure in Texas) (citing additional opinions).

⁵ *See generally* ch. 254, Elec. Code.

⁶ *Id.* §§ 251.005(a), 253.031(e). If an out-of-state political committee decides to file a campaign treasurer appointment, the out-of-state political committee becomes subject to the requirements of Title 15 to the same extent as a political committee that is not an out-of-state political committee. *Id.* § 251.005(b).

⁷ *Id.* § 251.001(15).

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(2) If 80% or more of the total political expenditures are in connection with elections not voted on in Texas, the committee is an out-of-state committee.

(3) If less than 80% of the total political expenditures are in connection with elections not voted on in Texas, the committee is no longer an out-of-state committee.⁸

A political committee may be removed from out-of-state status by making a political expenditure in connection with an election voted on in Texas, including a federal election, if the expenditure sufficiently affects the results of the calculation under section 20.13(c) of the Ethics Commission Rules. If an out-of-state political committee performs an activity that removes the committee from out-of-state status, the committee becomes subject to the requirements of Title 15 to the same extent as a political committee that is not an out-of-state political committee,⁹ and accordingly must file a campaign treasurer appointment before exceeding \$870 in either political contributions or political expenditures in connection with a state or local election in Texas.¹⁰

Contributions to Super PACs

The committee states that it has been acting as an out-of-state political committee that makes contributions to candidates inside and outside Texas. We assume that the committee makes 80 percent or more of its total political expenditures in connection with elections that are not voted on in Texas. The issue here is whether the committee's contributions to Super PACs, who may ultimately use the contributions to make expenditures in connection with an election voted on in Texas, are political expenditures made in connection with an election voted on in Texas for purposes of determining whether the committee is an out-of-state political committee. The committee argues that its contributions to Super PACs should not be considered political expenditures made in connection with an election voted on in Texas because the committee does not control a Super PAC's use of the contributions and does not receive binding assurance on how or where a Super PAC will spend the contributions.

Neither Title 15 of the Texas Election Code nor the Ethics Commission Rules clarifies when a political expenditure is "inside this state," as provided by section 251.001(15) of the Texas Election Code, or "in connection with [an election] voted on in Texas," as provided by section 20.13(c) of the Ethics Commission Rules. In our opinion, whether the committee's political

⁸ 1 Tex. Admin. Code § 20.13(c). Ethics Commission Rules section 20.13(c) uses the phrase "political expenditures ... in connection with elections not voted on in Texas" to interpret section 251.001(15) of the Election Code, which uses the phrase "political expenditures in any combination of elections outside this state and federal offices not voted on in this state." For purposes of this opinion, we use the phrase provided in the rule.

⁹ Elec. Code § 251.005(c).

¹⁰ *Id.* § 253.031(b).

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contribution to a Super PAC is a political expenditure in connection with an election voted on in Texas depends not on how the recipient Super PAC ultimately uses the contribution, but rather on the committee's intent in making the contribution.

It is our opinion as well that the committee would intend that a contribution to a Super PAC be used in connection with an election voted on in Texas only if the committee were to “earmark”¹¹ or designate the contribution to the Super PAC to make political expenditures in connection with an election voted on in Texas. Examples of such an earmarking or designation include: (1) the committee contributes to a Super PAC in response to a solicitation from the Super PAC for a contribution to be used to support or oppose a candidate or measure in an election voted on in Texas and the committee expressly consents to such use; or (2) the committee contributes to a Super PAC subject to a condition or agreement between the committee and the Super PAC, or subsequently agrees with the Super PAC after the contribution is made, that all or a portion of the contribution would be used to support or oppose a candidate or measure in an election voted on in Texas. Conversely, a contribution not earmarked or designated to be used by the recipient committee to support or oppose a candidate or measure in an election voted on in Texas, such as by contributing to a Super PAC for a general or unspecified purpose, is not considered a political expenditure made in connection with an election voted on in Texas for purposes of calculating whether the federal political committee is an out-of-state political committee. This allows the committee to calculate the proportion of its political expenditures that are made in connection with an election voted on in Texas using records and other information available to the committee.

¹¹ Under federal law, “earmarked” means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate’s authorized committee. 11 C.F.R. § 110.6(b)(1). Other states similarly define “earmark.” For example, under Montana law, an “earmarked contribution” is a contribution made with the express, implied, oral, written, direct, or indirect designation or instruction, that all or part of it be transferred to or expended on behalf of a specified candidate, ballot issue committee, political party committee, independent committee or petition for nomination. An earmarked contribution is the same as a designated contribution. Mont. Admin. R. 44.11.404(1). For additional definitions of “earmark,” see Colo. Rev. Stat. § 1-45-103(7.5) and Wash. Rev. Code § 42.17A.460.



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 550

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’s¹ 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.

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

¹ “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).

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.²

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 benefit³ 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.⁴ 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).

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).⁵ Therefore, the use of government resources for an individual public

² This opinion does not apply to a judicial officer.

³ “Benefit” is defined, in pertinent part, as “anything reasonably regarded as economic gain or advantage.” Penal Code § 1.07(a)(7).

⁴ “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).

⁵ 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

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 possession⁶ 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 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.

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).

⁶ "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).

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).⁷ 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.⁸ 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).⁹ The “spending” of public funds includes the use of a political subdivision employee’s work time or a political subdivision’s equipment or facilities.¹⁰

⁷ “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).

⁸ *See* Gov’t Code § 571.091 (specifying the laws the commission may consider in an advisory opinion).

⁹ 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”).

¹⁰ *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

“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.¹¹ 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.¹²

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.

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).

¹¹ Ethics Advisory Opinion No. 443 (2002).

¹² 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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PUBLIC MEETING AGENDA

Date and Time: 9:00 a.m., Friday, February 28, 2020
Location: Room E1.014, Capitol Extension, Austin, Texas

1. Call to order; roll call.
2. Discussion regarding dates for next Commission meeting.
3. Approve minutes for the following meetings:
 - o Executive Session – November 20, 2019;
 - o Public Meeting – November 20, 2019; and
 - o Public Meeting – November 21, 2019.

ADMINISTRATIVE WAIVERS, REDUCTIONS, APPEALS OF FINES

4. Discussion and possible action on appeals of determinations made under Ethics Commission Rules §§18.25 and 18.26 relating to administrative waiver or reduction of a fine, for the following filers:
 1. Manufacturing Caucus (00068983)
 2. Martina Salinas (00069864)
 3. John Sparks, Campaign Treasurer, Holly-Lake Hawkins Republican Club (00054783)
 4. Michael Paul Jones (00070977)
 5. Chris Hale (00082360)
 6. Demetrius Walker (00082413)
 7. Marla Naylor, Campaign Treasurer, WISD Bond Realists (00084218)
 8. Stuart Sutton, Campaign Treasurer, Canyon ISD Cares FOR Kids (00082994)
 9. Paul Stafford (00069699)
 10. Kyle Austin Frels-Henry (00082449)

For more information, contact Anne Temple Peters, Executive Director, at (512) 463-5800.

RULEMAKING

Rule Adoption

5. Discussion and possible action on the adoption or proposal and publication in the Texas Register of new Ethics Commission Rules §12.86, regarding motions for continuance in preliminary review hearings.
6. Discussion and possible action on the adoption or proposal and publication in the Texas Register of new Ethics Commission Rule §12.174, regarding the summary disposition of a matter in a formal hearing.
7. Discussion and possible action on the adoption or proposal and publication in the Texas Register of new Ethics Commission Rules §§18.10 and 18.11, regarding the procedures for waiving or reducing fines assessed for corrected reports, and an amendment to Ethics Commission Rule §18.9, regarding corrected and amended reports.
8. Discussion and possible action on the adoption or proposal and publication in the Texas Register of the repeal of Ethics Commission Rules §22.5, regarding corporate and labor organization contributions to direct campaign expenditure committees, and amendments to Ethics Commission Rules §§20.1 and 22.6, regarding definitions of terms in Title 15 of the Election Code that are in conflict with, or made obsolete by, legislation passed in the 86th Legislative Session.
9. Discussion and possible action on the adoption or proposal and publication in the Texas Register of the repeal of Ethics Commission Rules §§22.33, 27.1, and 27.101, regarding expenditure limits in the Judicial Campaign Fairness Act that were repealed by legislation passed in the 86th Legislative Session.

Rule Publication

10. Discussion and possible action on the proposal and publication in the Texas Register of an amendment to Ethics Commission Rule §12.29 and new Ethics Commission Rule §12.30, regarding the issuance of subpoenas by a respondent's attorney.
11. Discussion and possible action on the proposal and publication in the Texas Register of: (1) amendments to Ethics Commission Rules §§20.1 and 24.18, regarding hybrid political committees and the designation of corporate political contributions for administrative purposes; and (2) new Ethics Commission Rules

For more information, contact Anne Temple Peters, Executive Director, at (512) 463-5800.

