



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 130

April 1, 1993

Acceptance of gifts by a state agency, and acceptance of gifts by individual officers and employees of a state agency. (AOR-140)

The Department of Agriculture has asked for an advisory opinion in regard to gifts sent to the department. The request letter sets out the following background information:

The department has regulatory oversight of and provides marketing assistance to various agricultural industries and occasionally receives general food items in addition to flowers and wine from both the public and members of these industries. As the department is directly involved in these industries, it is not unusual to receive samples of these items from businesses and individuals from across the state.

The department would like to accept these gifts on behalf of the department as a whole and would distribute them to our employees at random.

In this context, the request letter asks whether the department or the commissioner himself may accept these items as gifts. Answering this request provides the occasion for a general review of two issues of concern to many state officers and employees: (1) under what circumstances gifts may be accepted *by a state agency* and (2) under what circumstances *individual officers and employees* of a state agency may accept gifts.

ACCEPTANCE OF GIFTS BY A STATE AGENCY

The Ethics Commission has issued several opinions that consider the acceptance of gifts by a state agency. [Ethics Advisory Opinions Nos. 118](#) (1993), [63](#), [62](#), [51](#), [31](#) (1992). Chapter 305 of the Government Code, which regulates lobbying, and chapter 36 of the Penal Code, which regulates gifts to public officers and employees, do not apply to gifts given to a state agency. [Ethics Advisory Opinions Nos. 62](#), [31](#) (1992). The statutes applicable to a specific state agency determine whether the agency has authority to accept gifts. *Id.* Although questions about the specific authority of a state agency to accept gifts are outside the Ethics Commission's advisory opinion authority,¹ previous Ethics Advisory Opinions have set out some general guidelines about the acceptance of gifts by a state agency. First, the commission has noted that even if a state agency has authority to accept gifts generally, the agency may accept gifts on behalf of the department only if the gifts can be used in carrying out the department's powers and duties. *Id.* A gift to a state agency becomes state property, and neither the agency nor any officer or employee of the agency is permitted to use it for personal or private purposes. *Id.* Consequently, a state agency, cannot accept gifts for the personal use or enjoyment of individual state officers or employees.

A number of requests for advisory opinions have asked about the acceptance of food and beverages by a state agency. Although there may be circumstances in which an agency may accept food or beverages for the purposes of carrying out agency business,² it is doubtful that acceptance of food or beverages to be distributed among agency employees serves an agency purpose. [Ethics Advisory Opinion No. 62](#) (1992). Moreover, even if a legal theory is available to provide for the acceptance of the food or beverages, the appropriateness of the acceptance must be carefully considered. If the donor is subject to agency regulation or oversight, or engages in a business

that can be affected by agency action, then it may be that the donor hopes or expects to curry favor with the agency. Even if it is not the case that the donor expects to curry favor, it may appear so, especially to someone whose interests are different from those of the donor, and who may feel at a regulatory disadvantage because of the donor's largesse. It is important to remember that the underlying purpose of all ethics law and regulation is to prevent the *fact* or *appearance* that government is influenced by gifts or consideration other than the objective merits of making a certain decision. This brings us to the second issue raised by the Department of Agriculture's request: whether an individual officer or employee of a state agency may accept gifts personally.

ACCEPTANCE OF GIFTS BY AN INDIVIDUAL

Bribery

A state officer or employee commits the offense of bribery if he or she solicits, offers, or accepts a "benefit" in exchange for his or her decision, opinion, recommendation, vote, or other exercise of discretion as a state employee. Penal Code § 36.02. A "benefit" is "anything reasonably regarded as pecuniary gain or pecuniary advantage." Penal Code § 36.01(5). Common sense should tell a state officer or employee whether something is a bribe. There are no exceptions to the prohibition on bribery.

