TEXAS ETHICS COMMISSION
BIENNIAL REPORT
2021-2022

A REPORT TO THE OFFICE OF THE GOVERNOR AND THE 88TH LEGISLATURE PURSUANT TO TEX. GOV'T CODE § 571.073

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I. ADVISORY OPINIONS

The Texas Ethics Commission issued 11 advisory opinions in 2021 and 15 advisory opinions in 2022. The Ethics Advisory Opinion ("EAO") number, issue(s), and summary are listed below. The full opinions are found at Appendix 1.

EAO #	Issue	Summary
559	Whether certain written communications, created by a political subdivision and related to the political subdivision's upcoming elections, constitute political advertisements for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a).	When asked to consider whether a specific written communication constitutes political advertising for purposes of the Election Code, we view the communication as a whole. A significant factor in determining whether a particular communication is a political advertisement is whether it provides information without promoting a public officer or measure. The mere fact that a communication includes an express disclaimer of support or opposition is not determinative. However, the specific communications considered in this opinion are not political advertisements for purposes of section 255.003 of the Election Code because they are entirely informational and do not include any advocacy.
560	Whether an officer of a political subdivision may use public funds to print and affix graphic designs to bicycle-sharing stations, hats, t-shirts, and water bottles that identify the public official by name, office, and include the following statement: "Funding for this Station Provided by [the requestor]."	When asked to consider whether a specific written communication constitutes political advertising for purposes of the Election Code, we view the communication as a whole. The mere fact that the name of a public officer appears in a written communication does not determine whether the communication constitutes political advertising, but the context and frequency with which it appears are relevant to making that determination. The written communications considered in this opinion constitute political advertisements because they identify a public officer as such, include his name in a conspicuous manner, and promote the officer by crediting him with funding a public resource that is paid for by the political subdivision. Rather than being primarily informational, the primary purpose of the communications appears to be to support the incumbent official.

561	May a judicial officer create—or coordinate the creation of—photographs of his courtroom for use in political advertisements? Does it make a difference if the photographs are taken from the gallery, the area in front of the bench, or behind the bench? May a judicial officer use, for political advertisements, photographs that are created without his cooperation or coordination, even if they show the officer behind the bench?	Section 255.003(a) of the Texas Election Code does not apply to district judges because they are not officers or employees of political subdivisions. Section 39.02(a)(2) of the Penal Code prohibits judges from using their courtrooms to create political advertisements, but not from repurposing material that is created lawfully.
562	Whether section 305.006(c) of the Texas Government Code requires registered lobbyists to disclose expenditures on social media advertising. Whether a mass media communication can, for purposes of Section 305.006(c)(2), "support or oppose pending legislation" even if it does not expressly state "support/oppose this legislation."	Communications published on social media websites are "mass media communications" for purposes of Section 305.006(c) of the Texas Government Code. Consequently, lobbyists registered under Chapter 305 of the Texas Government Code must report their expenditures for advertisements on social media (sometimes called social media "boosts") if the communications support or oppose or encourage another to support or oppose pending legislation or administrative action. A mass media communication can support or oppose pending legislation even if it does not include the phrase "support/oppose this legislation" or similar words or phrases such as "vote for," "vote against," "defeat," or "reject." A communication supports or opposes pending legislation if, when viewed as a whole, it would lead one to reasonably believe that its purpose was to support or oppose the pending legislation.
563	Whether an officer or employee of a political subdivision may use public funds to advertise and produce an event that uses the officer's title, such as "Mayor's Fun Run" or "Mayor's Unity Walk." Whether an officer of a political subdivision may announce, at a public meeting of the political subdivision that is recorded and broadcast on an Internet website, that the officer will have a booth at the event where he or she will	Section 255.003(a) does not broadly prohibit political subdivisions from producing or advertising an event that uses an official's title in its name. However, such an event that otherwise entails the use of public funds to support or oppose a candidate or measure would violate section 255.003(a). Section 255.003(a) does not prohibit discussion of matters pending before a governmental body. However, it does prohibit one or more members of a governmental body from arranging a discussion of a matter not pending before the governmental body in the hopes that broadcasts of the discussion would influence the outcome of an election.

	distribute merchandise purchased with personal funds. Whether an officer or employee of a political subdivision may spend public funds—including the use of paid staff time—to set up tents and provide tables, chairs, and traffic control for a food distribution event at which public officials from other governmental entities are present and distributing personal campaign items purchased with their campaign funds.	An officer or employee of a political subdivision may not spend public funds to produce an event for the purposes of providing a place for public officials to distribute campaign items.
564	Whether a written communication, created by a political subdivision and related to the political subdivision's special election, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a).	The specific communication considered in this opinion is not political advertising for purposes of Section 255.003 of the Election Code because it is entirely informational and does not include any advocacy.
565	Whether section 255.003(a) of the Election Code prohibits officers and employees of a special purpose district from spending public funds to create and distribute certain written communications.	While section 255.003(a) applies to the requestor, a special purpose district, it does not prohibit the district's officers and employees from spending public funds to create and distribute the specific communications considered in this request because they are entirely informational and do not include any advocacy.
566	Whether a judge may use political contributions for consulting and travel expenses to seek an appointment to a federal judicial office.	A judge may use political contributions for consulting and travel expenses to seek an appointment to a federal judicial office.
567	Whether a judge may use political contributions to pay expenses related to home security systems and equipment.	A judge may use political contributions to pay ordinary and necessary expenses incurred in connection with ensuring their home security.
568	Whether Section 572.069 of the Texas Government Code would prohibit a former employee of a state agency from providing certain services to a company that bid on procurements from the agency.	Section 572.069 of the Texas Government Code would not prohibit a former state employee from accepting employment to provide the described services to a company that bid on procurements from the agency because he did not participate in the procurements. The former state employee may obtain employment with the company before the second anniversary of the date

		on which the employee's service or employment with the state agency ceased.
569	Whether a candidate or officeholder may use her existing political contributions to establish a general-purpose political committee (GPAC), which she will control. Whether a candidate or officeholder may receive a salary from a GPAC that the candidate or officeholder established or controls.	A candidate or officeholder may use her own political contributions to establish a GPAC and may control such a GPAC. Political contributions "accepted" by a candidate-established or controlled GPAC are accepted by a person as a candidate or officeholder and therefore may not be converted to personal use by the controlling candidate or officeholder and may not be used to pay the controlling candidate or officeholder a salary. Personal use restrictions notwithstanding, the Penal Code gift and honorarium restrictions would allow such employment under only a narrow set of facts, and such employment may violate the standards of conduct for a public servant.
570	Whether the revolving door provision in Government Code section 572.054(b) prohibits a former employee of a regulatory agency who participated in canceling a request for proposal ("RFP") during her state service from receiving compensation for assisting with a response to a subsequent RFP for the same service or product	Like separate contracts, separate RFPs leading to separate contracts are separate "matters" for purposes of the revolving door provision in Government Code section 572.054(b). However, the conclusion that a specific work activity constitutes "participation in" one matter does not necessarily preclude the conclusion that the same work also constitutes "participation in" another matter. Tex. Ethics Comm'n Op. No. 397 (1998). When an officer or employee of an agency participates in the decision to cancel or rescind an RFP, and the agency subsequently issues another RFP for the same service or product, the employee may have participated in both the rescinded RFP and the reissued RFP for purposes of section 572.054(b), even if the RFP is not reissued until after the employee's state service has concluded. Whether the former officer or employee participated in the reissued RFP depends on, among other things, whether the agency reviews or analyzes the former officer's or employee's work in connection with reissuing the RFP. Here, the requestor has asked the Commission to rely on facts that would demonstrate her lack of participation in the subsequent RFP, so this opinion concludes that she is not precluded from working on a response. However, we caution agency officers and employees against using their authority to cancel a procurement for essential state services with an intent to profit from their

		knowledge of the agency's inevitable search for a new provider.
571	Whether Chapter 572 of the Government Code prohibits a former employee of a regulatory agency from accepting certain employment pertaining to Medicaid applications	None of the revolving door provisions in Chapter 572 of the Government Code prohibit the requestor from accepting the prospective employment. The requestor is not a member of the governing body or the executive head of a regulatory agency, so section 572.054(a) does not apply. Section 572.054(b) would prohibit the requestor from working on any specific Medicaid application on which she participated during her state service, but would not prohibit her from working on all Medicaid applications generally. And section 572.069 does not prohibit the requestor from accepting the employment because Medicaid applications are not procurements or contract negotiations.
572	Whether section 572.069 of the Government Code prohibits a former employee of a regulatory agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the employee participated during her state service.	No. Affiliates are different persons for purposes of Chapter 572 of the Government Code. Therefore, we conclude that section 572.069 of the Government Code does not prohibit a former employee of a regulatory agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the employee participated during her state service.
573	Whether the laws under the Commission's jurisdiction prohibit a former employee of a state agency from accepting employment at another state agency.	Nothing in Chapter 572 of the Government Code prohibits the requestor from accepting the employment with another state agency. All three revolving door provisions prohibit former state officers and employees from representing, accepting employment, or receiving compensation from certain "person[s]." As defined by Chapter 572, a state agency is not a "person," so none of the revolving door provisions restrict former state officers and employees from accepting employment with another state agency. Provisions of chapter 39 of the Penal Code prohibit public servants from misusing government property, services, personnel, and information to obtain a personal benefit. However, the requestor has not presented any facts that would indicate the requisite intent to find a violation.
574	Whether a corporation may coordinate with candidates or political committees on the content, timing, and distribution of advertisements that criticize or praise candidates—including	No. Texas law prohibits corporations from making campaign contributions, which includes making an expenditure for advertisements coordinated with a candidate or political committee that criticize or praise a candidate or the candidate's opponent. Such advertisements are campaign contributions

	those with whom the corporation coordinates and their opponents—for opposing or supporting certain legislative policies.	because they constitute things of value given with the intent that they be used in connection with a campaign for elected office and with the prior consent or approval of the candidate or committee on whose behalf the expenditure is made.
575	Whether a specific-purpose committee's contributions and expenditures trigger section 253.007's restrictions on the lobbying activity of candidates and officeholders.	Yes, if the candidate or officeholder has the authority to control the contributions accepted and expenditures made by the specific-purpose committee. Contributions accepted by a political committee controlled by a candidate or officeholder are accepted "as a candidate or officeholder." Tex. Elec. Code § 253.007(b). Furthermore, expenditures made by a political committee controlled by a candidate or officeholder are knowingly made or authorized by the candidate or officeholder. Id.
576	Whether candidates for party precinct chair are subject to the campaign treasurer and campaign finance filing requirements of Title 15 of the Texas Election Code.	No. Title 15 of the Texas Election Code requires candidates for public office and certain candidates for state and county party offices to designate campaign treasurers and file campaign finance reports. It does not require candidates for precinct offices of political parties to designate campaign treasurers or file campaign finance reports.
577	Whether an employee of a university system participates in a procurement or contract negotiation for the purposes of Section 572.069 of the Government Code when the employee informally recommends an attorney to provide outside legal services to the university system decision makers, but has no involvement in the formal selection process or negotiating the terms of the contract.	An employee of a university system does not "participate" in a procurement or contract negotiation by informally recommending a lawyer for outside legal services and would not be prohibited from accepting employment from the lawyer's law firm before the second anniversary of the date the employee's outside counsel contract was signed.
578	Whether a government employee's direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation under Section 572.069 of the Government Code. Whether Section 572.069 of the Government Code prohibits a former employee of a state agency from accepting employment from an affiliate of a person that was involved in procurements or	Direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation. Affiliates are different persons for purposes of Chapter 572 of the Government Code. Therefore, Section 572.069 of the Government Code does not prohibit a former employee of a state agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the employee participated during his state service.

	contract negotiations in which the employee participated during his state service.	
579	Whether any of the State's revolving door provisions prohibit a former state employee from accepting certain employment.	The requestor may accept the position. First, he is not a member of his agency's governing body nor is he the agency's executive head, so Section 572.054(a) does not apply. Second, as long as the position does not require him to work on any "particular matter" in which he participated as a state employee, Section 572.054(b) does not prohibit him from accepting the position. Finally, because he did not participate in any procurement or contract negotiation involving the potential employer during his state service, Section 572.069 does not prohibit him from accepting the position.
580	Whether a corporation subject to section 253.094 of the Texas Election Code may provide pro bono legal services to candidates or political committees in Texas for the purpose of challenging in court the interpretation or constitutionality of a Texas law or regulation subject to the jurisdiction of the Texas Ethics Commission.	No. Section 253.094 of the Texas Election Code prohibits corporations from making political contributions to candidates and political committees. Legal services provided without charge to candidates or political committees are in-kind contributions. When those services are given with the intent that they be used in connection with a campaign, they are in-kind campaign contributions. The described legal services would be used in connection with a campaign because the requestor's standing to pursue such a challenge would depend on its client's status as a candidate or political committee subject to the laws administered and enforced by the Commission.
581	Whether a political committee may accept political contributions through a web portal shared with an incorporated association that established and administers the political committee.	Yes. A political committee may accept political contributions that have been processed by a web portal shared with an incorporated association, provided the general-purpose committee complies with applicable recordkeeping and reporting provisions.
582	Whether a written communication, created by a political subdivision and related to a measure, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising.	No. Assuming the factual statements in the communication are true, the communication provided by the requestor is entirely informational and does not include any advocacy.
583	Whether, under the Judicial Campaign Fairness Act (JCFA), a general-purpose committee may make a maximum "campaign contribution" (up to $25,000) to a state-wide judicial candidate and a maximum "officeholder	No. The JCFA prescribes a $25,000 per-election limit on "political contributions" from general-purpose committees to a judicial candidate or officeholder regardless of whether classified as a "campaign contribution" or "officeholder" contribution.

	contribution" (up to an additional $25,000) before a general election.	
584	Whether expenditures made by a candidate to encourage donations to a local food bank are political expenditures when publicized by the candidate on a social media page that is also used for his campaign.	Yes. Expenditures incurred by a candidate in connection with charitable fundraising are political expenditures if the candidate promotes the activity on his campaign's social media page.

II. COMMISSION ACTIVITY SUMMARY

A. Sworn Complaints

During 2021-2022, a total of 658 sworn complaints were filed with the Texas Ethics Commission. The following chart shows the number of sworn complaints processed according to the type of resolution as described in Section 571.073(2)(A)-(G), Government Code.

Type of Resolution	2021	2022
Number of sworn complaints filed with the Commission	279	379
Number of sworn complaints dismissed for noncompliance with statutory form requirements	98	113
Number of sworn complaints dismissed for lack of jurisdiction	66	100
Number of sworn complaints dismissed after a finding of no credible evidence of a violation	9	19
Number of sworn complaints dismissed after a finding of a lack of sufficient evidence to determine whether a violation within the jurisdiction of the Commission had occurred	0	0
Number of sworn complaints dismissed with no finding	2	1
Number of sworn complaints dismissed because report was corrected before jurisdiction was accepted[1]	4	4
Number of sworn complaints resolved by the Commission through an agreed order[2]	102	87
Number of sworn complaints resolved by the Commission through a Final Order	3	9

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

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

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

Penalty Amount	Sworn Complaint Orders FY 2021	Sworn Complaint Orders FY 2022
$50.00	1	
$100.00	2	
$150.00		
$200.00		
$250.00	1	1
$300.00		
$400.00		1
$500.00	2	6
$600.00		
$750.00	3	
$1,000.00	1	3
$1,250.00		2
$1,500.00	2	
$2,000.00		
$2,500.00	1	2
$3,000.00		
$5,000.00	1	2
$5,500.00		1
$6,000.00		1
$7,500.00		1
$30,000.00		1

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

B. Civil Penalties for Failure to Timely File

The attached spreadsheets show summary information for fiscal years 2021 and 2022 pertaining to civil penalties imposed by the Texas Ethics Commission for failure to timely file a statement or report. Specifically, the information is organized by the type of report required to be filed with the Commission and the filer categories required to file each type of report. For each filer category, the summary shows:

- The number and amount of civil penalties that were assessed for failure to timely file the report;
- The number and amount of civil penalties waived by operation of Tex. Elec. Code § 254.164;[4]
- The number and amount of civil penalties waived by the Commission;
- The number and amount of fines due that were not waived by the Commission;
- The number and amount of fines fully paid;
- The number and amount of fines partially paid; and
- The number and amount of fines which have not yet been paid.

The amount of a civil penalty for failure to timely file a report is set by statute. The late-filing penalty is $500 for most reports. For a report due eight days before an election or for the first semiannual report due after a primary or general election, the late filing penalty is $500 for the first day the report is late and $100 a day for each day thereafter that the report is late.

If a filer accrues at least $1,000 of unpaid civil penalties, the Commission refers the matter to the Office of the Attorney General ("OAG") for collection. In fiscal year 2021, the Commission referred $629,306.00 to the OAG, and the OAG collected $61,908.04. In fiscal year 2022, the Commission referred $229,400.00 to the OAG, and the OAG collected $43,453.68. The OAG's collections on behalf of the Commission are included in the attached spreadsheets.

[4] Tex. Election Code § 254.164 ("HB89") prohibits the Texas Ethics Commission from imposing a civil penalty on any general-purpose committee for a late-filed report if the report discloses that the committee did not accept political contributions totally $3,000 or more, accept political contributions from a single person totaling $1,000 or more, or make or authorize political expenditures totaling $3,000.