§§22.35 and 24.19, regarding political contributions to political committees by corporations and labor organizations, and the affidavit by a direct campaign expenditure only political committee that accepts contributions from corporations or labor organizations.

12. Discussion and possible action on the proposal and publication in the Texas Register of amendments to Ethics Commission Rules §§8.1 through 8.21 and new Ethics Commission Rule §8.18, regarding advisory opinion request procedures.
13. Discussion and possible action on the proposal and publication in the Texas Register of amendments to Ethics Commission Rules §§12.83 and 12.84 regarding sworn complaint procedures.
14. Discussion and possible action on the proposal and publication in the Texas Register of new Ethics Commission Rule §12.34 regarding agreed orders.

OTHER POLICY MATTERS

15. Discussion of, and possible action on, any unfinished business from the Executive Session or Public Meeting held on February 27, 2020.
16. Adjourn.

CERTIFICATION: I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements. Certifying Official & Agency Liaison: Anne Temple Peters, Executive Director.

NOTICE: Under the Americans with Disabilities Act, an individual with a disability must have an equal opportunity for effective communication and participation in public meetings. Upon request, the Texas Ethics Commission will provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, and large print or Braille documents. In determining the type of auxiliary aid or service, the Commission will give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify Margie Castellanos at (512) 463-5800 or RELAY Texas at (800) 735-2989 two days before this meeting so that appropriate arrangements can be made. Please also contact Ms. Castellanos if you need assistance in having English translated into Spanish.

The draft meeting minutes will be available on our website the day before the meeting, at <https://www.ethics.state.tx.us/DraftMinutes>.

If you would like a copy of the draft minutes, please provide your email address below, and return this sheet to Ethics Commission staff at the meeting.

Email address:

EXHIBIT A

Text of Proposed New Rule

The proposed new language is indicated by underlined text.

1 **Subchapter C. INVESTIGATION AND PRELIMINARY REVIEW**

2 **§12.86. Motions for Continuance.**

3 (a) Contents of a motion for continuance. A request to postpone a preliminary review
4 hearing must be in writing and include the specific reasons and supporting evidence for
5 the continuance and the dates of any previous motions for continuance.

6 (b) Date of filing. Motions for continuance must be received by the Commission no later
7 than 21 days before the date of the proceeding or must provide good cause with
8 supporting evidence for presenting the motion after that time. If the presiding officer
9 finds good cause has been demonstrated, the presiding officer may consider a motion that
10 is not timely filed.

11 (c) Responses to motions for continuance. Responses to motions for continuance must be
12 in writing and include the date the complaint was filed and the number of previous
13 requests to postpone filed in the case. Unless otherwise ordered or allowed by the
14 presiding officer, responses to motions for continuance must be made no later than seven
15 business days after receipt of the motion.

16 (d) Rulings on motions for continuance. A motion for continuance is not granted until it
17 has been ruled on by the presiding officer, even if the motion is uncontested or agreed. A
18 case is subject to default under §12.23 of this chapter for a party's failure to appear at a
19 scheduled hearing in which a motion for continuance has not been ruled on by the
20 presiding officer.

EXHIBIT A

Text of Proposed New Rules and Amendments

The proposed new language is indicated by underlined text.

1 **§12.174. Summary Disposition.**

2
3 (a) Granting of summary disposition. Summary disposition shall be granted on all or part
4 of a complaint’s allegations if the allegations, the motion for summary disposition, and the
5 summary disposition evidence show that there is no genuine issue as to any material fact
6 and that the moving party is entitled to a decision in its favor as a matter of law on all or
7 some of the issues expressly set out in the motion. Summary disposition is not permitted
8 based on the ground that there is no evidence of one or more essential elements of a claim
9 or defense on which the opposing party would have the burden of proof at the formal
10 hearing.

11
12 (b) Deadlines. Unless otherwise ordered by the presiding officer:

13
14 (1) A party may file a motion for summary disposition at any time after the
15 commission orders a formal hearing, but the motion must be filed at least 45 days
16 before a scheduled hearing on the merits.

17
18 (2) The response and opposing summary disposition evidence shall be filed no later
19 than 15 days after the filing of the motion.

20
21 (c) Contents of Motion. A motion for summary disposition shall include the contents listed
22 below. A motion may be denied for failure to comply with these requirements.

23
24 (1) The motion shall state the specific issues upon which summary disposition is
25 sought and the specific grounds justifying summary disposition.

26
27 (2) The motion shall also separately state all material facts upon which the motion
28 is based. Each material fact stated shall be followed by a clear and specific reference
29 to the supporting summary disposition evidence.

30
31 (3) The first page of the motion shall contain the following statement in at least 12-
32 point, bold-face type: “Notice to parties: This motion requests the commission to

1 decide some or all of the issues in this case without holding an evidentiary hearing
2 on the merits. You have 15 days after the filing of the motion to file a response. If
3 you do not file a response, this case may be decided against you without an
4 evidentiary hearing on the merits.

5
6 (d) Responses to motions.

7
8 (1) A party may file a response and summary disposition evidence to oppose a
9 motion for summary disposition.

10
11 (2) The response shall include all arguments against the motion for summary
12 disposition, any objections to the form of the motion, and any objections to the
13 summary disposition evidence offered in support of the motion.

14
15 (e) Summary disposition evidence.

16
17 (1) Summary disposition evidence may include deposition transcripts; interrogatory
18 answers and other discovery responses; pleadings; admissions; affidavits; materials
19 obtained by discovery; matters officially noticed; stipulations; authenticated or
20 certified public, business, or medical records; and other admissible evidence. No
21 oral testimony shall be received at a hearing on a motion for summary disposition.

22
23 (2) Summary disposition may be based on uncontroverted written testimonial
24 evidence of an interested witness, or of an expert witness as to subject matter
25 concerning which the presiding officer must be guided solely by the opinion
26 testimony of experts, if the evidence is clear, positive and direct, otherwise credible
27 and free from contradictions and inconsistencies, and could have been readily
28 controverted.

29
30 (3) All summary disposition evidence offered in support of or in opposition to a
31 motion for summary disposition shall be filed with the motion or response. Copies
32 of relevant portions of materials obtained by discovery that are relied upon to
33 support or oppose a motion for summary disposition shall be included in the
34 summary disposition evidence.

1 (f) Proceedings on motions.

2
3 (1) The presiding officer may order a hearing on a motion for summary disposition
4 and the commission may rule on the motion without a hearing.

5
6 (2) The affirmative vote of six commissioners is necessary to grant summary
7 disposition finding a violation by a preponderance of the evidence.

8
9 (3) If summary disposition is granted on all contested issues in a case, the record
10 shall close on the date ordered by the presiding officer or on the later of the filing
11 of the last summary disposition arguments or evidence, the date the summary
12 disposition response was due, or the date a hearing was held on the motion. The
13 commission shall issue a final decision and written report, including a statement of
14 reasons, findings of fact, and conclusions of law in support of the summary
15 disposition rendered.

16
17 (4) If summary disposition is granted on some but not all of the contested issues in
18 a case, the commission shall not take evidence or hear further argument upon the
19 issues for which summary disposition has been granted. The commission shall issue
20 an order:

21
22 (A) specifying the facts about which there is no genuine issue;

23
24 (B) specifying the issues for which summary disposition has been
25 granted; and

26
27 (C) directing further proceedings as necessary. If an evidentiary hearing
28 is held on the remaining issues, the facts and issues resolved by summary
29 disposition shall be deemed established, and the hearing shall be
30 conducted accordingly. After the evidentiary hearing is concluded, the
31 commission shall include in the final decision a statement of reasons,
32 findings of fact, and conclusions of law in support of the partial summary
33 disposition rendered.

EXHIBIT A

Text of Proposed New Rules and Amendments

The proposed new language is indicated by underlined text.

The deleted language is indicated by [~~striketrough~~] text.

1 **Chapter 18. GENERAL RULES CONCERNING REPORTS**

2 **§18.9. Corrected/Amended Reports.**

3 (a) A filer may correct/amend a report filed with the commission or a local filing authority
4 at any time.

5 (b) A corrected/amended report must clearly identify how the corrected/amended report is
6 different from the report being corrected/amended.

7 (c) A filer who files a corrected/amended report must submit an affidavit identifying the
8 information that was corrected/amended.

