



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 534

February 1, 2016

Whether an employee of a state agency may accept from persons regulated by the agency subscription fees for operating a website that compiles publicly available information. (AOR-606)

The Texas Ethics Commission (“commission”) has been asked whether an employee (“the employee”) of a state regulatory agency may accept from persons regulated by the agency subscription fees for operating a website that compiles publicly available information.

The requestor of this opinion (“the requestor”) states that the agency sets the minimum standards for the conduct and training of certain law enforcement officers. The agency’s duties include training and law enforcement functions. As part of its regulatory scope, the agency authorizes training providers to provide law enforcement training under non-monetary training contracts. The entities that provide the training are subject to the agency’s training regulations and standards. The training contracts are issued, reviewed, and renewed according to the agency’s standards. To ensure compliance, agency personnel regularly perform audits or initiate investigations based on complaints. Oversight of all training performed under the training contracts is legally delegated to training coordinators, who are subject to action following noncompliance with the agency’s regulations, such as reprimand, suspension, or revocation.

The requestor states that the employee works daily with contract training providers and training coordinators. The employee is required to maintain close liaison with training coordinators and entities in relation to prospective and existing training provider contracts, including processing applications for the contracts. The employee is responsible for the initial issue and renewal process of all contract training providers, but agency executive staff formally approves new and renewal contracts. Agency field agents also audit and inspect training providers and coordinators.

Current and Proposed Websites

Since 2008, the employee has acted as a moderator for an electronic mailing list located on a third-party Internet website. The mailing list is an online forum for the moderator and mailing list members to share information regarding law enforcement training opportunities, scholarships, law enforcement association resources, law enforcement grant resources, and job vacancies. The members of the mailing list include training coordinators and agency licensees. The requestor states that the information posted to the website is publicly available on other freely accessible websites on the Internet. The employee has moderated the mailing list during working hours and with the consent of the agency, but has, since requesting this opinion, continued to moderate the mailing list in the employee’s private capacity only. The requestor states that the current website is not an asset of the agency.

The employee wishes to create and operate an entirely new website that would be used to similarly aggregate and share publicly available information on law enforcement training opportunities in Texas. The requestor states that no state resources, including agency time or equipment, would be used for the proposed website and that the employee would not disclose any protected or restricted information that the employee acquired by reason of the employee’s position at the agency. The requestor proposes operating the website and charging subscriptions to allow access only to paying members.

PENAL CODE RESTRICTIONS

The first question is whether the employee may operate the website and receive subscription fees from entities and persons regulated by the agency. The laws under the commission's authority include chapter 36 of the Penal Code, which restricts an employee of a state regulatory agency from accepting a "benefit." Penal Code § 36.08(a). A "benefit" is anything reasonably regarded as pecuniary gain or pecuniary advantage. *Id.* § 36.01(3). A benefit would include a payment of money as a subscription fee to access the website.

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. *Id.*¹ Thus, any payment made to the employee by a person who the employee knows is regulated by the agency would be a prohibited benefit. However, section 36.08 does not prohibit a payment to a public servant to which the public servant is lawfully entitled or for which the public servant gives legitimate consideration in a capacity other than as a public servant. *Id.* § 36.10(a)(1). A public servant gives "legitimate consideration" if the public servant provides services to another in exchange for a payment that is commensurate with the actual value of those services. Ethics Advisory Opinion No. 533 (2015). The requirement that a public servant act "in a capacity other than as a public servant" means that it must be the services rendered, and not the status of the public servant rendering the services, that is of value to the person for whom the services are performed. *Id.*

If the subscription fees paid by persons regulated by the agency to the employee reflect the actual value of the services that the employee provides in a capacity other than as a public servant, and the fees are not given in consideration for services that the employee was requested to provide because of his or her official position or duties, then the fees from persons regulated by the agency would not be prohibited by section 36.08 of the Penal Code.

The laws under the commission's authority also include section 36.07 of the Penal Code, which prohibits a public servant from accepting an honorarium² in consideration for services that the public servant would not have been requested to provide but for his or her official position or duties. Penal Code § 36.07(a). An honorarium is permissible as long as the public servant's official status was not a deciding factor in the decision to request the public servant to perform the services at issue³. In this case, based on the working relationship between the employee and the training providers and coordinators, and the employee's role in processing their applications, there is a considerable possibility that a training provider or training coordinator would subscribe to the new website, in part, because of the employee's official position with the agency. However, whether any payment is made for that reason depends upon the specific facts. If the employee's official position is not a reason why the subscription fee is paid, then the honorarium provision would not prohibit the public servant from accepting the fee.⁴

The second question is whether the employee may operate the website for entities and persons who are not regulated by the agency. If a fee is not a prohibited honorarium and is not from a person who is subject to the jurisdiction of the employee or the agency, then sections 36.07 and 36.08 of the Penal Code would not prohibit the employee from accepting the fee.

