

TEXAS ETHICS COMMISSION
P.O. Box 12070, Austin, Texas 78711-2070
(512) 463-5800

Steven D. Wolens, Chair
Chad M. Craycraft, Vice Chair
Randall H. Erben
Chris Flood

Mary K. "Katie" Kennedy
Patrick W. Mizell
Richard S. Schmidt
Joseph O. Slovacek

EXECUTIVE SESSION AGENDA

Date and Time:	1:30 p.m., Thursday, March 21, 2019
Location:	Room E1.014, Capitol Extension, Austin, Texas

1. Call to order; roll call.
2. Presentation of Certificates of Outstanding Service awards to Former Commissioners Chase Untermeyer and Tom Ramsay.
3. **Executive session pursuant to Section 551.071, Government Code, Consultation with Attorneys, and Section 551.074, Government Code, Personnel Matters; Closed Meeting.**
4. Discussion of pending litigation to seek legal advice relating to the following:
 - A. Cause No. D-1-GN-17-001878: *Texas Ethics Commission v. Michael Quinn Sullivan*, in the 250th Judicial District Court in Travis County, Texas; Cause No. 03-17-00392-CV: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the Third Court of Appeals at Austin, Texas; and Cause No. 18-0580: *Michael Quinn Sullivan v. Texas Ethics Commission*, in the Supreme Court of Texas.
 - B. Cause No. D-1-GN-14-001252: *Empower Texans, Inc. and Michael Quinn Sullivan v. State of Texas Ethics Commission; Natalia Luna Ashley, in her capacity as Executive Director of the Texas Ethics Commission; Tom Ramsay, individually and in his capacity as Commissioner; et al.*; in the 53rd Judicial District Court of Travis County, Texas; and related case, Cause No. 03-17-00770-CV: *Empower Texans, Inc., and Michael Quinn Sullivan v. Tom Ramsay in his individual capacity, et al.*; in the Third Court of Appeals, Austin, Texas.
 - C. Cause No. D-1-GN-15-004455: *Texas Ethics Commission v. Empower Texans, Inc. and Michael Quinn Sullivan*, in the 345th Judicial District Court of Travis

For more information, contact Ian Steusloff, Interim Executive Director, at (512) 463-5800.

County, Texas; and related case, Cause No. 03-16-00872-CV: *Empower Texans, Inc., and Michael Quinn Sullivan v. Texas Ethics Commission*, in the Third Court of Appeals, Austin, Texas.

5. Discussion to seek legal advice regarding referrals and orders under Subchapter F (Enforcement), Chapter 571, Texas Government Code.
6. Discussion to seek legal advice regarding procedures for advisory opinion requests received by the Texas Ethics Commission.
7. Discussion to seek legal advice regarding requirements of the Texas Open Meetings Act.
8. Discussion of personnel matters specifically related to applicants for, and possible appointment to the position of, Executive Director and/or ratification and appointment of Interim or Acting Executive Director.
9. Discussion to seek legal advice regarding authority and methods to collect delinquent obligations owed to the Commission.
10. **Reconvene in open session and possible appointment and/or ratification by vote on Item 8.**

ADMINISTRATIVE WAIVERS, REDUCTIONS, APPEALS OF FINES

11. Discussion and possible action on appeals of determinations made under Ethics Commission Rules §§ 18.25 and 18.26 relating to administrative waiver or reduction of a fine, for the following individual:

1. Daniel “Dan” Wyde (JCOH 58687)

12. Adjourn.

CERTIFICATION: I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements. Certifying Official & Agency Liaison: Ian Steusloff, Interim Executive Director.

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hearing impaired, readers, and large print or Braille documents. In determining the type of auxiliary aid or service, the Commission will give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify Margie Castellanos at (512) 463-5800 or RELAY Texas at (800) 735-2989 two days before this meeting so that appropriate arrangements can be made. Please also contact Ms. Castellanos if you need assistance in having English translated into Spanish.

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PUBLIC MEETING AGENDA

Date and Time:	3:00 p.m., Thursday, March 21, 2019
Location:	Room E1.014, Capitol Extension, Austin, Texas

1. Call to order; roll call.
2. Update on pending legislation affecting the Commission.

OTHER POLICY MATTERS

3. Discussion and possible action regarding the termination of a campaign treasurer appointment for the following inactive individuals and political committees:

Candidates:

- 1) Bernardo T. Aldape (00080183)
- 2) Arnoldo A. Alonzo (00082307)
- 3) Spencer R. Bounds (00082330)
- 4) Joshua G. Burns (00082362)
- 5) Steven M. Cantu (00081587)
- 6) Aaron D. Close (00082374)
- 7) Pamela Curry (00081891)
- 8) Michael G. Hendrix Jr. (00070826)
- 9) Mallory A. Olfers (00082340)
- 10) Jeffery A. Rank (00081926)
- 11) Janis M. Richards (00082393)
- 12) Kyle Brandon Stephenson (00081868)
- 13) Stephen A. West (00082342)

Political Committees:

- 14) Abilene Fire Fighter's Association PAC (00065735)
Mr. Jessy Horton, Treasurer
- 15) Aggregate Transporters association of Texas PAC (00068600)
Mr. Michael K Stewart, Treasurer
- 16) Arturo Alonzo For Texas Campaign (00082313)
Mrs. Gaby Zavala, Treasurer
- 17) Central Texas PAC Centre Development (00015824)

For more information, contact Ian Steusloff, Interim Executive Director, at (512) 463-5800.