9 (d) A corrected/amended report filed with the commission after the original report is due
10 is subject to a late fine as provided by §18.13 of this title (relating to Fine for a Late Report).
11 [~~is not subject to a late fine if filed in accordance with §571.0771 or §305.033(f) of the~~
12 ~~Government Code or §254.0405 of the Election Code, as applicable.~~]

13 (e) Subsection (d) does not apply to:

14 (1) a lobby registration or report, other than an activities report, that is
15 corrected/amended not later than the 14th business day after the date the filer
16 became aware of the errors or omissions in the original registration or report;

17 (2) a semiannual report that is corrected/amended before the eighth day after the
18 original report was filed;

19 (3) a semiannual report that is corrected/amended on or after the eighth day after the
20 original report was filed if:

21 (A) the correction/amendment is made before a sworn complaint is filed with
22 regard to the subject of the correction/amendment; and

23 (B) the original report was made in good faith and without an intent to
24 mislead or misrepresent the information contained in the report;

25 (4) an 8-day pre-election report that is corrected/amended in accordance with §18.10
26 of this title (relating to Guidelines for Substantial Compliance for a
27 Corrected/Amended 8-day Pre-election Report);

1 (5) a report other than an 8-day pre-election report that is corrected/amended not
2 later than the 14th business day after the date the filer learns the report as originally
3 filed is inaccurate or incomplete if:

4 (A) the errors or omissions were made in good faith; and

5 (B) the filer files an affidavit stating that the errors or omissions in the
6 original report were made in good faith.

7 (f) In this section, “8-day pre-election report” has the same meaning assigned by §18.10(c)
8 of this title.

9 (g) [(e)] Except as provided by subsections (b) and (c), this section does not apply to a civil
10 penalty assessed through the [corrected/amended report filed under §571.069, Government
11 Code, or a corrected/amended report filed in response to a] sworn complaint or facial
12 compliance review process.

13 **§18.10. Guidelines for Substantial Compliance for a Corrected/Amended 8-day Pre-**
14 **election Report.**

15 (a) A corrected/amended 8-day pre-election report substantially complies with the
16 applicable law and will not be assessed a late fine under §18.9 of this title (relating to
17 Corrected/Amended Reports) if:

18 (1) The original report was filed in good faith and the corrected/amended report
19 was filed not later than the 14th business day after the date the filer learned of
20 the errors or omissions; and

21 (2) The only corrections/amendments needed were to correct the following types
22 of errors or omissions:

23 (A) a technical, clerical, or *de minimis* error, including a typographical
24 error, that is not misleading and does not substantially affect disclosure;

25 (B) an error in or omission of information that is solely required for the
26 commission’s administrative purposes, including a report type or filer
27 identification number;

28 (C) an error that is minor in context and that, upon correction/amendment,
29 does not result in changed monetary amounts or activity disclosed,
30 including a descriptive change or a change to the period covered by the
31 report;

1 (D) one or more errors in disclosing contributions that, in total:

2 (i) do not exceed \$2,000; or

3 (ii) do not exceed the lesser of 10% of the total contributions on
4 the corrected/amended report or \$10,000;

5 (E) one or more errors in disclosing expenditures that, in total:

6 (i) do not exceed \$2,000; or

7 (ii) do not exceed the lesser of 10% of the total expenditures on
8 the corrected/amended report or \$10,000;

9 (F) one or more errors in disclosing loans that, in total:

10 (i) do not exceed \$2,000; or

11 (ii) do not exceed the lesser of 10% of the amount originally
12 disclosed or \$10,000; or

13 (G) an error in the amount of total contributions maintained that:

14 (i) does not exceed \$250; or

15 (ii) does not exceed the lesser of 10% of the amount originally
16 disclosed or \$2,500.

17 (b) The executive director shall determine whether an 8-day pre-election report as
18 originally filed substantially complies with applicable law by applying the criteria provided
19 in this section.

20 (c) In this section, “8-day pre-election report” means a report due eight days before an
21 election filed in accordance with the requirements of §20.213(d), 20.325(e), or 20.425(d)
22 of this title (relating to a candidate, a specific-purpose committee, or a general-purpose
23 committee, respectively) and §254.064(c), 254.124(c), or 254.154(c) of the Election Code
24 (relating to a candidate, a specific-purpose committee, or a general-purpose committee,
25 respectively).

26 **§18.11 Guidelines for Waiver or Reduction of a Late Fine for a Corrected/Amended**
27 **8-day Pre-election Report.**

28 (a) A filer who has filed a corrected/amended 8-day pre-election report may request the
29 executive director to waive or reduce a late fine assessed under §18.9 of this title (relating
30 to Corrected/Amended Reports) by submitting an affidavit to the executive director. The
31 executive director shall waive a late fine if the report meets the criteria in subsection (b) of

1 this section and shall reduce a late fine if the report meets the criteria in subsection (c) of
2 this section.

3 (b) A late fine for a correction/amendment to an 8-day pre-election report shall be waived
4 if:

5 (1) The corrected report was filed not later than the fourth day after the original
6 report due date;

7 (2) The only correction/amendment by a candidate or officeholder was to add to
8 or delete from the outstanding loans total an amount of loans made from personal
9 funds;

10 (3) The only correction/amendment by a political committee was to add the
11 name of each candidate supported or opposed by the committee, when each
12 name was originally disclosed on the appropriate schedule for disclosing
13 political expenditures; or

14 (4) The only correction/amendment was to disclose the actual amount of a
15 contribution or expenditure, when:

16 (A) the amount originally disclosed was an overestimation;

17 (B) the difference between the originally disclosed amount and the actual
18 amount did not vary by more than 10%; and

19 (C) the original report clearly included an explanation of the estimated
20 amount disclosed and the filer's intention to file a correction/amendment
21 as soon as the actual amount was known.

22 (c) A late fine for a correction/amendment to an 8-day pre-election report that does not
23 meet the criteria for a waiver under subsection (b) of this section shall be reduced as
24 follows:

25 (1) If the corrected/amended report was filed more than four days after the original
26 report due date but was filed before the election day, the late fine is reduced to \$500;

27 (2) If the corrected/amended report was filed after the election and the amount of
28 the incorrectly reported or unreported activity was more than 10% of the total
29 amount disclosed on the corrected/amended report but did not exceed the lesser of
30 25% of the total amount of activity, or \$5,000, the late fine is reduced to \$1,000; or

31 (3) If the amount of the incorrectly reported or unreported activity was more than
32 40% of the total amount disclosed in the corrected/amended report and the

1 corrected/amended report was filed over a year after the election, the late fine is
2 reduced to 10% of the amount at issue.

3 (d) A late fine that is reduced under this section will revert to the full amount originally
4 assessed if the reduced fine is not paid on or before the 30th calendar day after the date of
5 the notice informing the filer of the reduction.

6 (e) A filer may appeal a determination made under this section by submitting a request in
7 writing to the commission.

8 (1) The request for appeal should state the filer's reasons for requesting an appeal,
9 provide any additional information needed to support the request, and state whether
10 the filer would like the opportunity to appear before the commission and offer
11 testimony regarding the appeal.

12 (2) After hearing a request for appeal, the commission may affirm the determination
13 made under this section or make a new determination based on facts presented in
14 the appeal.

15 (f) This section does not apply to a civil penalty assessed through the sworn complaint
16 process or facial compliance review process.

EXHIBIT A

Text of Proposed Rulemaking

The deleted language is indicated by [strikethrough] text.

1 **Chapter 20. REPORTING POLITICAL CONTRIBUTIONS AND**
2 **EXPENDITURES**

3
4 **Subchapter A. GENERAL RULES**

5 **§20.1. Definitions.**

6 The following words and terms, when used in Title 15 of the Election Code, in this chapter,
7 Chapter 22 of this title (relating to Restrictions on Contributions and Expenditures), and
8 Chapter 24 of this title (relating to Restrictions on Contributions and Expenditures
9 Applicable to Corporations and Labor Organizations), shall have the following meanings,
10 unless the context clearly indicates otherwise.

11 (1) through (4) – no change

12 ~~[(5) Direct campaign expenditure--A campaign expenditure that does not constitute a~~
13 ~~contribution by the person making the expenditure. A campaign expenditure is not a~~
14 ~~contribution from the person making the expenditure if:~~

15 ~~(A) it is made without the prior consent or approval of the candidate or officeholder~~
16 ~~on whose behalf the expenditure was made; or~~

17 ~~(B) it is made in connection with a measure, but is not a political contribution to a~~
18 ~~political committee supporting or opposing the measure.]~~

19 ~~(5)~~(6) Election cycle--A single election and any related primary or runoff election.

