



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 89

*December 10, 1992*

*Whether certain types of communication between employees of an engineering firm and officers and employees of a state agency are subject to the registration and reporting requirements of the lobby statute. (AOR-27)*

The Texas Ethics Commission has been asked to consider a number of questions about chapter 305 of the Government Code, which sets out registration and reporting requirements for lobbyists. The requestor has asked questions about the application of chapter 305 to communications between employees of an engineering firm and officers and employees of state agencies. *See generally* [Ethics Advisory Opinion No. 3](#) (1992) (regarding compensation and expenditure thresholds for registration as a lobbyist).

### **Issue No. 1 - Lobby Registration by Entities**

A threshold question is whether the lobby statute requires only individuals to register as lobbyists, or whether entities may also be required to register. The lobby statute requires a "person" who meets either one of two registration requirements to register as a lobbyist. Gov't Code § 305.003(a). "Person" means "an individual, corporation, association, firm, partnership, committee, club, organization, or group of persons who are voluntarily acting in concert." *Id.* § 305.002(8). Thus, the definition of "person" indicates that entities may be required to register as lobbyists.<sup>1</sup>

As indicated above, a "person" must register if the person meets either one of two registration requirements. One of those thresholds is the "expenditure" threshold.<sup>2</sup> Under that threshold a "person" must register if the person expends more than \$200 in a calendar quarter to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action. *Id.* § 305.003(a)(1); Tex. Ethics Comm'n, 17 Tex. Reg. 4444 (1992) (to be codified at title 1, section 40.1, of the Texas Administrative Code). Because the request letter describes lobby expenditures by the engineering firm,<sup>3</sup> the firm may be required to register under the expenditure threshold and report those expenditures.

In the situation described, it is possible that the engineering firm is within an exception to the registration requirement. A person who meets one of the registration thresholds is nonetheless exempt from required registration if that person is

a person whose only activity to influence legislation or administrative action is to compensate or reimburse *an individual registrant* to act in the person's behalf to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

Gov't Code § 305.004(4) (emphasis added). *But see* Tex. Ethics Comm'n, 17 Tex. Reg. 4446 (1992) (to be codified at title 1, section 40.13(c), of the Texas Administrative Code) (firm *may* register in such circumstances). The firm would be within this exception if its *only* lobby activity is to compensate individual registrants for lobbying or to reimburse employees for lobby expenditures.

The exception set out above, by its terms, does not apply to the firm if a firm employee uses a firm credit card or an advance from the firm, for example, to make a lobbying expenditure, since the firm's activity could not be

characterized as "compensating or reimbursing an individual registrant."<sup>4</sup> In such circumstances, the expenditures are attributable to the firm for purposes of the registration and reporting requirements of the lobby statute.<sup>5</sup>

## **Issue No. 2 - Application of "Presence" Requirement to Entities**

In order for a registrant to make certain expenditures, a registrant must be "present." Gov't Code §§ 305.006(f), 305.024(a)(7). The presence of an officer, employee, or member of the engineering firm who is himself registered would satisfy that requirement. Also, if the registered firm is a partnership, the presence of a partner, whether registered or not, would satisfy the requirement. Or, if the registered firm is a corporation, the presence of a person--whether registered or not--whose position, authority, or conduct could support an award of exemplary damages against the corporation would satisfy the presence requirement. *See Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 406 (Tex. 1934); *Corporate Wings, Inc. v. King*, 767 S.W.2d 485 (Tex. App.--Dallas 1989, no writ).

## **Issue No. 3 - Discussions About Agency Standards**

The requestor has asked about the application of chapter 305 to a situation in which an employee of an engineering firm discusses a new air pollution control technology with staff members of the Texas Air Control Board (TACB). The discussion takes place at a lunch paid for by the employee of the engineering firm, and the employee seeks to convince the staff members that the technology should be promulgated as a standard by the agency. The employee is receiving compensation for communicating with a member of the executive branch in an attempt to influence administrative action. This activity, as well as the employee's time preparing for this activity, is included in the calculation to determine whether the employee has crossed the compensation threshold for registration under chapter 305. Gov't Code § 305.003(a)(2); Tex. Ethics Comm'n, 17 Tex. Reg. 4445 (1992) (to be codified at title 1, section 40.11(a), of the Texas Administrative Code) (preparation time). *See generally Ethics Advisory Opinion No. 2* (1992) (regarding registration thresholds).

An expenditure for lunch should be attributed either to the firm or to the individual employee as described above. The requestor asks whether the answer would be different if the conversation took place in TACB offices. It would not.

## **Issue No. 4 - Requests for Information**

The requestor also describes a situation in which a member of an engineering firm asks a Texas Department of Transportation official what highway construction projects are being planned by the department. A request for information is not a communication to influence administrative action and is not covered by the registration and reporting requirements in chapter 305. Tex. Ethics Comm'n, 17 Tex. Reg. 6893 (1992) (to be codified at title 1, section 40.7(a)(2), of the Texas Administrative Code).

