TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 101

December 10, 1992

Whether certain special districts are included within the executive branch for purposes of the lobby statute. (AOR-92)

The Texas Ethics Commission has received two requests in regard to the scope of the term "member of the executive branch" for purposes of the lobby law, chapter 305 of the Government Code. One of the requests asks whether the term includes officers and employees of a flood control district or a metropolitan transit authority. The other asks whether the term includes officers and employees of a municipal utility district or a river authority.

In specified circumstances, a person who communicates with a "member of the executive branch" to influence "administrative action" is required to register as a lobbyist. Gov't Code § 305.003. "Member of the executive branch" is defined as "an officer, officer-elect, candidate for, or employee of any state agency, department, or office in the executive branch of state government." *Id.* § 305.002(4). The statute does not further define "state agency or department." *See generally* Ethics Advisory Opinion No. 31 (1992) (concluding that "state agency" for purposes of chapter 305 includes state colleges and universities).[1]

The legislature has frequently expressly stated that "state agency," for purposes of particular statutes, is an entity that has statewide jurisdiction. *See*, *e.g.*, V.T.C.S. arts. 6252-9f, § 1(1)(A); 6252-11c, § 1(3); 6252-13a, § 3(1). Article 6252-9b, V.T.C.S., one of the statutes under the Ethics Commission's jurisdiction, defines "state agency" as a body that "has authority that is not limited to a geographical portion of the state." V.T.C.S. art. 6252-9b, § 2(8)(A)(ii). Also, a provision in chapter 305 defines "political subdivision," for purposes of that section, to include municipal utility districts, metropolitan transit authorities, and "any other governmental entity that embraces a geographic area within a definite boundary." Gov't Code § 305.026(b). Chapter 305 of the Government Code uses the term "political subdivision" to describe entities other than entities that are part of one of the branches of state government. *Id.* § 305.003(b). We conclude, therefore, that as a general rule, statewide jurisdiction is implicit in the term "state agency or department" as used in chapter 305. Therefore municipal utility districts,[2] flood control districts,[3]and metropolitan transit authorities[4] are not states agencies or departments, and communications to officers and employees of such governmental bodies are not governed by chapter 305 of the Government Code.

The issue is somewhat more complicated in regard to river authorities. Like municipal utility districts, river authorities are usually created under the conservation amendment to the state constitution and their regulatory authority is limited geographically.[5] *See generally* Water Aux. Laws, Table III (Vernon 1992) (alphabetical listing of districts created or validated pursuant to the conservation amendment); W. Thrombley, Special Districts and Authorities in Texas at 120-22 (1959) (characterizing river authorities as districts of "regional character"). Nonetheless, river authorities are considered state agencies for various purposes. *See*, *e.g.*, V.T.C.S. art. 6252-8e, § 1(4)(A) (including river authorities within the definition of "state agency"). Indeed, article 6252-9b, which is administered and enforced by the Ethics Commission, includes river authorities within the definition of state agency. V.T.C.S. art. 6252-9b, § 2(8)(C). A member of the board of directors of a river authority is listed as an "appointed officer of a major state agency." *Id.* § 2(5)(A)(xlviii).[6] On the other hand, river authorities are not always specifically included in a statute's definition of "state agency." *See*, *e.g.*, V.T.C.S. arts. 4591.2, § 1(3)

(specifically excluding river authorities from the definition of state agency); 6252-3g, § 1.01(10) (defining river authorities as political subdivisions); *see also id.* arts. 6252-9f, § 1(1)(A) (defining "state agency" as being within the executive branch and having statewide jurisdiction), 6252-13a, § 3(1) (defining "agency" as government body having statewide jurisdiction for purposes of APTRA). *See generally* Attorney General Opinions DM-20 n.5 (1992) (noting inconsistencies in treatment of river authorities), JM-1005 (1989) (recognizing instances in which river authorities have been found to be state agencies, but concluding that they are political subdivisions for purposes of the Civil Practice and Remedies Code).

Neither the legislature nor the courts have treated river authorities in a consistent manner. In *Lower Colorado River Auth. v. McCraw*, 83 S.W.2d 629 (Tex. 1935), the Texas SupremeCourt held that the Lower Colorado River Authority (LCRA) is a state board. Because LCRA's enabling act provided for six-year terms of office[7] for its directors, the court determined:

> [U]nless the board of directors of this district can be classed as a state board, the entire act must fall.

Id. at 634.[8] Later cases, however, found the LCRA to be a political subdivision, not a state agency. *Karling v. Lower Colorado River Auth.*, 303 S.W.2d 495 (Tex. Civ. App.--Austin 1957, writ ref'd n.r.e.); *Hodge v. Lower Colorado River Auth.*, 163 S.W.2d 855 (Tex. Civ. App.--Austin 1942, writ dism'd by agr.); *see also Bennett v. Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 501 (Tex. 1954) (approving the analysis in *Hodge* and noting "We can see no distinction in the rules of law to be applied to either a drainage district or the Lower Colorado River Authority"). *See generally Lower Colorado River Auth. v. Chemical Bank & Trust Co.*, 185 S.W.2d 461 (Tex. Civ. App.--Austin), *aff'd*, 190 S.W.2d 48 (Tex. 1945) (further analysis of the nature of LCRA).