20
21 ~~(6)~~(7) Identified measure--A question or proposal submitted in an election for an
22 expression of the voters' will and includes the circulation and submission of a petition to
23 determine whether a question or proposal is required to be submitted in an election for an
24 expression of the voters' will.

25 ~~[(8) In kind contribution--A contribution of goods, services, or any other thing of value,~~
26 ~~except money, and includes an agreement made or other obligation incurred, whether~~
27 ~~legally enforceable or not, to make such a contribution. The term does not include a direct~~
28 ~~campaign expenditure.]~~

29 ~~(7)~~(9) Non-political expenditure--An expenditure from political contributions that is not
30 an officeholder expenditure or a campaign expenditure.

1 ~~(8)~~(10) Opposed candidate--A candidate who has an opponent whose name is to appear
2 on the ballot. The name of a write-in candidate does not appear on the ballot.

3 ~~(9)~~(11) Out-of-state political committee--A political committee that makes political
4 expenditures outside Texas and in the 12 months immediately preceding the making of a
5 political expenditure by the committee inside Texas (other than an expenditure made in
6 connection with a campaign for a federal office or made for a federal officeholder),
7 makes 80% or more of the committee's total political expenditures in any combination of
8 elections outside this state and federal offices not voted on in this state. Section 20.13 of
9 this title (relating to Out-of-State Committees) explains the practical application of this
10 definition.

11 ~~(10)~~(12) Pledge--A contribution in the form of an unfulfilled promise or unfulfilled
12 agreement, whether enforceable or not, to provide a specified amount of money or
13 specific goods or services. The term does not include a contribution actually made in the
14 form of a check.

15 ~~(11)~~(13) Political advertising:

16 (A) A communication that supports or opposes a political party, a public officer, a
17 measure, or a candidate for nomination or election to a public office or office of a
18 political party, and:

19 (i) is published in a newspaper, magazine, or other periodical in return for
20 consideration;

21 (ii) is broadcast by radio or television in return for consideration;

22 (iii) appears in a pamphlet, circular, flier, billboard, or other sign, bumper
23 sticker, or similar form of written communication; or

24 (iv) appears on an Internet website.

25 (B) The term does not include an individual communication made by e-mail but
26 does include mass e-mails involving an expenditure of funds beyond the basic cost
27 of hardware messaging software and bandwidth.

28 ~~[(14) Political committee--Two or more persons that have as a principal purpose accepting
29 political contributions or making political expenditures to support or oppose candidates,
30 officeholders, or measures. The term does not include a group composed exclusively of
31 two or more individual filers or political committees required to file reports under Election
32 Code, Title 15 (concerning Regulating Political Funds and Campaigns), who make
33 reportable expenditures for a joint activity such as a fundraiser or an advertisement.]~~

1 ~~(12)~~(15) Political subdivision--A county, city, or school district or any other
2 governmental entity that:

3 (A) embraces a geographic area with a defined boundary;

4 (B) exists for the purpose of discharging functions of government; and

5 (C) possesses authority for subordinate self-government through officers selected
6 by it.

7 ~~(13)~~(16) Report--Any document required to be filed by this title, including an
8 appointment of campaign treasurer, any type of report of contributions and expenditures,
9 and any notice.

10 ~~(14)~~(17) Special pre-election report--A shorthand term for a report filed in accordance
11 with the requirements of §§20.221, 20.333, or 20.435 of this title (relating to Special Pre-
12 Election Report by Certain Candidates; Special Pre-Election Report by Certain Specific-
13 Purpose Committees; Special Pre-Election Reports by Certain General-Purpose
14 Committees) and §§254.038 and §254.039 of the Election Code (relating to Special
15 Report Near Election by Certain Candidates and Political Committees and Special Report
16 Near Election By Certain General-Purpose Committees).

17 ~~(15)~~(18) Specific-purpose committee--A political committee that does not meet the
18 definition of general-purpose committee and that has among its principal purposes:

19 (A) supporting or opposing one or more:

20 (i) candidates, all of whom are identified and are seeking offices that are
21 known; or

22 (ii) measures, all of which are identified;

23 (B) assisting one or more officeholders, all of whom are identified; or

24 (C) supporting or opposing only one candidate who is unidentified or who is
25 seeking an office that is unknown.

26 ~~(16)~~(19) Unidentified measure--A question or proposal that is intended to be submitted in
27 an election for an expression of the voters' will and that is not yet legally required to be
28 submitted in an election, except that the term does not include the circulation or
29 submission of a petition to determine whether a question or proposal is required to be
30 submitted in an election for an expression of the voters' will. The circulation or
31 submission of a petition to determine whether a question or proposal is required to be
32 submitted in an election for an expression of the voters' will is considered to be an
33 identified measure.

1 ~~(17)~~(20) Principal purpose--A group has as a principal purpose of accepting political
2 contributions or making political expenditures, including direct campaign expenditures,
3 when that activity is an important or a main function of the group.

4 (A) A group may have more than one principal purpose.

5 (B) A group has as a principal purpose accepting political contributions if the
6 proportion of the political contributions to the total contributions to the group is
7 more than 25 percent within a calendar year. A contributor intends to make a
8 political contribution if the solicitations that prompted the contribution or the
9 statements made by the contributor about the contribution would lead to no other
10 reasonable conclusion than that the contribution was intended to be a political
11 contribution.

12 (C) The group may maintain specific evidence of contributions related only to
13 political contributions or only to nonpolitical contributions. For example, the
14 group may ask the contributor to make an indication when the contribution is
15 made that the contribution is only a nonpolitical contribution.

16 (D) A group has as a principal purpose making political expenditures, including
17 direct expenditures, if the group expends more than 25 percent of its annual
18 expenses to make political expenditures within a calendar year. The following
19 shall be included for purposes of calculating the threshold:

20 (i) the amount of money paid in compensation and benefits to the group's
21 employees for work related to making political expenditures;

22 (ii) the amount of money spent on political expenditures; and

23 (iii) the amount of money attributable to the proportional share of
24 administrative expenses related to political expenditures. The proportional
25 share of administrative expenses is calculated by comparing the political
26 expenditures in clause (ii) with nonpolitical expenditures. (For example, if
27 the group sends three mailings a year and each costs \$10,000, if the first
28 two are issue based newsletters and the third is a direct advocacy sample
29 ballot, and there were no other outside expenditures, then the proportion of
30 the administrative expenses attributable to political expenditures would be
31 33%.) Administrative expenses include:

32 (I) fees for services to non-employees;

33 (II) advertising and promotion;

34 (III) office expenses;

1 (IV) information technology;

2 (V) occupancy;

3 (VI) travel expenses;

4 (VII) interest; and

5 (VIII) insurance.

6 (E) The group may maintain specific evidence of administrative expenses related
7 only to political expenditures or only to nonpolitical expenditures. Specifically
8 identified administrative expenses shall not be included in the proportion
9 established by subparagraph (D)(iii) but allocated by the actual amount of the
10 expense.

11 (F) In this section, the term "political expenditures" includes direct campaign
12 expenditures.

13 ~~(18)~~(21) In connection with a campaign:

14 (A) An expenditure is made in connection with a campaign for an elective office if
15 it is:

16 (i) made for a communication that expressly advocates the election or
17 defeat of a clearly identified candidate by:

18 (I) using such words as "vote for," "elect," "support," "vote against,"
19 "defeat," "reject," "cast your ballot for," or "Smith for city council;"
20 or

21 (II) using such phrases as "elect the incumbent" or "reject the
22 challenger," or such phrases as "vote pro-life" or "vote pro-choice"
23 accompanied by a listing of candidates described as "pro-life" or
24 "pro-choice;"

25 (ii) made for a communication broadcast by radio, television, cable, or
26 satellite or distributed by print or electronic media, including any print
27 publication, mailing, Internet website, electronic mail, or automated phone
28 bank, that:

29 (I) refers to a clearly identified candidate;

30 (II) is distributed within 30 days before a contested election for the
31 office sought by the candidate;

1 (III) targets a mass audience or group in the geographical area the
2 candidate seeks to represent; and

3 (IV) includes words, whether displayed, written, or spoken; images
4 of the candidate or candidate's opponent; or sounds of the voice of
5 the candidate or candidate's opponent that, without consideration of
6 the intent of the person making the communication, are susceptible
7 of no other reasonable interpretation than to urge the election or
8 defeat of the candidate;

9 (iii) made by a candidate or political committee to support or oppose a
10 candidate; or

11 (iv) a campaign contribution to:

12 (I) a candidate; or

13 (II) a group that, at the time of the contribution, already qualifies as a
14 political committee.

