



2012 Texas Ethics, Gift & Honorarium Laws MADE EASY

Answers to the most frequently asked questions about
the Texas Ethics, Gift & Honorarium Laws

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Ethics, Gift and Honorarium Laws Made Easy

Numerous state statutes address ethical limitations that apply to elected and appointed public officials, as well as to staff members. Some of the provisions are contained in the Texas Penal Code and cover the ability of local officials to accept gifts and honoraria and to use certain official information for their own benefit. Additionally, there are laws outside of the Penal Code that place ethical limitations on local officials. These include laws, regulations and codes that regulate the conduct of certain types of professionals, including attorneys, engineers, accountants and others. Throughout the law, there are specific statutes and court decisions that have ethical implications, some of which are discussed in other handbooks and articles available on the Texas Attorney General's website. Public officials and candidates for public office should pay particular attention to the reporting requirements and restrictions set forth in Title 15 of the Election Code; most ethics complaints filed with the Texas Ethics Commission stem from alleged violations of this law. Relevant statutes, rules, opinions and frequently asked questions may be found on the Ethics Commission's website at www.ethics.state.tx.us. However, neither this handbook nor these other resources can catalogue all relevant issues. Finally, local entities might adopt ethics-related limitations through an ordinance, policy or city charter provision that contains such restrictions. Each of these sources should be consulted.

The following questions and answers provide a layperson's explanation of the ethics-related provisions contained in state law or other sources. This handbook is intended to provide general guidance on the issues raised in this area. The Local Government Affairs Section of the Office of the Attorney General is available to answer questions from local officials, who should nonetheless consult with their own legal counsel regarding the application of the law to the facts of each particular situation.

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General Ethics Requirements

1. Is there a general state statute that provides a code of ethics for local officials or staff?

There is not a general statutory code of ethics specifically for local officials or staff. To determine whether an official has violated any ethical duties, one must consult several Texas statutes, including the conflict of interest laws under chapters 171 and 176 of the Local Government Code, as well as any special statutes that may apply to the conduct or to the profession at issue. Most local officials are also “public servants” for purposes of Title 8 of the Texas Penal Code – entitled “Offenses Against Public Administration” – which addresses bribery, honoraria, impermissible gifts and abuse of office. Additionally, the official must look to any local provisions that may have been adopted through a city charter or a local ordinance or policy. State officials are subject to other laws, such as chapter 572 of the Government Code. In summary, there are several provisions in Texas law that may be applicable to local officials.

2. Are there state statutes that impose a set of professional and ethical requirements on certain professionals that may be employed by a local entity (e.g., county engineer, city attorney)?

There are certain state statutes that impose a special set of professional responsibilities on how individuals within certain professions or offices must perform their functions. For example, judges are subject to the standards imposed under the State Code of Judicial Conduct.¹ Generally, a judge who is a licensed attorney is subject to the code of professional responsibility applicable to all practicing lawyers.² Summarized below are some professional ethical and performance standards that may apply to local officials if they are acting within the scope of their professions.

Accountants: Regulated by the Texas Board of Public Accountancy. Phone: (512) 305-7866. Statutes that contain the regulations: (TEX. OCC. CODE ANN.) Chapter 901 - Public Accountancy Act. The Texas State Board of Public Accountancy can be found at www.tsbpa.state.tx.us.

Architects: Regulated by the Texas Board of Architectural Examiners. Phone: (512) 305-9000. Statutes that contain the regulations: (TEX. OCC. CODE ANN.) Chapter 1051. The Texas Board of Architectural Examiners can be found at www.tbae.state.tx.us.

Physicians: Regulated by the Texas Medical Board. Phone: (800) 248-4062. Statutes that contain the regulations: (TEX. OCC. CODE ANN.) Chapters 151-165 - Medical Practice Act. The Texas Medical Board can be found at www.tmb.state.tx.us.

Engineers: Regulated by the Texas Board of Professional Engineers. Phone: (512) 440-7723. Statutes that contain the regulations: (TEX. OCC. CODE ANN.) Chapter 1001. The Board of Professional Engineers can be found at www.tbpe.state.tx.us.