- Mr. Darwin McKee, Treasurer
- 18) Coastal Bend Texas Democratic Women (00055120)
Mrs. Glenda G. Turner, Treasurer
- 19) Generationist Political Action Committee (00068154)
Mr. Michael Lee Steenbergen, Treasurer
- 20) Keep Austin Proud (00081816)
Mr. Charles T. Simpson, Treasurer
- 21) Liberty and Justice PAC (00081547)
Mr. Dustin Mitchell, Treasurer
- 22) MAD ORGANIZANDO NOCHE Y DIA Y ADELANTE (00082390)
Ms. Grace Hernandez, Treasurer
- 23) Mi Voto es Mio PAC (00081886)
Mr. Ralph Basim Garcia, Treasurer
- 24) Our Astrodome (00081518)
Mr. Ralph B. Garcia, Treasurer
- 25) Save East Austin Schools PAC (00081962)
Ms. Monica L. Sanchez, Treasurer
- 26) Shine On (00081692)
Ms. Michelle Jurado, Treasurer
- 27) Texas Democrats (00070332)
Mr. Michael Lee Steenbergen, Treasurer
- 28) Uptown PAC (00070238)
Ms. Kimberly Pettit, Treasurer
- 29) Valley Political Action Committee (00066822)
Mr. Johnathon David Gins, Treasurer
- 30) We Are Pearland (00081689)
Ms. Leisha A. D'Angelo, Treasurer
- 31) Weslaco Municipal Police Association PAC (00065953)
Mrs. Esmer Lopez, Treasurer
- 32) Williamson County Young Democrats (00081008)
Mrs. Deana E Tollerton, Treasurer

4. Adjourn.

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EXECUTIVE SESSION AGENDA

Date and Time:	9:00 a.m., Friday, March 22, 2019
Location:	Room E1.014, Capitol Extension, Austin, Texas

1. Call to order; roll call.
2. **Executive session pursuant to Section 551.074, Government Code, Personnel Matters; Closed Meeting.**
3. Discussion of personnel matters specifically related to applicants for, and possible appointment to the position of, Executive Director and/or ratification and appointment of Interim or Acting Executive Director.
4. **Reconvene in open session and possible appointment and/or ratification by vote on Item 3.**
5. Adjourn.

CERTIFICATION: I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements. Certifying Official & Agency Liaison: Ian Steusloff, Interim Executive Director.

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arrangements can be made. Please also contact Ms. Castellanos if you need assistance in having English translated into Spanish.

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PUBLIC MEETING AGENDA

Date and Time:	9:05 a.m., Friday, March 22, 2019
Location:	Room E1.014, Capitol Extension, Austin, Texas

1. Call to order; roll call.
2. Discussion regarding dates for next Texas Ethics Commission meeting.
3. Discussion regarding per diem applicable to Commission members.
4. Approve minutes for the following meetings:
 - o Executive Session – December 13, 2018
 - o Public Meeting – December 13, 2018
 - o Public Meeting – December 14, 2018

ADMINISTRATIVE WAIVERS, REDUCTIONS, APPEALS OF FINES

5. Discussion and possible action to waive or reduce the late-filing penalty in connection with a corrected report or to determine whether the corrected report as originally filed substantially complied with the applicable law for the following individual and political committee:
 1. Elizabeth Graham, Treasurer, Texas Right to Life PAC (GPAC)(00016515)
 2. Richard West “Bo” French (00070859)

RULEMAKING **Rules for Adoption**

6. Discussion and possible action on the adoption and publication in the Texas Register of new Ethics Commission Rule § 34.77, regarding the requirement that a

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lobbyist registered with the Texas Ethics Commission disclose a registration made under the Foreign Agent Registration Act.

7. Discussion and possible action on the adoption and publication in the Texas Register of new Ethics Commission Rule § 18.31, regarding adjustments to reporting thresholds under Government Code § 571.064 based on the rate of inflation.
8. Discussion and possible action on the adoption and publication in the Texas Register of new Ethics Commission Rule § 16.12, regarding facial compliance reviews.
9. Discussion and possible action on the adoption and publication in the Texas register of new Ethics Commission Rule § 24.18, regarding the designation of a corporation's political contributions made to a general-purpose committee for administrative expenses under § 253.100(a) of the Election Code.