TEXAS ETHICS COMMISSION

SUMMARY OF FINES FOR LATE FILINGS ASSESSED IN FISCAL YEAR 2021*

REPORT	CIVIL PENALTIES		HB89 WAIVERS		FINES WAIVED		FINES DUE		PAID IN FULL		PAID - PARTIAL		NOT PAID	
TYPE	#	$	#	$	#	$	#	$	#	$	#	$	#	$
Personal Financial Statements	138	$69,000.00	0	$0.00	77	$36,350.00	75	$32,650.00	27	$9,850.00	0	$0.00	48	$22,800.00
Semiannual Reports														
Candidates/Officeholders	205	$273,700.00	0	$0.00	50	$48,150.00	163	$225,550.00	15	$6,700.00	1	$0.01	148	$218,849.99
Specific-purpose Committees	18	$10,200.00	0	$0.00	5	$3,700.00	13	$6,500.00	3	$1,500.00	0	$0.00	10	$5,000.00
Judicial Candidates/Officeholders	96	$104,800.00	0	$0.00	50	$38,150.00	58	$66,650.00	33	$16,950.00	0	$0.00	25	$49,700.00
Judicial Specific-purpose Committees	3	$1,500.00	0	$0.00	1	$250.00	3	$1,250.00	1	$250.00	0	$0.00	2	$1,000.00
General-purpose Committees	298	$199,100.00	148	$86,700.00	34	$29,150.00	120	$83,250.00	25	$13,750.00	0	$0.00	95	$69,500.00
County Executive Committees	7	$8,600.00	0	$0.00	1	$5,600.00	6	$3,000.00	2	$1,000.00	0	$0.00	4	$2,000.00
Monthly Reports														
General-purpose Committees	181	$90,500.00	128	$6,400.00	15	$6,950.00	42	$19,550.00	25	$11,050.00	0	$0.00	17	$8,500.00
30th Day Before Election Reports														
Candidates/Officeholders	17	$8,500.00	0	$0.00	7	$2,550.00	16	$5,950.00	7	$2,100.00	1	$400.00	9	$3,450.00
Specific-purpose Committees	1	$500.00	0	$0.00	0	$0.00	1	$500.00	1	$500.00	0	$0.00	0	$0.00
Judicial Candidates/Officeholders	3	1500	0	$0.00	3	650.00	3	$850.00	1	300.00	0	$0.00	2	$550.00
Judicial Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
General-purpose Committees	26	$13,000.00	7	$3,500.00	5	$1,900.00	16	$7,600.00	8	$3,600.00	1	$100.00	8	$3,900.00
County Executive Committees	3	$1,500.00	0	$0.00	2	$1,000.00	1	$500.00	1	$500.00	0	$0.00	0	$0.00
8th Day Before Election Reports														
Candidates/Officeholders	25	$57,900.00	0	$0.00	11	$21,150.00	12	$36,750.00	4	$1,950.00	2	$13,110.84	8	$21,689.16
Specific-purpose Committees	5	$3,700.00	0	$0.00	2	$1,500.00	3	$2,200.00	2	$1,500.00	0	$0.00	1	$700.00
Judicial Candidates/Officeholders	7	$4,400.00	0	$0.00	6	$2,950.00	5	$1,450.00	2	$300.00	0	$0.00	3	$1,150.00
Judicial Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
General-purpose Committees	102	$104,300.00	11	$37,100.00	22	$29,150.00	48	$38,050.00	27	$13,950.00	1	$500.00	21	$23,600.00
County Executive Committees	4	$15,100.00	0	$0.00	3	$11,750.00	3	$3,350.00	3	$3,350.00	0	$0.00	0	$0.00
Daily Pre-election Reports														
Candidates/Officeholders	1	$500.00	0	$0.00	1	$500.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
GPAC & SPAC Contributions Reports	0	0	0	$0.00	0	0	0	$0.00	0	0	0	0	0	$0.00
GPAC Expenditures Reports	0	0	0	$0.00	0	0	0	$0.00	0	0	0	0	0	$0.00
Special Session Reports														
Candidates/Officeholders	0	$0.00	0	$0.00	0	$0.00	10	$0.00	0	$0.00	0	$0.00	0	$0.00
Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
Totals	1,140	$968,300.00	294	$133,700.00	295	$241,400.00	598	$535,600.00	187	$89,100.00	6	$14,110.85	401	$432,389.15

* This chart reflects the fines assessed and waivers granted as of December 12, 2022 for reports due in fiscal year 2021. Numbers subject to change as filers request waivers and the Commission considers such requests.

TEXAS ETHICS COMMISSION

SUMMARY OF FINES FOR LATE FILINGS ASSESSED IN FISCAL YEAR 2022*

REPORT	CIVIL PENALTIES		HB89 WAIVERS		FINES WAIVED		FINES DUE		PAID IN FULL		PAID - PARTIAL		NOT PAID	
TYPE	#	$	#	$	#	$	#	$	#	$	#	$	#	$
Personal Financial Statements	350	$175,000.00	0	$0.00	25	$12,350.00	326	$162,650.00	38	$18,650.00	0	$0.00	288	$144,000.00
Semiannual Reports														
Candidates/Officeholders	342	$684,400.00	0	$0.00	4	$2,000.00	338	$682,400.00	7	$4,000.00	1	$321.71	331	$678,078.29
Specific-purpose Committees	40	$71,300.00	0	$0.00	0	$0.00	40	$71,300.00	3	$1,500.00	0	$0.00	37	$69,800.00
Judicial Candidates/Officeholders	97	$170,400.00	0	$0.00	2	$1,000.00	95	$169,400.00	18	$9,400.00	0	$0.00	7	$160,000.00
Judicial Specific-purpose Committees	2	$1,000.00	0	$0.00	0	$0.00	2	$1,000.00	0	$0.00	0	$0.00	2	$1,000.00
General-purpose Committees	322	$236,900.00	116	$72,300.00	4	$1,650.00	204	$171,950.00	16	$7,550.00	0	$0.00	188	$164,400.00
County Executive Committees	7	$3,500.00	1	$500.00	0	$0.00	6	$3,000.00	0	$0.00	0	$0.00	6	$3,000.00
Monthly Reports														
General-purpose Committees	181	$93,500.00	100	$50,000.00	2	$1,000.00	79	$42,500.00	18	$9,000.00	0	$0.00	61	$33,500.00
30th Day Before Election Reports														
Candidates/Officeholders	74	$37,000.00	0	$0.00	0	$0.00	74	$37,000.00	10	$5,000.00	0	$0.00	64	$32,000.00
Specific-purpose Committees	6	$4,100.00	0	$0.00	1	$500.00	5	$3,600.00	0	$0.00	0	$0.00	5	$3,600.00
Judicial Candidates/Officeholders	28	14000	0	$0.00	0	0.00	28	$14,000.00	5	2,500.00	0	$0.00	23	$11,500.00
Judicial Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
General-purpose Committees	30	$1,500.00	3	$1,500.00	4	$1,850.00	24	$11,650.00	6	$2,650.00	0	$0.00	18	$9,000.00
County Executive Committees	0	$0.00	0	$0.00	0	$0.00	1	$0.00	0	$0.00	0	$0.00	0	$0.00
8th Day Before Election Reports														
Candidates/Officeholders	80	$329,000.00	0	$0.00	0	$0.00	80	$329,000.00	3	$2,200.00	0	$0.00	77	$326,800.00
Specific-purpose Committees	10	$40,800.00	0	$0.00	0	$0.00	10	$40,800.00	0	$0.00	0	$0.00	10	$40,800.00
Judicial Candidates/Officeholders	25	$106,800.00	0	$0.00	1	$500.00	24	$106,300.00	2	$1,100.00	0	$0.00	22	$105,200.00
Judicial Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
General-purpose Committees	81	$298,200.00	9	$14,200.00	1	$7,800.00	72	$276,200.00	4	$2,100.00	2	$1,000.00	68	$273,100.00
County Executive Committees	2	$1,000.00	0	$0.00	0	$0.00	2	$1,000.00	0	$0.00	0	$0.00	2	$1,000.00
Daily Pre-election Reports														
Candidates/Officeholders	1	$2,000.00	0	$0.00	0	$0.00	1	$2,000.00	0	$0.00	0	$0.00	1	$2,000.00
GPAC & SPAC Contributions Reports	0	0	0	$0.00	0	0	0	$0.00	0	0	0	0	0	$0.00
GPAC Expenditures Reports	0	0	0	$0.00	0	0	0	$0.00	0	0	0	0	0	$0.00
Special Session Reports														
Candidates/Officeholders	13	$6,500.00	0	$0.00	2	$1,000.00	11	$5,500.00	3	$1,500.00	0	$0.00	8	$4,000.00
Specific-purpose Committees	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00	0	$0.00
Totals	1,691	$2,276,900.00	229	$138,500.00	46	$29,650.00	1,422	$2,131,250.00	133	$67,150.00	3	$1,321.71	1,218	$2,062,778.29

* This chart reflects the fines assessed and waivers granted as of December 12, 2022 for reports due in fiscal year 2022. Numbers subject to change as filers request waivers and the Commission considers such requests.

III. RECOMMENDATIONS FOR STATUTORY CHANGES

At its December 14, 2022 meeting, the Texas Ethics Commission approved the following recommendations for statutory changes. Commission staff is available to provide background information and other assistance in connection with bills that would affect the laws under the Commission's jurisdiction.

Recommendation 1: Reconsider Reporting Threshold Adjustments

Section 571.064(b) of the Government Code requires the TEC to use its rulemaking authority to adjust all reporting and registration thresholds on an annual basis pursuant to a formula set by statute. Specifically, the TEC must adjust thresholds "upward to the nearest multiple of $10 in accordance with the percentage increase for the previous year in the Consumer Price Index for Urban Consumers published by the Bureau of Labor Statistics of the United States Department of Labor."

The formula results in complicated, hard-to-remember numbers (*e.g.* $1,640 lobby registration threshold). And the difficulty is compounded by the requirement to adjust the thresholds every year.

The TEC recommends that the Legislature reconsider the current system of threshold adjustments. Options include, but are not limited to: (1) making modest changes to the adjustment formula and frequency of adjustments; or (2) repealing section 571.064(b) and, if necessary, amending each individual threshold by statutory change.

Recommendation 2: Modernize Filing Requirements

Section 254.036 of the Election Code needs minor changes to modernize the law. References to outdated technology (*i.e.*, filing by "diskette") could result in delays in public disclosure. And unnecessary filing requirements (*i.e.*, filing by "black" but not blue ink) results in needless violations.

A draft amendment to Section 254.036 of the Election Code is attached as **Exhibit A**.

Recommendation 3: Allow the TEC to Provide Notice by Email

Section 251.033 of the Election Code permits the TEC to send notices to filers about future required reports "by electronic mail." Email is less expensive, faster, and a more reliable way to notify filers of legal requirements. However, there are several laws under the TEC's jurisdiction that still require the use of traditional mail. The TEC recommends permitting the agency to send all notices by electronic mail unless the law requires delivery by registered or certified mail.

- Section 571.032 of the Government Code—which addresses how the TEC must notify sworn complaint complainants and respondents—requires the TEC to send certain notices by registered or certified mail, and other notices to be sent by "regular mail."

- Section 254.042(a) of the Election Code, Section 305.033(a) of the Government Code, and Section 572.033(a) of the Government Code—which address how the TEC must notify filers of late or missing reports—require the TEC to "immediately mail" a notice of the determination to the person required to file the report.

- Section 572.030 of the Government Code—which addresses how the TEC must notify personal financial statement filers of their obligations—requires the TEC to "mail" certain documents to each individual required to file.

Draft amendments to Sections 571.032, 305.0033(a), 572.033(a), and 572.030 of the Government Code, and Section 254.042(a) of the Election Code, is attached as **Exhibit B**.

Recommendation 4: Resolve Statutory Conflicts

The Legislature has passed different, conflicting versions of several laws over the past few biennia. The TEC recommends that the Legislature clarify these laws and resolve the conflicts, including:

- The 85th legislature passed two different versions of Section 572.032(a-1) of the Government Code. One version requires the TEC to redact home addresses, telephone numbers, and names of dependent children for all PFS filers. The other version requires the TEC to only redact the home address for judges and certain members of the Texas Civil Commitment Office. The TEC's current practice is to redact home addresses, telephone numbers, and names of dependent children for all PFS filers.

- The 81st legislature passed two different versions of Section 571.122(b-1) of the Government Code. One version states that a person must be a resident of the state to file a sworn complaint, while the other grants standing to anyone who owns real property in Texas. The TEC's current practice is to grant standing to anyone who either resides in Texas or owns real property in Texas.

- The 79th legislature passed two different versions of Section 305.024(a) of the Government Code. One version expressly includes the exception permitted under Section 305.0061(e-1) allowing gifts under $50 to be sent by mail or contract carrier, and the other version does not include that exception. The TEC's current practice is to recognize the exception.

Draft amendments to Sections 572.032 (a-1), 571.122, and 305.024 of the Government Code is attached as **Exhibit C**.

Recommendation 5: Allow TEC Staff to Comply with Criminal Investigations

Section 571.140 of the Government Code prohibits TEC staff from disclosing any information regarding a sworn complaint except in certain limited circumstances, including, for example, when such disclosure is necessary to investigate the complaint. Occasionally, criminal law enforcement authorities will request information from the TEC in connection with a criminal investigation. It is currently unclear whether TEC staff is permitted to comply with those

requests, even in response to a grand jury subpoena served on the TEC. The TEC recommends that the Legislature clarify that TEC staff may disclose information related to sworn complaints when it is requested by criminal law enforcement officials.

A draft amendment to Section 571.140 of the Government Code is attached as **Exhibit D**.

Recommendation 6: Address "Scam PACs"

A "scam PAC" is a political committee that intentionally misleads a donor into thinking that their money will support a specific candidate when it will not. The scheme is usually pretty straightforward; a political committee that is unrelated to any candidate emails a solicitation to potential donors in which it mimics the official correspondence of the candidate's own campaign. Often, it appears these scam PACs are created to enrich their creators.

There have been several recent news stories about scam PACs targeting would-be donors on both sides of the aisle.[5] No candidate or officeholder wants their supporters to be misled into giving their money to an unrelated third party. And all candidates and officeholders want intended contributions to benefit their campaigns, not someone else.

Several bills have been introduced in Congress that are designed to address scam PACs at the federal level.[6] Other legislative recommendations that have been proposed by the Federal Elections Commission include: (i) expanding personal-use provisions to cover all political committees; (ii) requiring disclosure of PAC's overhead percentage on the home page and solicitation page of PACs; and (iii) requiring PAC websites to contain prominent, plain-English information about how the PAC is actually spending its money.

Recommendation 7: Address "Sham PACs"

Similar to scam PACs, there are also "sham PACs," where a fraudulent registration is made to make a group seem legitimate during the election. The TEC has seen several instances of fake names or unwitting people being appointed treasurer of fake political committees. One way to combat this is to make the person submitting the PAC registration form verify their identity. This could be done by requiring the person filing the form to include their Driver's License number or some other form of identification.

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[5] *See, e.g.*, https://www.nytimes.com/2021/11/10/us/politics/pac-operator-charges.html (scam PAC targeting Donald Trump supporters); https://www.nytimes.com/2021/11/26/us/politics/email-political-fundraising-pitches.html (scam PAC targeting Beto O'Rourke supporters).

[6] https://www.congress.gov/bill/116th-congress/house-bill/6854/text?r=29&s=1; https://www.congress.gov/bill/117th-congress/house-bill/6494/text

EXHIBIT A

SECTION __. Sections 254.036(a) and (b), Election Code, are amended to read as follows:

(a) Each report filed under this chapter with an authority other than the commission must be in a format prescribed by the commission. A report filed with the commission that is not required to be filed electronically [~~by computer diskette, modem, or other means of electronic transfer~~] must be on a form prescribed by the commission and typed or written in black or blue ink [~~or typed with black typewriter ribbon or, if the report is a computer printout, the printout must conform to the same format and paper size as the form prescribed by the commission~~].

(b) Except as provided by Subsection (c) or (e), each report filed under this chapter with the commission must be filed electronically [~~by computer diskette, modem, or other means of electronic transfer~~], using computer software provided by the commission or computer software that meets commission specifications for a standard file format.

EXHIBIT B

SECTION __. Section 571.032, Government Code, is amended by amending Subsection (a) and adding Subsection (c) to read as follows:

a) Except as provided by Subsection (b) or (c), each written notice, decision, and report required to be sent under this chapter shall be sent by registered or certified mail, restricted delivery, return receipt requested.

c) Written notice under Section 571.123(c) that a sworn complaint does not comply with the form requirements or that the commission does not have jurisdiction over the violation alleged in the complaint may be sent by regular mail or electronic delivery.

SECTION __. Section 254.042(a), Election Code, is amended to read as follows:

a) The commission shall determine from any available evidence whether a report required to be filed with the commission under this chapter is late. On making that determination, the commission shall immediately provide written notice by regular mail or electronic delivery of [~~mail a notice of~~] the determination to the person required to file the report.

SECTION __. Section 305.033(a), Government Code, is amended to read as follows:

a) The commission shall determine from any available evidence whether a registration or report required to be filed with the commission under this chapter is late. A registration filed without the fee required by Section 305.005 is considered to be late. On making a determination that a required registration or report is late, the commission shall immediately provide written notice by regular mail or electronic delivery of [~~mail a notice of~~] the determination to the person responsible for the filing, to the commission, and to the appropriate attorney for the state.

SECTION __. Section 572.033(a), Government Code, is amended to read as follows:

a) The commission shall determine from any available evidence whether a statement required to be filed under this chapter is late. On making a determination that the statement is late, the commission shall immediately provide written notice by regular mail or electronic delivery of [~~mail a notice of~~] the

determination to the individual responsible for filing the statement and to the appropriate attorney for the state.

SECTION __. Sections 572.030(b) and (c), Government Code, are amended to read as follows:

b) The commission shall notify [~~mail to~~] each individual required to file under this subchapter of [~~a notice that~~]:

(1) the requirement [~~states~~] that the individual [~~is required to~~] file a financial statement under this subchapter;

(2) [~~identifies~~] the filing dates for the financial statement as provided by Sections 572.026 and 572.027; and

(3) [~~describes~~] the manner in which the individual may electronically file the financial statement and access instructions for filing financial statements on [~~obtain the financial statement forms and instructions from~~] the commission's Internet website[~~;~~

[~~(4) states that on request of the individual, the commission will mail to the individual a copy of the financial statement forms and instructions; and~~

[~~(5) states, if applicable, the fee for mailing the forms and instructions and the manner in which the individual may pay the fee~~].

(c) Except as provided by commission rule, the [~~The~~] notice required by Subsection (b) must be provided [~~mailed~~]:

(1) before the 30th day before the deadline for filing the financial statement under Section 572.026(a) or (c), except as otherwise provided by this subsection;

(2) not later than the 15th day after the applicable deadline for filing an application for a place on the ballot or a declaration of write-in candidacy for candidates required to file under Section 572.027(a), (b), or (c);

(3) not later than the seventh day after the date of appointment for individuals required to file under Section 572.026(b), or if the legislature is in session, sooner if possible; and

(4) not later than the fifth day after the date the certificate of nomination is filed for candidates required to file under Section 572.027(d) [~~574.027(d)~~].

SECTION __. Sections 572.030(d) and (e), Government Code, are repealed.

EXHIBIT C

SECTION __. Section 572.032(a-1), Government Code, as amended by Chapters 34 (S.B. 1576) and 983 (H.B. 776), Acts of the 85th Legislature, Regular Session, 2017, is reenacted and amended to read as follows:

(a-1) The commission shall remove an individual's [~~the~~] home address, an individual's [~~the~~] telephone number, and the names of an individual's [~~the~~] dependent children [~~of an individual~~] from a financial statement filed by the individual under this subchapter before:

(1) permitting a member of the public to view the statement;

(2) providing a copy of the statement to a member of the public; or

(3) making the statement available to the public on the commission's Internet website[~~, if the commission makes statements filed under this subchapter available on its website~~].