Judges: Regulated by the State Commission on Judicial Conduct. Phone: (877) 228-5750 or (512) 463-5533. Statutes that contain the regulations: (TEX. OCC. CODE ANN.) Chapter 33

¹ TEX. CODE JUD. CONDUCT, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (West 2005 & Supp. 2011).

² TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01-9.01, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (West 2005 & Supp. 2011).

and the Code of Judicial Conduct, *reprinted in* Gov't Code tit. 2, subtit G. app. B. The Commission on Judicial Conduct can be found at www.scjc.state.tx.us.

Lawyers: Regulated by the State Bar of Texas. Phone: (800) 204-2222. Statutes that contain the regulations: Texas Disciplinary Rules of Professional Conduct (1990), *reprinted in* Gov't Code tit. 2, subtit. G. app. A. The State Bar of Texas can be found at www.texasbar.com.

Nurses: Regulated by the Texas Board of Nursing. Phone: (512) 305-7400. Statutes that contain the regulations: (TEX. OCC. CODE ANN.) Chapter 301. The Board of Nurse Examiners can be found at www.bon.state.tx.us.

Physical Therapists and Occupational Therapists: Regulated by the Executive Council of Physical Therapy and Occupational Therapy Examiners. Phone: (512) 305-6900. Statutes that contain the regulations: (TEX. OCC. CODE ANN.) Chapter 452. The Executive Council of Physical Therapy and Occupational Therapy Examiners can be found at www.ecptote.state.tx.us.

Plumbers: Regulated by the Texas Board of Plumbing Examiners. Phone: (512) 936-5200 or (800) 845-6584. Statutes that contain the regulations: (TEX. OCC. CODE ANN.) Chapter 1301. The Board of Plumbing Examiners can be found at www.tsbpe.state.tx.us.

Real Estate Professionals: Regulated by the Texas Real Estate Commission. Phone: (512) 459-6544. Statutes that contain the regulations: (TEX. OCC. CODE ANN.) Chapters 1101, 1102 and 1103. The Real Estate Commission can be found at www.trec.state.tx.us.

For a complete list of state licenses issued for various occupations, see www.texas.gov.

Local professionals may also voluntarily join professional associations that have a code of ethics for their members. For example, city managers and local attorneys often belong to organizations that have their own code of ethics for members. If a member is found to have violated the code in the performance of his profession, the organization might issue a written reprimand to the person and/or cancel the person's membership in the organization. Since membership in such an organization is voluntary, the remedies available to the organization are limited.

3. What role does the Texas Ethics Commission have in enforcing or advising local officials on state or local ethics requirements?

The Texas Ethics Commission administers and enforces several types of statutes, including campaign finance laws, political advertising laws, lobbying restrictions and filing requirements of personal financial statements.³

The Texas Ethics Commission may also issue advisory opinions to a requestor subject to Chapter 36 (Bribery, Gift and Honorarium laws) or Chapter 39 (Misuse of Government Resources) of the Penal Code. The Commission will consider an opinion request only from a person who seeks advice on how the law applies to that person in regard to a specific factual situation, either existing or hypothetical. Once an opinion is issued by the Commission, the opinion is an open record and is posted on the agency's website. The requestor may choose to keep his or her name

³ See TEX. GOV'T CODE ANN. § 571.061 (West Supp. 2011).

confidential. Reasonable reliance upon a written advisory opinion issued by the Commission may serve as a defense to prosecution or the imposition of a civil penalty.⁴

4. Can a local governing body impose a specific set of ethical requirements on elected and/or appointed officials and staff?

Unless prohibited by law, a governing body, by majority vote of its members, may impose a set of ethical requirements for elected and/or appointed local officials and staff. If adopted, such a set of requirements is generally contained in an ethics ordinance or policy. In home rule cities (cities that adopted a home rule charter while over 5,000 in population), such ethical limitations may also be contained in the city charter, as well as in the city ethics ordinance or policy.