ADVISORY OPINION(S)

10. Discussion and possible action regarding procedures for advisory opinion requests received by the Texas Ethics Commission.
11. Advisory Opinion Request No. SP-14: Whether a public officer may use government resources for political advertising.

This opinion request construes Section 39.02 of the Penal Code and Section 255.003(a) of the Election Code.

12. Advisory Opinion No. SP-16: Whether the secretary of state is a statewide officeholder for purposes of Title 15 of the Election Code.

This opinion construes Sections 253.034, 253.042, 254.0391, 254.0612, and 254.0912 of the Election Code.

OTHER POLICY MATTERS

13. Reports more than 30 days late: Discussion and possible action regarding the imposition of an additional fine on the following filers:

Personal Financial Statements

1. Julian Ybarr, Jr. (00070645)
2. Seth Andrew Sutton (00082500)

14. Update on accepting payments of fines by credit card.
15. Update on legislative action concerning the Commission's budget.
16. Discussion of and possible action on any unfinished business from March 21, 2019, Public Meeting.
17. Adjourn.

CERTIFICATION: I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements. Certifying Official & Agency Liaison: Ian Steusloff, Interim Executive Director.

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EXHIBIT A

Text of Proposed Rule

The proposed new language is indicated by underlined text.

Chapter 34. REGULATION OF LOBBYISTS

Subchapter C. COMPLETING THE REGISTRATION FORM

- 1 **§34.77. Disclosure of Registration under Foreign Agents Registration Act.**
- 2 The registration of any person who has also filed an active registration statement under the
- 3 Foreign Agents Registration Act of 1938, as amended (22 U.S.C. §611 et seq.), must
- 4 include the registration number assigned to the registration statement by the United States
- 5 Attorney General until the registration statement is terminated.

Exhibit A

Text of Proposed Rule Amendment

The proposed new language is indicated by underlined text.

Chapter 18. GENERAL RULES CONCERNING REPORTS

§18.31. Adjustments to Reporting Thresholds.

(a) Pursuant to section 571.064 of the Government Code, the reporting thresholds are adjusted as follows:

Campaign Finance Reports: Section of Election Code	Threshold Description	Original Threshold Amount	Adjusted Amount
253.031(b)	The amount of political contributions or political expenditures permitted by a political committee before a campaign treasurer appointment is required	\$500	\$870
253.031(d)(2)	The amount of political contributions or political expenditures permitted by a county executive party of a political party before a campaign treasurer appointment is required	\$25,000	\$32,320
254.031(a)(1)	Threshold at which contributor information is required to be reported	\$50	\$90
254.031(a)(2)	Threshold at which lender information is required to be reported	\$50	\$90
254.031(a)(3)	Threshold at which information on the payee of a political expenditure is required to be reported	\$100	\$180
254.031(a)(5)	Threshold below which contributor information is not required to be reported	\$50	\$90
254.031(a)(5)	Threshold below which payee information is not required to be reported	\$100	\$180

Exhibit A

Campaign Finance Reports: Section of Election Code	Threshold Description	Original Threshold Amount	Adjusted Amount
254.031(a)(9)	Threshold at which the source of any credit, interest, return of deposit fee from political contributions or asset is required to be reported	\$100	\$130
254.031(a)(10)	Threshold at which the proceeds from sale of a political asset is required to be reported	\$100	\$130
254.031(a)(11)	Threshold at which any gain from an investment purchased with political contributions is required to be reported	\$100	\$130
254.031(a)(12)	Threshold at which any other gain from political contribution is required to be reported	\$100	\$130
254.0311(b)(1)	Threshold at which contributor information for contributions from non-caucus members is required to be reported by a caucus	\$50	\$90
254.0311(b)(2)	Threshold at which lender information is required to be reported by a caucus	\$50	\$90
254.0311(b)(3)	Threshold at which payee information for expenditures is required to be reported by a caucus	\$50	\$90
254.0311(b)(3)	Threshold below which payee information for expenditures is not required to be reported by a caucus	\$50	\$90
254.0311(b)(4)	Threshold below which contributor and payee information is not required to be reported by a caucus	\$50	\$90
254.0312	Threshold at which the best efforts rule requires one to make a written or oral request for contributor information in order to be considered in	\$500	\$680

