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Texas Comptroller of Public Accounts

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RQ-0533-KP

February 29, 2024

The Honorable Ken Paxton
Attorney General
State of Texas
209 West 14th Street, 8th Floor
Austin, Texas 78701-1614

Re: Attorney General Opinion request on likely application of conflict-of-interest rules to grants awarded by the Texas Opioid Abatement Fund Council

Dear General Paxton:

As the presiding officer of the Texas Opioid Abatement Fund Council, I respectfully request an Attorney General Opinion on what statutory or common law authorities would govern a grant of funds from the Opioid Abatement Settlement Fund to an entity in which a Council member may hold an interest, whether the Council could enact rules to resolve a potential conflict through disclosure and recusal and, if not, whether there is a legally viable solution to enable the Council to fulfill its statutory duties and to prevent Council vacancies.

As you are aware, the Council was created to distribute funds to communities to provide relief for those affected by the opioid crisis. It originated from settlement agreements and related documents filed in lawsuits against opioid manufacturers, distributors and purveyors. The 87th Legislature enacted statutes to govern the Council's distribution of funds. *See generally* TEX. GOV'T CODE ch. 403, subch. R.

Section 403.503 creates the Council, which is composed of fourteen members:

- Six from academia or the medical profession with significant experience in opioid interventions, each appointed to represent a specific region;
- Four current or retired health care professionals with significant experience in treating opioid-related harms;
- Two members employed by hospital districts;
- One member of a law enforcement agency who has experience with opioid-related harms; and
- The Comptroller or designee, who will serve as the nonvoting presiding officer.

Each regional member is selected by the Executive Commissioner of the Health and Human Services Commission from lists provided by leaders of each county and municipality that brought opioid-related claims against the released entities, that had its claims released in the settlement agreements, and that is located within the region the member will represent. *Id*. Council members do not receive compensation for their service on the Council. TEX. GOV'T CODE § 403.504.

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Of the settlement funds delegated to the Council, fifteen percent is allocated to hospital districts and the remainder is distributed in accordance with an abatement strategy chosen by the Council. TEX. GOV'T CODE § 403.508(a). The Council does not create this strategy from whole cloth; the opioid settlement agreements define eligible strategies and the Council adopted rules establishing detailed parameters for the strategies. *See, e.g.*, 34 TEX. ADMIN. CODE §§ 16.200-205. Grant applications go through three levels of review before they can be awarded. 34 TEX. ADMIN. CODE § 16.208. Grants that are awarded are subject to ongoing oversight and monitoring. 34 TEX. ADMIN. CODE §§ 16.212-220.

No modern court has addressed whether board members or their employers can receive grants from the boards they serve. Several prior attorneys general have addressed the issue in formal opinions, however, and the answers have been resoundingly negative. *See, e.g.,* Tex. Att'y Gen. Op. Nos. DM-0018 (1991), JC-0426 (2001), JC-0484 (2002), KP-0259 (2019). Your opinion in KP-0259 said that when a member of a governing body has a financial interest in a contract, even disclosure and recusal of the interest is not sufficient to prevent the contract from being invalidated under the common law. Tex. Att'y Gen. Op. No. KP-0259 (2019) at 1.

The Council is required to have members with specific types of experience, who are affiliated with the same entities that would otherwise be eligible for the grants. If every qualified, otherwise eligible entity with any tie to a Council member would lose the ability to remediate opioid harms because of the member's service on the Council, many of the current members could resign, and filling those positions could cause a significant delay in saving lives. I am therefore requesting your opinion on the likelihood that a court would interpret the laws in a way that would not disqualify entities in which a Council member may be found to have an interest from receiving grants.

1. **Can Council members resolve potential conflicts by disclosing the interest and recusing themselves under Government Code Chapter 572?**

   a. The Legislature created a comprehensive statutory scheme addressing conflicts of interest for all public servants.

Government Code Chapter 572 contains the ethics policy for all state employees and officers. It states:

> (a) It is the policy of this state that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature **that is in substantial conflict** with the proper discharge of the officer's or employee's duties in the public interest.
>
> (b) To implement this policy and to strengthen the faith and confidence of the people of this state in state government, this chapter provides standards of conduct and **disclosure requirements** to be observed by **persons owing a responsibility to the people and government of this state** in the performance of their official duties.
>
> (c) It is the intent of the legislature that this chapter serve not only as a guide for official conduct of those persons but also as a basis for discipline of those who refuse to abide by its terms.