5. What types of issues are typically addressed in an ethics ordinance regarding elected and appointed officials?

An ethics ordinance regarding elected and appointed officials typically addresses issues such as: conflicts of interest;⁵ voting on zoning classifications affecting property owned by an official within a certain distance; supplemental compensation; outside employment; representing business entities before a board, commission or governing body;⁶ post-employment restrictions; restrictions on lobbying for ballot items; requirements for annual financial disclosure statements; and the receipt of gifts.⁷

Some large cities such as Dallas, El Paso, Houston and San Antonio have also imposed registration and reporting requirements on local lobbyists and other individuals and entities.

To the extent authorized by law, local ordinances may be stricter than state law but may not lower the standards set forth in state law.

6. What types of issues are typically addressed in an ethics ordinance regarding employees?

An ethics ordinance regarding employees typically addresses issues such as: supplemental compensation; outside employment; representing business entities before a board, commission or governing body;⁸ post-employment restrictions; restrictions on lobbying for ballot items; and the receipt of gifts.⁹

⁴ *Id.*

⁵ See SACHSE, TEX. HOME RULE CHARTER § 14.08.

⁶ See FORT WORTH, TEX., CODE OF ORDINANCES § 2-238(b)(1).

⁷ See SOUTHLAKE, TEX., CODE OF ORDINANCES § 2-264(a)(1); FORT WORTH, TEX., CODE OF ORDINANCES § 2-238(a); see also TEX. PEN. CODE ANN. § 36.08 (West 2003).

⁸ See FORT WORTH, TEX., CODE OF ORDINANCES § 2-238(b)(1).

⁹ See SOUTHLAKE, TEX., CODE OF ORDINANCES § 2-264(a)(1); FORT WORTH, TEX., CODE OF ORDINANCES § 2-238(a); see also TEX. PEN. CODE ANN. § 36.08 (West 2003).

Bribery and Illegal Gift Statutes

7. Is it illegal for a person to offer, or for a public official to accept a gift or benefit in exchange for an exercise of official discretion?

Section 36.02 of the Texas Penal Code makes it a crime of bribery for a person to offer, confer or agree to confer, or for a public official or employee to accept, agree to accept or solicit, any benefit as consideration for a decision, opinion, recommendation, vote or other exercise of discretion.¹⁰ The Penal Code defines a prohibited “benefit” as:

Anything reasonably regarded as pecuniary [monetary] gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest.¹¹

In other words, a benefit would include anything that is offered that a reasonable person would consider having some monetary value, whether it is given to the public official or to someone in whom the official has a direct and substantial interest (such as a family member or a business associate).

The state law on bribery does not contain a monetary threshold at which point a benefit that is provided could be considered a potential bribe. Therefore, anything that a reasonable person would find as having a monetary value should be refused. The Texas Ethics Commission, however, has advised that a plaque, unless it was quite elaborate, would not be considered a benefit under the bribery law if such item is unsolicited and not offered or accepted in exchange for any action or inaction on the part of a public servant.¹²

To prove bribery, a prosecutor must show that the benefit offered or given to an official was done so as consideration for an official’s decision, vote, recommendation or other exercise of discretion. Whether a benefit was given as consideration for such actions remains a fact question that would have to be addressed on a case-by-case basis by the local prosecutor.

However, it is important to note that the Penal Code prohibits, with certain exceptions, a public official from ever accepting a benefit from a person subject to his or her jurisdiction, regardless of whether it was in consideration or in exchange for any official action.¹³

8. Does state law prohibit a local official or employee from accepting a gift or benefit if the item was offered or accepted after the exercise of official discretion?

Even if an item was offered or accepted after the exercise of an official action, it may still be considered bribery of a public official or employee. According to section 36.02(c) of the Penal Code, the fact that a benefit was not offered or accepted until after the exercise of some official discretion is not a defense to bribery.

¹⁰ TEX. PEN. CODE ANN. § 36.02(a) (West 2003).

¹¹ *Id.* § 36.01(3).

¹² Op. Tex. Ethics Comm’n No. 36 (1992).