Exhibit A

Campaign Finance Reports: Section of Election Code	Threshold Description	Original Threshold Amount	Adjusted Amount
	compliance when contributor information is missing		
254.036	Threshold of political contributions and political expenditures below which a filer qualifies for the electronic filing exemption, if certain conditions are met	\$20,000	\$27,140
254.038(a)	Contribution threshold triggering a Special Report Near Election by Certain Candidates and Political Committees during the 9 days before election	\$1,000	\$1,790
254.039	Contribution threshold triggering Special Report Near Election by GPACs during the 9 days before election	\$5,000	\$6,090
254.039	Direct Campaign expenditure thresholds triggering Special Report Near Election by GPACs (\$1,000 for single candidate or \$15,000 for group of candidates) during the 9 days before election	\$1,000/\$15,000	\$1,790/\$26,780
254.0611(a)(2)	Threshold at which principal occupation/employer information for contributors to judicial filers is required to be reported	\$50	\$90
254.0611(a)(3)	Threshold at which the disclosure of an asset purchased with political contributions is required to be reported by judicial filers	\$500	\$900

Exhibit A

Campaign Finance Reports: Section of Election Code	Threshold Description	Original Threshold Amount	Adjusted Amount
254.0612	Threshold at which principal occupation/employer information for contributors to statewide executive and legislative candidates is required to be reported	\$500	\$900
254.095	Threshold of political contributions or political contributions below which a report is not required for officeholders who do not file with the Commission, unless also a candidate	\$500	\$900
254.151(6)	Threshold at which the principal occupation for GPAC contributors is required to be reported	\$50	\$90
254.1541(a)	Threshold of political contributions and political expenditures below which a GPAC has a \$100 contribution itemization threshold, rather than \$50	\$20,000	\$25,860
254.1541(b)	Contribution reporting threshold for GPACs qualifying under section 254.1541 set to \$100	\$100	\$180
254.156(1)	Threshold at which contributor, lender, and payee information is required for a political contribution, loan, or expenditure, respectively, to an MPAC	\$10	\$20
254.156(2)	Threshold at which contribution, loan, and expenditure information for MPACs qualifying under section 254.1541 is set to \$20	\$20	\$40
254.181, 254.182, 254.183	Threshold of political contributions and political expenditures below which a candidate or SPAC may elect to avoid certain pre-election filing	\$500	\$900

Exhibit A

Campaign Finance Reports: Section of Election Code	Threshold Description	Original Threshold Amount	Adjusted Amount
	requirements (modified reporting)		
254.261	Threshold at which a person making direct campaign expenditures in an election must disclose the expenditures, including payee information	\$100	\$130

Lobby Registrations and Reports: Section of Government Code	Threshold Description	Original Threshold Amount	Adjusted Amount
305.003(1)	Threshold of expenditures over which a person must register as a lobbyist	\$500, by 1 Tex. Admin. Code §34.41	\$780
305.003(2)	Threshold of compensation or reimbursement over which a person must register as a lobbyist	\$1,000, by 1 Tex. Admin. Code §34.43	\$1,560
305.004(7)	Threshold of expenditures and compensation below which a person lobbying on behalf of political party is excepted from the requirement to register as a lobbyist	\$5,000	\$8,930
305.005(g)(2)	Threshold of category to report compensation less than \$10,000	\$10,000	\$17,860
305.005(g)(3)	Upper threshold of category to report compensation of at least \$10,000 but less than \$25,000	\$25,000	\$44,630
305.005(g)(4)	Upper threshold of category to report compensation of at least \$25,000 but less than \$50,000	\$50,000	\$89,260
305.005(g)(5)	Upper threshold of category to report compensation of at least \$50,000 but less than \$100,000	\$100,000	\$178,520
305.005(g)(6)	Upper threshold of category to report compensation of at	\$150,000	\$267,770

Exhibit A

Lobby Registrations and Reports: Section of Government Code	Threshold Description	Original Threshold Amount	Adjusted Amount
	least \$100,000 but less than \$150,000		
305.005(g)(7)	Upper threshold of category to report compensation of at least \$150,000 but less than \$200,000	\$200,000	\$357,030
305.005(g)(8)	Upper threshold of category to report compensation of at least \$200,000 but less than \$250,000	\$250,000	\$446,280
305.005(g)(9)	Upper threshold of category to report compensation of at least \$250,000 but less than \$300,000	\$300,000	\$535,540
305.005(g)(10)	Upper threshold of category to report compensation of at least \$300,000 but less than \$350,000	\$350,000	\$624,790
305.005(g)(11)	Upper threshold of category to report compensation of at least \$350,000 but less than \$400,000	\$400,000	\$714,050
305.005(g)(12)	Upper threshold of category to report compensation of at least \$400,000 but less than \$450,000	\$450,000	\$803,310
305.005(g)(13)	Upper threshold of category to report compensation of at least \$450,000 but less than \$500,000	\$500,000	\$892,560
305.005(g-1)	Threshold of compensation or reimbursement at which a registrant must report the exact amount	\$500,000	\$892,560
305.0061(c)(3)	Threshold over which the name of a legislator who is the recipient of a gift, a description of the gift, and amount of the gift is required to be disclosed	\$50	\$90
305.0061(e-1)	Threshold below which an expenditure for food or beverages is considered a gift and reported as such	\$50	\$90
305.0063	Threshold of expenditures below which a registrant may file lobby activities reports annually instead of monthly	\$1,000	\$1,790