## **Issue No. 5 - Extolling Merits of Firm**

Next the requestor asks about the application of chapter 305 to a situation in which an employee of an engineering firm takes an official of the Texas Department of Transportation to lunch to inquire about projects planned by the department. The engineering firm employee "spends much of the luncheon extolling the merits of the engineering firm." The lobby statute applies to communications intended to influence "administrative action." Gov't Code § 305.003. "Administrative action" includes any matter that *may* be the subject of agency action. *Id.* § 305.002(1). Presumably, the engineering firm employee is extolling the merits of the engineering firm with the hope that his words may influence agency action. *See Ethics Advisory Opinion No. 4* (1992). If so, the activity is a communication to influence. *Id.*

## **Issue No. 6 - Hunting Trip**

Another question is about the application of chapter 305 to a hunting trip that includes firm employees and state officials and is paid for by an engineering firm. The requestor asks whether the subjects discussed during the trip

determine whether the contact on the trip is a communication to influence. A person required to register as a lobbyist must report an expenditure if it is made "to communicate directly with" one or more members of the executive branch to influence administrative action. Gov't Code §§ 305.003(a), 305.006. The personal contact made on the trip is communication to influence administrative action, even if the purpose of the trip is to influence agency action by the generation of goodwill and even if business is not discussed during the trip. *See Ethics Advisory Opinion No. 4* (1992). In such a case, the expenditure for the trip must be attributed either to the firm or to individual employees as described above. *See Ethics Advisory Opinion No. 12* (1992) (regarding expenditures in connection with a hunting trip). This analysis would also apply to the requestor's question as to whether chapter 305 applies to an employee of an engineering firm who accompanies an employee of a state agency to a sporting or cultural event and pays for tickets and food.

### **Issue No. 7 - Construction Projects**

The requestor also describes the following three situations:

- (1) A government entity which is covered by the Lobby Registration Law promulgates a fee curve schedule whereby a set percentage of each construction project awarded by the entity is allowed for engineering for a construction project. For example, the entity allows 3% of the construction cost for engineering. An engineering firm employee visits with an entity official to convince such official that the percentage is inadequate for all construction projects.
- (2) A government entity which is covered by the Lobby Registration Law promulgates a fee curve schedule whereby a set percentage of each construction project awarded by the entity sets a fixed percentage allowed for engineering for a construction project. For example, the entity allows 3% of the construction cost for engineering. An engineering firm employee visits with an entity official to concentrate on increasing the percentage for a particular construction project for which bids are about to be requested by the entity.
- (3) An employee of an engineering firm has lunch with a member of the Texas Department of Transportation to convince the Department to change the routing of a planned road if an engineering firm client will pay for the road.

In all of these situations a firm employee is compensated for communication intended to influence agency action. The question is whether the communication is excepted from the registration and reporting requirements of the lobby statute. A commission rule excepts from the compensation threshold "direct communication for the purpose of compliance with existing laws, administrative rules, policies, and procedures, when there is no attempt to change or seek exceptions to such rules, policies, or procedures." Tex. Ethics Comm'n, 17 Tex. Reg. 6893 (1992) (to be codified at title 1, section 40.7(a)(8), of the Texas Administrative Code). This exception applies to discussions or negotiations intended to persuade a member of the executive branch that an applicant does in fact meet standards of general applicability. *See generally Ethics Advisory Opinions Nos. 16, 15, 14* (1992). This exception from the compensation threshold does not, however, apply to the situations described above because the firm employee would be attempting to influence a change in a policy of general applicability.

### **Issue No. 8 - Bidding Procedures**

Another question is about a lunch at which a firm employee attempts to convince a member of the executive branch of the merits of "going to a sole source purchase rather than utilizing a request for bids." The requestor asks whether the lobby statute applies if such a change "is in the discretion of the official" or if the change is one that the member of the executive branch "can influence but not unilaterally make." In either case, if the suggested change would require an exception from agency rules of general applicability, the communication is not excepted from the registration and reporting requirements of the lobby statute. Chapter 305 governs any communication to officers or employees of state agencies intended to influence agency action, regardless of whether the communication is made to a person who has the actual authority to make the change.

**SUMMARY**

An entity may be required to register as a lobbyist under the expenditure threshold for lobby registration. An expenditure made directly from the funds of an engineering firm, in contrast to reimbursement paid by the firm to an individual registrant, is an expenditure by the firm for purposes of the lobby statute, not an expenditure made by the employee who acted on behalf of the firm. An employee of an engineering firm who is paid to communicate with an official of a regulatory agency to extol the merits of the firm is engaged in lobby activity if the purpose of doing so is to influence the agency official in regard to any matter that may be the subject of agency action. Similarly, expenditures for a hunting trip are not exempted from chapter 305 of the Government Code simply because no business is discussed on the trip.

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<sup>1</sup> A 1973 attorney general opinion that considered the compensation threshold of the lobby statute then in effect stated that an entity that hires another to communicate directly is not itself communicating directly. Attorney General Opinion H-191 (1973). We think an organization can, acting through its agents, communicate and may sometimes be required to register.

<sup>2</sup> The other threshold is a "compensation or reimbursement" threshold. Gov't Code § 305.003(a)(2). The questions before us do not require us to consider whether an entity may be required to register under the "compensation or reimbursement" threshold.

<sup>3</sup> See p. 4, *infra* (considering whether particular expenditures are lobby expenditures).

<sup>4</sup> Also, the exception does not apply if the individual receiving the reimbursement is not a registrant.

<sup>5</sup> "Double reporting" is not required under the lobby statute. [Ethics Advisory Opinion No. 48](#) (1992). Therefore, an expenditure attributable to the firm need not be reported by the natural person acting on behalf of the firm.