¹³ TEX. PEN. CODE ANN. §§ 36.08, 36.10 (West 2003 & Supp. 2011).

9. Does state law prohibit a local official or employee from accepting a gift or benefit if it was unsolicited and if it can be shown that it did not influence the exercise of official discretion?

Even if an item was not solicited and had no influence over the decision that was made, it may still be considered bribery of a public official or employee. The fact that a benefit did not have influence over the decision would not be considered a defense to a prosecution for bribery.

Additionally, it is important to note that the Penal Code generally prohibits a public servant from ever accepting a benefit from a person subject to his or her jurisdiction, regardless of whether it was in consideration or in exchange for any official action.¹⁴ There are some exceptions to this prohibition (see below). (Nonetheless, these exceptions do not apply to the bribery statute.)

10. Can a local official or staff member accept a gift that is simply provided in appreciation for superior public service and that is not in exchange for any official exercise of discretion?

The Penal Code generally prohibits a public official from ever accepting a benefit from a person subject to his or her jurisdiction, regardless of whether it was in recognition of superior service or a token of gratitude.¹⁵

11. What is considered a “gift or benefit” for purposes of the general prohibition against the acceptance of gifts by public officials and public employees?

A gift or benefit is considered anything reasonably regarded as monetary gain or a monetary advantage. A floral arrangement, gift basket or other item would constitute a gift. Similarly, tickets to an event or the provision of complimentary or discounted services or products would likewise constitute a gift. Whether an item has such a value is a fact question that must be determined on a case-by-case basis by the local prosecutor.

12. Are there exceptions to the gift or benefit limitations that apply to public officials and public employees?

Several exceptions exist to the prohibition against providing a gift to a public official or public employee. (Again, these are not exceptions to the bribery statute.) The following are not prohibited:

1. **Token Gifts:** An item that has a value of less than \$50, excluding cash or a negotiable instrument, if it was not given in exchange for any exercise of official discretion;
2. **Gifts from Family or Close Friends:** A gift conferred by an official’s family or by a personal friend, if there is an independent relationship that is not related to the status or work of the official;
3. **Gifts from Individuals with Whom the Public Official or Public Employee Has an Independent Business Relationship:** A gift conferred by a professional or business contact if there is an independent relationship that is not related to the status or work of the official;

¹⁴ *Id.*

¹⁵ *Id.*

4. **Statutorily Provided Fees:** A fee that is provided by law that an official is lawfully entitled to receive for performing some function other than his or her official function as a public servant (e.g., jury duty fee);
5. **Payment of Expenses:** This exception applies only to a benefit given in honor or appreciation to a public servant who is required to file a campaign finance report under Title 15 of the Election Code or to file a personal financial disclosure statement under Chapter 572 of the Government Code. This benefit must be used solely to defray expenses that accrue in the performance of duties or activities in connection with the office. The expenses must be non-reimbursable by the political subdivision. The benefit and the source of any benefit in excess of \$50 must be reported in the campaign finance report or the personal financial disclosure statement;
6. **Political Contributions as defined by Title 15 of the Election Code;** and
7. **Food, lodging, transportation or entertainment accepted as a guest.** A public servant may lawfully accept food, lodging, transportation or entertainment *as a guest* – meaning that the recipient must be *in the presence* of the donor.¹⁶ A public servant may accept lodging, transportation and meals in connection with a seminar or conference in which the public servant renders a substantive service.¹⁷ Each exception has its own reporting requirements.

13. What can public officials or public employees do with unsolicited benefits that they are prohibited from accepting?

A public official or employee who receives an unsolicited benefit may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious or scientific purposes.¹⁸ However, this exception does not apply if the gift was provided as part of an honorarium. In such a case, the gift should be refused, and the offering entity is free to make some other use of the benefit.

14. Can a public official or employee be criminally prosecuted if found to have illegally accepted a gift or benefit?

A public official who accepts or solicits a gift or benefit in exchange for some exercise of official discretion may be prosecuted for bribery, which is a felony of the second degree.¹⁹ A public official who accepts or solicits a gift or benefit from a person subject to his or her jurisdiction can be prosecuted for accepting an illegal gift, which is a Class A misdemeanor.²⁰

15. Can a public official or public employee be removed from office if found to have illegally accepted a gift or benefit?