Exhibit A

Personal Financial Statements: Section of Gov't Code	Threshold Description	Original Threshold Amount	Adjusted Amount
572.022(a)(1)	Threshold of category to report an amount less than \$5,000	less than \$5,000	less than \$8,930
572.022(a)(2)	Threshold of category to report an amount of at least \$5,000 but less than \$10,000	\$5,000 to less than \$10,000	\$8,930 to less than \$17,860
572.022(a)(3)	Threshold of category to report an amount of at least \$10,000 but less than \$25,000	\$10,000 to less than \$25,000	\$17,860 to less than \$44,630
572.022(a)(4)	Threshold of category to report an amount of at least \$25,000 or more	\$25,000 or more	\$44,630 or more
572.005, 572.023(b)(1)	Threshold to disclose the source and category of amount of retainer received by a business entity in which the filer has a substantial interest; section 572.005 defines substantial interest, in part, as owning over \$25,000 of the fair market value of the business entity	\$25,000	\$44,630
572.023(b)(4)	Threshold over which income from interest, dividends, royalties, and rents is required to be reported	\$500	\$900
572.023(b)(5)	Threshold over which the identity of each loan guarantor and person to whom filer owes liability on a personal note or lease agreement is required to be reported	\$1,000	\$1,790
572.023(b)(7)	Threshold of value over which the identity of the source of a gift and a gift description is required to be reported	\$250	\$450
572.023(b)(8)	Threshold over which the source and amount of income received as beneficiary of a trust asset is required to be reported	\$500	\$900

Exhibit A

Speaker Election and Certain Ceremonial Reports: Section of Government Code	Threshold Type	Current Threshold Amount	Adjusted Amount
302.014(4)	Expenditure of campaign funds over \$10 must be disclosed, including payee's name and address and the purpose	\$10	\$20
303.005(a)(1) – (10)	Thresholds applicable to contribution and expenditure disclosure requirements for a governor for a day or speaker's reunion day ceremony report	\$50	\$90

(b) The effective date of this rule is January 1, 2020.

EXHIBIT A

The proposed new language is indicated by underlined text.

Chapter 16. FACIAL COMPLIANCE REVIEWS AND AUDITS**1 §16.12. Facial Review of Total Amount of Political Contributions Maintained.**

2 (a) In this section “expected total political contributions maintained” for a report subject to review
3 is the total amount of political contributions maintained disclosed on the previous report and all
4 monetary political contributions, loans, and credits, less all expenditures from political
5 contributions disclosed on the report that is subject to review, excluding the purchase of
6 investments that can be readily converted to cash.

7 (b) When there is a difference greater than the threshold set by §20.50(c) of this title (relating to
8 Total Political Contributions Maintained) between the total amount of political contributions
9 maintained disclosed in a report and the expected total political contributions maintained, the
10 commission may request from the filer the bank statement showing the balance as of the last day
11 of the reporting period for each account in which political contributions are maintained.

12 (c) Producing the requested bank statements that show the total amount of political contributions
13 was accurately reported in the report that is subject to review is sufficient to end the review of the
14 total amount of political contributions maintained as disclosed in the report.

EXHIBIT A

The proposed new language is indicated by underlined text.

**Chapter 24. RESTRICTIONS ON CONTRIBUTIONS & EXPENDITURES
APPLICABLE TO CORPORATIONS & LABOR ORGANIZATIONS**

1 §24.18. Designation of Contribution for Administrative Purposes.

2 Any of the following will serve to designate a corporate expenditure as restricted to the
3 establishment, administration, maintenance, or operation of a general-purpose committee:

4 (1) A contemporaneous written instruction that the expenditure is restricted to the
5 administration, maintenance, or operation of the committee accepting the
6 expenditure;

7 (2) The negotiable instrument conveying the contribution contains language
8 indicating that the entity is a corporation, including but not limited to "Inc.,"
9 "Incorporated," "Corp.," or "Corporation;" or

10 (3) The general-purpose committee accepting the contribution reports the
11 contribution as monetary contribution or monetary support from a corporation or
12 labor organization on the committee's campaign finance report.

DRAFT 4

ETHICS ADVISORY OPINION NO. ____

March 22, 2019

Whether a public officer¹ may use government resources for political advertising. (SP-14)

BACKGROUND

The Texas Ethics Commission (“Commission”) has been asked on numerous occasions about the permissibility of a public officer’s use of government resources for political advertising. For example, we have been asked whether a public officer may be interviewed in his or her government office for use in a campaign video.

In the circumstances described above, the government resources come into the public officer’s custody or possession by virtue of holding the public office.

