



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 522

*December 2, 2014*

*Whether an employee of a member of the Texas Legislature may, at the direction of the member and as a regular part of the employee's job duties, drive the member between the member's Austin residence and the Capitol and drive the member for personal appointments and errands. (AOR-590)*

The Texas Ethics Commission has been asked whether an employee of a member of the Texas Legislature may, at the direction of the member and as a regular part of the employee's job duties, drive the member between the member's Austin residence and the Capitol and drive the member for personal appointments and errands. The requestor of this opinion provides the following hypothetical situation:

[T]he member for personal reasons does not care to operate a motor vehicle and, to avoid doing so, has established a standing policy in which his Capitol staff, from the chief of staff on down to the scheduler, all take turns driving him to his Capitol office on workday mornings and back to his home in the evenings according to a regular schedule. Additionally, staff occasionally drive the member to midday personal appointments, such as to the member's barber or dentist. The question is whether the conduct described in this hypothetical scenario violates a provision of Chapter 39, Penal Code ... and, if so, whether staff become complicit in the violation by acquiescing in the member's request.

The requestor has also stated that the member of the legislature does not ordinarily reside in Travis County, that the member maintains an Austin residence for legislative purposes, and that the employee's time spent driving the member is time for which the employee is compensated (i.e., state work time).

The work time of state employees is a thing of value belonging to the state. Ethics Advisory Opinion No. 431 (2000). Section 39.02 of the Penal Code states that a public servant may not, with intent to obtain a benefit or with intent to harm or defraud another, violate a law relating to the public servant's office or employment or misuse a thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment. Penal Code § 39.02(a).<sup>1</sup> The issue before us is whether the use of a legislative employee's work time to transport a member of the legislature for the purposes described in the request would constitute a misuse of government property.

As we have indicated in previous opinions, the legislature is the appropriate body to determine whether, subject to constitutional limitations, a particular use of legislative resources is permissible.<sup>2</sup> However, we have recognized that public funds and other state resources must be used for public purposes. Tex. Const. art. III, §§ 50, 51; art. VIII, § 3. *See also* Ethics Advisory Opinion No. 372 (1997).<sup>3</sup> Whether any particular activity furthers a public purpose depends upon the specific facts. Tex. Att'y Gen. Op. No. JM-516 (1986).

Whether a legislative employee's work time is used for public or private purposes depends on the specific activities in which the employee is engaged during that time. The use of a legislative employee's work time for purely personal activities would not further a state purpose and would constitute a misuse.<sup>4</sup> Similarly, directing a legislative employee to spend work time for improper purposes constitutes a misuse. Ethics Advisory Opinion

Nos. 431 (2000), 209 (1994), 190 (1994), 172 (1993) (a legislator may not use state equipment and employees for personal or campaign purposes).

In our opinion, driving a member of the legislature for the member's personal appointments and errands may generally further a personal purpose. However, it is possible for an employee to be simultaneously engaged in state-related activities while driving (e.g., discussing legislative business) or waiting for a member to conduct other business (e.g., reviewing legislation). We can also imagine emergencies or other extenuating circumstances in which an employee's time spent driving a member between the member's home and Capitol office may further public purposes (e.g., legitimate security concerns).<sup>5</sup> Ultimately, however, the legislature is the appropriate body to determine whether, subject to constitutional limitations, a particular use of legislative resources is permissible.

The legal value of an advisory opinion is to provide a defense to prosecution for activities that, in the opinion of the commission, are not in violation of the laws under the commission's jurisdiction. Gov't Code § 571.097.

Under the facts presented, we cannot provide such a defense for the activity in question.<sup>6</sup>

### SUMMARY

The work time of state employees is a thing of value belonging to the state and may not be misused by state employees or members of the legislature. The use of a legislative employee's work time for purely personal activities would not further a state purpose and would constitute a misuse. The legislature is the appropriate body for determining whether, subject to constitutional limitations, a particular use of legislative resources is permissible.

---

<sup>1</sup> A "benefit" is anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested. Penal Code § 1.07(7). "Misuse" means to deal with property contrary to: (A) an agreement under which the public servant holds the property; (B) a contract of employment or oath of office of a public servant; (C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or (D) a limited purpose for which the property is delivered or received. *Id.* § 39.01(2).

<sup>2</sup> See Ethics Advisory Opinion Nos. 386 (1997) (use of state computers and personnel to electronically file campaign finance reports for officeholders), 366 (1997) (legislative employees posting information to an Internet website in the normal course of business), 260 (1995) (member of the legislature using a state computer for personal purposes), 209 (1994) (legislator using state employees and resources to mail certain correspondence).

<sup>3</sup> Other state laws and policies adopted by state governmental bodies impose additional restrictions on the use of state resources. See, e.g., General Appropriations Act, Acts 2013, 83rd R.S., ch. 1411, art. X, § 1. See also Chapter 660, Gov't Code (providing restrictions on travel expenses for state officers and employees). We cannot issue an advisory opinion interpreting the Texas Constitution or other laws outside the commission's jurisdiction. Ethics Advisory Opinion Nos. 366 (1997), 209 (1994).

<sup>4</sup> A legislator's use of staff during the hours of their state employment and the use of a legislator's office facilities, supplies, and equipment should be related to the purposes of the legislator's office. State Ethics Advisory Opinion No. 84-10 (1984).

<sup>5</sup> Cf. Tex. Att'y Gen. Op. No. JM-879 (1988) (stating that a county commissioner's travel between home and office may be reasonably related to county business in exceptional circumstances), Tex. Att'y Gen. Op. No. H-992 (1977) (stating that county commissioners' travel between home and office is not official travel subject to reimbursement in normal circumstances).

<sup>6</sup> We have stated that the incidental personal use of state equipment during working hours in specific circumstances would not violate section 39.02(a)(2) of the Penal Code if the use does not result in additional costs to the state. See, e.g., Ethics Advisory Opinion Nos. 395 (1998), 372 (1997), 172 (1993), 134 (1993) (separately addressing a legislative employee's use of work time to track a legislator's overall schedule and state employees' incidental personal use of phones, electronic mail, and Internet connections with no additional costs to the state). Under the facts presented, the use of work time to drive the member would be a regular part of the employee's job duties, and thus would not be incidental.