The third question is whether the employee may donate a portion of the subscription fees to dependents of law enforcement officers for scholarships or to a memorial for Texas peace officers. Assuming that the subscription fees are not a prohibited benefit or honorarium, the laws under the commission's jurisdiction would not prohibit the employee from donating a portion of the fees.

The fourth question is whether the employee may operate the website as a non-profit enterprise or without charging for access. The relevant restrictions in chapter 36 of the Penal Code prohibit public servants from accepting certain benefits. If the employee operates the website without accepting a benefit, then the benefit restrictions under chapter 36 of the Penal Code would not prohibit that activity.⁵

STANDARDS OF CONDUCT

The laws under the commission's jurisdiction also include section 572.051 of the Government Code, which sets out standards of conduct for state officers and employees. Gov't Code § 572.051. Those standards provide, in part, that a state officer or employee should not accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct. *Id.* § 572.051(a)(1). Those standards also provide that a state officer or employee should not accept other employment or compensation that might induce the officer or employee to disclose confidential information or that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of official duties. *Id.* § 572.051(a)(2), (3).

In the present case, the employee processes applications from current and prospective training providers and training coordinators who seek the agency's authorization to provide certain training services to law enforcement officers and, in providing those services, are regulated by the employee and the agency. It also appears that the information that would be maintained on the new website would be directly related to the training services offered by training providers, which is dependent on the agency's authorization. Given that the employee moderated the electronic mailing list in her official capacity using agency resources, there may be confusion or an expectation among regulated persons that the new website would be related to the employee's performance of official duties. Therefore, in our opinion, any payments made to the employee by persons regulated by the agency to obtain such information might reasonably tend to influence the employee in the discharge of official duties. Additionally, the payments might reasonably be offered with the intent to influence, and could reasonably be expected to interfere with the employee's judgment in processing applications or contracts from the same persons who pay the employee for access to the website. Therefore, the employee should not receive subscription fees for operating the website from any person who is regulated by the agency in the manner described in this opinion.⁶ However, fees paid by persons who are completely outside the jurisdiction of the agency do not raise similar concerns.

Section 572.051 of the Government Code also requires each state agency to adopt and distribute a written ethics policy for the agency's employees consistent with the standards of conduct and other provisions of subchapter C, chapter 572, of the Government Code. *Id.* § 572.051(c). A state employee who violates the standards of conduct or the adopted ethics policy is subject to termination of the employee's state employment or another employment-related sanction. *Id.* § 572.051(b). A state officer or employee who violates the standards of conduct is subject to any applicable civil or criminal penalty if the violation also constitutes a violation of another statute or rule. *Id.* The commission does not have authority to enforce these standards of conduct. *Id.* § 572.051(e).⁷

SUMMARY

An employee of a state regulatory agency should not accept from a person regulated by the agency a payment in the form of a subscription fee to operate a website as described in this opinion.

1 Additionally, 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. *Id.* § 36.08(d). The facts presented by the requestor do not clearly indicate whether the employee exercises such discretion. For purposes of this opinion, we assume that the employee is not subject to any of the additional benefit restrictions under section 36.08.

2 In our opinion, a payment to the public servant to maintain and provide access to information on the website would be an honorarium in consideration for services.

3 We have previously stated that the permissibility of an honorarium depends on the motivation of the person seeking the services of a public servant. Although it may be impossible to know the various motivations of a person seeking the services of a public servant, a useful way for a public servant to analyze whether acceptance

of an honorarium is permissible is to ask: “Would my services be as useful or desirable if I did not hold a position with the government?” Ethics Advisory Opinion No. 305 (1996)..

4 We cannot address any restrictions that are imposed on the employee by other laws or policies outside the commission’s jurisdiction, including laws and policies that are specific to the agency.

5 Chapter 36 of the Penal Code includes additional restrictions on certain actions by public servants. *See generally*, ch. 36, Penal Code. We assume that none of those other restrictions apply to the facts presented.

6 We do not think the fees paid by regulated persons would be appropriate in any of the circumstances presented by the requestor.

7 We note that section 572.055 of the Government Code provides that an association or organization of employees of a regulatory agency may not solicit, accept, or agree to accept anything of value from a business entity regulated by that agency and from which the business entity must obtain a permit to operate that business in this state or from an individual directly or indirectly connected with that business entity. Gov’t Code § 572.055(a). Similarly, a business entity regulated by a regulatory agency and from which the business entity must obtain a permit to operate that business in this state, or an individual directly or indirectly connected with that business entity may not offer, confer, or agree to confer on an association or organization of employees of that agency anything of value. *Id.* § 572.055(b). The facts presented by the requestor do not indicate that the subscription fees to operate the proposed website would be provided to an association or organization of employees of a regulatory agency.