



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 354

December 13, 1996

Whether a member of the House of Representatives may rely on the exception set out in section 253.034(c) of the Election Code if the member intends to run for the Senate in a special election that has not yet been ordered but which will almost certainly be ordered and held during the 1997 Legislative Session. (AOR-391)

The Texas Ethics Commission has been asked about the application of section 253.034 of the Election Code. That section prohibits a member of the legislature from accepting political contributions during a period beginning 30 days before a regular legislative session convenes and ending on the last day of the session. For the 1997 Legislative Session, the moratorium begins on December 15, 1996.

The moratorium does not apply to a political contribution made and accepted with the intent that it be used in an election held or ordered during the moratorium if the person accepting the contribution is a candidate in the election and if the contribution is made after the person appointed a campaign treasurer with the appropriate authority. Elec. Code § 253.034(c)(1). The question raised here is whether that exception applies to contributions accepted by a member of the legislature who intends to be a candidate in a special election that has not yet been ordered.

The legislator in question intends to run for a seat that will be vacated by a state Senator who was elected to Congress in the November 1996 election. It appears that the Senator will not vacate his seat until he qualifies for the federal office. *See generally* Tex. Const. art. XVI, § 40 (member of Texas Legislature may not hold federal office); Elec. Code § 201.025 (vacancy in first office occurs when officer qualifies for second office); *Pruitt v. Glen Rose Indep. Sch. Dist. No. 1*, 84 S.W.2d 1004, 1006 (Tex. 1935) (when two offices cannot be held by same person, acceptance of and qualification for second office constitutes resignation of first office). Consequently, although there is not yet a vacancy, it is almost certain that a vacancy will occur in the Texas Senate in January 1997.

A vacancy in the Texas Legislature may be filled only by a special election. Elec. Code § 203.002. The governor must order a special election "as soon as practicable after the vacancy occurs." *Id.* § 201.051; *see id.* § 3.003(a)(3). If a vacancy in the legislature occurs during the 60 days before a legislative session convenes or during the session (and more than 25 days before the last possible day of the session), the special election to fill the vacancy must be held on a Tuesday or Saturday occurring not earlier than the 21st day or later than the 45th day after the date the election is ordered. *Id.* § 203.013(a), (c). Thus, a special election to fill a seat in the Texas Senate will almost certainly be ordered and held during the 1997 Legislative Session.

The issue here is whether a legislator who intends to run in that special election may rely on the exception set out in section 253.034(c)(1) and accept contributions during the period in which members of the legislature are otherwise prohibited from accepting contributions. The exception applies to a contribution made and accepted with the intent that it be used in an election held or ordered during the moratorium on contributions. It is the intent of the donor and the donee that is critical in determining whether the exception applies. Both parties must intend that the contribution be used in connection with an election held or ordered during the moratorium. Since there is every reason to anticipate that an election will be ordered and held during the moratorium to fill the Senate seat in question, it is certainly possible that a person who intends to seek election to that seat could form

the intent required by the exception set out in section 253.034(c)(1). Therefore, if both the House member and the donor have the requisite intent, the House member may accept contributions in connection with the anticipated election regardless of the fact that the election has not yet been ordered.¹

SUMMARY

A member of the House of Representatives who intends to run for the Senate in a special election that has not yet been ordered but which will almost certainly be ordered and held during the 1997 Legislative Session may rely on the exception set out in section 253.034(c)(1) of the Election Code.

¹ The exception in section 253.034(c)(1) applies to a "candidate" who has filed a campaign treasurer appointment with the appropriate authority. The definition of "candidate" for purposes of that section includes a person who has filed a campaign treasurer appointment as well as a person who has made a public announcement of a definite intent to run for office in a particular election. Elec. Code § 251.001(1). Therefore, a person who has not yet filed an application for a place on a special election ballot may nonetheless be a candidate for purposes of section 253.034(c)(1).