15 (B) An expenditure is made in connection with a campaign on a measure if it is:

16 (i) made for a communication that expressly advocates the passage or
17 defeat of a clearly identified measure by using such words as "vote for,"
18 "support," "vote against," "defeat," "reject," or "cast your ballot for;"

19 (ii) made for a communication broadcast by radio, television, cable, or
20 satellite or distributed by print or electronic media, including any print
21 publication, mailing, Internet website, electronic mail, or automated phone
22 bank, that:

23 (I) refers to a clearly identified measure;

24 (II) is distributed within 30 days before the election in which the
25 measure is to appear on the ballot;

26 (III) targets a mass audience or group in the geographical area in
27 which the measure is to appear on the ballot; and

28 (IV) includes words, whether displayed, written, or spoken, that,
29 without consideration of the intent of the person making the
30 communication, are susceptible of no other reasonable interpretation
31 than to urge the passage or defeat of the measure;

32 (iii) made by a political committee to support or oppose a measure; or

1 (iv) a campaign contribution to a group that, at the time of the contribution,
2 already qualifies as a political committee.

3 (C) Any cost incurred for covering or carrying a news story, commentary, or
4 editorial by a broadcasting station or cable television operator, Internet website, or
5 newspaper, magazine, or other periodical publication, including an Internet or
6 other electronic publication, is not a campaign expenditure if the cost for the news
7 story, commentary, or editorial is not paid for by, and the medium is not owned or
8 controlled by, a candidate or political committee.

9 (D) For purposes of this section:

10 (i) a candidate is clearly identified by a communication that includes the
11 candidate's name, office sought, office held, likeness, photograph, or other
12 apparent and unambiguous reference; and

13 (ii) a measure is clearly identified by a communication that includes the
14 measure's name or ballot designation (such as "Proposition 1"), purposes,
15 election date, or other apparent and unambiguous reference.

16 ~~(19)(22)~~ Discount--The provision of any goods or services without charge or at a charge
17 which is less than fair market value. A discount is an in-kind political contribution unless
18 the terms of the transaction reflect the usual and normal practice of the industry and are
19 typical of the terms that are offered to political and non-political persons alike, or unless
20 the discount is given solely in order to comply with §253.041 of the Election Code. The
21 value of an in-kind contribution in the form of a discount is the difference between the
22 fair market value of the goods or services at the time of the contribution and the amount
23 charged.

24 ~~(20)(23)~~ School district--For purposes of §254.130 of the Election Code and §§20.3
25 (relating to Reports Filed with the Commission), 20.7 (relating to Reports Filed with
26 Other Local Filing Authority), and 20.315 (relating to Termination of Campaign
27 Treasurer Appointment) of this title, the term includes a junior college district or
28 community college district.

29 ~~(21)(24)~~ Vendor--Any person providing goods or services to a candidate, officeholder,
30 political committee, or other filer under this chapter. The term does not include an
31 employee of the candidate, officeholder, political committee, or other filer.

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

33 ~~§22.5. Contributions to Direct Campaign Expenditure Only Committees.~~

1 ~~(a) Before accepting a political contribution from corporations or labor organizations, a~~
2 ~~political committee that intends to act exclusively as a “direct campaign expenditure only~~
3 ~~committee” must file with the commission an affidavit stating the following:~~

4 ~~(1) the committee intends to act exclusively as a direct campaign expenditure only~~
5 ~~committee; and~~

6 ~~(2) the committee will not use its political contributions to make political~~
7 ~~contributions to any candidate for elective office, officeholder, or political~~
8 ~~committee that makes a political contribution to a candidate or officeholder.~~

9 ~~(b) A political committee’s acceptance of a political contribution from a corporation or~~
10 ~~labor organization does not constitute a violation of §253.003(b) or §253.094(a) of the~~
11 ~~Election Code if, before accepting the contribution, the committee files with the~~
12 ~~commission an affidavit described under subsection (a) of this section.~~

13 ~~(c) A corporation or labor organization may not make a political contribution to a “direct~~
14 ~~campaign expenditure only committee” before the committee has filed with the~~
15 ~~commission an affidavit described under subsection (a) of this section.~~

16 ~~(d) A corporation’s or labor organization’s making of a political contribution to a political~~
17 ~~committee that has filed an affidavit described under subsection (a) of this section does not~~
18 ~~constitute a violation of §253.094(a) of the Election Code.~~

19 ~~(e) This section does not apply to a contribution made or accepted under §253.096 or~~
20 ~~§253.104 of the Election Code and an expenditure made under §253.100 of the Election~~
21 ~~Code.]~~

22 **§22.6. Reporting Direct Campaign Expenditures.**

23 (a) Section 254.261 of the Election Code applies to a person who, not acting in concert
24 with another person, makes one or more direct campaign expenditures that exceed \$100 in
25 an election from the person’s own property.

26 ~~[(b) For purposes of Section 254.261 of the Election Code, “acting in concert” means acting~~
27 ~~in cooperation or consultation with another, or under an express or implied agreement, to~~
28 ~~pursue a common activity. Evidence of acting in concert can be provided by showing that~~
29 ~~persons are:~~

30 ~~(1) using the same consultants;~~

31 ~~(2) using the same person to purchase media;~~

32 ~~(3) sharing mailing lists;~~

33 ~~(4) sharing email lists;~~

- 1 ~~(5) sharing telephone lists;~~
- 2 ~~(6) exchanging drafts or final proofs of political advertising;~~
- 3 ~~(7) meeting with a candidate, or a candidate's agent or staff regarding campaign~~
4 ~~communications, including but not limited to talking points, campaign themes,~~
5 ~~campaign communication schedules, and campaign events;~~
- 6 ~~(8) sharing research on candidates or measures; or~~
- 7 ~~(9) sharing polling data.]~~

EXHIBIT A

Text of Proposed Rulemaking

The deleted language is indicated by [strikethrough] text.

Chapter 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

~~§22.33. Expenditure Limits of the Judicial Campaign Fairness Act.~~

~~For purposes of the expenditure limits prescribed by §253.168 of the Election Code:~~

~~(1) an officeholder expenditure is attributed to the next election in which the officeholder is a candidate that occurs after the expenditure is made; and~~

~~(2) a campaign expenditure is attributed to the election for which the expenditure is made.]~~

Chapter 27. JUDICIAL CAMPAIGN FAIRNESS ACT

Subchapter A. GENERAL RULES

~~§27.1. Applicability.~~

~~This chapter applies only to a candidate, officeholder, political committee, political contribution, or political expenditure to which the Judicial Campaign Fairness Act, Subchapter F, Chapter 253, Election Code, applies.]~~

Chapter 27. JUDICIAL CAMPAIGN FAIRNESS ACT

Subchapter C. GENERAL REPORTING RULES

~~§27.101. When a Declaration of Compliance or Declaration of Intent Is Required.~~

~~(a) "Declaration" means a declaration of compliance or declaration of intent required to be filed under §253.164, Election Code.~~

~~(b) A person is required to file a declaration only when:~~

~~(1) the person becomes a candidate for a judicial office at a time when the person is not already a candidate for another judicial office, or~~

1 ~~(2) the person changes their intent to comply or not comply with the voluntary~~
2 ~~expenditure limits as stated in their most recently filed declaration.~~

3 ~~(c) A candidate for a judicial office who decides to seek a different judicial office that~~
4 ~~requires the candidate to transfer their campaign treasurer appointment to another filing~~
5 ~~authority under §20.206 of this title shall also file with the other authority:~~

6 ~~(1) a copy of the candidate's declaration certified by the authority with whom it was~~
7 ~~originally filed, or~~

8 ~~(2) a new declaration, if the candidate changes their intent to comply or not comply~~
9 ~~with the voluntary expenditure limits as stated in their most recently filed~~
10 ~~declaration.~~

11 ~~(d) A declaration remains in effect for the judicial office sought by a candidate at the time~~
12 ~~it is filed. If a candidate for a judicial office decides to seek a different judicial office, the~~
13 ~~declaration that is in effect remains in effect for the subsequent judicial office.]~~

Draft Subpoena Rules, Modeled on Texas Rules of Civil Procedure

Text of Proposed New Rules	Related Provisions from TRCP
<p>The proposed new language is indicated by <u>underlined</u> text.</p> <p>§12.29. Subpoenas <u>Issued by Commission.</u></p> <p>(a) A subpoena issued under section 571.137 of the Government Code shall specify the date, time, place, and manner for execution of the subpoena.</p> <p>(b) A subpoena <u>issued under section 571.137 of the Government Code</u> that requires a person to provide testimony shall be served on that person at least 10 business days before the date the subpoena is to be executed.</p> <p>§12.30. <u>Subpoenas Issued by Counsel for the Respondent.</u></p> <p>(a) <u>This section applies only to subpoenas issued by a respondent’s counsel under section 571.125(f) (concerning the issuance of a subpoena for a witness in a preliminary review hearing) or 571.130(f) (concerning the issuance of a subpoena for a witness in a formal hearing) of the Government Code.</u></p>	