SECTION __. Section 571.122(b-1), Government Code, as amended by Chapters 604 (H.B. 607) and 1166 (H.B. 3218), Acts of the 81st Legislature, Regular Session, 2009, is reenacted and amended to read as follows:

(b-1) To be eligible to file a sworn complaint with the commission, an individual must be a resident of this state or must own real property in this state. A copy of one of the following documents must be attached to the complaint:

(1) the complainant's driver's license or personal identification certificate issued under Chapter 521, Transportation Code, or commercial driver's license issued under Chapter 522, Transportation Code; [~~or~~]

(2) a utility bill, bank statement, government check, paycheck, or other government document that:

(A) shows the name and address of the complainant; and

(B) is dated not more than 30 days before the date on which the complaint is filed; or

(3) a property tax bill, notice of appraised value, or other government document that:

(A) shows the name of the complainant;

(B) shows the address of real property in this state; and

(C) identifies the complainant as the owner of the real property.

SECTION __. Section 305.024(a), Government Code, as amended by Section 2, Chapter 92 (S.B. 1011), and Section 5, Chapter 206 (H.B. 1508), Acts of the 79th Legislature, Regular Session, 2005, is reenacted and amended to read as follows:

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

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

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

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

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

(A) an expenditure for transportation and lodging;

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

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

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

(E) an expenditure described by Section 305.006(b)(1), (2), (3), or (6) unless:

(i) [~~(A)~~] the registrant is present at the event; or

(ii) [~~(B)~~] the expenditure is for a gift of food or beverages required to be reported under Section 305.006(b)(4) in accordance with Section 305.0061(e-1).

EXHIBIT D

SECTION __. Section 571.140(a), Government Code, is amended to read as follows:

(a) Except as provided by Subsection (b) or (b-1) or by Section 571.1401 or 571.171, proceedings at a preliminary review hearing performed by the commission, a sworn complaint, and documents and any additional evidence relating to the processing, preliminary review, preliminary review hearing, or resolution of a sworn complaint or motion are confidential and may not be disclosed unless entered into the record of a formal hearing or a judicial proceeding, except that a document or statement that was previously public information remains public information.

SECTION __. Subchapter E, Chapter 571, Government Code, is amended by adding Section 571.1401 to read as follows:

Sec. 571.1401. CERTAIN DISCLOSURE OF INFORMATION. (a) The commission may disclose to a law enforcement agency information that is confidential under Section 571.140(a) to the extent necessary for the recipient of the information to perform a duty or function that is separate from the commission's duties and functions.

(b) Information disclosed to a law enforcement agency under this section remains confidential, and the agency receiving the information shall take appropriate measures to prevent disclosure of the information.

(c) A person commits an offense if the person discloses confidential information obtained under this section. An offense under this subsection is a Class C misdemeanor.

APPENDIX 1

TEXAS ETHICS COMMISSION

ADVISORY OPINIONS
2021-2022

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 559

March 12, 2021

ISSUE

Whether certain written communications, created by a political subdivision and related to the political subdivision's upcoming elections, constitute political advertisements for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a).

SUMMARY

When asked to consider whether a specific written communication constitutes political advertising for purposes of the Election Code, we view the communication as a whole. A significant factor in determining whether a particular communication is a political advertisement is whether it provides information without promoting a public officer or measure.

The mere fact that a communication includes an express disclaimer of support or opposition is not determinative. However, the specific communications considered in this opinion are not political advertisements for purposes of section 255.003 of the Election Code because they are entirely informational and do not include any advocacy.

FACTS

The requestor, an officer of a political subdivision, has asked the commission to consider a collection of proposed written communications related to the subdivision's general and special elections, including: (1) a 16-page brochure, (2) three posters, and (3) three social-media posts. The question presented to the commission is whether any of the written communications constitute "political advertising" for purposes of the Election Code. *See* Tex. Elec. Code §§ 251.001(16); 255.003(a).

ANALYSIS

Legal Standard:

Under section 255.003(a) of the Election Code, an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. Tex. Elec. Code § 255.003(a). "Political advertising" means, in relevant part, a communication *supporting or opposing* a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id*. at § 251.001(16) (emphasis added).

"The critical issue in determining whether an advertisement is 'political advertising' is whether it is a communication supporting or opposing a candidate or a public officer [or a measure]." Tex. Ethics Comm'n Op. No. 476 (2007) (citing Tex. Ethics Comm'n Op. No. 102 (1992)). Whether a particular communication supports or opposes a measure is a fact question. *Id*.

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

Some of the materials include an express disclaimer of support or opposition, but that is not determinative:

As an initial matter, both the brochure and the posters include the following statement: "[t]his document is to be used for informational purposes and is not intended to advocate passage or failure of any issue on the ballot." With respect to the brochure, this statement is included on multiple pages, printed in a larger typeface than the other text, and conspicuously placed.

However, the mere fact that a written communication contains an express disclaimer of support or opposition does not determine whether the communication constitutes political advertising. Instead, we view the communication as a whole. Tex. Ethics Comm'n Op. No. 476 (2007) ("We stress that whether a particular communication supports or opposes a candidate or a public officer is a fact question that can be answered only when the communication is viewed as a whole."). *Id*.

When viewed in their entirety, the materials are informational and do not support or oppose any candidate or measure:

Each of the documents, even the social media posts, include at least some factual information about the ballot measures, including but not limited to the date of the election. The brochure in

particular includes pages of information about the election, including the ballot language and a detailed description of the purpose of each ballot item. For example, in describing one of the proposed bond measures, the brochure describes: (1) the amount of the proposed bond, (2) what the money would be used for, and (3) the process by which the political subdivision determined how to use the money. The brochure also describes the potential tax implications of approving general obligation bonds.

At least some of this factual information would undoubtedly affect whether certain voters will support or oppose the measures. After reading the materials, a voter may not think the bonds are necessary or that the potential tax consequences outweigh the proposed benefits. But there is a difference between advocacy and education. The Election Code does not prohibit political subdivisions from spending public funds to enable voters to make informed decisions.

However, no matter how much factual information about the purposes of a measure election is included in a communication, *any amount* of advocacy is impermissible. Violations sometimes occur when a factual explanation is accompanied by a motivational slogan or a call to action. Common examples include, "it pays to invest in the future;" "it's time to move ahead;" "let's build a better city;" and "show that you care about our future." *See* TEC guide "A Short Guide to the Prohibition Against Using Political Subdivision Resources for Political Advertising in Connection with an Election," at https://www.ethics.state.tx.us/resources/advertising/Bsub_adv.php.

In a similar context, we have said that a communication includes "express advocacy" if it uses words or phrases such as "vote for," "support," "vote against," "defeat," "reject," or "cast your ballot for." *See* 1 Tex. Admin. Code § 20.1(18). In our opinion, the inclusion of these or any similar words or phrases would also tend to indicate that a communication contains support or opposition for purposes of section 251.001(16) of the Texas Election Code.

Importantly, the materials considered in this opinion do not include any motivational slogan or call to action; they merely describe the purposes and potential consequences of each measure. Nor do they include any of the words or phrases included in Ethics Commission Rule 20.1(18). In fact, they say exactly the opposite. For example, when the brochure includes the ballot language on page one, it states for each measure, "VOTE FOR OR AGAINST." Viewed within the context of the document, this is not a statement of support or opposition, but rather a factual description of the options voters will be presented with.

In conclusion, the written communications considered in this request do not constitute political advertisements. Consequently, section 255.003(a) of the Election Code does not prohibit the political subdivision from using public funds to create and distribute them.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 560

March 12, 2021

ISSUE

Whether an officer of a political subdivision may use public funds to print and affix graphic designs to bicycle-sharing stations, hats, t-shirts, and water bottles that identify the public official by name, office, and include the following statement: "Funding for this Station Provided by [the requestor]."

SUMMARY

When asked to consider whether a specific written communication constitutes political advertising for purposes of the Election Code, we view the communication as a whole. The mere fact that the name of a public officer appears in a written communication does not determine whether the communication constitutes political advertising, but the context and frequency with which it appears are relevant to making that determination.

The written communications considered in this opinion constitute political advertisements because they identify a public officer as such, include his name in a conspicuous manner, and promote the officer by crediting him with funding a public resource that is paid for by the political subdivision. Rather than being primarily informational, the primary purpose of the communications appears to be to support the incumbent official.

FACTS

The requestor is an elected officer of a political subdivision. His request asks the commission whether he may use the political subdivision's funds to print certain graphic designs and affix them to bicycle-sharing stations, hats, t-shirts, and water bottles in connection with a bicycle-sharing program that is also funded by the political subdivision. Each design includes the name of the bicycle-sharing program and the name of the office held by the requestor. Also included on each design—in smaller print, but set apart from any other text—is the following statement: "Funding for this Station Provided by [the requestor]." The statement includes both the requestor's name and identifies the office he holds.

ANALYSIS

Legal Standard:

Under section 255.003(a) of the Election Code, an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. Tex. Elec. Code § 255.003(a). "Political advertising" means, in relevant part, communication *supporting or opposing* a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id*. at § 251.001(16) (emphasis added).

"The critical issue in determining whether an advertisement is 'political advertising' is whether it is a communication supporting or opposing a candidate or a public officer." Tex. Ethics Comm'n Op. No. 476 (2007) (citing Tex. Ethics Comm'n Op. No. 102 (1992)). Whether a particular communication supports or opposes a candidate or a public officer is a fact question. *Id*.

"The mere fact that the name of a public officer or the picture of a public officer appears in a [written communication] would not determine whether the communication constitutes political advertising." *Id*. However, the context and frequency with which the name or picture appears are relevant to making that determination. *Id*. For example, we have cautioned against "the use of personally phrased references, such as the use of the public officer's name, in particular when those references are set apart from other text." *Id*. However, including a public official's name or office may not be political advertising if "the communication provides information and a discussion of official activities without promotion of the public officer." *Id*.

We have applied this standard in several prior opinions. For example, in Ethics Advisory Opinion No. 476, we considered a four-page newsletter that included several photographs of a public officer and his printed name in a type face that was "bolded or larger than the main text." We concluded that, "when viewed as a whole," the newsletter constituted support of a public officer for purposes of the Election Code's definition of "political advertising." *Id*. (citing Tex. Elec. Code § 251.001(16)).

In Ethics Advisory Opinion No. 506, we considered a refrigerator magnet that prominently displayed an individual photograph of a public officer standing in front of a representation of a city seal, the name of the public officer in a print size that was larger than any other text on the magnet, the name of the office the public officer held, and the text "DEDICATION to (1) Timely Constituent Response! (2) Responsible City Spending! (3) Standing up for residents, businesses, and for what is right and just! Our #1 Priority." Tex. Ethics Comm'n Op. No. 506 (2012). We concluded that the magnet constituted "self-promotion of a public officer because the name and photograph of the public officer appear in an unduly conspicuous way and the three-item list promotes the public officer's priorities." *Id*.

Conversely, in Ethics Advisory Opinion No. 211, we concluded that a brochure that described the duties of a justice of the peace court and only contained the name of the incumbent in the letterhead and not in an unduly conspicuous way did not constitute support and thus was not

"political advertising" for purposes of section 251.001(16) of the Election Code. Tex. Ethics Comm'n Op. No. 211 (1994).

The Graphic Designs Include Support for a Public Official, and as such are Political Advertisements:

We conclude that the designs constitute political advertisements for purposes of section 255.003 of the Election Code. They identify a public officer as such, include his name in a conspicuous manner, and promote the officer by crediting him with funding the stations. The included statement, which identifies the requestor by name and office and credits him with funding the bicycle-sharing stations, appears in a smaller print size than the rest of the design. However, it is "set apart from other text" and is prominent because there is very little competing text. *See* Tex. Ethics Comm'n Op. No. 476 (2007).

Furthermore, the designs are self-promotional rather than informational. *See* Tex. Ethics Comm'n Op. No. 211 (1994); *see also* 1 Tex. Admin. Code § 26.2(3)(A). They do not include any information about how to use the bicycle-sharing program; nor do they include any information about the duties of the requestor's office. In fact, the only information included on the designs is the purported source of funding for the bicycle-sharing program, namely, the requestor. In short, the designs would lead one to reasonably believe "that the purpose of the communication was to support the incumbent." Tex. Ethics Comm'n Op. No. 211 (1994).

For these reasons, the designs constitute political advertisements. Tex. Elec. Code § 251.001(16). Consequently, the political subdivision may not use public funds to affix them to bicycle-sharing stations, hats, t-shirts, or water bottles. Tex. Elec. Code § 255.003(a).

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 561

June 17, 2021

ISSUE

May a judicial officer create—or coordinate the creation of—photographs of his courtroom for use in political advertisements? Does it make a difference if the photographs are taken from the gallery, the area in front of the bench, or behind the bench?

May a judicial officer use, for political advertisements, photographs that are created without his cooperation or coordination, even if they show the officer behind the bench? **(AOR-639)**

SUMMARY

Section 255.003(a) of the Texas Election Code does not apply to district judges because they are not officers or employees of political subdivisions.

Section 39.02(a)(2) of the Penal Code prohibits judges from using their courtrooms to create political advertisements, but not from repurposing material that is created lawfully.

FACTS

The requestor is a judicial officer who seeks clarification of Ethics Advisory Opinion ("EAO") No. 550 as it applies to a judge's use of photographs taken in his courtroom.

Specifically, the requestor asks whether he may use, for political purposes, photographs that are taken in different parts of the courtroom, such as the gallery, the area in front of the bench, or behind the bench. The requestor states that his courtroom is open anytime the building is open, but that he typically restricts the public to the gallery, permits attorneys into the area in front of the bench, and allows no one but himself behind his bench. Exceptions are made for ceremonies like weddings or adoptions, or for public tours of the courthouse, when the requestor allows the public into the area in front of the bench, and, if requested, even behind his bench.

Separately, the requestor asks whether he is permitted to use, for political purposes, photographs that are published in the public domain, even if they show him behind the bench. He specifically identifies multiple sources of public-domain photographs, including "local media outlets (print, TV, and Internet)" and "social media (from ZOOM hearings)."

ANALYSIS

Section 255.003(a) of the Election Code does not apply to the requestor because he is not an officer or employee of a political subdivision.

Unlike section 39.02(a)(2) of the Penal Code—which applies to all "public servant[s]"—section 255.003(a) of the Election Code applies only to officers and employees of "political subdivisions." Tex. Elec. Code § 255.003(a). For the following reasons, the requestor is neither an officer nor employee of a political subdivision, and thus section 255.003(a) does not apply to his use of his courtroom.

The Texas Election Code defines "political subdivision" to mean a county, city, or school district or any other governmental entity that (1) embraces a geographic area with a defined boundary, (2) exists for the purpose of discharging functions of government, and (3) possesses authority for subordinate self-government through officers selected by it. Tex. Elec. Code § 1.005(13). The Texas Supreme Court has further defined "political subdivisions" as having "the power to assess and collect taxes …." *Guaranty Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 531 (Tex. 1980).

The requestor in this case is a judge of a Texas judicial district, also known as a district court. District courts are created by the Texas Constitution, and they are the trial courts of general jurisdiction of the state of Texas. Tex. Const. art. V. §§ 7-8. Each county of Texas must be served by at least one district court, but in sparsely populated areas of the state, several counties may be served by a single district court. In other words, judicial districts satisfy the first two elements of the definition of political subdivision because they embrace a geographic area within a defined boundary, and they exist for the purpose of discharging functions of government.

But district courts neither possess the authority for subordinate self-government through officers selected by it, nor do they have the power to assess and collect taxes. Instead, they are part of the state government's judicial branch. *See* Tex. Const. art. V. §§ 7-8. Consequently, district judges are not officers or employees of political subdivisions, they are officers of state government. *See* Tex. Elec. Code § 1.005(18-1) (defining "state judge" to include district court judges). Therefore, section 255.003(a) does not apply to the requestor, and no use of his courtroom would constitute a violation of that section.

The Penal Code prohibits judges from using their courtrooms to create political advertisements, but not from repurposing material that is created lawfully.

Ethics Advisory Opinion No. 550 concludes that a 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." Tex. Ethics Comm'n Op. No. 550 (2019).[1] Conversely, a

[1] Section 39.02(a)(2) 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 "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

"public area of a government facility" that is "equally accessible" to everyone is not in the "custody or possession" of a public officer for purposes of the Penal Code, and thus may be used for political advertisements. *Id*.

Courtrooms are not "equally accessible" to judges and the general public. *See* Tex. Ethics Comm'n Op. No. 550 (2019). Judges may exclude the public from their courtrooms when no proceedings are taking place and even during certain official business. [2] The law requires judges to allow the public to access their courtrooms during other proceedings, but even then, it affords them significant discretion to control the behavior of visitors.[3] In short, a judge nearly always has more access to, and more rights within, his own courtroom than anyone else.

The requestor says that he invites the public to tour his courtroom when it is not in session and even occasionally allows members of the public to sit behind his bench. However, the fact that he has the authority to grant or deny that permission is evidence of his "custody or possession" of the courtroom. *See* Tex. Penal Code § 39.02(a)(2). To put it plainly, the requestor's opponent would need permission to take a photograph from behind the requestor's bench, but the requestor himself would not need anyone's permission, much less his political opponent's.

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of the public servant's office or employment." A public servant, as defined in the Penal Code, includes a public officer. Tex. Penal Code §1.07(a)(7).

[2] Under both state and federal law, criminal defendants have a constitutional right to a "public trial." *Levine v. United States*, 362 U.S. 610, 616 (1960). However, the public's right to access criminal trials is not absolute. *See Hernandez v. State*, 914 S.W.2d 219, 221-22 (Tex. App.—El Paso 1996), pet. ref'd) ("[r]easonable limitations on public attendance may be imposed where they are necessary to protect a state interest that outweighs the defendant's right to public scrutiny.").

The public's right to access civil proceedings is even more limited. In what is called the "open-courts" provision, the Texas Constitution states that "[a]ll courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have remedy by due course of law." Tex. Const. art. 1 § 13. However, the Supreme Court of Texas has refused to construe the open-courts provision as guaranteeing the public a right to access court proceedings, and has permitted, for example, excluding the public to preserve the trade secrets of litigants. *In re M-I L.L.C.*, 505 S.W.3d 569, 577-78 (2016) ("To the extent the open-courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect countervailing interests, such as the preservation of trade secrets.").

State law also permits judges to conduct certain proceedings privately, at their discretion. For example, the Texas Family Code allows judges to exclude the public from certain hearings involving juveniles, and presumes that hearings involving a child under the age of 14 would be closed to the public unless the judge "finds that the interest of the child or the interests of the public would be better served by opening the hearing to the public." Tex. Fam. Code § 54.08.

[3] *See*, *e.g.*, *Garcia v. State*, 2005 Tex. App. LEXIS 5405, *8 (Tex. App.—San Antonio 2005, pet. denied); *see also In re Bell*, 894 S.W.2d 119, 127-131 (Tex. 1995) (judges are given "wide latitude" to use their contempt powers to enforce order and decorum in the courtroom). This authority extends not only to attorneys appearing before the court, but to spectators as well. *See*, *e.g.*, *Batiste v. State*, 2013 Tex. Crim. App. Unpub. LEXIS 657, *29 (Tex. Crim. App. June 5, 2013) (not designated for publication). And a failure to comply with this authority can result in a finding of contempt and possible imprisonment. *See Ex. Parte Gonzalez*, 238 S.W. 635, 636 (Tex. 1922) (orig. proceeding) (the purpose of contempt is to "compel due decorum and respect in [the judge's] presence").