There is no special remedy under the Penal Code that provides for removal of a public official due to a violation of the gift laws. However, if a person is criminally convicted of such an offense, it may affect his or her eligibility for office. Additionally, such a conviction may act to automatically remove the official from office or be a ground for seeking the removal of a

¹⁶ *Id.* § 36.07(b).

¹⁷ *Id.* § 36.10(a).

¹⁸ *Id.* § 36.08(i).

¹⁹ *Id.* § 36.02(e).

²⁰ *Id.* § 36.08(h).

member of a governing body through a recall or other removal action if such action is authorized under state law or a city charter.²¹

Honorarium Statutes

16. Does state law prohibit a public official or public employee from accepting an honorarium or other item of value in exchange for providing a speech or other service?

State law generally prohibits a public servant from soliciting, accepting or agreeing to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties.²²

In other words, acceptance of an honorarium by a public official or employee is prohibited if the public servant was asked to provide the speech or the service because of his official position or knowledge that was gained in his official position.

Although the Penal Code does not define "honorarium," numerous ethics opinions and attorney general opinions can provide some guidance. The Texas Ethics Commission has noted that an "honorarium" is commonly understood to be "a payment in recognition of acts or professional service for which custom or propriety forbids a price to be set."²³ The Ethics Commission has determined that fees for speaking, teaching and certain other services are included in the term "honorarium."²⁴ The Ethics Commission has concluded that an honorarium payment "in consideration for services" can be either payment of contractual consideration or payment in appreciation of such services.²⁵

The holding in GA-354 (2005) is also illustrative. A payment by a private association of public officials, compensating one of its members for services as its immediate past president, does not per se violate sections 36.07 (concerning prohibited honoraria) or 36.09 (concerning the offer of a gift to a public servant) of the Texas Penal Code. Section 36.07 does not prohibit fair compensation to a person for services as the president of a private association, assuming the person was elected president because of the person's skills and abilities and not because the person is a public servant of a particular county or district. Section 36.09 does not prohibit payment to a person for legitimate consideration rendered in a capacity other than as a public servant.

17. Is the prohibition on accepting honoraria waived if the public official or employee provides the speech or service on his or her own personal time and there is no expenditure of public resources?

The prohibition on accepting honoraria may apply even if the public official or employee provides the speech or service on his or her own personal time and there is no expenditure of public resources. It also does not matter for whom or where the speech or service is being provided.²⁶

²¹ See TEX. LOC. GOV'T CODE ANN. §§ 21.025 & 21.031 (West 2008).

²² TEX. PENAL CODE ANN. § 36.07(a) (West Supp. 2011).

²³ Op. Tex. Ethics Comm'n No. 401 (1998) at p.2, n.1.

²⁴ Op. Tex. Ethics Comm'n Nos. 305 (1996), 416 (1999) and 294 (1995).

²⁵ Op. Tex. Ethics Comm'n No. 97 (1992).

²⁶ See Op. Tex. Ethics Comm'n No. 173 (1993).

18. Does the prohibition against honoraria apply to expenses incurred by a public servant for food, lodging or transportation in connection with providing a speech or service?

The prohibition on honoraria does not prohibit a public official or public employee from accepting payment for meals, transportation or lodging expenses in connection with a conference or similar event in which the public servant renders services, such as providing a speech, to the extent that those services are more than merely perfunctory.²⁷

Misuse of Government Property Statutes

19. Does state law prohibit a public official or public employee from using government property for personal purposes?

State law prohibits a public official or public employee from misusing government property, services, personnel or any other thing of value belonging to the government with the intent to obtain a benefit or to harm or defraud another.²⁸ Misuse is defined as dealing with property in a way that is contrary to an agreement under which the public servant holds the property, a contract of employment or oath of office of a public servant, a law that prescribes the manner of custody or disposition of the property, or a limited purpose for which the property is delivered or received.²⁹

20. Does state law prohibit the use of public employees to perform private work for public officials during work hours?

State law prohibits a public official or public employee from misusing any government property, including personnel.³⁰ Since most public employees are only allowed to perform work that benefits the general public during work hours, use of such employees to perform private work for an official during such hours would be prohibited.