The legislature resolved any questions with respect to the LCRA in 1973 when it amended section 3 of the LCRA act to include the following language:

> It is expressly provided that [the LCRA] Board of Directors is a State Board as contemplated by Section 30a of Article 16 of the Constitution of Texas.

S.B. 858, Acts 1973, 63d Leg., ch. 268, § 1, at 633; *see also* S.B. 115, Acts 1975, 64th Leg., ch. 74, § 1, at 184-85 (nearly identical language relocated to section 4 of the act). The legislature also has specifically stated that other river authorities are state agencies. *E.g.*, H.B. 1416, Acts 1969, 61st Leg., ch. 432, § 1, at 1465 (amending section 4 of the Guadalupe-Blanco River Authority act and stating that the authority's board of directors is "a state board of a state agency as contemplated by Section 30a of Article XVI, Constitution of Texas"); H.B. 511, Acts 1947, 50th Leg., ch. 119, § 4, at 209-10 (amending section 18 of the Upper Colorado River Authority act and characterizing the authority as "a State agency"); *see also* Water Aux. Laws, Tables (Vernon 1992) (cites to subsequent acts affecting the authorities referenced above, butnot affecting the above-quoted provisions). However, other acts providing for river authorities do not contain such language. *E.g.*, S.B. 125, Acts 1977, 65th Leg., ch. 394, § 1, at 1079 (creating the Angelina and Neches River Authority simply as "a governmental agency, body politic and corporate"); H.B. 1531, Acts 1973, 63d Leg., ch. 438, § 1, at 1192 (declaring the Palo Duro River Authority to be "a political subdivision"); H.B. 726, Acts 1937, 45th Leg., ch. 276, § 2, at 557-58 (creating the San Antonio River Canal and Conservation District, which later became the San Antonio River Authority, as "a Governmental Agency, a Municipality, Body Politic and Corporate"); *see also* Water Aux. Laws, Tables (Vernon 1992) (cites to subsequent acts affecting the authorities referenced above, but not affecting the above-quoted provisions). The Brazos River Authority is declared to be a state agency, but directors take an oath similar to that of county commissioners. S.B. 3, Acts 1935, 44th Leg., 1st C.S., ch. 368, §§ 1, 14 at 1527-28, 1536. Although the activities of all river authorities primarily focus on water supply and distribution, flood control, and water quality control, they are uniquely organized and thus difficult to categorize.

> River authorities are governed by boards of directors ranging in size from 3 to 24 members. Directors may be appointed by the governor with state senate confirmation, appointed by the Texas Water Commission, elected from the districts, or appointed by the governing bodies of member cities and/or counties.

Tex. Advisory Comm'n on Intergovernmental Relations, Handbook of Governments in Texas at V-16 (1983); *see also* 36 D. Brooks, County and Special District Law § 46.29 (Texas Practice 1989).

Although the issue is a difficult one, we believe that article 6252-9b, another law subject to the Ethics Commission's jurisdiction, is the most useful source for defining the term "state agency or department" for purposes of the lobby statute. Based on the inclusion of river authorities among state agencies under article 6252-9b, we conclude that river authorities are state agencies for purposes of the lobby law, chapter 305 of the Government Code,[9] despite the limited geographical jurisdiction of river authorities. Thus a person who communicates directly with an officer or employee of a river authority to influence administrative action, and does not fall within an exception, must register as a lobbyist if the person meets one of the registration thresholds.

SUMMARY

As a general rule, statewide jurisdiction is implicit in the term "state agency or department" as used in chapter 305 of the Government Code. However, a person who communicates directly with an officer or employee of a river authority to influence administrative action must register as a lobbyist if the person meets one of the registration thresholds.

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[1] Section 305.003(b) excepts from lobby registration requirements "a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state." (Emphasis added.) See also Tex. Ethics Comm'n, 17 Tex. Reg. 4444 (1992) (to be codified at title 1, sections 40.1 and 40.3, of the Texas Administrative Code).