The requestor also says that his personal policy is to keep his courtroom open to the public whenever the courthouse itself is open. However, he confirmed that there is nothing preventing him from changing that policy and using the key given to him as a judicial officeholder to lock his courtroom when it is not in use. Again, judge's authority to adopt a policy that determines when the public may enter their courtrooms when not in use demonstrates their custody or possession of the space. *See* Tex. Penal Code § 39.02(a)(2).

Consequently, and in response to the requestor's first question, if a judge were to personally create—or coordinate with a third party to create—a photograph anywhere in his courtroom for use in a political advertisement, then he or she would derive a private benefit from the use of a government resource that is in his or her custody or possession, in violation of Section 39.02(a)(2).

However, the Penal Code does not prohibit public servants from repurposing an image that is created for a separate, lawful purpose. For example, if a journalist attends an open court proceeding, sits in the gallery as a member of the general public, and takes a photograph that is published in a newspaper or periodical, a judge may repurpose that photograph for his campaign. Under these circumstances, the judge does not "misuse" the government property in his custody for private benefit. Tex. Penal Code § 39.02(a)(2). Rather, the judge uses his courtroom for its proper governmental purpose, and a journalist independently uses his rights as a member of the general public to take and publish a photograph from inside the room.

Whether a judge may play a part in the creation of the images himself is another matter, and the answer depends on the circumstances. For example, the requestor asks whether he may repurpose the official video of his court's proceedings—recorded and posted to the internet with government-owned equipment—for use in political advertisements. In our opinion, such use is permissible because the video's intended purpose is to fulfil a proper governmental function and would be recorded regardless of whether the judge later repurposes it for a political advertisement. In other words, the use is "incidental," and "does not result in additional costs or damage to the state" or "impede agency functions." *See* Tex. Ethics Comm'n Op. Nos. 134 (1993) (state employee's use of state telephones to place personal local calls), 372 (1997) (state employee's use of state cellular phones, email, and Internet); 395 (1998) (state employee's use of state telephones to place long-distance personal calls).

On the other hand, a judicial officer would violate section 39.02(a)(2) if he were to coordinate the creation of photographs or video in his courtroom that would not otherwise be taken for official purposes and use them for political advertising. *See* Tex. Ethics Comm'n Op. No. 550 (2019). Because courtrooms are government property placed in the custody or possession of judicial officers that are not "equally accessible" to the public, their use for political advertising constitutes a "misuse[]" for purposes of section 39.02(a)(2). *Id*.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 562

June 17, 2021

ISSUE

Whether section 305.006(c) of the Texas Government Code requires registered lobbyists to disclose expenditures on social media advertising.

Whether a mass media communication can, for purposes of Section 305.006(c)(2), "support or oppose pending legislation" even if it does not expressly state "support/oppose this legislation." **(AOR-645)**

SUMMARY

Communications published on social media websites are "mass media communications" for purposes of Section 305.006(c) of the Texas Government Code. Consequently, lobbyists registered under Chapter 305 of the Texas Government Code must report their expenditures for advertisements on social media (sometimes called social media "boosts") if the communications support or oppose or encourage another to support or oppose pending legislation or administrative action.

A mass media communication can support or oppose pending legislation even if it does not include the phrase "support/oppose this legislation" or similar words or phrases such as "vote for," "vote against," "defeat," or "reject." A communication supports or opposes pending legislation if, when viewed as a whole, it would lead one to reasonably believe that its purpose was to support or oppose the pending legislation.

FACTS

The requestor is an employee of an organization that also employs a person registered as a lobbyist under Chapter 305 of the Texas Government Code. The registered lobbyist files on behalf of both himself and the organization.

The requestor seeks answers to two questions regarding the application of Chapter 305. First, the requestor asks whether registered lobbyists must disclose how much they spend on advertising on social media, even if the communication is not directed at a lawmaker or elected official. Second, and assuming the first question is answered in the affirmative, the requestor asks

whether expenditures for social media advertising would need to be disclosed by a registered lobbyist even if the communications did not explicitly say "support/oppose this legislation."

ANALYSIS

Section 305.006 of the Texas Government Code requires registered lobbyists to file reports with the Texas Ethics Commission ("Commission") and defines the required contents of those reports. Subsection (b) requires lobbyists to report their expenditures "made to communicate *directly* with a member of the legislative or executive branch to influence legislation or administrative action …." Tex. Gov't Code § 305.006(b) (emphasis added). In addition, Subsection (c) requires registered lobbyists to report expenditures for certain communications that are *not made directly* to members of the legislative or executive branch:

> (c) The report must also list the total expenditures made by the registrant or by others on the registrant's behalf and with the registrant's consent or ratification for broadcast or print advertisements, direct mailings, and other mass media communications if:
>
> (1) the communications are made to a person other than a member, employee, or stockholder of an entity that reimburses, retains, or employs the registrant; and
> (2) the communications support or oppose or encourage another to support or oppose pending legislation or administrative action.

Tex. Gov't Code § 305.006(c).

Chapter 305 expressly includes broadcast or print advertisements and direct mailings as types of "mass media communications." *Id*. The question addressed by this opinion is whether communications published on social media websites are "mass media communications" for purposes of the lobby law. *See id*.

In our opinion, the answer is yes, posts to social media are mass media communications for purposes of the lobby law, and expenditures for such communications must be reported by registered lobbyists if the remaining conditions of Subsection 305.006(c) apply. In this context, the Commission sees no good reason to distinguish between communications that are published in print and those that are published on social media.

However, registered lobbyists are only required to report these expenditures if the other conditions of Section 305.006(c) apply. First, the communication must be "made to a person other than a member, employee, or stockholder of an entity that reimburses, retains, or employs the registrant". Tex. Gov't Code § 305.006(c)(1). For example, a public post on Twitter would satisfy this requirement because it is broadcast to the general public, but a private message to another employee of the lobbyist's employer would not.

Second, the communication must "support or oppose or encourage another to support or oppose pending legislation or administrative action." Tex. Gov't Code § 305.006(c)(2). Chapter 305

does not define "support or oppose," so we look to our prior opinions interpreting similar language from the Texas Election Code.

Section 251.001(16) of the Texas Election Code defines "political advertising" as certain "communication[s] *supporting or opposing* a candidate for nomination or election to a public office or office of a political party, a political party, a public officer, or a measure …." Tex. Elec. Code § 251.001(16) (emphasis added). Several of the Commission's prior opinions have stated that, "[t]he critical issue in determining whether an advertisement is 'political advertising' is whether it is a communication supporting or opposing a candidate or a public officer." Tex. Ethics Comm'n Op. No. 476 (2007) (citing Tex. Ethics Comm'n Op. No. 102 (1992)).

When the Commission is asked to consider whether a communication supports or opposes a candidate, public officer, or measure for purposes of the Texas Election Code, it views the communication "as a whole." *See, e.g.* Tex. Ethics Comm'n Op. Nos. 559, 560 (2021). "Whether a particular communication supports or opposes a measure is a fact question." Tex. Ethics Comm'n Op. No. 559 (2021) (citing Tex. Ethics Comm'n Op. No. 476 (2007)).

The Commission has opined that the inclusion of "express advocacy" as defined by Rule 20.1(18)—words or phrases such as "vote for," "support," "vote against," "defeat," or "reject"—would indicate that a communication supports or opposes a candidate, official, or measure for purposes of Section 255.003(a) of the Election Code. Tex. Ethics Comm'n Op. No. 559 (2021). However, the Commission has also determined that express advocacy is *not required* for a communication to support or oppose a candidate, official, or measure. *Id*.; *see also* Tex. Ethics Comm'n Op. Nos. 560 (2021) (concluding that a communication was political advertising despite not including any express advocacy). Instead, like other jurisdictions, the Commission views the communication as a whole and considers it within the broader context in which it is distributed. *See, e.g. Vargas v. City of Salinas*, 205 P.3d 207, 209 (Cal. 2009) (Rejecting an "express advocacy" standard and finding, "under some circumstances it may be necessary to examine the 'style, tenor and timing' of a communication in order to determine whether it should be characterized as permissible or impermissible.").

A significant factor in determining whether a particular communication supports or opposes a measure is "whether the communication provides information" without promoting the measure. *Id*. (citing Tex. Ethics Comm'n Op. No. 476 (2007)). Even if the information would affect whether certain voters or elected officials would support or oppose a measure, a communication does not support or oppose a measure if it merely provides factual information. Tex. Ethics Comm'n Op. No. 559 (2021). "However, no matter how much factual information about the purposes of a measure election is included in a communication, *any amount* of advocacy" urging a person to take a particular action transforms the communication into one that supports or opposes. Tex. Ethics Comm'n Op. No. 559 (2021).

The Commission's prior opinions interpreting the phrase "supporting or opposing" in the Texas Election Code inform our interpretation of the phrase "support or oppose" in the Texas Government Code. In short, a communication supports or opposes pending legislation if it "would lead one to reasonably believe that the purpose of the communication" was to advocate for or against the pending legislation. *See* Tex. Ethics Comm'n Op. No. 560 (2021) (internal quotation removed).

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 563

September 1, 2021

ISSUES

Whether an officer or employee of a political subdivision may use public funds to advertise and produce an event that uses the officer's title, such as "Mayor's Fun Run" or "Mayor's Unity Walk."

Whether an officer of a political subdivision may announce, at a public meeting of the political subdivision that is recorded and broadcast on an Internet website, that the officer will have a booth at the event where he or she will distribute merchandise purchased with personal funds.

Whether an officer or employee of a political subdivision may spend public funds—including the use of paid staff time—to set up tents and provide tables, chairs, and traffic control for a food distribution event at which public officials from other governmental entities are present and distributing personal campaign items purchased with their campaign funds. **(AOR-642)**

SUMMARY

Section 255.003(a) does not broadly prohibit political subdivisions from producing or advertising an event that uses an official's title in its name. However, such an event that otherwise entails the use of public funds to support or oppose a candidate or measure would violate section 255.003(a).

Section 255.003(a) does not prohibit discussion of matters pending before a governmental body. However, it does prohibit one or more members of a governmental body from arranging a discussion of a matter not pending before the governmental body in the hopes that broadcasts of the discussion would influence the outcome of an election.

An officer or employee of a political subdivision may not spend public funds to produce an event for the purposes of providing a place for public officials to distribute campaign items.

FACTS

The requestor, an employee of a city, asks several questions on behalf of both herself and several elected officials and other employees of the city, including its elected mayor and city councilmembers.

First, the requestor seeks an opinion on whether the city may use city resources including staff to produce an event that uses the title of an elected official. Further, the requestor seeks an opinion on whether the city may use city resources to advertise the event. To that end, the requestor seeks an opinion on whether either of two particular written communications constitute "political advertising" for purposes of section 255.003(a) of the Texas Election Code. The first communication is a one-page advertisement for an event called "The Mayor's Unity Walk," and it includes: (1) the name of the event, (2) the name of the city's elected mayor, (3) the time and place of the event, and (4) the city's name and official logo. The second communication is identical to the first with the exception of an additional line of text with information about a city councilmember's presence at the event. The requestor asks whether the city may use public resources to create and distribute these communications in advance of the event. The requestor asks whether the answer depends on whether there is a "pending election for the office after which the event is named," whether the "incumbent has not announced his/her candidacy to run for office," or whether "the event is not a regularly held event."

Second, the requestor seeks an opinion on whether it would be a violation of section 255.003(a) for a member of the city council to announce, during a public meeting of the city, that he will have a booth at the event where he will distribute water bottles purchased with his private funds. The requestor asks whether it would violate section 255.003(a) if the public meeting was broadcast or rebroadcast over the subdivision's cable channel, its website, or any of its social media platforms.

Finally, the requestor seeks an opinion on whether it would be a violation of section 255.003(a) for employees of a political subdivision to set up tents and provide tables, chairs, and traffic control for a "food distribution event" at which public officials from other governmental entities are present and passing out not only the food but also personal campaign items purchased with their campaign funds.

ANALYSIS

Legal Standard:

Section 255.003(a) of the Texas Election Code states that an officer or employee of a political subdivision may not spend public funds for political advertising. "Political advertising" is defined in part as a "communication supporting or opposing a candidate" or "public officer." *Id.* at 251.001(16). Furthermore, oral communications may constitute "political advertising" if they are either broadcast by radio or television in return for consideration or appear on an Internet website. *Id*.

We have previously found that "the critical issue in determining whether an advertisement is 'political advertising'" is, as relevant here, whether a communication supports or opposes a public officer. Tex. Ethics Comm'n Op. No. 102 (1992). Whether a communication supports or opposes a public officer is a "fact question that can be answered only when the communication is viewed as a whole." Tex. Ethics Comm'n Op. No. 476 (2007).

Under most circumstances, the requestor's written communication and named event would not violate section 255.003:

Whether a political subdivision may spend public funds to produce and advertise an event is a fact-specific inquiry. Section 255.003(a) would prohibit an incumbent official from using public funds to pay for what amounts to a campaign event for his reelection. However, we do not believe that the mere use of an official's title in the name of an event—such as the "Mayor's Unity Walk"—renders the event a political advertisement.

Section 255.003(a) may at times require a consideration of the circumstances surrounding the expenditure of public funds. For example, the timing of an event—particularly in relationship to an election date—may be relevant to whether the event amounts to political advertising. But, we again stress that the inquiry required by section 255.003(a) demands a holistic consideration of the facts and does not focus on any single factor. *See* Tex. Ethics Comm'n Op. No. 476 (2007).

Here, the requestor has asked whether surrounding circumstances are relevant, but did not provide the Commission with any specific circumstances to consider. We struggle to imagine any set of facts that would render either the event described in this request or the submitted advertisement for that event a political advertisement. In this instance, the one-page advertisement provided by the requestor features two lines of text that identify a public official: one with the title of the event ("The Mayor's Unity Walk") and the other with the name of the city's Mayor. Neither mention is unduly conspicuous, and neither the instances of identification nor the flyer as a whole indicate that the purpose of the flyer is to support the incumbent. *See* Tex. Ethics Comm'n Op. No. 211 (1994) (concluding that a brochure describing the duties of a justice of the peace was not political advertising because its inclusion of the incumbent's name was not "unduly conspicuous.").

The requestor also asks whether using public funds to create and distribute a second, similar communication would violate section 255.003(a). This second communication is identical to the first with the exception of an additional line of text with information about a city councilmember's presence at the event. We reach the same conclusion with respect to this communication. Standing alone and without the benefit of knowing the surrounding circumstances, the communication does not appear to be a political advertisement.

The test under section 255.003(a) is whether the expenditure of public funds would lead one to "reasonably believe" that the purpose of the expenditure was to support the incumbent. Tex. Ethics Comm'n Op. No. 560 (2020) (citing Tex. Ethics Op. No. 211 (1994)). Therefore, we cannot categorically say that there are *no* set of possible circumstances that would lead someone to reasonably believe that the purpose of this event or these advertisements was to support the incumbent mayor or city council member. For example, and without reaching any conclusion

because it is outside the scope of this request, we believe the question would be more challenging if a "Mayor's Unity Walk" was scheduled on election day and involved an organized walk to a polling place.

In summary, we conclude that under most circumstances section 255.003(a) would not prohibit officers or employees of political subdivisions from spending public funds to produce the communications or event in question. The requestor provides no information that would indicate that the timing of the event relative to an upcoming election, the potential candidacy of the elected official in that election, or whether the event is held regularly would make this particular communication or event impermissible under section 255.003(a). However, we believe it is possible for an elected official or political subdivision to use public funds to produce and promote an event that is deliberately timed and arranged to support or oppose a candidate or public official. Each case must be viewed as a whole.

Section 255.003 does not prevent public officers from discussing matters properly before their respective government bodies:

The requestor next asks whether a city councilmember may make remarks regarding their presence at a city event during a city council meeting that is broadcast online. As a threshold matter, oral communications that "appear on an Internet website" can constitute political advertising, provided the communication "[supports] or [opposes] a candidate" or "public officer." Tex. Elec. Code §§ 251.001(16)(A), 255.003(a). And the use of city resources (*e.g.* cameras, computers, and bandwidth) to broadcast the meeting online would constitute an expenditure of public funds for purpose of section 255.003(a). Tex. Ethics Comm'n Op. No. 550 (2019) ("The 'spending' of public funds includes the use of a political subdivision's employees work time or a political subdivision's equipment or facilities."). However, the Commission previously concluded—and at least one state court of appeals agrees—that section 255.003(a) was not intended to "inhibit discussion of matters pending before a government body." Tex. Ethics Comm'n Op. No. 456 (2004); *In re Turner*, 558 S.W.3d 796, 800 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

As we have previously stated, whether a communication supports or opposes a candidate is a fact-specific inquiry. And in this particular instance, the requestor has not provided any information that would indicate the matter is, or is not, pending before the city council. However, assuming that the remarks relate to a matter pending before the council and are not made "with the hope that the discussion and its broadcast would influence the outcome of an election," then there is no violation of section 255.003(a). *Id*. ("It is not possible, however, to state that comments by city council members at a recorded public meeting could never give rise to a violation of section 255.003 because we can imagine a situation in which one or more city council members might arrange a discussion of a matter not pending before the council with the hope that broadcasts of the discussion would influence the outcome of an election.").

Spending public funds to facilitate the distribution of political advertising is spending public funds for political advertising:

Finally, the requestor asks whether the city may spend public funds to produce an event at which elected officials from other government entities are invited to distribute their own campaign materials. Under this request, no public funds are being spent to *create* the political advertisements. However, in our view, Section 255.003(a) prohibits officers and employees of political subdivisions from spending public funds to facilitate the distribution of political advertisements. The city's production of an event deliberately designed to provide a platform for the dissemination of political advertising is therefore prohibited by section 255.003.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 564

September 1, 2021

ISSUE

Whether a written communication, created by a political subdivision and related to the political subdivision's special election, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a). **(AOR-643)**

SUMMARY

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

FACTS

The requestor is the legal representative of a town and its town secretary, who is an officer or employee of that political subdivision. The town called a special election to consider adopting a home rule charter. The requestor has asked the commission to consider "a draft cover letter that the Town Secretary plans to send to each registered voter of the Town forwarding a copy of the proposed Home Rule Charter document pursuant to the requirements of Texas Local Government Code 9.003(b)." The question presented to the commission is whether the written communication constitutes "political advertising" for purposes of the Election Code. *See* Tex. Elec. Code §§ 251.001(16); 255.003(a).