(b) A subpoena must be issued in the name of “The State of Texas” and must:

(1) state the sworn complaint numbers for the sworn complaints at issue in the hearing at which the witness is summoned to appear;

(2) state that the subpoena pertains to a sworn complaint proceeding before the Texas Ethics Commission;

(3) state the date on which the subpoena is issued;

(4) identify the person to whom the subpoena is directed;

(5) state the time and place of the preliminary review hearing or formal hearing at which the subpoena directs the person to appear;

(6) identify the respondent at whose instance the subpoena is issued and the respondent’s attorney of record;

(7) specify with reasonable particularity any documents with which the person to whom the subpoena is directed shall appear;

176.1. Form.

Every subpoena must be issued in the name of “The State of Texas” and must:

(a) state the style of the suit and its cause number;

(b) state the court in which the suit is pending;

(c) state the date on which the subpoena is issued;

(d) identify the person to whom the subpoena is directed;

(e) state the time, place, and nature of the action required by the person to whom the subpoena is directed, as provided in Rule 176.2;

(f) identify the party at whose instance the subpoena is issued, and the party’s attorney of record, if any;

(8) state the text of § 12.31(i) of this chapter; and

(9) be signed by the attorney issuing the subpoena.

(c) A subpoena must command the person to whom it is directed to appear and give testimony at:

(1) a preliminary review hearing; or

(2) a formal hearing.

(d) A subpoena may only direct a person to appear, with or without documents, and give testimony at a preliminary review hearing or formal hearing before the commission.

(e) A subpoena may be issued only by the counsel of record for a respondent in a sworn complaint proceeding before the commission against that respondent.

(g) state the text of Rule 176.8(a); and

(h) be signed by the person issuing the subpoena.

176.2. Required Actions.

A subpoena must command the person to whom it is directed to do either or both of the following:

(a) attend and give testimony at a deposition, hearing, or trial;

(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person.

[Rule 176.3 on range limitations and limitation of subpoena power to scope of discovery rules, omitted here, does not have an equivalent in the proposed Commission rules]

(f) Service.

(1) Manner of service. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the sworn complaint proceeding, the subpoena may be served on the witness's attorney of record.

176.4 Who May Issue.

A subpoena may be issued by:

- (a) the clerk of the appropriate district, county, or justice court, who must provide the party requesting the subpoena with an original and a copy for each witness to be completed by the party;
- (b) an attorney authorized to practice in the State of Texas, as an officer of the Court; or
- (c) an officer authorized to take depositions in this State, who must issue the subpoena immediately on a request accompanied by a notice to take a deposition under Rules 199 or 200, or a notice under Rule 205.3, and who may also serve the notice with the subpoena.

176.5. Service.

(a) Manner of service. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record.

(2) Deadline for service. A subpoena must be served upon the person required to appear at least 21 days before the preliminary review hearing or formal hearing at which the person is required to appear. The subpoena and proof of service must be filed with the commission within three days of its service on the person required to appear.

(3) Proof of service. Proof of service must be made by filing either:

(A) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(B) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

(g) Response.

(1) Except as provided in this subsection, a person served with a subpoena must comply with the command stated therein unless discharged by the commission or by the party summoning such witness. A person commanded to appear and give testimony must remain at the place of hearing from day to day until discharged by the commission or the party summoning the witness.

(b) Proof of service. Proof of service must be made by filing either:

(1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

176.6. Response.

(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at the place of deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

(2) If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(3) A person commanded to appear with documents must produce the documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand.

(4) A person commanded to appear at a hearing must file any motion to quash the subpoena or objection to a requirement to appear with certain documents with the commission no later than the 14th day before the hearing at which the person is directed to appear. Commission staff may move to quash a subpoena or object to appearance with

(b) Organizations. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(c) Production of documents or tangible things. A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also compelled to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(d) Objections. A person commanded to produce and permit inspection or copying of designated documents and things may serve on the party requesting issuance of the subpoena – before the time specified for compliance – written objections to producing any or all of the designated materials. A person need not comply with the part of a subpoena to which objection is made as provided in this

certain documents in the same manner as the person commanded to appear by the subpoena. The filer of a motion to quash or objection to a requirement to appear with certain documents must serve the motion or objection on the proponent of the subpoena in person, by mail, by commercial delivery service, by fax, by email, or by other such manner as the presiding officer of the commission may direct, no later than the deadline for filing the motion to quash or objection to appearance with documents with the commission. After affording commission staff and the person commanded to appear an opportunity to move to quash the subpoena or object to appearance with certain documents, and affording the proponent of the subpoena an opportunity to respond to the motion to quash or objection to appearance with documents, the commission's presiding officer shall rule on a motion to quash or objection to appearance with documents.

(5) A person commanded to attend and give testimony, or to produce documents or things, at a preliminary review hearing or formal hearing may object to giving testimony or producing documents at the time and place specified for the hearing, rather than under subsection (g)(4) of this section.

paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

(e) Protective orders. A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things, and any other person affected by the subpoena, may move for a protective order under Rule 192.6(b) – before the time specified for compliance – either in the court in which the action is pending or in a district court in the county where the subpoena was served. The person must serve the motion on all parties in accordance with Rule 21A. A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court. The party requesting the subpoena may seek such an order at any time after the motion for protection is filed.

(f) Trial subpoenas. A person commanded to attend and give testimony, or to produce documents or things, at a hearing or trial, may object or move for protective order before the court at the time and place specified for compliance, rather than under paragraphs (d) and (e).

(6) A party's appearance with a document in response to a subpoena directing the party to appear with the document authenticates the document for use against that party in any proceeding before the commission unless the party appearing with the document objects to the authenticity of the document, or any part of it, at the time of the party's appearance, stating the specific basis for objection. An objection must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity. The requirement that the commission provide a reasonable opportunity to establish the document's authenticity may be satisfied by the opportunity to present a witness to authenticate the document at a subsequent hearing before the commission.

(h) A counsel for a respondent issuing a subpoena must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on a motion to quash or objection to appearance with documents, the presiding officer must provide a person served with a subpoena an adequate time for compliance, protection

193.7. Production of Documents Self-Authenticating.

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

176.7. Protection of Person from Undue Burden and Expense.

A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and

from disclosure of privileged material or information, and protection from undue burden or expense. The presiding officer may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.

protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.

176.8. Enforcement of Subpoena.

(a) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

(b) Proof of payment of fees required for fine or attachment. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

EXHIBIT A

Text of Proposed Rulemaking

The proposed new language is indicated by underlined text.

The deleted language is indicated by [~~striketrough~~] text.

1 **Chapter 20. REPORTING POLITICAL CONTRIBUTIONS AND**
 2 **EXPENDITURES**

3 **Subchapter A. GENERAL RULES**

4 **§20.1. Definitions.**

5 The following words and terms, when used in Title 15 of the Election Code, in this chapter,
 6 Chapter 22 of this title (relating to Restrictions on Contributions and Expenditures), and
 7 Chapter 24 of this title (relating to Restrictions on Contributions and Expenditures
 8 Applicable to Corporations and Labor Organizations), shall have the following meanings,
 9 unless the context clearly indicates otherwise.

10 ...

11 (25) Hybrid committee—A political committee that, as provided by section 252.003(a)(4)
 12 (relating to contents of a general-purpose committee’s campaign treasurer appointment) or
 13 252.0031(a)(2) (relating to a specific-purpose committee’s campaign treasurer
 14 appointment) of the Election Code, as applicable, has filed a campaign treasurer
 15 appointment that includes an affidavit stating that:

16 (A) the committee is not established or controlled by a candidate or an officeholder;
 17 and

18 (B) the committee will not use any political contribution from a corporation or a
 19 labor organization to make a political contribution to:

20 (i) a candidate for elective office;

21 (ii) an officeholder; or

22 (iii) a political committee that has not filed an affidavit in accordance with
 23 this section.

24 (26) Direct campaign expenditure-only committee—A political committee, as authorized
 25 by section 253.105 of the Election Code (relating to political contributions to direct
 26 campaign expenditure-only committees) to accept political contributions from corporations
 27 or labor organizations, that:

1 (A) is not established or controlled by a candidate or an officeholder;

2 (B) makes or intends to make direct campaign expenditures;

3 (C) does not make or intend to make political contributions to:

4 (i) a candidate;

5 (ii) an officeholder;

6 (iii) a specific-purpose committee established or controlled by a candidate
7 or an officeholder; or

8 (iv) a political committee that makes or intends to make political
9 contributions to a candidate, an officeholder, or a specific-purpose committee
10 established or controlled by a candidate or an officeholder; and

11 (D) has filed an affidavit with the commission stating the committee's intention to
12 operate as described by subparagraphs (B) and (C).