[2] Municipal utility districts are usually created under, and subject to conditions of, the conservation amendment to the state constitution. *See* Tex. Const. art. XVI, § 59; *see also id*. art. III, § 52 (constitutional article limiting indebtedness of defined districts; authority for creation of districts prior to conservation amendment). All municipal utility districts must further comply with chapter 54 of the Water Code, which establishes the criteria for the creation, composition, administration, and regulation of municipal utility districts. Conservation and reclamation districts, in general, constitute political subdivisions of the state. *Puryear v. Red River Auth. of Texas* , 383 S.W.2d 818, 820 (Tex. Civ. App.--Amarillo 1964, writ ref'd n.r.e.) (conservation and reclamation districts created pursuant to article XVI, section 59, of the constitution "constitute political subdivisions of the State and operate as a governmental agency performing governmental functions"); *Smith v. Harris County-Houston Ship Channel Navigation Dist.* , 330 S.W.2d 672, 674 (Tex. Civ. App.--Fort Worth 1959, no writ) (finding that districts created under the conservation amendment "are not classed with municipal corporations, but are political subdivisions of the State, performing governmental functions, and stand upon the same footing as counties, precincts, and other political subdivisions established by law"); Ethics Advisory Opinion No. 73 (1992) (an underground water conservation district is a political subdivision).

[3] The term "flood control district" has no constitutional or statutory meaning, but it is usually the term associated with levee improvement districts. Levee improvement districts are authorized by the conservation amendment of the Texas Constitution; they may be created in the manner prescribed by chapter 57 of the Water Code. *See Water* Code § 57.011; *see also id* . § § 66.011, 66.012 (purpose of stormwater control district, also created pursuant to article XVI, section 59, is to control floodwater). Levee improvement districts are political subdivisions. *Leonard v. Delta County Levee Improvement Dist. No. 2* , 507 S.W.2d 333 (Tex. Civ. App.-- Texarkana), *aff'd* , 516 S.W.2d 911 (Tex. 1974), *cert. denied* , 423 U.S. 829 (1975), *appeal after remand* , 559 S.W.2d 387 (Tex. Civ. App.--Texarkana 1977, writ ref'd n.r.e.); *Smith v. Harris County-Houston Ship Channel Navigation Dist.* , 330 S.W.2d 672 (Tex. Civ. App.--Fort Worth 1959, no writ).

[4] Metropolitan transit authorities are governed by article 1118x, V.T.C.S. Only certain specified metropolitan areas of the state are authorized to create rapid transit authorities. V.T.C.S. art. 1118x, § § 2, 3. Members of the board of a transit authority established by article 1118x are appointed by the governing body of either (1) the principal city, or (2) the principal city, county commissioners, and other incorporated municipalities in the county. *Id.* § 4. Board members are subject to chapter 171 of the Local Government Code, which governs conflicts of interest of officers of municipalities, counties, and certain other local governments. *Id.* Clearly, metropolitan transit authorities are political subdivisions. *See City of Humble v. Metropolitan Transit Auth.* , 636 S.W.2d 484 (Tex. App.--Austin 1982, writ ref'd n.r.e.).

[5] Unlike municipal utility districts, which operate under general laws of the state, river authorities are established by special acts of the legislature. *Compare* Water Code ch. 54 (governing municipal utility districts) *with* Water Code Aux. Laws, Tables II, III (Vernon 1992) (providing, respectively, an alphabetical listing of water districts with citation to location of each act in the General and Special Laws of Texas and a list of all districts created or validated pursuant to article XVI, section 59, with the citations to each act). The provisions of any special law creating a conservation district prevail over any inconsistent general law provisions applicable to all conservation districts. 36

D. Brooks, County and Special District Law § 46.6 (Texas Practice 1989), *citing Hidalgo County Water Control & Improvement Dist. v. Hidalgo County* , 134 S.W.2d 464 (Tex. Civ. App.--San Antonio 1939, writ ref'd).

6 A typographical error in the statute's numbering has been corrected in this opinion.

7 At the time of the *McCraw* decision, article XVI, section 30, of the Texas Constitution prohibited terms of public office not fixed by the constitution from exceeding two years. In 1982 that provision was amended to allow members of the governing boards of districts organized under article XVI, section 59, to hold office for four-year terms. However, article XVI, section 30a, of the constitution allows six-year terms of office for state boards.

8 *But see* W. Thrombley, Special Districts and Authorities in Texas at 9 n.7 (1959) (questioning logic of permitting six-year terms of office for special districts on grounds they are state agencies rather than local governments).

9 Attorney General Opinion H-297 (1974) found river authorities to be part of the executive branch for purposes of the lobby law then in effect. Although we adopt the same conclusion, we reject the reasoning of the opinion, which seems to suggest that all local political subdivisions are state agencies. The focus of that opinion was whether various local officials were exempt from the requirement that they register as lobbyists. Attorney General Opinion H-297 broadly construed both the definition of "executive branch" and the definition of "judicial branch" to achieve a result similar to the one now codified in section 305.003(b) of the Government Code, which exempts political subdivisions from any registration requirements triggered by the compensation threshold. *But see* 16 T.A.C. § 23.11 (reports required by Public Utility Commission). The inclusion of an exemption for officers and employees of political subdivisions in the current lobby act obviates the need to construe "state agency" as broadly as it was construed by the attorney general under the prior law.