ANALYSIS

Legal Standard:

Under Section 255.003(a) of the Election Code, an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. Tex. Elec. Code § 255.003(a). "Political advertising" means, in relevant part, a communication *supporting or opposing* a candidate for nomination or election to a public office or office of a

political party, a political party, a public officer, or a measure that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id*. at § 251.001(16) (emphasis added).

"The critical issue in determining whether an advertisement is 'political advertising' is whether it is a communication supporting or opposing a candidate or a public officer [or a measure]." Tex. Ethics Comm'n Op. No. 476 (2007) (citing Tex. Ethics Comm'n Op. No. 102 (1992)). Whether a particular communication supports or opposes a measure is a fact question. *Id*.

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

Section 255.003(a) does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure. Tex. Elec. Code § 255.003(b).

<u>When viewed in its entirety, the letter is informational and does not support or oppose any candidate or measure:</u>

The cover letter contains factual information about the ballot measure, including the date the Home Rule Charter Commission was established, the date the Home Rule Charter Commission submitted the proposed Charter to the Town Council, the date the Town Council ordered a special election, and the date of the special election. The letter states the type of municipality the town is currently and the type of municipality it would be if the measure were to pass. The letter next includes the language of the proposition to adopt the Home Rule Charter with the words "FOR ( )" or "AGAINST ( )" as the language will appear on the ballot. Finally, the letter concludes with a statement from the town secretary that, by adoption of the election order, the town council directed her to mail a copy of the proposed charter to each registered voter in the town.

No matter how much factual information about the purposes of a measure election is included in a communication, *any amount* of advocacy is impermissible under Section 255.003(a). We have said that a communication includes "express advocacy" if it uses words or phrases such as "vote for," "support," "vote against," "defeat," "reject," or "cast your ballot for." *See* 1 Tex. Admin. Code § 20.1(18). In our opinion, the inclusion of these or any similar words or phrases would also tend to indicate that a communication contains support or opposition for purposes of Section 251.001(16) of the Texas Election Code.

The cover letter considered in this opinion does not include any express advocacy, motivational slogan, or call to action. It describes the chronological sequence of events for voter approval of the home rule charter, the purpose of the charter, and language of the measure. Viewed as a whole,

this letter is not a statement of support or opposition, but rather a factual description of the measure the voters will be presented with.

In conclusion, the cover letter considered in this request does not constitute political advertising and does not advocate passage or defeat of a measure. Consequently, Section 255.003(a) of the Election Code does not prohibit the town secretary, or any other officer or employee of the political subdivision, from using public funds to create and distribute the written communication.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 564

September 1, 2021

ISSUE

Whether a written communication, created by a political subdivision and related to the political subdivision's special election, constitutes political advertising for purposes of the Election Code's prohibition against using public funds for political advertising. Tex. Elec. Code § 255.003(a). **(AOR-643)**

SUMMARY

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

FACTS

The requestor is the legal representative of a town and its town secretary, who is an officer or employee of that political subdivision. The town called a special election to consider adopting a home rule charter. The requestor has asked the commission to consider "a draft cover letter that the Town Secretary plans to send to each registered voter of the Town forwarding a copy of the proposed Home Rule Charter document pursuant to the requirements of Texas Local Government Code 9.003(b)." The question presented to the commission is whether the written communication constitutes "political advertising" for purposes of the Election Code. *See* Tex. Elec. Code §§ 251.001(16); 255.003(a).

ANALYSIS

Legal Standard:

Under Section 255.003(a) of the Election Code, an officer or employee of a political subdivision may not knowingly spend or authorize the spending of public funds for political advertising. Tex. Elec. Code § 255.003(a). "Political advertising" means, in relevant part, a communication *supporting or opposing* a candidate for nomination or election to a public office or office of a

political party, a political party, a public officer, or a measure that appears in a pamphlet, circular, flier, billboard or other sign, bumper sticker, or similar form of written communication. *Id*. at § 251.001(16) (emphasis added).

"The critical issue in determining whether an advertisement is 'political advertising' is whether it is a communication supporting or opposing a candidate or a public officer [or a measure]." Tex. Ethics Comm'n Op. No. 476 (2007) (citing Tex. Ethics Comm'n Op. No. 102 (1992)). Whether a particular communication supports or opposes a measure is a fact question. *Id*.

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

Section 255.003(a) does not apply to a communication that factually describes the purposes of a measure if the communication does not advocate passage or defeat of the measure. Tex. Elec. Code § 255.003(b).

<u>When viewed in its entirety, the letter is informational and does not support or oppose any candidate or measure:</u>

The cover letter contains factual information about the ballot measure, including the date the Home Rule Charter Commission was established, the date the Home Rule Charter Commission submitted the proposed Charter to the Town Council, the date the Town Council ordered a special election, and the date of the special election. The letter states the type of municipality the town is currently and the type of municipality it would be if the measure were to pass. The letter next includes the language of the proposition to adopt the Home Rule Charter with the words "FOR ( )" or "AGAINST ( )" as the language will appear on the ballot. Finally, the letter concludes with a statement from the town secretary that, by adoption of the election order, the town council directed her to mail a copy of the proposed charter to each registered voter in the town.

No matter how much factual information about the purposes of a measure election is included in a communication, *any amount* of advocacy is impermissible under Section 255.003(a). We have said that a communication includes "express advocacy" if it uses words or phrases such as "vote for," "support," "vote against," "defeat," "reject," or "cast your ballot for." *See* 1 Tex. Admin. Code § 20.1(18). In our opinion, the inclusion of these or any similar words or phrases would also tend to indicate that a communication contains support or opposition for purposes of Section 251.001(16) of the Texas Election Code.

The cover letter considered in this opinion does not include any express advocacy, motivational slogan, or call to action. It describes the chronological sequence of events for voter approval of the home rule charter, the purpose of the charter, and language of the measure. Viewed as a whole,

this letter is not a statement of support or opposition, but rather a factual description of the measure the voters will be presented with.

In conclusion, the cover letter considered in this request does not constitute political advertising and does not advocate passage or defeat of a measure. Consequently, Section 255.003(a) of the Election Code does not prohibit the town secretary, or any other officer or employee of the political subdivision, from using public funds to create and distribute the written communication.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 565

September 1, 2021

ISSUES

Whether section 255.003(a) of the Election Code prohibits officers and employees of a special purpose district from spending public funds to create and distribute certain written communications. **(AOR-650)**

SUMMARY

While section 255.003(a) applies to the requestor, a special purpose district, it does not prohibit the district's officers and employees from spending public funds to create and distribute the specific communications considered in this request because they are entirely informational and do not include any advocacy.

FACTS

The requestor is the legal representative of a special purpose district authorized by state law. The district has specific powers under state law, including the power to impose certain taxes and fees; to adopt and enforce reasonable rules and regulations for the administration and operation of the district and its properties and facilities, and to provide for public safety and security within the district. The district provides certain municipal types of services including parks, facilities, and recreation centers, but not other core services, such as law enforcement, transportation infrastructure maintenance, and water management services.

The district encompasses a geographic area with boundaries defined by law. It is governed by an elected board of governors, and every qualified voter within the district is eligible to vote in their elections. After being elected, the board of directors elect a chairman, a vice chairman, a secretary, and any other officers the board considers necessary.

The requestor states that the district's board of directors is considering whether to call an election to incorporate as a municipality.[1] In connection with that election, the district wants to provide certain educational materials to voters. The requestor has provided those materials to the

[1] The requestor states that the district has the authority to incorporate as a municipality. For purposes of this opinion, the Commission relies on that statement as true.

Commission for review and asked for an advisory opinion addressing whether they contain political advertising for purposes of section 255.003(a) of the Texas Election Code.

ANALYSIS

As a political subdivision, the requestor may not spend public funds for political advertising:

The threshold question addressed by this opinion is whether Section 255.003(a) of the Texas Election Code applies to the district. That section prohibits officers and employees of political subdivisions from "knowingly spend[ing] or authoriz[ing] the spending of public funds for political advertising." Tex. Elec. Code § 255.003(a). The requestor represents a special purpose district, and the Commission has never before issued an opinion addressing whether special purpose districts are political subdivisions for purposes of section 255.003(a).

The Election Code defines "political subdivision" as "a county, city, or school district or *any other governmental entity that*: (A) embraces a geographic area with a defined boundary; (B) exists for the purpose of discharging functions of government; and (C) possesses authority for subordinate self-government through officers selected by it." Tex. Elec. Code § 1.005(13) (emphasis added). The district, having the above-described powers, boundaries, and governance, satisfies each element of this three-part test.

The Commission therefore concludes that the district is a political subdivision for purposes of section 255.003(a) of the Election Code. Consequently, its officers and employees are prohibited from knowingly spending public funds for political advertising. "Political advertising" means, in relevant part, a communication *supporting or opposing* a measure that appears in a pamphlet, circular, flier, billboard, or other sign, bumper sticker, or similar form of written communication. Tex. Elec. Code § 251.001(16) (emphasis added).

The materials submitted with the request do not contain political advertising:

The requestor submitted for review three one-page flyers and a 10-page "Public Education Summary." The Commission has reviewed each of the documents and determined that none of them contain political advertising for purposes of section 255.003(a).

The three flyers describe: (1) the history of the district's existence and governance; (2) the district's roadmap for studying incorporation and calling an election; and (3) how the district might transition to a Home Rule City if and when the voters approve the district's incorporation as a General Law City. All three flyers use colorful graphic designs, but, fundamentally, they all provide factual content without promoting the measure. For example, the second flyer primarily outlines the steps the district would take prior to calling an election, including retaining consulting firms, studying various issues related to incorporation, and providing public forums for residents to voice their support or opposition. To the extent that it also describes the consequences of incorporation, it does so using factual terms and appears to include both the advantages (*e.g.* expanded services) and disadvantages (*e.g.* higher taxes).

The longer document summarizes the results of a study conducted by the district to consider the benefits and impacts of municipal incorporation. It describes how certain issues of governance, municipal services, and law enforcement would change if the district was to incorporate. For example, the document explains that as a special purpose district, municipal utility services are provided to residents through various Municipal Utility Districts ("MUD"), but if it was to incorporate, the district could enact an ordinance that assumes all assets, liabilities, and operations of the MUDs and begin operating as a city municipal utility. As another example, the document explains that the district is currently prohibited from directly hiring law enforcement personnel or creating a police department, but as an incorporated city it would be *required* to provide law enforcement services.

Each of the communications contain factual information that may affect whether voters will support or oppose the district's incorporation. However, "[t]he Election Code does not prohibit political subdivisions from spending public funds to enable voters to make informed decisions." Tex. Ethics Op. No. 559 (2021).

Instead, the critical issue in determining whether a particular communication supports or opposes a measure is whether it provides information "without promotion" of the measure. *Id*. (citing Tex. Ethics Op. No. 476 (2007)). "[W]hether a communication supports or opposes a measure is a fact question that can be answered only when the communication is viewed as a whole. Tex. Ethics Op. No. 476 (2007).

Here, as in some prior opinions, the communications do not include a "motivational slogan or call to action." Tex. Ethics Op. No. 559 (2021). Nor do they include any "express advocacy" as defined by the Commission's rules. *See id*. (citing 1 Tex. Admin Code § 20.1(18)). And when viewed as a whole, the Commission's conclusion is that they do not support or oppose any candidate or measure. Consequently, section 255.003(a) of the Election Code does not prohibit the district from spending public funds to create and distribute the communications.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 566

September 1, 2021

ISSUES

Whether a judge may use political contributions for consulting and travel expenses to seek an appointment to a federal judicial office. **(AOR-646)**

SUMMARY

A judge may use political contributions for consulting and travel expenses to seek an appointment to a federal judicial office.

FACTS

The requestor is a state judge who is seeking an appointment to a federal judicial office. He wishes "to use political contributions received in connection with election to a state judicial office to pay expenses, such as consulting and travel expenses, incurred in connection with seeking a federal appointment to another judicial office[.]"

ANALYSIS

Title 15 of the Texas Election Code prohibits candidates and officeholders from converting political contributions to personal use. Tex. Elec. Code § 253.035(a). "Personal use" is defined as "a use that primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office." *Id*. § 253.035(d).

The Commission has previously concluded that a federal judge may use political contributions accepted as a Texas judicial candidate or officeholder to make expenditures in connection with the federal office. Tex. Ethics. Comm'n Op. No. 445 (2002). In so holding, the Commission found that "an expenditure in connection with a federal office is no more a personal use than is an expenditure in connection with a state or local office in Texas." *Id*. The Commission has also concluded that campaign contributions received in connection with campaigns for state office may be used to campaign for a different, federal office. Tex. Ethics. Comm'n Op. No. 317 (1996) ("As a general rule, the Texas Election Code does not prohibit the use of campaign contributions received in connection with one office to campaign for another office.").

Unlike in Ethics Advisory Opinion No. 445, this requestor does not yet hold the federal judicial office, so the expenditures would not be connected with the performance of duties or activities as a "holder" of a public office. Tex. Elec. Code § 253.035(d). Therefore, the question becomes whether the requestor is a "candidate" for the federal judicial office for purposes of Title 15. *See* Tex. Elec. Code § 253.035(d) ("Personal use" is "a use that primarily furthers individual or family purposes not connected with the performance of duties or activities *as a candidate for or holder of* a public office.") (emphasis added).

Title 15 defines "candidate" broadly to mean any person "who knowingly and willingly takes affirmative action for the purpose of gaining *nomination or election* to public office or for the purpose of satisfying financial obligations incurred by the person in connection with the campaign for *nomination or election*." *Id*. at § 251.001(1) (emphasis added). The definition includes several examples of "affirmative action," including "the filing of an application for *nomination* by convention" and "the seeking of the *nomination* of an executive committee of a political party to fill a vacancy." *Id*. at §§ 251.001(1)(C), 251.001(1)(H) (emphasis added).

In our opinion, a person who knowingly and willingly takes affirmative action for the purpose of gaining an appointment to a federal judicial office—which necessarily involves being nominated first—is a "candidate" for that office under Title 15's definition. Therefore, the requestor may use political contributions accepted as a Texas judicial candidate or officeholder to pay for ordinary and necessary expenses incurred in connection with seeking appointment to a federal judicial office.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 567

September 1, 2021

ISSUES

Whether a judge may use political contributions to pay expenses related to home security systems and equipment. **(AOR-649).**

SUMMARY

A judge may use political contributions to pay ordinary and necessary expenses incurred in connection with ensuring their home security.

FACTS

The requestor is a judicial officer seeking guidance on the use of campaign funds to pay for home security measures recommended by the Texas Office of Court Administration. The requestor notes that judicial officers are provided some security when physically within the Courthouse, but are generally unprotected in most other settings, particularly at home. This lack of security can have terrible consequences. The requestor cites the shooting of a Travis County district judge in 2015 as an example of the danger that judicial officers face.

The requestor provides a personal security assessment created by the Texas Office of Court Administration. The assessment describes the requestor's home and its various vulnerabilities. The report makes many recommendations for improving security at the requestor's home, including: (1) motion sensing lights at entrances to the home, walkways around the home, and the home's garage, (2) new perimeter doors, (3) secure locks and strike plates on doors, (4) security storm doors, (5) garage shields, (6) locks on some utility boxes, (7) security cameras, (8) motion sensors, (9) gate locks, and (10) a safe.

ANALYSIS

Legal standard:

Section 253.035(a) of the Texas Election Code prohibits a candidate or officeholder from converting political contributions to "personal use." Tex. Elec. Code § 253.035(a). "Personal use"

is defined as a use that "primarily furthers individual or family purposes not connected with the performance of duties or activities as a candidate for or holder of a public office." *Id.* § 253.035(d).

In Ethics Advisory Opinion 555, the Commission considered whether a judge may use political contributions to fund the production of an educational podcast. Tex. Ethics Comm'n Op. No. 555 (2020). The Commission concluded that the contemplated podcast would be "connected to the judge's performance of official duties and activities." *Id*. As a result, "ordinary and necessary expenses" related to the creation of the podcast could be paid for with political contributions. *Id*.

In Ethics Advisory Opinion 547, the Commission found that a candidate could use political contributions to pay childcare expenses. Though this use did "further some individual or family purposes," the Commission noted that a use was not prohibited simply because it "may have some incidental benefits to the individual candidate." Tex. Ethics Comm'n Op. No. 547 (2018) (quoting Tex. Ethics Comm'n Op. No. 149 (1993)). Instead, the Commission focused on whether or not the expenses would have been incurred but for the individual's status as a candidate, and concluded that they would not. *Id*. ("According to the facts presented, the candidate began paying for childcare services only after becoming a candidate, and the candidate's stated purpose in acquiring the childcare services is to allow or facilitate her participation in campaign events.").

The Federal Election Commission has also addressed similar questions. In Advisory Opinion 2021-03, the FEC determined that the use of campaign funds for "bona fide, legitimate, professional personal security personnel against threats arising from the members' status as officeholders is a permissible use of campaign funds …." That opinion also noted that the FEC had previously and repeatedly authorized "the use of campaign funds to protect against threats to officeholders' personal safety, on the grounds that the need for such expenses would not exist without their status as Members of Congress."

<u>Judicial officers may use political contributions to pay ordinary and necessary expenses incurred in connection with ensuring the security of their homes:</u>

Here, like in Ethics Advisory Opinion 547, the requestor's stated purpose for making the expenditures is connected to the performance of her official duties and would not be necessary but for her status as an officeholder. As the requestor notes, judicial officers' performance of their official duties and activities can threaten their physical safety in their own homes. If the requestor were not a judicial officer, she would not be exposed to the same dangers. Further, a judicial officer's reasonable fear that their safety might be threatened could impact the way in which they execute their duties. Consequently, ordinary and necessary expenses incurred in connection with ensuring a judicial officer's security while at home are connected with the performance of the officer's duties or activities. Tex. Elec. Code § 253.035(d).

Though home security may provide an incidental benefit to the judicial officer or their family, the primary function of the use of political contributions is connected to the requestor's execution of their public duty. *See Id*. We therefore conclude that the requester's use of political contributions to defray ordinary and necessary expenses related to home security measures would not violate section 253.035.

We stress that political contributions may only be used to defray "ordinary and necessary expenses." Tex. Ethics Comm'n Op. No. 555 (2020). We decline to offer an opinion on whether or not the specific home-security measures identified in Texas Office of Court Administration's assessment are ordinary and necessary. However, we would assume, in the absence of any countervailing evidence, that the Texas Office of Court Administration would not recommend something that is not ordinary or necessary.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 568

September 1, 2021

ISSUES

Whether Section 572.069 of the Texas Government Code would prohibit a former employee of a state agency from providing certain services to a company that bid on procurements from the agency. **(AOR-648)**

SUMMARY

Section 572.069 of the Texas Government Code would not prohibit a former state employee from accepting employment to provide the described services to a company that bid on procurements from the agency because he did not participate in the procurements. The former state employee may obtain employment with the company before the second anniversary of the date on which the employee's service or employment with the state agency ceased.