TEX. GOV'T CODE § 572.001 (emphasis added). So, while the personal financial statements described in Chapter 572 Subchapter B only apply to specific public officials, the general ethics policy described throughout the chapter is intended to govern all "persons owing a responsibility to the people and government of this state". It does this by defining "state officer" and "state employee" broadly enough to include every official serving at the state level. *See generally* TEX. GOV'T CODE §§ 572.002, .003.[1]

The stated goal of chapter 572 is to avoid actual, substantial conflicts of interest, not to ban all potential conflicts or appearances of impropriety. *See* TEX. GOV'T CODE § 572.001(a) ("It is the policy of this state that a state officer or state employee may not have a direct or indirect interest . . . **that is in substantial conflict** with the proper discharge of the officer's or employee's duties. . . ") (emphasis added). It provides guidelines for what all state officers or employees should not do, including accepting other employment or engaging in a business or professional activity that the officer or employee might reasonably expect to impair the person's independence of judgment or require the person to disclose confidential information acquired through the official position. TEX. GOV'T CODE §§ 572.051(a)(2), (3).

State agencies are responsible for adopting policies to ensure their own employees do not violate the prohibition on conflicts of interest. TEX. GOV'T CODE § 572.051(c). A state employee who violates the statute or the agency's policies is subject to employment-related sanctions, up to discharge. TEX. GOV'T CODE § 572.051(b).

Elected and appointed officers do not answer to an agency employer, so the Legislature provided a statutory framework to avoid conflicts of interest. Except for certain constitutionally created offices, most elected and appointed officers must publicly disclose any personal or private interest in a matter before them, and recuse themselves from any decision on the matter. Tex. Gov't Code § 572.058(a). Violation can result in removal from office by following the stated procedure. Tex. Gov't Code § 572.058(c).

Several other statutes govern potential conflicts of interest for other "persons owing a responsibility to the people and government of this state." TEX. GOV'T CODE § 572.001; *see* TEX. GOV'T CODE § 571.061 (Ethics Commission administers and enforces chapters 302, 303, 305, 572, 2004; §§ 2152.064 and 2155.003; TEX. LOC. GOV'T CODE ch. 159, TEX. ELEC. CODE tit. 15). Like state elected and appointed officials, the Legislature has provided that members of local governing bodies can avoid conflicts by

[1] Examples of the many officials encompassed by the definitions in sections 572.002 and .003 include:

- State officers, which are elected officers, appointed officers, salaried appointed officers, appointed officers of major state agencies, and executive agency heads.
    - An "elected officer" is an elected member of the legislature, executive branch, judiciary or State Board of Education, a district attorney or an individual appointed to fill a vacancy in an otherwise elected position.
    - An "appointed officer" is the secretary of state, an individual appointed to the governing board of an institute of higher education, an officer appointed for a specific term, or a member of a governing board or commission "who is *not appointed*, and who is *not* otherwise: (i) an elected officer; (ii) *an officer described by [the previous paragraphs*] or (iii) an executive head of a state agency."
    - A salaried appointed officer is an appointed officer who receives a salary.
    - An "appointed officer of a major state agency" is one of eight enumerated commissioners, directors or chief executives of major agencies or a member of one of the 36 listed commissions or boards.
    - An "executive head of a state agency" is appointed by the governing body or highest officer of the state agency to act as the chief executive of the agency.
- State employees are all individuals, other than state officers, who are employed by the executive, judicial or legislative branches of the state government.

disclosing the interest and abstaining from the vote. TEX. LOC. GOV'T CODE § 171.004. This statute clearly contemplates, and allows, contracts between the governing bodies and entities in which members have personal interests, and only requires disclosure and abstention if the interest is "substantial". *Id*. A member's interest in a business entity is substantial if it constitutes 10 percent or more of the voting shares, $15,000 or more of the fair market value or if funds received from the business exceeded 10% of the member's gross income for the previous year. TEX. LOC. GOV'T CODE § 171.002. Some other public servants are also simply required to disclose personal interests while for others, particularly those whose primary roles are contracting and overseeing procurement, any interest is prohibited. *See, e.g.,* TEX. GOV'T CODE § 2152.064 (a member of the Facilities Commission may not have an interest in a contract, and a member who accepts a gift from a recipient of a contract is subject to dismissal); § 2263.005 (outside financial advisors and service providers for the state must disclose any relationship with any party to a transaction with the state governmental entity); TEX. LOC. GOV'T CODE § 302.005(b)(1) (a governing body entering an energy savings performance contract must have it reviewed by a licensed professional engineer who is not an officer or employee of a provider for the contract under review).

b. A court is not likely to rule that the Council members are among some of the only public servants omitted from this comprehensive scheme.

Council members are appointed to their positions. An "appointed officer" under Chapter 572 is defined as one who is "appointed for a term of office specified by the Texas Constitution or a statute of this state." TEX. GOV'T CODE § 572.002(1)(C). The Opioid Settlement Fund statute does not set terms for Council members. However, Article 16, Section 30 of the Texas Constitution sets the duration of all offices not set by statute at two years. Because the Council members are appointed and serve for a set amount of time, rather than at the will of an agency employer, they should be subject to the disclosure and recusal provision in section 572.058 for appointed officers.

