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January 7, 2019

The Honorable Sarah Davis
Chair, Committee on General Investigating
& Ethics
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0226

Re: Whether a legislator may receive
payment from a unit of local government for
lobbying activities (RQ-0228-KP)

Dear Representative Davis:

You ask three questions about a legislator's authority to represent a unit of local government before a state agency or another unit of local government.¹ You first ask whether and when a legislator may "receive payment from a unit of local government for . . . lobbying, as that term is described in Chapter 305, Government Code, either a state agency or another unit of local government." *See* Request Letter at 1. While chapter 305 does not define the term lobbying, it regulates communications to "persuade members of the legislative or executive branch to take specific action," primarily by requiring a person who communicates with legislative or executive branch members in specified circumstance to register as a lobbyist. TEX. GOV'T CODE §§ 305.001, .003(a). A "[m]ember of the executive branch" includes officers and employees of "any state agency, department, or office in the executive branch of state government." *Id.* § 305.002(4). "'Administrative action' means rulemaking, licensing, or any other matter that may be the subject of action by a state agency or executive branch office." *Id.* § 305.002(1). A person must register as a lobbyist if the individual (1) expends more than a threshold amount to communicate with a member "of the legislative or executive branch to influence legislation" or

(2) receives, or is entitled to receive under an agreement under which the person is retained or employed, compensation or reimbursement, [above a specified amount] from another person to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

Id. § 305.003(a). Legislators are excluded from the registration requirement of subsection 305.003(a)(2). *Id.* § 305.003(b-1). And chapter 305 does not address communications with officers or employees of local government. Nevertheless, for purposes of your question, we

¹*See* Letter from Honorable Sarah Davis, Chair, House Comm. on Gen. Investigating & Ethics, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Apr. 30, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinions-rqs> ("Request Letter").

address a legislator's authority to receive payment from a unit of local government for directly communicating with legislative and executive officers or employees of a state agency or a unit of local government to influence legislation or administrative action. *See* Request Letter at 1.

Relevant to your questions, chapter 572 of the Government Code establishes standards of conduct and conflict-of-interest requirements for state officers and employees, including legislators. *See* TEX. GOV'T CODE §§ 572.001, .002(4)(a); *see generally id.* §§ 572.001–.069 (chapter 572). Section 572.052 governs a legislator's representation before a state agency, stating that “[a] member of the legislature may not, for compensation, represent another person before a state agency in the executive branch of state government,” with exceptions only for certain criminal and ministerial matters. *Id.* § 572.052(a). But “person,” as that word appears in chapter 572, means only “an individual or a business entity.” *Id.* § 572.002(7) (stating that “[i]n this chapter . . . ‘[p]erson’ means an individual or a business entity”). An “individual” in chapter 572 is a natural person. *See* Tex. Ethics Comm’n Op. No. 213 (1994) at 2. A “business entity” is “any entity recognized by law through which business for profit is conducted” TEX. GOV’T CODE § 572.002(2). In different contexts, the Legislature commonly defines “person” to include units of local government or comparable terms.² But chapter 572’s definition of “person” omits units of local government. *Id.* § 572.002(7). When construing a statute, courts presume “that words not included were purposefully omitted.” *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). Like the courts, we “must take the Legislature at its word [and] respect its policy choices.” *Christus Health Gulf Coast v. Aetna, Inc.*, 397 S.W.3d 651, 654 (Tex. 2013). Therefore, because a unit of local government is not a person under section 572.052, that statute does not prohibit a legislator from receiving compensation to represent a unit of local government before a state agency. *See* Tex. Ethics Comm’n Op. No. 220 (1994) (stating that because a nonprofit organization is not an individual or business entity, it is not a “person” for purposes of chapter 572). No other statute addresses a legislator’s representation of a unit of local government before a state agency. Also, no statute “prohibits a legislator from representing clients before governmental units other than state agencies.” Tex. Att’y Gen. Op. No. GA-0087 (2003) at 3; *see also* Tex. Ethics Comm’n Op. No. 178 (1993) (determining that generally a legislator is not prohibited from representing a client before a metropolitan transit authority). Thus, no statute specifically precludes a legislator from accepting compensation to represent a unit of local government before a state agency or another unit of local government.

However, other statutory duties may limit a legislator’s authority to represent a unit of local government in particular circumstances. Section 572.001 of the Government Code declares the state’s policy that

²*See, e.g.,* TEX. BUS. & COM. CODE § 1.201(b)(27) (Uniform Commercial Code) (“‘Person’ means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, any other legal or commercial entity, or a particular series of a for-profit entity.”); TEX. GOV’T CODE § 311.005(2) (Code Construction Act) (stating that unless a statute or context provides otherwise, “[p]erson” includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity”); *id.* § 2001.003(5) (Administrative Procedure Act) (“‘Person’ means an individual, partnership, corporation, association, governmental subdivision, or public or private organization that is not a state agency.”).

