



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 517

May 29, 2014

Whether comprehensive diagnostic tests provided to members of the legislative or executive branch constitute a gift for purposes of the lobby law, and the application of the reporting requirements in the lobby law for such tests. (AOR-585)

The Texas Ethics Commission (commission) has been asked whether comprehensive diagnostic blood tests given to a member of the legislative or executive branch constitute a gift for purposes of the lobby law. The requestor, a registered lobbyist representing the entity providing the tests, also asks how to report expenditures for the tests. Both chapter 305 of the Government Code (which regulates lobby activity) and chapter 36 of the Penal Code (concerning acceptance of benefits by a public servant) are relevant to these questions.

Several provisions of the Penal Code apply to the offer and acceptance of a gift. Under sections 36.08(f) and 36.09, a person is generally prohibited from offering, and a public servant is generally prohibited from accepting, any “benefit.” A “benefit” is “anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest.” Penal Code § 36.01(3).¹ The prohibitions in sections 36.08 and 36.09 do not apply, however, to a gift that is required to be reported under the lobby law. *Id.* § 36.10(a)(5).²

The commission has previously determined that a waiver of a registration fee for a symposium, works of art, a free subscription to a magazine, the provision of a World Wide Web page (including related services) are gifts for purposes of the lobby law. *See* Ethics Advisory Opinion Nos. 29 (1992), 87 (1992), 120 (1993), 355 (1996). The diagnostic tests in question would require a needle to draw blood and individuals to conduct the tests and analyze the results. The results would then be given to members of the legislative or executive branch.³ In our opinion, the diagnostic tests are a combination of goods and services that constitute a gift. Thus, a diagnostic test that is provided by a registered lobbyist to communicate directly with a member of the legislative or executive branch with the intent to influence legislative or administrative action constitutes a gift subject to the lobby law. *See generally* Ethics Advisory Opinion Nos. 46 (1992), 355 (1996).

The requestor states that during the diagnostic testing, he will be present on behalf of his client (the entity providing the testing).⁴ He asks how to report the expenditures for the testing. A registered lobbyist must file lobby activities reports that include the amounts of expenditures subject to the lobby law according to several categories, including the amount of expenditures made for gifts. Gov’t Code § 305.006(b). A lobby activities report must also include the amounts of expenditures that are directly attributable to members of the legislative or executive branch according to certain categories, such as state senators, state representatives, and elected or appointed state officers. *Id.* § 305.0062(a). In addition, a lobby activities report must disclose additional details regarding any expenditure for a gift with a value that exceeds \$50, including the name of the member of the legislative or executive branch in whose behalf the expenditure is made, a general description of the gift, and the amount of the expenditure. *Id.* § 305.0061(c). Assuming that the expenditures are subject to the lobby law and that the value of each gift exceeds \$50, the lobbyist would report on his lobby activities report the expenditures in detail for each of the diagnostic tests provided to a member of the legislative or executive branch.

The lobby law prohibits a person registered as a lobbyist, or a person on the registrant's behalf and with the registrant's consent or ratification, from making expenditures for gifts that in the aggregate exceed \$500 in a calendar year to a single member of the legislative or executive branch. Gov't Code § 305.024(a)(2)(C). Thus, the gifts in the form of diagnostic blood tests would count toward the annual aggregate \$500 limit on expenditures for gifts. The requestor states that the market value for the tests is well under \$500. Thus, according to the facts presented by the requestor, the expenditures would be required to be reported under the lobby law and therefore would not be prohibited by sections 36.08 or 36.09 of the Penal Code. Penal Code § 36.10(a)(5).⁵ Assuming that none of the diagnostic tests cause the \$500 aggregate limit for gifts to be exceeded, the restrictions under section 305.024 of the Government Code would not prohibit the expenditures.

SUMMARY

A diagnostic blood test and analysis of the results provided to a member of the legislative or executive branch with the intent to influence legislation or administrative action constitutes a gift for purposes of the lobby law. Expenditures made by a registrant, or by an entity whose expenditures are properly reported by an individual registrant, incurred in administering the test are disclosed as gifts on a lobby activities report.

¹ Whether a particular item is a benefit is a fact question. *See generally* Ethics Advisory Opinion Nos. 69, 63, 61, 60, 51, 36 (1992).

² Note, however, that if all the elements of bribery in section 36.02(a)(4) of the Penal Code are present, then the benefit would be prohibited even if it were reported in accordance with the lobby law.

³ For purposes of the lobby law, a member of the legislative branch means a member, member-elect, candidate for, or officer of the legislature or of a legislative committee, or an employee of the legislature. Gov't Code § 305.002(7). A member of the executive branch means 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).

⁴ Under the facts presented, a registered lobbyist would be reporting lobby expenditures on behalf of an entity. An entity that is required to register under the lobby law may nevertheless avoid registration if all activity otherwise reportable by the entity is reported by one or more individuals in accordance with sections 34.65 (relating to compensation by a lobby firm employee) and 34.85 (relating to an individual reporting expenditures by an entity) of the Ethics Commission Rules. 1 Tex. Admin. Code § 34.45(a). It is important to note that the restrictions on expenditures contained in section 305.024 of the Government Code apply to an entity that avoids registration on the earlier of the date the entity makes the expenditure that would have required the entity to register as a lobbyist or the date the entity receives, or is entitled to receive compensation or reimbursement that would have required the entity to register as a lobbyist. *Id.* at §34.45(b).

⁵ If the expenditures were made without lobby intent, then they are not required to be reported under Chapter 305 of the Government Code and do not fall under the exception in section 36.10(a)(5) of the Penal Code. *See* Ethics Advisory Opinion No. 428 (2000). The expenditures, therefore, would not be permissible under the Penal Code unless another exception under section 36.10 applies. We note, however, that the fact that a communication does not include a discussion of specific legislation or administrative action does not mean that the discussion is not a lobby communication. If a communication is intended to generate or maintain goodwill for the purpose of influencing potential future legislation or administrative action, the communication is a lobby communication. *See* Ethics Advisory Opinion Nos. 94, 90, 89, 34, 4 (1992).