It has been suggested that the two-year default term is not sufficient to deem the Council members "appointed for a term of office." *See Cowell v. Ayers*, 220 S.W. 764, 765 (Tex. 1920) (Section 30a, authorizing legislature to set terms longer than default, "uses no language suitable to create offices or prescribe terms."). While the definition of "appointed officers" includes those who are appointed for a set term as well as those are not appointed at all, officers who are appointed but not for a set term seem to fall into a gray area not covered by any of the definitions. *See* TEX. GOV'T CODE § 572.002(1) (" 'Appointed officer' means: . . . (C) an officer of a state agency who is appointed for a term of office specified by the Constitution . . . ; or (D) an individual who is a member of a governing board or commission of a state agency, who is not appointed, and who is not otherwise: . . . (ii) an officer described in Paragraph . . . (C) . . . ."). But saying that this one narrow type of officer is the only one not covered by this otherwise exhaustive statutory scheme, and is therefore subject to the common law, would be an absurd result. The significance of whether a public servant is appointed, elected or an employee seems to be based on how violations would be punished, not whether the official's term is sufficiently defined. Moreover, what was at issue in *Cowell* was whether the constitutional provision allowing the Legislature to expand this default term was sufficient to create an office that would otherwise no longer exist, not whether the default terms in section 30 applied. 220 S.W. at 765.

Even if they are not considered "appointed officers" under that specific definition, a court might find that section 572.051 uses the term "state officers or employees" in a broader sense. Section 572.001 states the Legislature's intent for the ethics policy to encompass all "persons owing a responsibility to the people and government of this state." Sections 572.002 and .003 define the terms in a manner that is

clearly trying to include all individuals serving the state. If Council members are "state officers or employees" in that sense, the Council could adopt policies allowing for disclosure and recusal. The Legislature believed disclosure and recusal to be sufficient to prevent actual, significant conflicts for elected and appointed officers as well as local governing officers, so there is no reason that such a rule should not be sufficient to protect against conflicts for Council members.

Several Attorney General opinions concluded that Chapter 572 did not apply, but not because of the members' titles. Rather, they stated that it did not apply to contracts or grants at all. *See, e.g.*, Tex. Att'y Gen. Op. Nos. JM-671 (1987), JC-0484 (2002), GA-0351 (2005). Looking at the legislative history of the predecessor statute to section 572.058 and the common law that predated the statute, they concluded that the statute was based on a provision governing legislators and, as such, applied only to rulemaking and other regulatory functions undertaken by legislative bodies. *See* Tex. Att'y Gen. Op. No. GA-0351 (2005) at 4 (citing Tex. Att'y Gen. Op. No. JM-671 as finding that neither the statutory language nor the legislative history expressed an intent to modify the common law). Although this conclusion has been repeated in several Attorney General opinions since it was first written in 1987, no court has considered the issue. Modern courts do not consult extrinsic aids in the absence of ambiguity, so a court facing the issue for the first time today would not be likely to consider the same resources, and the language of section 572.058 does not support this reading. Moreover, a plain reading of sections 572.001, .002 and .051 belies this interpretation, given the Legislature's express intent for the policy to have a broad scope.

In fact, the Ethics Commission has applied section 572.058 to a contract between a board and an entity in which a board member held an interest. Op. Tex. Ethics Comm'n. No. EAO-412 (1999). The Commission acknowledged the Attorney General's stance that the provision did not apply to contracts but distinguished the matter before it on the ground that the board member's interest was nonpecuniary. Under the Ethics Commission's reading, an entity in which a Council member has a nonpecuniary interest, such as a hospital in which a Council member-physician has admitting privileges but from which he receives no income, a sister hospital within the same hospital system that employs a Council member, or a nonprofit entity for which a Council member serves as an uncompensated board member, could potentially receive a grant from the Council if the member discloses the interest and recuses herself from the vote on that grant.

c. If section 572.058 applies, does it override the outright prohibition on contracts for goods and services contained in section 2261.252?

Government Code section 2261.252 expressly prohibits governing boards from entering into contracts for the purchase of goods and services with entities in which members have a financial interest. While the common-law conflict of interest doctrine has been applied to a transaction between two governmental entities, section 2261.252 applies only to contracts between a governmental entity and a private vendor. Tex. Gov't Code § 2261.252; Tex. Att'y Gen. Op. No. JC-0484 (2002). The definition of "contract" in chapter 2261 expressly includes grants. Tex. Gov't Code § 2261.002. It is important that the Council understand the scope of section 2261.252, including whether it would prohibit a contract with a private entity even if a contract with a similarly-situated public entity was allowed.

2. Is a court likely to abrogate the common law prohibition on contracts between governmental bodies and interested members?