FACTS

The requestor asks whether he may now accept employment at "Company X." He retired from employment at a state agency[1] on May 31, 2020. During his period of employment at the state agency, Company X bid on three "Shared Technology Services procurements." The requestor did not serve "on the procurement team," but "was a member of the agency leadership team that was informed by the procurement team with regard to project status." Within the structure of the state agency, "contracts were handled entirely and completely" by another organization, which was led by a peer who reported to the same director as the requestor.

In the prospective employment with Company X, the requestor would be "advising state governments in North America (USA and Canada) on how to successfully adopt cloud services into their IT modernization strategy." He states, "As a condition of my proposed employment with Company X, I would not participate in any manner with work associated with the State of Texas until May 2022, two years after my retirement[.]"

ANALYSIS

Legal Standard:

Section 572.069 of the Government Code states:

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

Tex. Gov't Code § 572.069.

Section 572.069 does not define the term "participated." However, the term 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." Tex. Gov't Code § 572.054(h)(1). We rely on the meaning of "participated" in Section 572.054 when construing Section 572.069, and we therefore apply that meaning here. *See* Tex. Gov't Code § 311.011(b) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.").

The former state employee did not participate on behalf of a state agency in a procurement or contract negotiation involving company X:

The first question is whether the former state employee participated on behalf of a state agency in a procurement or contract negotiation involving the prospective employer. We have held that a requestor participated in a procurement on behalf of a state agency by scoring and evaluating bid proposals for a contract to provide information technology services, even though the requestor did not participate any further in the request for proposal or participate in negotiation with vendors or the vendor selection. Tex. Ethics Comm'n Op. No. 545 (2017).

Here, during his period of employment with the state agency, the former state employee was informed of the status of the three procurements with Company X because of his position as a member of the agency leadership team, but he states that he did nothing additional with the procurements in that role. Having been informed of the status of the procurements is distinguishable from having taken action "through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action." Tex. Gov't Code § 572.054(h)(1). Indeed, it appears that only staff in another organization within the state agency took any action on the three procurements.

In our opinion, the former state employee did not participate in a procurement on behalf of a state agency merely by keeping informed of the status of agency procurements. Accordingly, Section 572.069 of the Government Code would not prohibit the former state employee from accepting employment from the company that bid on the procurements before the second anniversary of the date the employee's employment with the state agency ceased.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 569

December 9, 2021

ISSUES

Whether a candidate or officeholder may use her existing political contributions to establish a general-purpose political committee (GPAC), which she will control.

Whether a candidate or officeholder may receive a salary from a GPAC that the candidate or officeholder established or controls. (AOR-653)

SUMMARY

A candidate or officeholder may use her own political contributions to establish a GPAC and may control such a GPAC.

Political contributions "accepted" by a candidate-established or controlled GPAC are accepted by a person as a candidate or officeholder and therefore may not be converted to personal use by the controlling candidate or officeholder and may not be used to pay the controlling candidate or officeholder a salary.

Personal use restrictions notwithstanding, the Penal Code gift and honorarium restrictions would allow such employment under only a narrow set of facts, and such employment may violate the standards of conduct for a public servant.

FACTS

The requestor is a member of the legislature. The requestor plans to use her existing political contributions to establish a GPAC to support candidates and county political parties in state and local elections in Texas. The requestor plans to exercise control over the GPAC and act as its executive director. If the GPAC is able to garner sufficient support, the requestor also plans to draw a salary as executive director of the GPAC. The requestor asks whether drawing a salary from the GPAC would constitute a conversion of political contributions to personal use due to the use of her political contributions as seed money or due to her exercise of control over the GPAC.

ANALYSIS

Candidates and officeholders may establish and control GPACs.

The requestor's question focuses on conversion of political contributions to personal use, but to reach that question, the Commission must decide a whether a candidate-established or controlled political committee can exist as a separate entity from the candidate's campaign when the candidate has control over the disposition of the political committee's funds.

"Political committee" means two or more persons acting in concert with a principal purpose of accepting political contributions or making political expenditures. The term does not include a group composed exclusively of two or more individual filers or political committees required to file reports under this title who make reportable expenditures for a joint activity. Tex. Elec. Code § 251.001(12).

Nothing in title 15 plainly prohibits candidates and officeholders from forming or establishing GPACs, and several provisions indicate that they may. For example, the definition of a political committee suggests a title 15 filer may form a GPAC so long as she is not acting in concert exclusively with other title 15 filers. Tex. Elec. Code § 251.001(12) (excluding "a group composed exclusively of *two or more individual filers* or political committees…") (emphasis added). In addition, section 252.003(a)(4)(A) provides that a GPAC "established or controlled by a candidate or an officeholder" may not accept certain corporate contributions, which implies that such a committee may exist.

In our opinion, a candidate or officeholder may establish and control a GPAC that is distinct from her campaign, provided the committee is formed with a principal purpose of supporting or opposing candidates other than the establishing or controlling candidate or officeholder, or measures. The candidate-established or controlled GPAC must also maintain formal separation from the campaign of the candidate or officeholder establishing or controlling it. The GPAC and candidate or officeholder must also give effect to intent of the donor when deciding the recipient of political contributions. *See* Tex. Elec. Code § 253.001 (prohibiting contributions in the name of another).

Political contributions accepted by a candidate-controlled GPAC are subject to the personal use restriction.

A person who accepts a political contribution as a candidate or officeholder may not convert the contribution to personal use. Tex. Elec. Code § 253.035(a). Similarly, a specific-purpose political committee that accepts a political contribution may not convert the contribution to the personal use of a candidate, officeholder, or former candidate or officeholder. *Id.* § 253.035(b).[1] But the

[1] A "Specific-purpose committee" is defined as:

> a political committee that does not have among its principal purposes those of a general-purpose committee but does have among its principal purposes:
> (A) supporting or opposing one or more:
> (i) candidates, all of whom are identified and are seeking offices that are known; or

personal use prohibition normally does not apply to political contributions accepted by a general-purpose committee. *See id.* § 253.035.[2]

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

A candidate or officeholder may make a contribution from political contributions to a general-purpose political committee. Tex. Ethics Comm'n Op. No. 47 (1992). However, a candidate may not pay herself a salary from contributions accepted as a candidate or officeholder, or by a specific-purpose committee. A salary is quintessentially personal compensation, to be used at the recipient's personal discretion. A candidate's time spent on a campaign or engaging in officeholder activities is not an expense that can be charged to the campaign. Therefore, a candidate or officeholder's payment of a salary to herself would be a conversion to personal use.

In our opinion, political contributions putatively accepted by a candidate-controlled GPAC are, in effect accepted by a person "as a candidate or officeholder," and subject to the personal use restriction. A candidate or officeholder cannot avoid personal use restrictions by labeling a political committee under her control a GPAC. Instead, when a candidate or officeholder controls the ultimate disposition of political contributions, the candidate or officeholder accepts the contributions as "a candidate or officeholder" even if she does so on behalf of a GPAC. *See* Tex. Elec. Code 253.035(a) (applying the personal use restriction to contributions accepted "as a candidate or officeholder"). Therefore, a candidate or officeholder may not accept a salary from a political committee she established or controls.

To hold otherwise would render the personal use restriction a nullity. A candidate or officeholder's campaign is already able to carry out the functions of a GPAC by making political contributions to other candidates, officeholders, political committees, and political parties without forming a separate political committee. Tex. Ethics Op. No. 47 (1992). If candidate or

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(ii) measures, all of which are identified;

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

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

Tex. Elec. Code § 251.001(13).

[2] A "general-purpose political committee" is defined as:

a political committee that has among its principal purposes:

(A) supporting or opposing:

(i) two or more candidates who are unidentified or are seeking offices that are unknown; or

(ii) one or more measures that are unidentified; or

(B) assisting two or more officeholders who are unidentified.

Id. § 251.001(14).

officeholder-controlled GPACs were not subject to the personal use restriction, candidates and officeholders could free themselves of the personal use restriction simply by encouraging contributors to give to GPACs they control instead of their campaigns. Likewise, existing candidate-controlled specific-purpose committees would need only re-label themselves as GPACs and intend to make political contributions to others to avoid the personal use restriction. This cannot be the result the legislature intended when it applied the personal use restriction to political contributions "accepted as a candidate or officeholder."

Payments to a state officer are subject to the Penal Code gift and honorarium restrictions.

As a general rule a legislator may accept a fee for work performed in a capacity other than as a legislator. Tex. Ethics Comm'n Op. No. 508 (2013) (citing Tex. Ethics Comm'n Op. No. 371 (1997)). However, a legislator is generally prohibited from soliciting, accepting, or agreeing to accept a benefit from any person unless a specific exception under section 36.10 of the Penal Code applies. Penal Code § 36.08(f). A "benefit" is "anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest." *Id*. § 36.01(3).

A fee or salary is a permissible "benefit," when is given to a public servant for "legitimate consideration in a capacity other than as a public servant." Penal Code § 36.10(a)(1); *See also* Tex. Ethics Comm'n Op. No. 192, n.3 (1994). "Legitimate consideration" is consideration "commensurate with the value of the services." Tex. Ethics Comm'n Op. No. 358 (1997) (citing Tex. Ethics Comm'n Op. No. 41, at 1 n.1 (1992)). A public servant acts "in a capacity other than as a public servant" when it is "the services rendered and not the status of the public servant rendering the services that is of value to the person paying for the services." *Id.*

Section 36.08 therefore does not prohibit a legislator from accepting compensation that is commensurate with the actual value of the services provided by the public servant if the services rendered, and not the status of the public servant rendering the services, are of value to the person paying for the services. Tex. Ethics Comm'n Op. Nos. 358 (1997), 41 (1992). Whether compensation reflects the actual value of services is a fact question requiring the consideration of all relevant circumstances. Tex. Ethics Comm'n Op. No. 508 (2013).

Here, questions of whether the compensation truly reflects the actual value of services provided are particularly acute because the legislator will both control the spending of the GPAC and be its employee. The substantial value a legislator brings to an entity that will rely on political contributions for its survival also presents a difficult fact question about whether the legislator's skill and expertise or her status as an officeholder provides value to the GPAC. However, it is possible for a legislator to receive legitimate consideration in a capacity other than as a public service from a GPAC.

Legislators are also prohibited from accepting an honorarium for services that they would not have been asked to provide but for their official position. Tex. Penal Code § 36.07(a). For a legislator to accept compensation from a GPAC or any other person, the services must be provided in a capacity other than as a legislator, and his official position must not be a reason for his employment. *See, e.g.*, Tex. Ethics Comm'n Op. No. 508 (2013), 148 (1993). Whether the

honorarium prohibition applies is also a fact question requiring a consideration of all relevant facts. *Id.*

It is difficult to separate a legislator's status as a public servant from her employment with the GPAC. The GPAC will depend on contributions from people who may have a mixed motive of contributing to the GPAC to get their preferred candidates elected and gaining favor with the legislator by contributing to her salary. Since the requestor's status as a legislator may play an integral role in the fundraising success of the GPAC, it is difficult to say that the legislator would have received a salary but for her status as a legislator. The legislator deciding to establish the GPAC and deciding to hire herself also complicates the question of whether she would have been hired but for her status as an officeholder. But again, compensation paid to a candidate or officeholder from a GPAC does not necessarily violate the honorarium prohibition.

A legislator's employment with a GPAC may violate the standards of conduct for a state officer.

Chapter 572 of the Government Code sets out standards of conduct applicable to all state officers, including legislators. Tex. Gov't Code § 572.051. One standard is that a state officer should not accept or solicit any gift, favor, or service that might reasonably tend to influence the officer in the discharge of official duties or that the officer knows or should know is being offered with the intent to influence the officer's official conduct. *Id*. at § 572.051(a)(1). Another standard is that a state officer should not accept other employment or compensation that could reasonably be expected to impair the officer's independence of judgment in the performance of the officer's official duties. *Id*. at § 572.051(a)(3). The legislature has not attached specific sanctions to violations of those standards beyond termination of an employee, which is not applicable here. *Id*. at § 571.051(b), (e).

Whether a state officer's particular activity is appropriate under these standards depends upon the officer's circumstances. *See* Tex. Ethics Comm'n Op. No. 358 (1997). The Commission has opined that it is a matter of personal ethics for each state officer to determine whether particular employment would violate that standard. Tex. Ethics Comm'n Op. Nos. 156 (1993), 41 (1992). However, a legislator depending on political contributions to a general-purpose committee for her livelihood certainly raises questions to the appropriateness of such employment. The GPAC will depend on political contributions to pay the legislator's salary. This puts the requestor in the position to rely on contributors to fund her campaign as well as her lifestyle. Such an arrangement leads to obvious and natural questions as to whether the employment may tend to influence the officer in the discharge of her official duties. *Id*. at § 572.051(a)(1), (3).

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 570

February 25, 2022

ISSUE

Whether the revolving door provision in Government Code section 572.054(b) prohibits a former employee of a regulatory agency who participated in canceling a request for proposal ("RFP") during her state service from receiving compensation for assisting with a response to a subsequent RFP for the same service or product. ***(AOR-655)***

SUMMARY

Like separate contracts, separate RFPs leading to separate contracts are separate "matters" for purposes of the revolving door provision in Government Code section 572.054(b). However, the conclusion that a specific work activity constitutes "participation in" one matter does not necessarily preclude the conclusion that the same work also constitutes "participation in" another matter. Tex. Ethics Comm'n Op. No. 397 (1998).

When an officer or employee of an agency participates in the decision to cancel or rescind an RFP, and the agency subsequently issues another RFP for the same service or product, the employee may have participated in both the rescinded RFP and the reissued RFP for purposes of section 572.054(b), even if the RFP is not reissued until after the employee's state service has concluded. Whether the former officer or employee participated in the reissued RFP depends on, among other things, whether the agency reviews or analyzes the former officer's or employee's work in connection with reissuing the RFP.

Here, the requestor has asked the Commission to rely on facts that would demonstrate her lack of participation in the subsequent RFP, so this opinion concludes that she is not precluded from working on a response. However, we caution agency officers and employees against using their authority to cancel a procurement for essential state services with an intent to profit from their knowledge of the agency's inevitable search for a new provider.

FACTS

The requestor seeks an opinion from the Commission on the applicability of Section 572.054(b). She is a former employee of a regulatory agency who, during her state service, had oversight over a program serviced by a private company pursuant to a contract with the agency. The

requestor was also involved in the development and issuance of the agency's requests for proposal ("RFP") soliciting bids to provide those services.

Near the conclusion of her state service, the agency canceled the pending RFP for the renewal of this program over concerns regarding the scoring process. The requestor acknowledges she was involved in the development, issuance, and cancellation of this RFP. Upon the cancellation of the RFP, the requestor recused herself from any discussions about the agency's future procurements and, shortly thereafter, retired from state service.

Ten months after the RFP was canceled—and eight months after the requestor retired—the agency began meeting with interested companies in connection with a forthcoming reissued RFP for the same program. Based in part on the information gained and the feedback received from these meetings, the agency published draft evaluation criteria for the forthcoming RFP. The requestor did not participate in any of these meetings or in drafting the criteria.

The requestor now wishes to accept compensation in connection with helping a private company respond to the reissued RFP.

ANALYSIS

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

The Government Code defines "particular matter" as a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding. Tex. Gov't Code § 572.054(h)(2). The Commission has previously opined that the "term 'particular matter' refers to a particular proceeding rather than to a particular subject matter …." Similarly, it has opined that former state employees are not prohibited from working in subject areas or for employers with which they became familiar in the course of their state employment. *Id*. (citing Tex. Ethics Comm'n Op. No. 364 (1997)).

The requestor relies primarily on Ethics Advisory Opinion No. ("EAO") 397, which in part states that "[s]eparate contracts are separate 'matters' for purposes of the revolving door provision in Government Code section 572.054(b)." Tex. Ethics Comm'n Op. No. 397 (1998). The requestor asserts that because the Commission has concluded that separate contracts are separate matters, "it logically follows that the separate RFPs leading to those contracts are also separate matters." We agree.

However, EAO 397 is also careful to clarify that "a conclusion that a particular work activity constitutes 'participation in' one matter … does not necessarily preclude the conclusion that the same activity also constitutes 'participation in' another matter." *Id*. ("In circumstances in which two matters are interdependent pieces of a larger project, an agency employee's 'participation' in one of the matters would also constitute 'participation' in the other matter if the employee's

work on the first matter is being reviewed or analyzed in the second matter."). Put simply, even though the RFPs constitute separate matters, the requestor may have participated in both.

The facts presented here make for an even closer call than EAO 397. In that opinion, the "separate contracts" were for distinct, albeit related, services. Here, on the other hand, the two RFPs are for the same service or set of services. In fact, the second RFP only exists because the first RFP was rescinded by the agency, and the requestor participated in making that decision.

Nevertheless, the requestor did not participate in the reissued RFP for purposes of section 572.054(b). Not only did she recuse herself from any discussion or development of the reissued RFP, a comparison of the evaluation criteria for the canceled RFP with the proposed criteria for the forthcoming RFP makes clear that the two are significantly different. *Cf.* Tex. Ethics Comm'n Op. No. 397 (1998) ("an agency employee's 'participation' in one of the matters would also constitute 'participation' in the other matter if the employee's work on the first matter is being reviewed or analyzed in the second matter"). Consequently, the requestor may receive compensation in connection with working on a response to the new RFP. However, the Penal Code prohibits the requestor from using any nonpublic information she gained by virtue of her public service to benefit herself or her prospective employer. Tex. Penal Code § 39.08(a).

Furthermore, the Commission takes this opportunity to caution state officers and employees against using their authority as public servants to benefit their prospective careers in the private-sector. The law prohibits, for example, an employee of a regulatory agency from canceling an RFP with the intention of creating for himself a private-sector job with a prospective bidder on a reissued RFP. This kind of self-dealing would also violate the spirit of multiple standards of conduct applicable to all state officers and employees, including 572.051(a)(3) ("A state officer or employee should not … accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties") and 572.051(a)(5) (A state officer or employee should not … intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another").

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 571

February 25, 2022

ISSUE

Whether Chapter 572 of the Government Code prohibits a former employee of a regulatory agency from accepting certain employment pertaining to Medicaid applications. ***(AOR-657)***

SUMMARY

None of the revolving door provisions in Chapter 572 of the Government Code prohibit the requestor from accepting the prospective employment. The requestor is not a member of the governing body or the executive head of a regulatory agency, so section 572.054(a) does not apply. Section 572.054(b) would prohibit the requestor from working on any specific Medicaid application on which she participated during her state service, but would not prohibit her from working on all Medicaid applications generally. And section 572.069 does not prohibit the requestor from accepting the employment because Medicaid applications are not procurements or contract negotiations.