21. Can a public official use government property or the services of public employees for private purposes if the public entity is reimbursed for the value of the property usage or service that is provided?

State law does not allow the use of government property or the services of government employees by a public official for his or her private use even if the public entity is fully reimbursed for the value of the property or the services after the fact.

22. Can a public official use a public employee to perform private work if the employee is paid for the value of the work and the work is performed on the employee's own time without the use of any public resources?

State law does not prohibit the use of the services of a public employee if the work is done on the employee's own time and without the use of any public resources. However, if the employee working on his or her own time for an official is paid less than fair market value by the official for this work, the official might run afoul of gift prohibitions previously discussed.

²⁷ TEX. PENAL CODE ANN. § 36.07(b) (West Supp. 2011).

²⁸ *Id.* § 39.02(a)(2) (West 2003).

²⁹ *Id.* § 39.01(2)(A)-(D).

³⁰ *Id.* § 39.02(a)(2).

23. Can a public official or public employee be criminally prosecuted for a violation of the misuse of government property law?

A public official or public employee can be criminally prosecuted for a violation of the misuse of government property law. *See, e.g., Megason v. State*, 19 S.W.3d 883 (Tex. App.—Texarkana 2000, pet. ref'd). Punishment for a violation of this law ranges from a Class C misdemeanor to a first degree felony, depending on the value of the misused property.³¹

24. Can a public official or public employee be removed for violation of the misuse of government property prohibition?

There is no special remedy under the Penal Code that provides for removal of a public official due to a misuse of government property. However, if a person is criminally convicted of such an offense, it may affect his or her eligibility for office. Additionally, such a conviction may act to automatically remove the official from office or be a ground for seeking the removal of a member of a governing body through a recall or other removal action if such is authorized under state law or a city charter.³²

Misuse of Official Information Statutes

25. Does state law prohibit a public official or public employee from using confidential information to gain a benefit or advantage?

Yes, state law specifically prohibits a public official or public employee from disclosing or using confidential information to which the official or employee has access by virtue of the office or employment to gain a benefit or advantage or with intent to harm or defraud another.³³

26. Does the prohibition on the misuse of government property apply to a public official or employee who uses information that is deemed open to the public (e.g., an open record)?

The prohibition on the misuse of official information applies only to information to which the public does not generally have access and that is prohibited from disclosure under Chapter 552 of the Government Code.³⁴

27. Can a public official or public employee be removed for a violation of the misuse of official information prohibition?

There is no special remedy under the Penal Code that provides for removal of a public official due to a misuse of official information. However, if a person is criminally convicted of such an offense, it may affect his or her eligibility for office. Additionally, such a conviction may act to automatically remove the official from office or be a ground for seeking the removal of a member of a governing body through a recall or other removal action if such is authorized under state law or a city charter.³⁵

³¹ *Id.* § 39.02(c).

³² *See* TEX. LOCAL GOV'T CODE ANN. §§ 21.025 & 21.031 (West 2008).

³³ Tex. Penal Code Ann. § 39.06 (West 2003).

³⁴ *Id.* § 39.06(d).

³⁵ *See* TEX. LOCAL GOV'T CODE ANN. §§ 21.025 & 21.031 (West 2008).

28. Can a public official or public employee be criminally prosecuted for a violation of the misuse of official information law?

A public official or public employee can be criminally prosecuted for a violation of the misuse of official information law. An offense of this law is generally a felony of the third degree.³⁶

Acknowledgment

This paper was reviewed by Henry De La Garza, Ethics Advisor with the Office of the Attorney General, and by Ross Fischer, former chairman of the Texas Ethics Commission.

³⁶ TEX. PENAL CODE ANN. § 39.06(e) (West 2003).