The common law has long prohibited a governmental body from entering into a contract in which a member has a financial interest, as stated in *Meyers v. Walker*, 276 S.W. 305, 307 (Tex. Civ. App.—Eastland 1925, no writ). The prior Attorney General opinions stating that Chapter 572 did not apply to contracts instead invalidated the agreements under the common law, which makes no allowance for disclosure and recusal. *See* Tex. Att'y Gen. Op. No. KP-0259 (2019) ("A contract that violates the common-law rule is void even if the interested official recuses himself or herself.") (citing Tex. Att'y Gen. Op. No. JC-0484 (2002)).

Legislative enactments supersede the common law, however, and the Legislature has enacted numerous statutes to override this doctrine. *See, e.g.,* TEX. LOC. GOV'T CODE ch. 171 (local public officers may enter contracts in which they have an interest but they must be disclosed and abstain from voting); TEX. GOV'T CODE § 404.0211 (state agency may select interested depository bank). It is unlikely that the Legislature enacted these statutes covering so many possible scenarios, often allowing these contracts with disclosure and recusal, only to have the common law simultaneously apply an outright prohibition. When statutes provide a comprehensive system of rules and guidelines, people should not be expected to also look at cases written approximately a century ago to determine whether contradictory principles may apply.

Even if the common law does fill any gaps in this statutory scheme with a prohibition, the Opioid Abatement Fund statute could be read as superseding the common law by requiring the same professionals to serve on the Council as are likely to work for the entities that provide the services the Council needs. It is often said that if the Legislature intends to abrogate the common law, it should do so expressly. *See* Tex. Att'y Gen. Op. No. KP-0259 (2019) (citing *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 461 (Tex. 2012)). Chapter 403 contains no language stating intent to supersede the common law. However, courts are moving away from requiring such formal declarations. *See Elephant Ins. Co. v. Kenyon*, 644 S.W.3d 137, 158 (Tex. 2022) (concur'g op.) (discussing diminished role for common law and *Ruttiger* in modern pervasive statutory scheme).

Although Chapter 403 does not say that entities affiliated with members can apply for grants, it defines who can serve on the Council and what types of programs can receive grant funding, which creates considerable overlap between the two. A court can abrogate the common law on a case-by-case basis and could decide to do so here to allow the Council to draft rules providing for disclosure and recusal. *See* Tex. Att'y Gen. Op. No. GA-360 (2005) at 8 (approving of a county employee's engagement on both sides of an interlocal contract because the type of contract did not require the same level of separation between parties as other contracts would). There are several reasons that the Council could be treated differently than other governing bodies.

First and foremost, the money being distributed is from the settlement of claims for injuries suffered by people in the communities on whose behalf the Council members' affiliated entities would receive the grants. The Council members are chosen because of their relationships to their communities and understanding of how best to help alleviate the crisis. The regional representatives in particular are chosen by the leaders of communities that brought claims that were then released through the settlement agreements. A large portion of grants must be allocated to address opioid-related problems in a tailored, regional approach, not for the state at large.

Second, certain areas have a limited number of professionals with the experience required by the statute. If any network affiliated with those professionals is prohibited from seeking a grant, the experts may not be willing to serve on the Council. On the other hand, if a professional does serve on the Council whose employer is the sole provider in his area and that entity is disqualified, then as a result of his service on the Council the entire region may be deprived of funding it was intended to receive.

Third, the settlement agreements, statutes and rules provide extensive guidance on how the funds are to be distributed and used and there is considerable oversight once the grants are issued. In GA-360, one consideration for allowing an auditor to serve two government functions at once, one of which oversaw the other, was that his profession (CPA) was highly regulated and his position could be audited if there were cause for concern. Tex. Att'y Gen. Op. No. GA-360 (2005) at 9-10.

If the Council has authority to enact rules requiring disclosure of such interests and recusal from voting on measures in which a Council member is interested, allowing entities in which Council members have financial interests to apply for grants would not be problematic.

3. Is there another, legally viable solution to enable the Council to fulfill its duties and to prevent vacancies?

Attorney General Opinion JC-0484 extended the application of the common law conflict of interest rule to apply to transactions between two governmental entities. Tex. Att'y Gen. Op. No. JC-0484 (2002). The opinion request listed five boards with stakeholder members that wanted to contract with their boards. *See* RQ-044-JC. In the years following the opinion, the statutes creating the five boards were all repealed and the boards were disbanded. Chapter 403 was enacted with the knowledge of this history, yet the Council was created with members who are all likely to be affiliated with entities with interests in the funds. If the Council cannot adopt rules allowing for disclosure and recusal, please provide guidance on any other solutions that would enable the Council to fulfill its statutory duties and meet its membership requirements.

Thank you for your time and attention to these important issues.

Sincerely,

Glenn Hegar

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