FACTS

The requestor asks whether any of the revolving door provisions in Chapter 572 of the Texas Government Code would prohibit her from accepting prospective employment. She is currently an employee of the Texas Health and Human Services Commission ("HHSC") who supervises a team that processes and makes approval or rejection decisions on Medicaid applications from uninsured patients that show up for care at a particular hospital operated by a healthcare system with multiple locations. The requestor asks the Commission whether she may seek employment from a different hospital location of the same healthcare system as a "patient access director" that has as one of its job responsibilities overseeing hospital employees who facilitate uninsured patients' Medicaid applications.

ANALYSIS

Chapter 572 of the Texas Government Code contains three different "revolving door" provisions. *See* Tex. Gov't Code §§ 572.054(a), 572.054(b), and 572.069. The first of these provisions, section 572.054(a), applies only to "[a] former member of the governing body or a former executive head of a regulatory agency." Tex. Gov't Code § 572.054(a). Because the requestor is

neither a member of HHSC's governing body nor the agency's executive head, this provision does not prohibit her from accepting any potential employment.

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

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

Based on these prior holdings, we conclude that separate Medicaid applications are separate "particular matters" for purposes of section 572.054(b). So, while this provision would prohibit the requestor from working on any specific Medicaid application on which she participated during her state service, she would not be prohibited from working on all Medicaid applications generally.

The third revolving door provision, section 572.069, also applies to all former state officers and employees. It prohibits all former state officers and employees who "participated on behalf of a state agency in a procurement or contract negotiation" from accepting employment from "a person" involved in that procurement or contract negotiation for two years after ceasing their state service. Unlike section 572.054(b), this provision does not merely prohibit former state agency employees from working on particular matters in their new employment. Instead, it prohibits former state agency employees from accepting *any* employment from certain persons for two years, even if the private employment is unrelated to anything they worked on during their state service.

This request raises several questions about the application of section 572.069. The first is whether the two locations of the same healthcare system are the same "person." Tex. Gov't Code § 572.069. Chapter 572 of the Government Code defines "person" as "an individual or business entity" and defines "business entity" as "any entity recognized by law through which business for profit is conducted, including a sole proprietorship, partnership, firm, corporation, holding company, joint stock company, receivership, or trust." Tex. Gov't Code §§ 572.002(2), 572.002(7). Information available from the healthcare system's website and the Texas Secretary

of State appears to confirm that the hospitals are not distinct legal entities, but merely two locations of the same organization. Therefore, it appears that the two hospitals are the same "person" for purposes of section 572.069.

Nevertheless, we conclude that the requestor is not prohibited from accepting the prospective employment because a patient's Medicaid application is not a "procurement or contract negotiation." The Government Code does not define procurement or contract negotiation. However, the State of Texas Procurement and Contract Management Guide, published by the Texas Comptroller of Public Accounts, identifies several "common characteristics between all procurements," including "defin[ing] the business need," "select[ing] the vendor that provides best value to the State," and "ensur[ing] that the awarded contract complies with applicable procurement law and contains provisions that achieve the procurement objectives."[1]

None of those steps are present in connection with an HHSC employee processing a Medicaid application. The decision to approve or deny an application for Medicaid coverage does not involve consideration of business needs, or the selection of a vendor, or the negotiation of contractual terms. It is a ministerial determination of whether to provide government assistance. In short, a Medicaid application involves an agency's delivery of services. A procurement, on the other hand, involves an agency's acquisition of goods or services.

Section 572.069's legislative history confirms our understanding. The stated purpose of Senate Bill 20 in the 84th Regular Legislative Session was "to reform state agency contracting by clarifying accountability, increasing transparency, and ensuring a fair competitive process."[2] It sought to accomplish this purpose by making "comprehensive changes to state agency contracting, purchasing, and accounting procedures."[3]

Section 572.069 was just one small piece of these comprehensive changes. Among other provisions, the bill required: (1) the state auditor to audit the performance of HHSC contracts in excess of $100 million in annual value, (2) the comptroller of public accounts to conduct, in cooperation with the governor's budget and policy staff, a study examining the feasibility and practicality of consolidating state purchasing functions into fewer state agencies or one state agency, (3) the Texas Department of Information Resources to post all contract solicitation documents to the centralized statewide accounting and payroll system, (4) state agencies to review vendor performance after certain contracts are completed or terminated, and (5) training, continuing education, and certification of state agency purchasing personnel. *Id*.

Put in this context, it becomes clear that section 572.069 was intended and designed to prohibit public servants from seeking to personally benefit from influencing an agency's decision to use taxpayer money to purchase goods or services from the private sector on behalf of a state agency. Because a Medicaid application is not a "procurement or contract negotiation," section 572.069 of the Government Code does not prohibit the requestor from accepting the prospective employment.

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[1] https://comptroller.texas.gov/purchasing/docs/96-1809.pdf
[2] https://capitol.texas.gov/tlodocs/84R/analysis/pdf/SB00020F.pdf#navpanes=0
[3] https://capitol.texas.gov/BillLookup/BillSummary.aspx?LegSess=84R&Bill=SB20

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 572

February 25, 2022

ISSUE

Whether section 572.069 of the Government Code prohibits a former employee of a regulatory agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the employee participated during her state service. ***(AOR-658)***

SUMMARY

No. Affiliates are different persons for purposes of Chapter 572 of the Government Code. Therefore, we conclude that section 572.069 of the Government Code does not prohibit a former employee of a regulatory agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the employee participated during her state service.

FACTS

The requestor asks whether section 572.069 of the Texas Government Code would prohibit her from accepting prospective employment. She is currently employed with the Texas Health and Human Services Commission ("HHSC") as an attorney assigned to provide legal advice for managed care and other Medicaid contracts and procurements. In connection with her state employment, the requestor has worked on procurements and contracts involving certain corporate subsidiaries of UnitedHealth Group Incorporated ("UGI"). The requestor asks the Commission whether she may accept employment from a different subsidiary of UGI that was not involved in any procurement or contract negotiation in which she participated.

ANALYSIS

Section 572.069 prohibits former state officers and employees who participated on behalf of a state agency in a procurement or contract negotiation from accepting employment from any person involved in that procurement or contract negotiation for two years after ceasing their state service. Tex. Gov't Code § 572.069. The requestor acknowledges that she participated on behalf of HHSC in procurements and contract negotiations with certain corporate subsidiaries of UGI. But she says that she did not participate in any procurement or contract negotiation involving the

particular UGI subsidiary that seeks to employ her. Therefore, the question presented by this request is whether a "person," for purposes of section 572.069, includes corporate affiliates.

Chapter 572 of the Government Code defines "person" as "an individual or business entity" and defines "business entity" as "any entity recognized by law through which business for profit is conducted, including a sole proprietorship, partnership, firm, corporation, holding company, joint stock company, receivership, or trust." Tex. Gov't Code §§ 572.002(2), 572.002(7). The requestor states that each of the UGI subsidiaries she has been involved with during her state service have their own taxpayer identification numbers and their own separate contracts with HHSC. Furthermore, she states that the obligations and benefits of those contracts do not transfer to other corporate subsidiaries of UGI. Information available from the Texas Secretary of State confirms that each subsidiary identified by the requestor is a separately-organized legal entity.

The Texas Business Organizations Code defines "affiliate" as "a *person* who controls, is controlled by, or is under common control with *another person*." *Id*. at § 1.002(1) (emphasis added). In other words, two affiliates are, by definition, distinct "persons," at least for purposes of the Business Organizations Code. Other state laws expressly define "person" to include affiliates within their scope. For example, section 59.002 of the Texas Business and Commerce Code, which addresses claims involving contracts for the construction or repair of improvements to real property, provides its own definition of "person" that "includes a parent, subsidiary, affiliated entity, joint venture partner, or owner of the person." Tex. Bus. & Comm. Code § 59.002(b).

In the absence of any similar statutory language in Chapter 572 of the Government Code, we must conclude the law does not prohibit an individual from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the requestor participated during her state service. Consequently, the requestor may accept the prospective employment.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 573

February 25, 2022

ISSUE

Whether the laws under the Commission's jurisdiction prohibit a former employee of a state agency from accepting employment at another state agency. ***(AOR-661)***

SUMMARY

Nothing in Chapter 572 of the Government Code prohibits the requestor from accepting the employment with another state agency. All three revolving door provisions prohibit former state officers and employees from representing, accepting employment, or receiving compensation from certain "person[s]." As defined by Chapter 572, a state agency is not a "person," so none of the revolving door provisions restrict former state officers and employees from accepting employment with another state agency.

Provisions of chapter 39 of the Penal Code prohibit public servants from misusing government property, services, personnel, and information to obtain a personal benefit. However, the requestor has not presented any facts that would indicate the requisite intent to find a violation.

FACTS

The requestor asks whether any of the revolving door provisions in Chapter 572 of the Texas Government Code would prohibit her from accepting employment with a state agency. He is currently an employee at a state agency at which he manages federally funded disaster recovery grants, including several "interagency grants" that involve other state agencies. The requestor played a significant role in identifying, recommending, scoping, and negotiating these grants. He asks the Commission whether he may accept employment from another state agency if the position is funded by one of the grants he currently manages. If the answer to this first question is no, the requestor asks whether he may accept employment at one of the state agencies with which he manages a grant if the position is not funded by one of the grants he manages.

ANALYSIS

Chapter 572 of the Texas Government Code contains three different "revolving door" provisions. *See* Tex. Gov't Code §§ 572.054(a), 572.054(b), and 572.069. Section 572.054(a) prohibits certain former senior agency officials and employees from appearing before their former agency

"on behalf of any person in connection with any matter on which the person seeks official action" for two years. Tex. Gov't Code § 572.054(a). Section 572.054(b) prohibits former state officers and employees of regulatory agencies from receiving any compensation for services rendered "on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment." Tex. Gov't Code § 572.054(b). And section 572.069 prohibits all former state officers and employees who participated on behalf of a state agency in a procurement or contract negotiation from accepting employment from any person involved in that procurement or contract negotiation for two years after ceasing their state service. *Id.*

In short, all three provisions prohibit former state officers and employees from representing, accepting employment, or receiving compensation from certain "person[s]." Chapter 572 of the Government Code defines "person" as "an individual or business entity" and defines "business entity" as "any entity recognized by law through which business for profit is conducted, including a sole proprietorship, partnership, firm, corporation, holding company, joint stock company, receivership, or trust." Tex. Gov't Code §§ 572.002(2), 572.002(7).

The plain language of Chapter 572 thus excludes state agencies from the definition of "person." A state agency is not an "individual," nor is it an entity recognized by law through which "business for profit" is conducted. *Id*. Consequently, none of the revolving door provisions in Chapter 572 prohibit the requestor from accepting employment at another state agency. This is true even if the position he accepts is funded by one of the grants he manages.

Section 39.06(b) of the Penal Code prohibits public servants from using nonpublic official information "for a nongovernmental purpose," including a personal benefit. *Id.* Similarly, section 39.02 of the Penal Code prohibits public servants from misusing government property, services, personnel, or any other thing of value belonging to the government to obtain a personal benefit. *Id.* However, the requestor has not presented any facts that would indicate the requisite intent to find a violation of either of these laws. On the contrary, the requestor states that he "could better serve the state" by moving to another state agency where he would have a broader role in coordinating and administering government services. Without any evidence that the requestor misused government property or information to benefit his *personal* interests—rather than the public interest—we must conclude that there is no violation of the Penal Code.

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 574

May 12, 2022

ISSUE

Whether a corporation may coordinate with candidates or political committees on the content, timing, and distribution of advertisements that criticize or praise candidates—including those with whom the corporation coordinates and their opponents—for opposing or supporting certain legislative policies. ***(AOR-659)***

SUMMARY

No. Texas law prohibits corporations from making campaign contributions, which includes making an expenditure for advertisements coordinated with a candidate or political committee that criticize or praise a candidate or the candidate's opponent. Such advertisements are campaign contributions because they constitute things of value given with the intent that they be used in connection with a campaign for elected office and with the prior consent or approval of the candidate or committee on whose behalf the expenditure is made.

FACTS

The requestor, a corporation, seeks guidance on whether advertisements distributed by the corporation are political contributions if the advertisements are coordinated with a political party or candidate. The requestor states that the intended advertisements will "criticize and/or praise certain Texas legislative policies and criticize and/or praise legislators for opposing and/or supporting such policies." The stated purpose is to "educate the public about these issues and the records of Texas legislators." The requestor states that the advertisements will mention legislators who are candidates, but will not "expressly advocate" for or against candidates.

In connection with making decisions about the content, timing, and distribution of the communications, the requestor wants to seek input from political party committees, state legislative candidates who may be supported in the communications or whose opponents may be criticized, and the agents of these candidates and committees. Specifically, if permitted by law, the requestor would like to: (1) allow political parties, candidates, and their agents to weigh in on potential topics for the communications; (2) allow political parties, candidates, and their agents to be materially involved in discussions regarding the creation, production, or distribution of the communications; and (3) obtain information from political parties, candidates, and their agents

regarding their issue-related plans or needs that are material to the communication and not available to the public.

ANALYSIS

Texas law prohibits corporations from making political contributions, including coordinated in-kind contributions, to candidates and committees.

Texas law prohibits corporations like the requestor from making campaign contributions. Tex. Elec. Code §§ 253.091; 253.094(a) (prohibiting corporations from making "political contribution[s]"); 251.001(5) (defining "political contributions" as including both "campaign contributions" and "officeholder contributions"). But it does not—and cannot—prohibit corporations from making certain campaign expenditures, including "direct campaign expenditures," *i.e.*, campaign expenditures that are "made without the prior consent or approval of the candidate or officeholder on whose behalf the expenditure is made." Tex. Elec. Code § 251.001(8); Tex. Ethics Comm'n Op. No. 489 (2010) (citing *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)). By definition, a "direct campaign expenditure" is not a "campaign contribution." Tex. Elec. Code § 251.001(8) (defining "direct campaign expenditure" as "a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure").

This distinction echoes United States Supreme Court precedent, which has "subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions." *McConnell v. FEC*, 540 U.S. 93, 134 (2003) (citing *FEC v. Beaumont*, 539 U.S. 146 (2003); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000); *Buckley v. Valeo*, 424 U.S. 1 (1976)); *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."). In those cases, the Court "recognized that contribution limits, unlike limits on expenditures, 'entai[l] only a marginal restriction upon the contributor's ability to engage in free communication.'" *McConnell*, 540 U.S. at 134-35 (quoting *Buckley*, 424 U.S. at 20-21).

And, even while the Court has found certain restrictions on corporate expenditures unconstitutional, it has repeatedly left the federal ban on corporate contributions intact. *See* 52 U.S.C. § 30118(a) (generally prohibiting corporations from making contributions); 11 C.F.R. § 114.2(b) (same); *Massachusetts*, 479 U.S. at 263 ("Our conclusion is that § 441b's restriction of *independent* spending is unconstitutional as applied to MCFL") (emphasis added); *see also King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 732 (Tex. 2017) ("legislatively enacted bans on corporate political contributions are constitutional under the First Amendment."). Under both federal and Texas law, corporations may make contributions to political committees that make only independent expenditures, *see Citizens United v. FEC*, 558 U.S. 310 (2020); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013), but they may not make contributions, including coordinated in-kind contributions, to candidates.

If made with the prior consent or approval of candidates or committees, the requestor's intended expenditures are prohibited campaign contributions.

The Election Code, defines a "contribution" as any "transfer of money, goods, services, or any other thing of value," and a "campaign contribution" as any "contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure." Tex. Elec. Code §§ 251.001(2), 251.001(3); 257.001 (each state or county political party may designate a general-purpose political committee as the principal political committee for that party in the state or county). Contributions need not be monetary; they can take the form of in-kind goods or services paid for by contributors. *Id*. at §§ 251.001(2); 251.001(21) (defining "in-kind contribution").

The requestor incorrectly asserts that Commission rule 20.1(18) limits what "in connection with a campaign" means for purposes of the Election Code's definition of campaign contribution. It does not. As described more fully below, rule 20.1(18) relates to independent campaign *expenditures*, not coordinated campaign contributions. The requestor also contends that its intended communications are not campaign contributions in part because they will not be distributed within 30 days of an election. However, the Election Code expressly states that, "[w]hether a contribution is made before, during, or after an election does not affect its status as a campaign contribution." *Id*. at § 251.001(3).

Rather than its timing, coordination is central to answering whether something is an in-kind "campaign contribution" or a "direct campaign expenditure." If an expenditure is made *without* "the prior consent or approval of the candidate or officeholder on whose behalf the expenditure is made," then it is a direct campaign expenditure, and thus not a prohibited campaign contribution. *Id*. at § 251.001(8). But, if it is made *with* the candidate's prior consent or approval, then it "constitute[s] a campaign contribution by the person making the expenditure," and thus may not be made by a corporation. *Id*.; *see also Osterberg v. Peca*, 12 S.W.3d 31, 36 n. 2 (Tex. 2000) ("What Chapter 253 defines as a 'direct campaign expenditure' corresponds with what the Federal Election Campaign Act and United States Supreme Court call an 'independent expenditure"); *Colo. Rep. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 610 (1996) (clarifying that an "independent" expenditure is an expenditure "not coordinated with the candidate or candidate's campaign"); Tex. Ethics Comm'n Op. No. 336, n. 1 (1996) ("Although the term 'independent campaign expenditure' is not used in Texas law, it is often more easily grasped than the term 'direct expenditure,' which Texas law uses to describe a campaign expenditure made without the prior consent or approval of the candidate benefited.").

Here, the requestor would like to coordinate with candidates and committees on the content, timing, and distribution of its communications. The communications will identify specific legislators who are candidates and "criticize and/or praise" those legislators. The legislators with whom the requestor would like to coordinate include "candidates who may be mentioned in the [communications] and/or whose opponents may be mentioned." And the coordination would include those candidates being "materially involved" in discussions regarding the creation, production, or distribution of the advocacy. Given these facts, we conclude that the communications would constitute a "thing of value" given "with the intent that it be used in connection with a campaign for elected office" and with "the prior consent or approval" of the candidate or committee on whose behalf the expenditure is made. Tex. Elec. Code

§§ 251.001(2), 251.001(3); 251.001(8); *see also id*. at § 251.0015 (a candidate or officeholder's "material involve[ment]" in decisions regarding the creation, production, or distribution of a campaign communication is evidence of "prior consent or approval"). Consequently, the communications are campaign contributions, and the requestor, a corporation, is prohibited from coordinating with candidates and committees in connection with their creation, timing, or distribution. Tex. Elec. Code §§ 253.091, 253.094(a).

The U.S. Constitution does not preclude the regulation of coordinated campaign contributions of non-express advocacy.

Citing *Buckley v. Valeo*, 424 U.S. 1 (1976), the requestor contends that the First Amendment prohibits nearly any regulation of political advocacy that does not use the so-called "magic words" of "express advocacy." But, while the Supreme Court has considered whether independent political *expenditures* may be restricted even if they do not contain express advocacy "or its functional equivalent," no binding authority has held that coordinated campaign *contributions* cannot be regulated unless they contain express advocacy. In fact, *Buckley* held otherwise. The Court upheld limits on in-kind contributions because they were designed to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47. But it struck down limits on independent expenditures because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id*.