SUMMARY

A public officer, including a statewide officer, legislator, county officer, municipal officer, or school district officer, would be prohibited from using government resources, such as the officer’s office in a government building, to create a photograph, video, or other communication for political advertising because the officer has custody or possession of the government resources by virtue of holding the public office

ANALYSIS

The Commission, on its own initiative, issues this advisory opinion to address whether a public officer may use government resources, such as the public officer’s office, to create a photograph, video, or other communication for political advertising. We also address whether a public officer may similarly use government resources that are equally accessible to the public. To resolve this question, we must address sections 39.02(a)(2) and 39.02(a)(1) of the Penal Code and section 255.003(a) of the Election Code, which restrict the use of government resources for political advertising.

¹ “Public officer” includes an officer of the state or a county, municipality, city, or political subdivision, as defined in section 1.07(a) of the Penal Code and section 1.005 of the Election Code. This opinion applies to a state officer who is a district officer of the state government, such as a legislator (*see* Elec. Code § 1.005(4)), or who is a statewide officer (*see id.* § 1.005(19)). This opinion also applies to an officer of a county, city, school district, or other subordinate self-governing entity. *See id.* § 1.005(13).

DRAFT 4

Use of Government Resources for Political Advertising

Section 39.02(a)(2), Penal Code

Section 39.02(a)(2) of the Penal Code states that a public servant may not, with intent to obtain a benefit² or harm or defraud another, intentionally or knowingly “misuse[] government property, services, personnel, or any other 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)(2). A public servant, as defined in the Penal Code, includes a public officer, among other enumerated persons.³ Because the questions addressed by the Commission relate to public officers, this opinion applies to that class of public servants.

A “misuse” means:

[T]o deal with government 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).

The use of government resources for an individual public servant’s benefit is a misuse contrary to the state constitutional requirements that public money be used for a public purpose. Tex. Const. art. III, §§ 51, 52(a).⁴ Therefore, the use of government resources for an individual public

² “Benefit” is defined, in pertinent part, as “anything reasonably regarded as economic gain or advantage.” Penal Code § 1.07(a)(7).

³ “Public servant” also includes an employee or agent of government, a juror or grand juror, an arbitrator or referee, a notary public, and a candidate for nomination or election public office. Penal Code § 1.07(a)(41).

⁴ Tex. Const. art. III, §§ 51 (legislature may not authorize grant of public money to any individual, association, municipal or other corporation), 52(a) (legislature may not authorize any county, city, town or other political corporation or subdivision of the state to grant public money or thing of value in aid of or to any individual, association, or corporation). *See also* Ethics Advisory Opinion Nos. 386 (1997) (use of state equipment or state employees to handle campaign contributions or prepare campaign finance reports for officeholders is a misuse of government resources), 172 (1993) (state employees’ work time may not be used to handle campaign contributions or expenditures); Gov’t Code § 556.004 (prohibiting use of legislatively appropriated money and other resources for campaign purposes); *Texans Uniting for Reform & Freedom v. Saenz*, 319 S.W.3d 914 (Tex. App. – Austin 2010), *petition denied*, 2011 Tex. LEXIS 59 (Tex., Jan. 14, 2011) (legislature intended section 556.004 of the Government

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servant's private campaign purposes would be a misuse. Section 39.02(a)(2) of the Penal Code applies only to a misuse of government resources that have "come into the public servant's custody or possession by virtue of the public servant's office or employment." A public officer would have custody or possession⁵ of a courtroom, an office, or other government resources by virtue of having exclusive control over those resources as a public officer. The public officer's use of a judicial bench or government office, which is restricted to the custody or possession of that officer, for political advertising would confer a benefit to the individual public servant for private campaign purposes and would violate section 39.02(a)(2) of the Penal Code.

Regarding government resources, such as the public area of a government facility, in our opinion, such an area would not be in the "custody or possession" of a public officer. Such an area would be equally accessible to those not having custody or possession of the government resources. Therefore, section 39.02(a)(2) of the Penal Code would not prohibit a public officer from using the public areas of a courthouse or other government building to create a communication for political advertising.

Regarding the specific example about which we have been asked, a public officer occupying the public officer's government office would have custody or possession of the government office by virtue of holding the public office. The government office would not be equally accessible to the public. We conclude that section 39.02(a)(2) would prohibit the public officer from using the public officer's government office to create any communication for political advertising, such as an interview for a campaign video. In our opinion, the best practices for public officers are to remove themselves from government facilities and decline to use other government resources, of which they have custody or possession, for campaign activity, including political advertising. We conclude that public officers may permissibly use government resources that are equally accessible to the general public, and they should relocate to publicly accessible areas, when creating photographs, videos, or other communications for political advertising.