13 **§22.35. Corporate Contributions to Certain Political Committees.**

14 (a) A political committee that accepts a monetary political contribution from a corporation
15 or labor organization shall maintain the contribution in a separate account for political
16 contributions from corporations and labor organizations.

17 (b) A political committee that accepts a political contribution from a corporation or labor
18 organization shall not use the contribution to make a political contribution to:

19 (1) a candidate for elective office;

20 (2) an officeholder; or

21 (3) a political committee other than a hybrid committee, a direct campaign
22 expenditure-only committee, or a political committee that supports or
23 opposes measures exclusively.

24 **CHAPTER 24. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES**
25 **APPLICABLE TO CORPORATIONS AND LABOR ORGANIZATIONS**

26 **§24.18. Designation of Contribution for Administrative Purposes.**

27 (a) Any of the following will serve to designate a political expenditure in the form of a
28 political contribution made by a corporation or labor organization [~~corporate expenditure~~]
29 as restricted to the establishment, administration, maintenance, or operation of a general-
30 purpose committee:

1 (1) A contemporaneous written instruction that the contribution [~~expenditure~~] is
2 restricted to the administration, maintenance, or operation of the committee
3 accepting the contribution; [~~expenditure~~];

4 (2) The negotiable instrument conveying the contribution contains language
5 indicating that the entity is a corporation, including but not limited to "Inc.,"
6 "Incorporated," "Corp.," or "Corporation;" [ø]

7 (3) The general-purpose committee accepting the contribution reports the
8 contribution as monetary contribution or monetary support from a corporation or
9 labor organization on the committee's campaign finance report; or

10 (4) The general-purpose committee accepting the contribution deposits the
11 contribution into a separate segregated account for political contributions from
12 corporations and labor organizations.

13 (b) Subsection (a) of this section shall not be read to restrict a hybrid committee, a direct
14 campaign expenditure-only committee, or a political committee that supports or opposes
15 measures exclusively from using a contribution from a corporation or labor organization
16 to make a direct campaign expenditure.

17 **§24.19. Affidavit Required by a Political Committee Making a Direct Campaign**
18 **Expenditure from a Political Contribution Accepted from a Corporation or Labor**
19 **Organization.**

20 A political committee, including a direct campaign expenditure-only committee, must
21 include in its campaign treasurer appointment the affidavit described by section
22 252.003(a)(4) (relating to contents of a general-purpose committee's campaign treasurer
23 appointment) or 252.0031(a)(2) (relating to contents of a specific-purpose committee's
24 campaign treasurer appointment) of the Election Code, as applicable, before using a
25 political contribution from a corporation or labor organization to make a direct campaign
26 expenditure in connection with a campaign for an elective office.

EXHIBIT A

Text of Proposed Rule Amendments

Chapter 8. ADVISORY OPINIONS

1 §8.1. Definitions.

2 The following words and terms, when used in this chapter, shall have the following
3 meanings, unless the context clearly indicates otherwise: AOR number--An advisory
4 opinion request file number assigned by the executive director to a pending advisory
5 opinion request in accordance with this chapter.

6 §8.3. Subject of an Advisory Opinion.

7 (a) The commission may only [~~will~~] issue a written advisory opinion on the application of
8 any of the following laws: [~~laws to a person qualified to make a request under §8.5 of this~~
9 ~~title (relating to Persons Eligible To Receive an Advisory Opinion):~~]

10 (1) Government Code, Chapter 302 (concerning Speaker of the House of
11 Representatives);

12 (2) Government Code, Chapter 303 (concerning Governor for a Day and Speaker's
13 Reunion Day Ceremonies);

14 (3) Government Code, Chapter 305 (concerning Registration of Lobbyists);

15 (4) Government Code, Chapter 572 (concerning Personal Financial Disclosure,
16 Standards of Conduct, and Conflict of Interest);

17 (5) Government Code, Chapter 2004 (concerning Representation Before State
18 Agencies);

19 (6) Local Government Code, Chapter 159, Subchapter C, in connection with a
20 county judicial officer, as defined by Section 159.051, Local Government Code,
21 who elects to file a financial statement with the commission;

22 (7) Election Code, Title 15 (concerning Regulating Political Funds and Campaigns);

23 (8) Penal Code, Chapter 36 (concerning Bribery and Corrupt Influence);

24 (9) Penal Code, Chapter 39 (concerning Abuse of Office);

25 (10) Government Code, §2152.064 (concerning Conflict of Interest in Certain
26 Transactions); and

- 1 (11) Government Code, §2155.003 (concerning Conflict of Interest).
- 2 (b) The commission may [~~will~~] not issue an advisory opinion that concerns the subject
3 matter of pending litigation known to the commission.
- 4 (c) For purposes of this section, the term litigation includes a sworn complaint proceeding
5 before the commission only if the Government Code Subchapters C - H, Chapter 2001,
6 apply to the proceeding.
- 7 (d) An advisory opinion cannot resolve a disputed question of fact.

8 **§8.5. Persons Eligible To Receive an Advisory Opinion.**

9 A person who is subject to one of the laws described in § 8.3(a) of this chapter [~~title~~]
10 (relating to Subject of Advisory Opinions) may request an opinion that advises how the
11 law applies to that person in a specific real or hypothetical factual situation.

12 **§8.7. Request for an Advisory Opinion.**

13 (a) A request for an advisory opinion shall describe a specified factual situation. The facts
14 specified may be real or hypothetical. The request must provide sufficient detail to permit
15 the commission to provide a response to the request, including the name of the person
16 making the request and, if applicable, the name of the person on whose behalf the request
17 is made.

18 (b) A request for an advisory opinion shall be:

- 19 (1) in writing; and
- 20 (2) mailed or hand-delivered [~~writing. A written request may be mailed, hand-~~
21 ~~delivered, or faxed~~] to the commission at the agency office or emailed to the
22 commission's email address designated for receiving requests.

23 **§8.9. Commission Initiated Opinion.**

24 When a majority of the commission determines that an opinion would be in the public
25 interest or in the interest of any person or persons within the jurisdiction of the commission,
26 the commission may on its own motion issue an advisory opinion.

27 **§8.11. Review and Processing of a Request.**

28 (a) Upon receipt of a written request for an advisory opinion, the executive director shall
29 [~~will~~] determine whether the request:

1 (1) pertains to the application of a law specified [request is one the commission will
2 answer] under §8.3 of this chapter [title (relating to Subject of an Advisory
3 Opinion)];

4 (2) meets the standing requirements of §8.5 of this chapter;

5 (3) meets the form requirements of §8.7 of this chapter; and

6 (4) cannot be answered by written response under § 8.17 of this chapter by reference
7 to the plain language of a statute, commission rule, or advisory opinion.

8 (b) If the executive director determines that a request for an opinion meets the requirements
9 of this chapter as set forth in subsections (a)(1)-(3) of this section and that the request
10 cannot be answered by written response under §8.17 of this chapter, [the commission will
11 answer the request,] the executive director shall [will] assign an AOR number to the
12 request. The executive director shall notify the person making the request of the AOR
13 number and of the proposed wording of the question to be answered by the commission.

14 (c) If the executive director determines that a request for an opinion does not meet the
15 requirements of this chapter as set forth in subsections (a)(1)-(3) of this section or that the
16 request can be answered by written response under §8.17 of this chapter, [request is one
17 the commission cannot answer,] the executive director shall notify the person making the
18 request of the reason the person making the request is not entitled to an advisory opinion
19 in response to the request [will not be answered].

20 **§8.13. Time Period.**

21 (a) The commission shall issue an advisory opinion in response to a request that meets the
22 requirements of this chapter not later than the 60th day after the date the commission
23 receives the [written] request.

24 (b) The time available to issue an advisory opinion in response to a written request is
25 automatically extended for 60 days pursuant to §571.092(b), Government Code. [For
26 purposes of calculating the time period under subsection (a) of this section, an advisory
27 opinion request is deemed to have been received on the date the executive director
28 determines the request complies with §§8.3, 8.5, and 8.7 of this title (relating to Subject of
29 an Advisory Opinion; Persons Eligible To Receive an Advisory Opinion; and Request for
30 an Advisory Opinion) and assigns the request an AOR number.]