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

TEX. GOV'T CODE § 572.001; *see also id.* § 572.002(4), (12) (including legislators in definition of state officer). Section 572.051 imposes other limitations on representation or employment applicable to legislators:

A. state officer or employee should not:

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

(2) accept other employment or engage in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position;

(3) accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties;

... ; or

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

Id. § 572.051(a). Whether chapter 572 limits a legislator's authority to represent a unit of local government depends on the facts in specific circumstances. *See* Tex. Att'y Gen. Op. No. GA-0087 (2003) at 4.

You next ask whether a unit of local government may pay a legislator "as an employee or independent contractor for attempting to influence the state agency's decision-making process." Request Letter at 1-2. Your question implicates article XVI, section 40(d), which provides "[n]o member of the Legislature of this State may hold any other office or position of profit under this State." TEX. CONST. art. XVI, § 40(d). Opinions of this office have determined that, for constitutional purposes, "an employee of a political subdivision holds a 'position of profit under this State.'" *See* Tex. Att'y Gen. Op. No. GA-0386 (2005) at 3; *see also* Tex. Att'y Gen. Op. No. JC-0430 (2001) at 2 (concerning an assistant county attorney); Tex. Att'y Gen. LO-90-055, at 2

(concerning a municipal firefighter). Thus, article XVI, section 40(d) would preclude a legislator from providing services as an employee of a unit of local government. That constitutional prohibition does not preclude a legislator from providing representation as an independent contractor. *See* Tex. Att’y Gen. Op. No. GA-0386 (2005) at 4.

Finally, you ask whether a unit of local government may pay a legislator in connection with an administrative action that the legislator neither lobbied for nor otherwise caused to occur. Request Letter at 2. Compensation for lobbying activities must not be made contingent on the outcome of administrative actions. TEX. GOV’T CODE § 305.022(a), (b). Also, a payment or agreement to pay a legislator with no expectation that the legislator would provide any services would likely constitute a gratuity, prohibited under article III, section 52(a) of the Texas constitution. TEX. CONST. art. III, § 52(a); *Tex. Mun. League Intergov’tl Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 383 (Tex. 2002) (stating that the constitution prohibits gratuitous payments to individuals, associations, and corporations.³ Further, payment with no expectation of a quid pro quo would raise concerns about the true purpose of the payment. *See* TEX. CONST. art. XVI, § 41 (prohibiting a legislator from receiving “money [or other] thing of value or employment . . . for his vote or official influence, or for withholding the same”); TEX. PENAL CODE § 36.02(a)(1) (prohibiting the offer or acceptance of a benefit as consideration for the exercise of discretion as a public servant); TEX. GOV’T CODE § 572.051(3) (stating that a state officer 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”). Moreover, a legislator may not solicit, accept, or agree “to accept any benefit from any person,” unless the legislator “gives legitimate consideration in a capacity other than as a public servant.” TEX. PENAL CODE §§ 36.08(f), .10(a)(1); *see also id.* § 1.07(a)(6), (38) (defining “person” for purposes of the Penal Code as including “a government or governmental subdivision”); Tex. Ethics Comm’n Op. No. 123 (1993) (explaining that a legislator may accept a benefit by giving consideration in a capacity other than as a legislator). Whether a payment to a legislator constitutes bona fide consideration for providing representation before a state agency or a unit of local government will depend on the particular facts.

³In *Texas Municipal League*, the Texas Supreme Court articulated a three-part test to determine the constitutionality of an expenditure of public funds, stating that a governmental entity must (1) ensure that its expenditure of public funds is to “accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public’s investment; and (3) ensure that the political subdivision receives a return benefit.” *Tex. Mun. League*, 74 S.W.3d at 384.

S U M M A R Y

No statute specifically precludes a legislator from accepting compensation to represent a unit of local government before a state agency or another unit of local government. Article XVI, section 40(d) of the Texas constitution precludes a legislator from providing services as an employee of a unit of local government.

A legislator may not solicit, accept, or agree to accept any benefit from any person unless the legislator gives legitimate consideration in a capacity other than as a public servant.

Whether a payment to a legislator constitutes bona fide consideration for providing representation before a state agency or a unit of local government will depend on the particular facts.

Very truly yours,



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