Section 39.02(a)(1), Penal Code

Section 39.02(a)(1) of the Penal Code states that a public servant may not, with intent to obtain a benefit or harm or defraud another, intentionally or knowingly "violate[] a law relating to the public servant's office or employment." Penal Code § 39.02(a)(1).⁶ Section 39.02(a)(2) of the

Code to prohibit state officers and employees from using their official authority to affect the result of an election, to affect the nomination of a candidate, or to achieve purposes similar in kind or nature to achieving or aiding the nomination or election of candidates); (Attorney General Opinion Nos. DM-431 (1997), JM-685 (1993) (both holding that governmental entity may not pay costs in connection with election contest involving government officeholder), MW-36 (1979) (public body has no authority to contribute public funds to or on behalf of an individual or organization).

⁵ "Custody" is defined as "[t]he care and control of a thing or person for inspection, preservation, or security." Black's Law Dictionary 467 (10th ed. 2014). "Possession" is defined as "[t]he fact of having or holding property in one's power; the exercise of dominion over property," and "[t]he right under which one may exercise control over something to the exclusion of all others." *Id.* at 1351. In the Penal Code, "possession" is more generally defined as "actual care, custody, control, or management." Penal Code § 1.07(a)(39).

⁶ "Law relating to a public servant's office or employment" means a law that specifically applies to a person acting in the capacity of a public servant and that directly or indirectly: (A) imposes a duty on the public servant; or (B)

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Penal Code and the constitutional requirement to use public money for a public purpose are laws relating to the public officer's office or employment. Therefore, in our opinion, a public officer would violate section 39.02(a)(1) of the Penal Code by using government resources of which the officer has custody or possession, including the government office, to create a photograph, video, or other communication for political advertising.

We caution that additional legal restrictions may apply to the use of any government resources, including other state or local laws or policies, and such restrictions may constitute law relating to a public servant's office or employment under section 39.02(a)(1) of the Penal Code. This prohibition has a wide application and "allows for a vast array of potential means of committing the offense." *State v. Martinez*, 548 S.W.3d 751, 759 (Tex. App. – Corpus Christi – Edinburg 2018), *reh'g denied*, 2018 Tex. App. LEXIS 5042 (Tex. App. – Corpus Christi – Edinburg June 11, 2018) (indictment alleging an offense under this provision must specify which law or laws relating to the public servant's office or employment were allegedly violated). We cannot address the application of laws or policies that are outside our jurisdiction for an advisory opinion.⁷ Accordingly, we cannot provide assurance that section 39.02(a)(1) of the Penal Code, depending upon all applicable laws, would not prohibit a public officer from using other government resources that are generally accessible to the public to create a photograph, video, or other communication for political advertising.

Section 255.003(a), Election Code

Section 255.003(a) of the Election Code states, in pertinent part, that an officer of a political subdivision may not knowingly "spend or authorize the spending of public funds for political advertising." Elec. Code § 255.003(a).⁸ The "spending" of public funds includes the use of a political subdivision employee's work time or a political subdivision's equipment or facilities.⁹ "Political advertising" is defined, in pertinent part, as a communication supporting or opposing a candidate for nomination or election to a public office or a public officer that is published or broadcast in return for consideration or appears in various forms of writing or on an Internet website. *Id.* § 251.001(16).

governs the conduct of the public servant. *Id.* § 39.01(1). "Law" means the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute. *Id.* § 1.07(a)(30).

⁷ See Gov't Code § 571.091 (specifying the laws the commission may consider in an advisory opinion).

⁸ Section 255.003(a) of the Election Code applies to an officer of a political subdivision. "Political subdivision" includes a county, city, or school district or any other government entity that possesses authority for subordinate self-government through officers selected by it. Elec. Code § 1.005(13)(C). By contrast, section 39.02 of the Penal Code applies to any public servant. *See supra*, n. 3 (defining "public servant").

⁹ *See, e.g.*, Ethics Advisory Opinion No. 443 (2002) (placement of campaign flyers in a school district teachers' lounge would involve the spending of public funds where school district employees were required to transport the flyers to an area of the school that was not accessible to the public), Ethics Advisory Opinion No. 45 (1992) (distribution of political advertising using school district equipment or school district employees on school district time would be the spending of public funds where an already existing internal mail system was used); Attorney General Opinion No. KP-177 (2018) (this statute prohibits the use of school district staff, facilities, or other resources where school districts electronically distributed links to Internet websites that were partisan in nature).

