




TEXAS ETHICS COMMISSION



****Overruled, Modified, Clarified, or Superseded****  **Opinion History**

ETHICS ADVISORY OPINION NO. 185

January 27, 1994

Whether "paying or agreeing to pay an employee or outside consultant a commission fee for soliciting, acquiring and closing underwriting projects for state bond issuers constitute[s] a violation of Section 305.022 of the Government Code." (AOR-206)

The Texas Ethics Commission has been asked whether "paying or agreeing to pay an employee or outside consultant a commission fee for soliciting, acquiring and closing underwriting projects for state bond issuers constitute[s] a violation of Section 305.022 of the Government Code."

Section 305.022 of the Government Code prohibits the payment of contingent fees for certain lobby activity. Specifically, it provides as follows:

- (a) A person may not retain or employ another person to influence legislation or administrative action for compensation that is totally or partially contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.
- (b) A person may not accept any employment or render any service to influence legislation or administrative action for compensation contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.
- (c) *For purposes of this section, a sales commission payable to an employee of a vendor of a product is not considered compensation contingent on the outcome of administrative action.*
- (d) This section does not prohibit the payment or acceptance of contingent fees:
 - (1) expressly authorized by other law; or
 - (2) for legal representation before state administrative agencies in contested hearings or similar adversarial proceedings prescribed by law or administrative rules.

Gov't Code § 305.022 (emphasis added). The question raised here is whether section 305.022 prohibits a contingent fee for efforts to influence a state agency's selection of a provider of investment banking services.

The prohibition applies to contingent fees for certain efforts to influence administrative action. "Administrative action" means "rulemaking, licensing, or any other matter that may be the subject of action by a state agency, including the proposal, consideration, or approval of the matter." Gov't Code § 305.002(1). An Ethics Commission rule in effect until July 19, 1993, provided that the term "administrative action" did not include "purchasing decisions."¹ Tex. Ethics Comm'n, 17 Tex. Reg. 6893 (1992) (adopting new rule 40.5(c)). The main effect of that rule was to except from required lobby registration a person who either received compensation for efforts to influence a state agency's purchasing decisions or made expenditures to influence a state agency's purchasing decisions. *See generally* Gov't Code § 305.003(a) (a person must register as a lobbyist if he meets

either a compensation threshold *or* an expenditure threshold in connection with direct communications to influence administrative action). Another effect of the rule, however, was to except contingent fees for efforts to influence state agency purchasing decisions from the contingent fee prohibition in section 305.022.²

The current rule regarding purchasing decisions provides that compensation for efforts to influence state agency purchasing decisions is not included in determining whether a person is required to register as a lobbyist *under the compensation threshold*.³ In other words, there is now a "purchasing decisions exception" under the compensation threshold for lobby registration, but not under the expenditure threshold. Tex. Ethics Comm'n, 18 Tex. Reg. 7061, *adopted* 18 Tex. Reg. 9748 (1993) (to be codified at title 1, section 30.19, of the Texas Administrative Code). Because purchasing decisions are no longer excluded from the definition of "administrative action," the rule change also raises the question whether it is now impermissible for a person to accept a contingent fee for efforts to influence state agency purchasing decisions.⁴

We adopted the rule change regarding purchasing decisions because we concluded that the making of expenditures for the personal benefit of state officers and employees to influence state agency purchasing decisions should be regulated by the lobby law. We did not intend to change the law in regard to contingent fees. We conclude, therefore, that section 305.022 of the Government Code does not prohibit contingent fees for efforts to influence state agency purchasing decisions.⁵

SUMMARY

Section 305.022 of the Government Code does not prohibit contingent fees for efforts to influence state agency purchasing decisions.

¹ This rule, adopted in 1992, codified a 1984 opinion of the Secretary of State determining that the phrase "administrative action" did not include the purchasing decisions of a state agency. Lobby Law Opinion No. 3 (1984). The stated reason for that conclusion was that purchasing decisions affect only the internal operations of a state agency and that the lobby law was intended to regulate persons who attempt to influence matters affecting the rights of the public.

² There is a statutory exception to the prohibition on contingent fees for a sales commission payable to an employee of a vendor of a product. Gov't Code § 305.022(c). In some circumstances, this exception has the same effect in regard to contingent fees as did the exclusion of purchasing decisions from the definition of administrative action. The phrase "purchasing decisions," however, has been interpreted to include more than decisions about buying products. See Lobby Law Opinion No. 4 (1985) ("purchasing decisions" includes decisions to purchase services); [Ethics Advisory Opinion No. 160](#) (1993) ("purchasing decisions" includes a state agency's selection of an investment banker to underwrite bond issued by the agency).