Prohibitions On Acceptance Of Benefits

In addition to the prohibitions against bribery, most state employees are subject to a general prohibition on the acceptance of benefits. Penal Code § 36.08. For example, an employee of a regulatory agency may not accept a benefit from a person the officer or employee "knows to be subject to regulation, inspection, or investigation by the public servant or his agency." Penal Code § 36.08(a). Also, an officer or employee of a state agency who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions may not accept a benefit from a person the officer or employee knows is "interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion." Penal Code § 36.08(d). Each state officer or employee should be aware of the prohibitions to which he or she is subject. ([Appendix A](#) contains the full text of section 36.08.) *The prohibitions in section 36.08 apply even if the donor is not seeking anything in return.*

Items That Are Benefits

Whether a particular item is a benefit often raises a fact question that the Ethics Commission cannot resolve. The Ethics Commission has expressly stated, however, that certain items are benefits, including the following: a \$50 clock, a \$160 rifle, a \$60 restaurant meal, football tickets, a hotel room, and a hunting trip. [Ethics Advisory Opinions Nos. 97, 94, 90, 69, 60](#) (1992).

Items That Are Not Benefits

Other advisory opinions have concluded that certain items are not benefits. A cup of coffee is not a benefit. [Ethics Advisory Opinion No. 118](#) (1993). Small amounts of perishable food delivered infrequently to government offices are generally not benefits. [Ethics Advisory Opinion No. 62](#) (1992). Also, trinkets of minimal value such as coffee mugs, key chains, and "gimme" caps are generally not benefits. [Ethics Advisory Opinion No. 61](#) (1992).³ A plaque is not a benefit. [Ethics Advisory Opinion No. 36](#) (1992). It is important to remember, however, that the conclusion that an item is not a benefit merely means that acceptance of the item is not a crime under section 36.08 of the Penal Code. Acceptance of such an item may nonetheless be in violation of agency policy or otherwise inappropriate. *See generally* V.T.C.S. art. 6252-9b, § 8 (standards of conduct for state officers and employees).

Exceptions To The Prohibitions On The Acceptance Of Benefits

There are a number of exceptions to the prohibitions on the acceptance of benefits. ([Appendix B](#) contains the full text of section 36.10, which contains the exceptions to the gift prohibitions. It is important to remember that these exceptions apply only to the gift prohibitions, not to bribery.) For example, a state officer or employee may

accept a benefit from a person such as a friend, relative, or business associate with whom the state employee has a relationship independent of his official status. Penal Code § 36.10(a)(2). Also, certain benefits from events honoring a state officer or executive director are permissible. Penal Code § 36.10(a)(3).

Benefits in the form of food, lodging, transportation, and entertainment are permissible if accepted as a "guest" and reported in accordance with any applicable reporting requirement. Penal Code § 36.10(b).⁴ To accept something as a "guest," the donor must be present. For most state employees there is no applicable reporting requirement. However, for a state officer or executive director who is required to file a financial disclosure statement under article 6252-9b, a gift of food, lodging, transportation, or entertainment must be reported if it is worth more than \$250. *See Ethics Advisory Opinion No. 71* (1992) ("gift" for purposes of article 6252-9b is a broader category than "gift" in section 36.10(a)(5)).

There is also an exception for certain gifts from persons required to register as lobbyists. Penal Code § 36.10(a)(5). To understand this exception, it is useful to examine the relationship between the Penal Code prohibitions on gifts and the prohibitions on gifts in the lobby statute.

THE LOBBY STATUTE

The lobby statute, chapter 305 of the Government Code, contains restrictions on gifts from a person required to register under the lobby statute. For the most part, the lobby statute is stricter than the Penal Code. A gift that is prohibited under the Penal Code is generally a prohibited gift under the lobby statute. The lobby statute then imposes some additional restrictions in regard to gifts from lobbyists.