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For purposes of section 255.003(a) of the Election Code, we have concluded that the use of a facility maintained by a political subdivision, in an area that was restricted to its employees, required government resources to operate while in that restricted area, and therefore violated section 255.003(a) of the Election Code.¹⁰ Furthermore, we have found violations of section 255.003(a) of the Election Code on numerous occasions since the statute was enacted where public officers controlled the access to certain government resources.¹¹

CONCLUSION

Section 39.02(a)(2) of the Penal Code prohibits a public officer from using government resources, of which the officer has custody or possession, to create a photograph, video, or other communication for political advertising. In addition, section 255.003(a) of the Election Code prohibits a public officer, who is also an officer of a political subdivision, from using government resources, such as restricted areas of government facilities, for political advertising. These statutes do not prohibit a public officer from using government resources that are equally accessible to the public for political advertising. Section 39.02(a)(1) of the Penal Code may, depending on all applicable laws, prohibit a public officer from using publicly accessible government resources for political advertising.

¹⁰ Ethics Advisory Opinion No. 443 (2002).

¹¹ See, e.g., *In re Brooks* (SC-3180260) (2018) (use of a county-owned vehicle dedicated to the officer's use), *In re Wilson* (SC-31712183) (2018) (use of a county Facebook page maintained by the officer), *In re Joiner* (SC-31605137) (2017) (use of newsletter headlined as from officer's desk), *In re Hawkins* (SC-31011409) (2012) (use of space in a city utility bill), *In re Downs* (SC-240588) (2004) (use of space in a city water bill), *In re McRae* (SC-240226) (2004), *In re Clark* (SC-240225) (2004) (use of city letterhead), *In re Bowman* (SC-240218) (2004) (use of emergency services district letterhead), *In re Lord* (SC-230963) (2004) (use of city-contracted video production), *In re Williams, et. al.* (SC-211170) (2001) (use of space in city water bill and airtime on city cable channel), *In re Morgan* (SC-210541) (2001) (use of internal mail system), and *In re Williams* (SC-991032) (1999) (use of special edition of sheriff's report).

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ETHICS ADVISORY OPINION NO. ____

March 22, 2019

ISSUE

Whether the secretary of state is a statewide officeholder for purposes of Title 15 of the Election Code. (SP-16)

SUMMARY

The secretary of state is not a “statewide officeholder” or “holder of a statewide office” for purposes of Title 15 of the Election Code (“Title 15”).¹

ANALYSIS

The Texas Ethics Commission (“Commission”), on its own initiative, issues this advisory opinion in response to inquiries concerning whether the secretary of state is a “statewide officeholder” or “holder of a statewide office” for purposes of Title 15. Title 15 contains certain restrictions and reporting requirements that apply to a “statewide officeholder” or “holder of a statewide office in the executive branch.”²

We note that section 251.002 of the Election Code states, “[t]he provisions of this title applicable to an officeholder apply only to a person who holds an elective public office and to the secretary of state.” Elec. Code § 251.002(a). Thus, the secretary of state is an officeholder and is thereby

¹ Title 15 consists of chapters 251 to 258 in the Election Code.

² See Elec. Code §§ 253.034 (prohibiting a statewide officeholder from accepting political contributions beginning on the 30th day before, and through the end of, a regular legislative session); 253.042 (limiting the amount a statewide officeholder may spend from political contributions to reimburse the officeholder for political expenditures made from personal funds); 254.0391 (requiring a statewide officeholder who accepts a political contribution during a special legislative session to file a separate report to disclose the contribution); 254.0612 and 254.0912 (requiring a holder of a statewide office in the executive branch to disclose additional information regarding political contributions from a person that in the aggregate total \$500 or more).

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subjected to the same provisions that apply generally to officeholders under Title 15.³ However, the restrictions that we address in this opinion are those specifically applicable to a “statewide officeholder.”

The secretary of state is an office with statewide jurisdiction to exercise certain constitutional and statutory powers.⁴ However, the Election Code defines the term “statewide office,” as it appears in the Election Code, as “an office of the federal or state government that is voted on statewide.” Elec. Code § 1.005(19). We previously applied that definition to hold that, for purposes of section 253.034 of the Election Code, a member of the State Board of Education is not a “statewide officeholder” because such a member is elected from a multi-county district, not statewide. Ethics Advisory Opinion No. 234 (1994). We similarly apply that definition in this opinion to determine whether the secretary of state is a statewide officeholder or holder of a statewide office in the executive branch for purposes of Title 15.⁵

The Texas Constitution provides that the secretary of state shall be appointed by the Governor and is not elected by the qualified voters of the state. Tex. Const. art. IV, §§ 2, 21. We therefore conclude that the secretary of state is not a statewide officeholder or a holder of a statewide office in the executive branch for purposes of Title 15.

³ The provisions applicable to an officeholder include, for example, the prohibition on converting political contributions to personal use (section 253.035, Election Code) and the requirement to file semiannual campaign finance reports (section 254.093, Election Code). We do not address those provisions in this opinion.

⁴ *See, e.g.*, Tex. Const. art. IV, §§ 3, 21; ch. 405, Gov’t Code; Elec. Code § 31.001 (secretary of state is the chief election officer of the state).

⁵ Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. Gov’t. Code § 311.011(b).