³ Former commission rule 40.5(c), effective July 19, 1993, excluded purchasing decisions from the definition of "administrative action" only for purposes of registration under the compensation threshold. Tex. Ethics Comm'n, 18 Tex. Reg. 2345, adopted 18 Tex. Reg. 4299 (1993) (amending rule 40.5(c)). Effective December 31, 1993--as part of a comprehensive revision of the lobby rules--new commission rule 30.19(a)(11) provides, simply stated, that "communicating to a member of the executive branch concerning the purchasing decisions of a state agency, or the negotiations regarding those decisions" is not to be considered in determining whether a person is required to register as a lobbyist under the compensation threshold. For purposes of this opinion, the effect of the two rules is the same: purchasing decisions are no longer expressly excepted from the definition of "administrative action" for purposes of the contingent fee prohibition in section 305.022.

⁴ See note 2 (explaining that there is a statutory exception for certain purchasing decisions about products). The question here is whether the Ethics Commission continues to recognize a broader exception, or at least to read that exception broadly.

⁵ We have already determined that a state agency's decision in regard to the selection of a provider of investment banking services is a purchasing decision. [Ethics Advisory Opinion No. 160](#) (1993). Therefore, section 305.022 does not prohibit a contingent fee for efforts to influence such a decision.

A person must comply with the criteria as provided in Section 2 of this act if the person:

(a) makes a total expenditure in excess of \$100 in a calendar quarter, not including any non-credit, loan, or lending expense, or the non-crediting fees, or activities described in Subsection 3B of Section 2 of this act; the commodity eligible with one or more members of the legislative or executive branch to influence legislation or administrative action; or

(b) provides information or endorsement in excess of \$100 in a calendar quarter that results in communication directly with a member of the legislative or executive branch to influence legislation or administrative action. This committee requires the registration of a person, other than a member of the judicial, legislative, or executive branch, who, as a part of his regular employment, has communicated directly with a member of the legislative or executive branch to influence legislation or action of the person or who he is considered or considered capable to do, and compensation is obtained in the course of that regular employment in excess of the contribution.

"Administrative action" is defined in §1000 as "action, issuance or any other service that may be a subject of action by a state agency, including the proposal, issuance, or approval of the action."

The definition of "Administrative action" in Article 1000-B of the Texas Statutes has not been interpreted. However, the Administrative Procedure and State Records Act, Act 1987, which deals with the recording process, specifically provides in Section 201 that its provisions do not apply to matters related solely to the internal personnel rules and practices of an agency. See, for example, Act 1987, Administrative Procedure Act, 1987, which states that certain agency "Administrative action" to such actions including the rights of members of the public or opposed to action which only affect the operations of the agency itself. An example of this in the California statute, 201's are, California Act, State Public Health Officer, "Administrative action" to such "the general, drafting, development, consideration, issuance, execution or effect by any state agency of any rule, regulation or other action in any rule-making proceeding or any quasi-legislative

proceeding In other words, "administrative action" is action taken by an administrative agency which creates public policy in the area the agency was created to regulate.

The question of "administrative action" in the lobby statute is intended to require persons to register as lobbyists who attempt to influence a state legislator's actions regarding actions that affect the status of members of the public. It is the question of those actions that the legislature did not intend "administrative action" to include actions taken by a state agency which only affect the operation of the agency itself, such as decisions to purchase equipment to be used by the agency.

The examples you gave of the actual business activities of municipal employees is related to state agencies include the following:

- sale water rights to assigned agencies
- develop and maintain contact with appropriate agency personnel
- describe state government needs of assigned agencies, including basic system requirements and current data processing problems
- present proposed solutions to the needs identified by the assigned agency
- present a "solution" alternative to needs based on feedback from the proposed solution
- assist in conducting any existing planning
- prepare and submit bids in response to requests to bid received from State Data Processing and Support Services Commission, prepare contracts, plans and administration to apply with lowest bid bid.

These activities are intended to influence state agencies in their purchase of computer equipment, software products and services, and maintenance services. Such purchasing activities by state agencies are not "administrative action" they are financial decisions which only affect the public in the use of public funds for purposes. use of public funds for state agencies is regulated by the appropriate act, not by the lobby laws. Therefore, municipal employees who try to influence such purchasing actions of state agencies in part or their actual employment activities are not acting to influence "administrative action".

The answer to your third question takes your second question into.

Public Law Number 86-360

Report from Mr. M. Douglas Lehm, Office of General Counsel, Department of Justice, Atlanta Georgia regarding lobby registration requirements.

EXHIBIT

'Administrative costs' as defined by sec. 501(c)(3), 501(c)(4), and 501(c)(29)(A), 501(c)(29)(B) does not include the purchase of regular telephone, software products and services, and maintenance services.