31 [(c) The authority granted by the Act, §1.29(b), is delegated to the staff of the commission.]

32 **§8.15. Publication in Texas Register; Comments.**

33 (a) Each request assigned an AOR number under this chapter shall be published in
34 summary form in the Texas Register.

1 (b) Any ~~interested~~ person may submit written comments to the commission concerning
2 an advisory opinion request. Comments submitted should reference the AOR number.

3 **§8.17. Request Answered by Written ~~Letter~~ Response.**

4 If the executive director determines that a request can be answered by reference to the plain
5 language of a statute, ~~or a~~ commission rule, or advisory opinion: ~~[if the question has~~
6 ~~already been answered by the commission, then in either case]~~

7 (1) the executive director shall ~~may~~ provide a written response to the person
8 making the request that cites the language of the statute, ~~or~~ rule, or advisory
9 opinion, ~~[the prior determination,]~~ as applicable; and

10 (2) the person making the request is not entitled to an advisory opinion in response
11 to the request.

12 **§8.18. No Defense to Prosecution or Civil Penalty.**

13 A person who requests an advisory opinion does not obtain a defense to prosecution or to
14 imposition of a civil penalty by requesting the opinion if any of the following apply:

15 (1) the commission is not authorized to answer the request because it does not
16 pertain to the application of a law specified under §8.3 of this chapter;

17 (2) the request does not meet the standing requirements of §8.5 of this chapter;

18 (3) the request does not meet the form requirements of §8.7 of this chapter; or

19 (4) the executive director responds to the request by written response under §8.17
20 of this chapter.

21 **§8.19. Confidentiality.**

22 (a) The name of a person who requests an advisory opinion is confidential.

23 (b) The original request for an advisory opinion shall be placed in a confidential file. ~~[No~~
24 ~~original request or copy of an original request may be removed from the agency office.]~~

25 (c) Confidentiality under subsection (a) of this section may be waived only if the person
26 making the request for an advisory opinion provides a verified, written waiver of
27 confidentiality to the executive director.

28 (d) If a request for a copy of an advisory opinion request is received, the executive director
29 shall prepare a redacted version of the advisory opinion request by deleting any information
30 that is likely to identify the person making the request. The redacted version of the request
31 shall be provided to the person who requested a copy of the advisory opinion request.

1 **§8.21. Compilation of Advisory Opinions.**

2 The executive director shall number and categorize each advisory opinion issued and shall
3 annually compile a summary of advisory opinions in a single reference document. The
4 executive director may publish and provide copies of advisory opinions in other formats as
5 may be in the public interest.

DRAFT 1

EXHIBIT A

Text of Proposed New Rules and Amendments

The proposed new language is indicated by underlined text.

The deleted language is indicated by [~~striketrough~~] text.

1 Chapter 12. SWORN COMPLAINTS

2 Subchapter C. INVESTIGATION AND PRELIMINARY REVIEW

3 §12.83. Preliminary Review.

4 (a) A complainant or respondent must respond to written questions [~~submitted to the~~
5 ~~respondent pursuant to section 571.1243 of the Government Code~~] not later than 15
6 business days after receiving [~~the respondent receives~~] the written questions. The executive
7 director may grant an extension of the time period for good cause shown.

8
9 (b) If the commission staff submits written questions to a respondent [~~pursuant to section~~
10 ~~571.1243 of the Government Code~~], the 120-day deadline for the commission to propose
11 an agreement to the respondent or dismiss the complaint (provided in section 571.1242(g)
12 of the Government Code) [~~time period set forth in section 571.1242(a)(2) of the~~
13 ~~Government Code or section 571.1242(b)(2) of the Government Code, as applicable, is~~
14 ~~increased by the number of business days during the period~~] is tolled beginning on the date
15 the commission sends the written questions and resets [~~ending~~] on the date the commission
16 receives the respondent's written response.

17
18 (c) If the commission staff applies to the commission for the issuance of a subpoena
19 pursuant to section 571.137(a-1) of the Government Code, the 120-day deadline for the
20 commission to propose an agreement to the respondent or dismiss the complaint (provided
21 in section 571.1242(g) of the Government Code) is tolled [~~time period set forth in section~~
22 ~~571.1242(a)(2) of the Government Code or section 571.1242(b)(2) of the Government~~
23 ~~Code as applicable, is increased by the number of business days during the period~~]
24 beginning on the date the staff applies to the commission for the subpoena and resets
25 [~~ending~~] on either:

26
27 (1) the date the commission rejects the staff's application for a subpoena;

28
29 (2) the date the person to whom the subpoena is directed complies with the
30 subpoena; or

31
32 (3) the date the commission receives a final ruling on a person's failure or refusal to
33 comply with a subpoena that is reported [~~reports~~] to a district court pursuant to
34 section 571.137(c) of the Government Code.
35

1 (d) If the commission staff proposes to a respondent an agreement to settle a complaint that
2 would be effective upon approval by the commission and the respondent, the 120-day
3 deadline for the commission to propose an agreement to the respondent or dismiss the
4 complaint (provided in section 571.1242(g) of the Government Code) is met. If a
5 respondent approves a proposed agreement, commission staff must submit the proposed
6 agreement to the commission to seek final approval at the next scheduled commission
7 meeting. If a respondent rejects a proposed agreement, the matter shall be set for a
8 preliminary review hearing at the next commission meeting for which notice has not yet
9 been posted. If a respondent rejects a proposed agreement within 45 days before the date
10 of a commission meeting, the matter shall be set for a preliminary review hearing at the
11 next commission meeting thereafter.

12
13 (e) [~~(d)~~] During a preliminary review, commission staff may present documents or
14 evidence, make recommendations, or otherwise communicate with commissioners outside
15 the presence of the respondent for the purpose of investigating and resolving a sworn
16 complaint.

17
18 (f) [~~(e)~~] Commission staff may not communicate with a commissioner outside the presence
19 of the respondent for the purpose of influencing a decision on a pending sworn complaint
20 after the complaint has been scheduled for a preliminary review hearing and notice of the
21 hearing has been sent to the respondent.

22 **Subchapter D. PRELIMINARY REVIEW HEARING**

23 **§12.84. Notice of Preliminary Review Hearing.**

24 (a) Commission staff shall provide notice of a preliminary review hearing to a respondent
25 and complainant at least 45 days before the date of the hearing and must include:

- 26 (1) the date, time, place, and nature of the hearing;
- 27 (2) a statement of the legal authority and jurisdiction under which the hearing is to
28 be held;
- 29 (3) a reference to the particular sections of the statutes and rules involved; and
- 30 (4) a short and plain statement of the factual matters asserted.

31 (b) Commission staff shall provide to a respondent at least 30 days before the date of the
32 hearing:

- 33 (1) a list of proposed witnesses to be called at the hearing and a brief statement as
34 to the nature of the testimony expected to be given by each witness to be called at
35 the hearing; and
 - 36 (2) copies of all documents expected to be used or introduced as exhibits at the
37 hearing.
- 38

1 (c) The respondent shall provide to commission staff the contents described by subsections
2 (b)(1) and (b)(2) of this section at least 30 days before the date of the hearing. [~~The contents~~
3 ~~must be received by commission staff at least 14 days before the date of the hearing.~~] If a
4 respondent or commission staff fail to comply with this section, the commission may
5 reschedule the hearing or proceed with the hearing and exclude at the hearing evidence,
6 documents, and testimony provided by the respondent or commission staff, as applicable,
7 but such failure may be excused upon a showing of good cause.

EXHIBIT A

Text of Proposed Rule Amendments

Chapter 12. SWORN COMPLAINTS

1 §12.34. Agreed Orders.

2 (a) The commission may enter into an agreed order with a respondent to resolve and settle
3 a complaint filed against the respondent, including an assurance of voluntary compliance,
4 a notice of reporting error, or an agreed order and resolution.

5 (b) An assurance of voluntary compliance:

6 (1) resolves a sworn complaint:

7 (A) with no determination that a violation within the jurisdiction of the
8 commission has occurred, if entered into before a preliminary review hearing
9 is completed; or

10 (B) with a determination that all violations within the jurisdiction of the
11 commission, when viewed as a whole in consideration of any mitigating
12 action taken by the respondent, are technical or de minimis; and

13 (2) may include a civil penalty.

14 (c) A notice of reporting error resolves a complaint with a determination that all violations
15 within the jurisdiction of the commission are reporting errors that do not materially defeat
16 the purpose of disclosure and may include a civil penalty in the form of an assessment fee.

17 (d) An agreed order and resolution resolves a sworn complaint with a determination that
18 one or more violations within the jurisdiction of the commission occurred and may include
19 a civil penalty.