As explained by the Court in *McConnell v. FEC*, 540 U.S. 93 (2003), this country has a long history of prohibiting political contributions by corporations. *See McConnell*, 540 U.S. at 115-22. In 1907, Congress "completely banned corporate contributions of 'money … in connection with' any federal election." *Id*. at 115. In 1925, Congress extended the prohibition of "contributions" "to include 'anything of value,' and made acceptance of a corporate contribution as well as the giving of such a contribution a crime. *Id*. at 116. After the 1972 Presidential elections, Congress enacted comprehensive campaign finance reform that, among other things, imposed limits not only on individual political contributions, but also on "expenditure[s] … relative to a clearly identified candidate. *Id*. at 118-121.

Confronting the limitation on expenditures, the *Buckley* Court narrowed the term "expenditure" to encompass only those funds that were used for communications that "expressly advocated" for the election or defeat of a "clearly identified candidate." *Buckley*, 424 U.S. at 80. These communications included those using the words "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, or reject," later referred to as the "magic words" test. *Id*. at 44, n.52; *see McConnell*, 540 U.S. at 126. The Court concluded, however, "that as so narrowed, the provision would not provide effective protection against the dangers of *quid pro quo* arrangements, because persons and groups could eschew expenditures that expressly advocated the election or defeat of a clearly identified candidate while remaining 'free to spend as much as they want to promote the candidate and his views.'" *McConnell*, 540 U.S. at 121 (quoting *Buckley*, 424 U.S. at 45). Conversely, the Court upheld the law's limits on individual contributions. *Buckley*, 424 U.S. at 29 ("the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms ….").

Thirty years later, the Supreme Court expressly rejected the magic words test for expenditures. *See McConnell*, 540 U.S. at 191-92 (2003) ("a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command."). The Court again recognized that advertisers could "easily evade the line by eschewing the use of magic words, … [a]nd although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id*. at 193. Consequently, the Court abandoned *Buckley*'s distinction between "express advocacy" and "issue advocacy," focusing instead on the difference between a "*genuine* issue ad," on one hand, and "the functional equivalent of express campaign advocacy," on the other. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476, n. 8 (2007) (emphasis added). As the Court later explained:

> This Court has long recognized "the governmental interest in preventing corruption and the appearance of corruption in election campaigns. *Buckley*, 424 U.S. at 45. This interest has been invoked as a reason for upholding *contribution* limits. As *Buckley* explained, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id*. at 26-27. We have suggested that this interest might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, "large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions." *Id*. at 45.
>
> *McConnell* arguably applied this interest—which this Court had only assumed could justify regulation of express advocacy—to ads that were the "functional equivalent" of express advocacy. *See* 540 U.S. at 204-06.

Wis. Right to Life, 551 U.S. at 478.

The requestor also cites Ethics Advisory Opinion 198, which construed the state's corporate expenditure prohibition in light of *Buckley*, but before *McConnell* and *Wisconsin*. While the opinion concludes that corporations may not be prohibited from making independent expenditures that do not include express advocacy, it also rejected the "magic words" test. Tex. Ethics Comm'n Op. No. 198 (1994). Instead, the Commission found that, "whether an actual communication constitutes express advocacy can be answered only on a case-by-case basis," and it left open the possibility that communications that included "candidates' voting records and positions on issues, poll results, and third-party endorsements" might constitute express advocacy even absent any magic words. *Id*. In any event, the opinion was about expenditures, not contributions, and it concluded that the Texas Legislature intended the Election Code "to prohibit political expenditures by corporations and labor organizations to the full extent allowed by the Constitution, as interpreted by the United States Supreme Court." *Id*.

As illustrated by these decisions, the Supreme Court's discussion of express advocacy and its "functional equivalent" address independent expenditures, not coordinated contributions. The communications that are the subject of this opinion, however, are coordinated campaign contributions.

Rule 20.1(18) does not define what constitutes a campaign contribution.

As previously mentioned, the requestor contends that the Commission has adopted a rule that defines when a *contribution* is made "in connection with a campaign." Not so. Rule 20.1(18) addresses campaign expenditures, not campaign contributions.

To be a "campaign expenditure," an expenditure must be "made by any person in connection with a campaign for an elective office or on a measure." *See* Tex. Elec. Code § 251.001(7). Rule 20.1(18)(A) states that "[a]n *expenditure* is made in connection with a campaign for elective office if it is" any of the following:

> (i) made for a communication that expressly advocates the election or defeat of a clearly identified candidate by:
>
> (I) using such words as "vote for," "elect," "support," "vote against," "defeat," "reject," "cast your ballot for," or "Smith for city council;" or
>
> (II) using such phrases as "elect the incumbent" or "reject the challenger," or such phrases as "vote pro-life" or "vote pro-choice" accompanied by a listing of candidates described as "pro-life" or "pro-choice;"
>
> (ii) made for a communication broadcast by radio, television, cable, or satellite or distributed by print or electronic media, including any print publication, mailing, Internet website, electronic mail, or automated phone bank, that:
>
> (I) refers to a clearly identified candidate;
>
> (II) is distributed within 30 days before a contested election for the office sought by the candidate;
>
> (III) targets a mass audience or group in the geographical area the candidate seeks to represent; and
>
> (IV) includes words, whether displayed, written, or spoken; images of the candidate or candidate's opponent; or sounds of the voice of the candidate or candidate's opponent that, without consideration of the intent of the person making the communication, are susceptible of no other reasonable interpretation than to urge the election or defeat of the candidate;
>
> (iii) made by a candidate or political committee to support or oppose a candidate; or
>
> (iv) a campaign contribution to:
>
> (I) a candidate; or
>
> (II) a group that, at the time of the contribution, already qualifies as a political committee.

1 Tex. Admin. Code § 20.1(18)(A) (emphasis added).

The requestor says that the intended communications "will ***not*** expressly advocate for or against candidates," and "will ***not*** be distributed in a legislative district within 30 days of an election in that district," so they would not be campaign expenditures under either clause (i) or (ii). The

requestor is not a candidate, and it says that it will not engage in any other activity that would require it to register as a political committee, so the communications would not be campaign expenditures under clause (iii) either.

That leaves clause (iv), which says that any campaign contribution to a candidate or political committee also qualifies as a campaign expenditure. Accordingly, the requestor's intended communications are not "campaign expenditures" unless they are "campaign contributions," and thus satisfy clause (iv) of rule 20.1(18)(A). In other words, rule 20.1(18) begs the question of what constitutes a campaign contribution; it does not answer it.

In summary, rule 20.1(18) tracks *McConnell*'s and *Wisconsin*'s holdings. It clarifies that, for purposes of determining whether an expenditure can be regulated as a campaign expenditure, it must either: (1) be express advocacy or its functional equivalent as defined by clauses (i) and (ii), or (2) be made directly by a campaign (clause (iii)) or in coordination with a campaign (clause (iv)). *See* 1 Tex. Admin. Code § 20.1(18).

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 575

May 12, 2022

ISSUE

Whether a specific-purpose committee's contributions and expenditures trigger section 253.007's restrictions on the lobbying activity of candidates and officeholders. ***(AOR-662)***

SUMMARY

Yes, if the candidate or officeholder has the authority to control the contributions accepted and expenditures made by the specific-purpose committee.[1] Contributions accepted by a political committee controlled by a candidate or officeholder are accepted "as a candidate or officeholder." Tex. Elec. Code § 253.007(b). Furthermore, expenditures made by a political committee controlled by a candidate or officeholder are knowingly made or authorized by the candidate or officeholder. *Id*.

FACTS

The requestor is a state legislator who seeks guidance on the application of section 253.007(b) of the Election Code. First, the requestor asks if contributions accepted by a specific-purpose committee can ever amount to contributions "accepted by the person as a candidate or officeholder" for purposes of section 253.007(b). Second, the requestor asks whether a candidate or officeholder can ever "knowingly make or authorize" the contributions of a specific-purpose committee for purposes of the same statute.

The requestor acknowledges that some candidates create specific-purpose political committees and operate them as their campaigns. The requestor says that contributions received by such committees "are maintained in an account separate from those of the [candidate]" and are "payable to the" committee. However, he acknowledges that those same contributions to the

[1] Nearly 40 states have enacted restrictions on lobbying after government service. *Miller v. Ziegler*, No. 2:21-CV-04233-MDH, 2022 U.S. Dist. LEXIS 14774, *9 (W.D. Mo. Jan. 27, 2022); *see also* https://www.ncsl.org/research/ethics/50-state-table-revolving-door-prohibitions.aspx . At least one such restriction has been successfully challenged as an unconstitutional restriction on the right to petition the government for redress of grievances. *Brinkman v. Budish*, 692 F. Supp. 2d 855 (S.D. Ohio 2010). But another has been upheld as a permissible exercise of the state's interest in preventing corruption and the appearance thereof. *Ziegler*, 2022 U.S. Dist. LEXIS 14774, *9-*11. When the law is unsettled, as it is here, the Commission presumes the constitutionality of a statute enacted by the Legislature.

committee are often "given in person to the candidate/officeholder," and are deposited by "campaign personnel."

ANALYSIS

The Legislature has limited the ability to use campaign funds for lobbying.

In response to concerns "about the revolving door of candidates and officeholders becoming lobbyists immediately after losing an election or retiring from office," the Texas Legislature sought to "prohibit[] a person who makes or authorizes certain political contributions and direct campaign expenditures from lobbying during the two-year period after the date the person makes or authorizes the contribution or expenditure."[2] The bill—HB 2677—was passed in 2019 without receiving a single nay in either the House or the Senate.[3]

Codified as section 253.007 of the Election Code, the law prohibits "a person who knowingly makes or authorizes" certain political contributions or expenditures from the political contributions "accepted by the person as a candidate or officeholder" from engaging in any activities that would require the person to register as a lobbyist under Chapter 305 of the Government Code for two years after the person makes or authorizes the contribution or expenditure. Tex. Elec. Code § 253.007(b). The contributions and expenditures that trigger this two-year prohibition include any "political contribution[s] or political expenditure[s] that [are] political contribution[s] to another candidate, officeholder, or political committee" and "direct campaign expenditure[s]." *Id*.

Importantly, the Legislature chose to trigger this restriction anytime a person makes or authorizes certain contributions or expenditures from the political contributions "accepted by the person as a candidate or officeholder." *Id*. This means that current and former candidates and officeholders cannot avoid the restrictions of section 253.007 by transferring the political contributions they accepted as a candidate or officeholder to political committees they control. Those funds, even after being transferred to a committee, were "accepted by the person as a candidate or officeholder." *Id*. And if the committee is controlled by the same person, then that person is also making or authorizing the expenditures of those funds. *Id*. Even if a person was to wait two years after transferring his political funds to a committee he controls, the *committee's* contributions and expenditures would trigger section 253.007 because the person would be making or authorizing political contributions or expenditures from the political contributions he accepted as a candidate or officeholder. *Id*. This prohibition includes any contribution to a general-purpose committee, as section 253.007(b) does not limit the term "political committee." *Id*.

Because the law was placed in Chapter 253 of the Election Code, it is also a violation for a person to knowingly accept a political contribution that the person knows to have been made in violation of section 253.007. *See* Tex. Elec. Code § 253.003(b) (creating a violation for accepting certain contributions made in violation of chapter 253). The Supreme Court of Texas has said that a violation of section 253.003(b) can only be established with evidence that a person had knowledge of not only the act of accepting the contribution but also that the

[2] https://capitol.texas.gov/tlodocs/86R/analysis/pdf/HB02677H.pdf#navpanes=0
[3] https://journals.house.texas.gov/hjrnl/86r/pdf/86RDAY58FINAL.PDF#page=53; https://journals.senate.texas.gov/sjrnl/86r/pdf/86RSJ05-20-F.PDF#page=13

contribution was made in violation of Chapter 253. *Osterberg v. Peca*, 12 S.W.3d 31, 38 (Tex. 2000).

Contributions accepted by a political committee controlled by a candidate or officeholder are accepted by the person as a candidate or officeholder.

The first question presented by this request is whether political contributions accepted by a specific-purpose committee are accepted by a person "as a candidate or officeholder." *See* Tex. Elec. Code § 253.007(b). In our opinion, the answer depends on whether a candidate or officeholder has the authority to exercise control over the acceptance of the committee's political contributions.

Last year, the Commission answered a very similar question, concluding that "political contributions putatively accepted by a candidate-controlled [general-purpose political committee] are, in effect accepted by a person 'as a candidate or officeholder'" for purposes of section 253.035(a) of the Election Code. Tex. Ethics Comm'n Op. No. 569 (2021). The laws considered by each opinion—sections 253.007(b) and 253.035(a) of the Texas Election Code—both refer to political contributions accepted "as a candidate or officeholder," and we see no reason to depart from our prior interpretation of that phrase. When a candidate controls a political committee, the contributions accepted by the committee are accepted by the controlling candidate "as a candidate or officeholder" for purposes of Chapter 253 of the Election Code.

Not all specific-purpose committees are controlled by candidates or officeholders. Many are operated independently from the candidates and officeholders they intend to support. Section 253.007 does not restrict candidates or officeholders from lobbying when an independently-operated political committee makes an expenditure. Such expenditures are not knowingly made or authorized by the candidate or officeholder, and the contributions these committees accept are not accepted by the candidate or officeholder.

But in practice, some specific-purpose committees not only coordinate with candidates, they operate as the campaigns of the candidates they support. The Commission has recognized that this has been the case for nearly thirty years. Tex. Ethics. Comm'n Op. No. 271 (1995) ("As a practical matter, the distinction between a candidate and a specific-purpose committee supporting the candidate may be maintained for little more than bookkeeping purposes."). Recent amendments to the Election Code demonstrate the Legislature's awareness as well. *See* Tex. Elec. Code § 252.003(a)(4)(A) (requiring a committee that intends to accept corporate contributions to file an affidavit with the Commission stating that the committee "is not established or controlled by a candidate or officeholder.").

The Commission has even adopted a different reporting standard for candidate-controlled committees. Specifically, expenditures by a committee that are coordinated with a candidate would typically need to be reported by the candidate as in-kind contributions, but the Commission has told candidates that they do not need to report an in-kind contribution each time a committee they control makes a political expenditure on their behalf. *See, e.g.*, *In the matter of Joe G. Rivera*, SC-31410218, at ¶ 12 (finding that as long as "direct contributions to and expenditures by the committee are properly disclosed by the committee, they need not be

reported by the candidate" because "such double-reporting for 'alter-ego' committees would be redundant and burdensome on the candidate or officeholder and therefore unnecessary.").

The Commission's decision in *Rivera* demonstrates that the Commission will ignore the legal distinction between a political committee and a candidate when the committee is operated as the "alter ego" of the candidate.[4] The Commission's use of the term "alter ego" was a reference to the "alter-ego doctrine," one of the common law standards for piercing a corporate veil, which applies when "there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice." *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986) (superseded by statute on other grounds); *see also SSP Partners v. Gladstrong Invs. Corp.*, 275 S.W.3d 444, 454 (Tex. 2008). The rationale is that if the shareholders of a corporation disregard the separation of the corporate enterprise, the law will also disregard it to avoid an unjust result or thwart an illegal purpose. *Id*.

Likewise, if a candidate disregards the separation between himself and a political committee, the law will also disregard it for purposes of the restrictions in Chapter 253 of the Election Code. One way in which candidates may disregard the separation between themselves and a political committee—blessed by the Commission in *Rivera*—is by not disclosing coordinated in-kind contributions from the committee on their personal filings. However, whether a candidate reports these contributions is not dispositive. When determining whether a committee is the alter ego of a candidate, we will take all of the traditional factors into consideration, including: (1) the degree to which the committee's legal formalities have been followed; (2) the degree to which the committee's property and the candidate's property have been kept separate; (3) the amount of control the candidate maintains over the committee; and (4) whether the committee has been used for campaign purposes. *See Castleberry*, 721 S.W.2d at 272.

The Texas Supreme Court has recognized several additional bases for piercing the corporate veil that are also relevant here, including "where the corporate fiction is resorted to as a means of evading an existing legal obligation," and "where the corporate fiction is used to circumvent a statute." *Id*. As we concluded in Ethics Advisory Opinion 569, candidates may not evade the Election Code's restrictions on their use of political funds by funneling their contributions and expenditures through political committees they control.

<u>Expenditures made by a political committee controlled by a candidate or officeholder are knowingly authorized by the candidate or officeholder.</u>

Similarly, expenditures made by a candidate-controlled political committee are knowingly made or authorized by the controlling candidate. It goes without saying that a person who exercises control over a political committee's expenditures knowingly makes or authorizes those expenditures. And when the person is also a candidate or officeholder that exercises control over the political committee's acceptance of political contributions, the person is knowingly making or authorizing political expenditures of funds accepted by the person as a candidate or officeholder. *See* Tex. Elec. Code § 253.007(b).

[4] This request asks about specific-purpose committees; however, we concluded last year that contributions accepted by a candidate-controlled general-purpose committee are also accepted "as a candidate or officeholder." Tex. Ethics Comm'n Op. No. 569 (2021).

To find otherwise would strip section 253.007 of any meaning. The Legislature sought to "prohibit[] a person who makes or authorizes certain political contributions and direct campaign expenditures from lobbying during the two-year period after the date the person makes or authorizes the contribution or expenditure."[5] It enacted such a prohibition without any dissent. Given the reality that candidates can operate their own specific-purpose committees "for little more than bookkeeping purposes," that prohibition must reach candidate-controlled committees. *See* Tex. Ethics. Comm'n Op. No. 271 (1995.) State law demands that we presume the Legislature intended to enact an effective statute. Tex. Gov't Code § 311.021(2) ("In enacting a statute, it is presumed that … the entire statute is intended to be effective").

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

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 576

September 29, 2022

ISSUE

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

SUMMARY

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

FACTS

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

ANALYSIS

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

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

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

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

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

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

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

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 577

September 29, 2022

ISSUE

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

SUMMARY

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

FACTS

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

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 578

September 29, 2022

ISSUES

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

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

SUMMARY

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

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

FACTS

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

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

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 579

September 29, 2022

ISSUE

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

SUMMARY

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

FACTS

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 580

December 14, 2022

ISSUE

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

SUMMARY

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

FACTS

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 581

December 14, 2022

ISSUE

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

SUMMARY

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

FACTS

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

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

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

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

ANALYSIS

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

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

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

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

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

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 582

December 14, 2022

ISSUE

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

SUMMARY

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

FACTS

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

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

ANALYSIS

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

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

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

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

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

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

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

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

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 583

December 14, 2022

ISSUE

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

SUMMARY

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

FACTS

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 584

December 14, 2022

ISSUE

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

SUMMARY

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

FACTS

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

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

ANALYSIS

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

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

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

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

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

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