



# TEXAS ETHICS COMMISSION



**\*\*Overruled, Modified, Clarified, or Superseded\*\***

## ETHICS ADVISORY OPINION NO. 60

*October 23, 1992*

*Whether a \$60 meal or a \$160 deer rifle is a benefit. (AOR-24 and AOR-85)*

A registered lobbyist has asked the Texas Ethics Commission a number of questions about specific expenditures made to communicate to influence legislative action. First, the lobbyist describes a situation in which he purchases a meal for a legislator and reports the expenditure as required by the lobby statute. The cost of the legislator's food and beverages is \$60. The requestor asks whether the meal is a "benefit" under chapter 36 of the Penal Code.

Under section 36.02 of the Penal Code, "benefits" are the currency of bribery. For bribery to occur, there must be a solicitation, offer, or acceptance of a "benefit." The other elements of the offense must also be present.<sup>1</sup> The question here is whether a \$60 restaurant meal is a "benefit." For purposes of chapter 36 of the Penal Code, 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." Penal Code § 36.01(5)<sup>2</sup> Webster's Dictionary defines "pecuniary" with the phrases "consisting of or measured in money" and "of or relating to money." Webster's Ninth New Collegiate Dictionary 866 (1991). The dictionary also gives "monetary" as a synonym for "pecuniary." *Id.* Thus, a "benefit" is anything reasonably regarded as monetary gain or advantage. *See generally Ethics Advisory Opinion No. 36* (1992) (plaques, in general, are not reasonably regarded as pecuniary gain or advantage). Chapter 36 makes clear that food may be a benefit since the guest exceptions in section 36.10(b) and (c) provide that the prohibition against accepting benefits is not applicable to food in certain circumstances. This exception would be superfluous if food could not be considered a "benefit." Although there are circumstances in which food is not a benefit, a \$60 restaurant meal is a benefit.<sup>3</sup>

The fact that a \$60 meal is a benefit does not, however, establish that bribery has occurred. Under the bribery prohibition, a benefit must be solicited, offered, or accepted *as consideration* for some official act on the part of the public servant. Penal Code § 36.02. This is in contrast to permissible lobbying under chapter 305 of the Government Code, which regulates certain expenditures made to communicate with members of the legislative and executive branch to influence legislation or administration action. Permissible lobby expenditures may raise expectations, but the donor does not seek and the donee does not offer any guarantees.

The requestor posits that at the meal in question the registrant asks for assistance on a legislative matter but that neither the legislator nor the registrant identifies the meal as consideration for such assistance. Again, whether bribery has occurred depends on whether there has been solicitation, offer, or acceptance of a benefit as consideration for action by a public servant. A determination of whether bribery had occurred would be based on all the evidence presented, not necessarily on an isolated utterance.

The requestor describes another hypothetical situation in which the registrant gives a member of the legislature a \$160 deer rifle and reports that expenditure under the lobby statute. At the time of presentation the registrant states, "Good luck on your next hunt," or "By the way, I need help on a legislative matter." The deer rifle is a benefit. The prohibitions on the offer and acceptance of benefits set out in sections 36.08 and 36.09 would not apply, however, because the rifle is a gift required to be reported under the lobby statute. Penal Code § 36.10(a)

(5). Whether the bribery statute would apply would depend on whether the deer rifle was offered or accepted "as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion." *Id.* § 36.02(a)(1). However, the specific situation described raises a serious question under the bribery provision.

The lobbyist's remaining question is whether a registrant may decline to report an expenditure under the lobby statute on the grounds that it would violate his right not to incriminate himself under the 5th Amendment to the United States Constitution. It is conceivable that specific information requested under the lobby statute might tend to incriminate a registrant. If so, the registrant may claim the 5th Amendment and refuse to report the information. *United States v. Sullivan*, 274 U.S. 259 (1927). The privilege must be claimed, however, in response to a particular question, not merely in a blanket refusal to furnish any information. *United States v. Johnson*, 577 F.2d 1304, 1311 (5th Cir. 1978). See generally *California v. Byers*, 402 U.S. 424 (1971).

## SUMMARY

Both a \$60 restaurant meal and a \$160 deer rifle are benefits. A benefit does not constitute a bribe, however, if it is not offered or accepted as consideration for some official act on the part of a public servant.

A registrant filing a report under the lobby law may claim his 5th Amendment privilege in response to specific questions if providing the information would tend to incriminate the registrant. The registrant must claim the privilege in response to particular questions, not in a blanket refusal to furnish any information.

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<sup>1</sup> Also, a legislator commits a Class A misdemeanor if he "solicits, accepts, or agrees to accept any benefit from any person." Penal Code § 36.08(f) (emphasis added); see also *id.* § 36.09 (making it an offense to offer, confer, or agree to confer a benefit on a public servant that the donor knows the public servant is prohibited from accepting). The prohibitions set out in sections 36.08(f) and 36.09(a) are inapplicable in the situation described because the meal, as described, is accepted as a guest and reported by the donor as required by the lobby statute. *Id.* § 36.10(b), (c). See generally [Ethics Advisory Opinion No. 12](#) (1992) (discussing "guest" exception to prohibitions set out in section 36.08).

<sup>2</sup> The question raised in this request for an opinion is whether lobby expenditures reported under chapter 305 of the Government Code are excluded from the definition of "benefit." Before January 1, 1992, political contributions and lobby expenditures reported in accordance with law were specifically excluded from the definition of "benefit." Penal Code § 36.01(5) (Vernon 1989). Senate Bill 1 deleted that exclusion. S.B. 1, Acts 1991, 72d Leg., ch. 304, § 4.01, at 1321. That deletion makes clear that reporting an expenditure under the lobby law does not mean that the expenditure is not a benefit. Certain prohibitions on the solicitation, offer, and acceptance of benefits, however, are not applicable to political contributions and certain lobby expenditures. See Penal Code § 36.10.

<sup>3</sup> The requestor also asks whether a \$20 restaurant meal would be a benefit. Whether the cost of a meal is so low that it could not be "reasonably regarded" as a pecuniary *gain* or *advantage* is a fact question for a judge or jury.