There is, however, one exception to the general rule that the lobby statute is stricter than the Penal Code. Under section 36.10(a)(5), there is an exception from the prohibition on the acceptance of benefits for a gift, award, or memento that is required to be reported by a lobby registrant under the lobby statute. "Gift" in this context does not include food, entertainment, transportation, or lodging. *See Gov't Code § 305.006* ("gift" is a separate category from "food and beverages" and "transportation and lodging"). Because of this exception there are circumstances in which it is permissible for a state officer or employee to accept a gift from a lobbyist that the state employee could not accept from a non-lobbyist. Nonetheless, a state officer or employee should exercise caution in relying on this exception since the exception only applies to a gift, award, or memento that is required to be reported by a lobbyist under the lobby statute. Whether a gift meets that criterion depends on facts that a state officer or employee will not necessarily be able to ascertain.

ETHICAL CONSIDERATIONS

In ethics advisory opinions the Ethics Commission has answered opinion requests on the basis of what is permitted or prohibited by law. This practice should not be taken as expressing a view on the part of the commission that everything that is legally permissible is appropriate. State officers and employees should always ask themselves whether it is appropriate for a public servant to accept something from a person who wants, or may want, or may be seen to want, an official favor within the public servant's authority. *See generally*, V.T.C.S art. 6252-9b, § 8 (standards of conduct for state officers and employees).

SUMMARY

Acceptance of gifts by a state agency is governed by laws that are not subject to interpretation by the Ethics Commission. Whether a state employee may accept a gift depends on the status of the donor and the donee as well as the nature of a gift.

Appendix A

Penal Code Section 36.08. GIFT TO PUBLIC SERVANT BY PERSON SUBJECT TO HIS JURISDICTION.

- (a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.
- (b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.
- (c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.
- (d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.
- (e) A public servant who has judicial or administrative authority, who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decision, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.
- (f) A member of the legislature, the governor, the lieutenant governor, or a person employed by a member of the legislature, the governor, the lieutenant governor, or an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from any person.
- (g) A public servant who is a hearing examiner employed by an agency performing regulatory functions and who conducts hearings in contested cases commits an offense if the public servant solicits, accepts, or agrees to accept any benefit from any person who is appearing before the agency in a contested case, who is doing business with the agency, or who the public servant knows is interested in any matter before the public servant. The exception provided by Section 36.10(b) of this code does not apply to a benefit under this subsection.
- (h) An offense under this section is a Class A misdemeanor.

Appendix B

Penal Code Section 36.10. NON-APPLICABLE.

- (a) Sections 36.08 (Gift to Public Servant) and 36.09 (Offering Gift to Public Servant) of this code do not apply to:
 - (1) A fee prescribed by law to be received by a public servant or any other benefit to which the public servant is lawfully entitled or for which he gives legitimate consideration in a capacity other than as a public servant;
 - (2) a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient; or
 - (3) a benefit to a public servant required to file a statement under Chapter 421, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-9b, Vernon's Texas Civil Statutes), or a report under Title 15, Election Code, that is derived from a function in honor or appreciation of the recipient if:
 - (A) the benefit and the source of any benefit in excess of \$50 is reported in the statement; and

(B) the benefit is used solely to defray the expenses that accrue in the performance of duties or activities in connection with the office which are nonreimbursable by the state or political subdivision;

(4) a political contribution as defined by Title 15, Election Code; or

(5) a gift, award, or memento to a member of the legislative or executive branch that is required to be reported under Chapter 305, Government Code.

(b) Section 36.08 (Gift to Public Servant) of this code does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donee is required by law to report those items, reported by the donee in accordance with that law.

(c) Section 36.09 (Offering Gift to Public Servant) of this code does not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donor is required by law to report those items, reported by the donor in accordance with that law.

¹ The Attorney General is the appropriate source for advice on such matters.

² For example, an agency that has authority to accept gifts may accept a waiver of fees for an employee to attend a seminar relevant to the employee's work for the agency. Acceptance of food provided at the seminar would likely be permissible since the state could pay for the employee's food in those circumstances. What is important to remember in this context is that it is not up to an individual employee to accept or reject the waiver of fees for a seminar. Rather, an employee may attend such a seminar at the direction of the appropriate supervisor.

³ The nature, value, or frequency of delivery of food or other items may lead to the conclusion that an item is a benefit.

⁴ This exception is not applicable to hearings examiners. Penal Code § 36.08(g).