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ATTORNEY GENERAL OF TEXAS

January 26, 2022

The Honorable Briscoe Cain
Chair, House Committee on Elections
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0398

Re: Application of chapter 556 of the Government Code to the Texas Windstorm Insurance Association (RQ-0419-KP)

Dear Representative Cain:

You ask several questions involving the application of Government Code section 556.006 to the Texas Windstorm Insurance Association (“TWIA” or the “Association”).¹

Government Code chapter 556 governs political activities by certain public entities and individuals. *See* TEX. GOV’T CODE §§ 556.001–.009. Subsection 556.006(a) provides: “A state agency may not use appropriated money to attempt to influence the passage or defeat of a legislative measure.” *Id.* § 556.006(a). State agency is defined for purposes of chapter 556 to mean, in relevant part, “a department, commission, board, office, or other agency in the executive branch of state government, created under the constitution or a statute, with statewide authority[.]” *Id.* § 556.001(2)(A). You first ask whether TWIA is a state agency subject to section 556.006. *See* Request Letter at 1.²

Attorney General Opinion JC-0161 considered the nature of the Texas Council for Developmental Disabilities as a state agency subject to chapter 556.³ *See* Tex. Att’y Gen. Op. No. JC-0161 (1999). The opinion looked at several factors in making its determination: It considered the fact that the board members were appointed by the Governor; that the board members had to

¹*See* Letter from Honorable Briscoe Cain, Chair, House Comm. on Elections, Tex. House of Representatives, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (July 29, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0419KP.pdf> (“Request Letter”).

²An entity’s status as a “state agency” has implications for numerous statutes outside chapter 556 of the Government Code. *See, e.g., Brown v. Univ. of Tex. Health Ctr.*, 957 S.W.2d 911, 914 (Tex. App.—Tyler 1997, no pet.) (concluding that a university’s status as a state agency bars breach of contract and tortious interference claims under the doctrine of sovereign immunity).

³You and the Association both refer us to Attorney General Opinion JC-0161, which examined whether an entity was subject to chapter 556. *See* Request Letter at 2–3; Brief from Michael Wilson, Perkins Law Group PLLC, to Office of the Att’y Gen., Op. Comm., at 6, 8–9 (Aug. 31, 2021).

be trained on open meetings, public information, and conflict-of-interest laws; that the Council was subject to the Sunset Act; that the Council had rulemaking authority; and that the Council had statewide authority to perform its duties. *Id.* at 3. We consider those and other relevant factors in our examination of whether TWIA qualifies as a state agency for purposes of chapter 556.

The primary purpose of TWIA is to provide an adequate market for windstorm and hail insurance in Texas seacoast territories. *See* TEX. INS. CODE § 2210.001. The Legislature requires all property insurers authorized to engage in the business of property insurance in Texas, other than insurers prevented by law from writing on a statewide basis those coverages available through TWIA, to be members of TWIA. *Id.* § 2210.051(a)–(b); *see id.* §§ 2210.006, .051(b) (to engage in business of insurance in Texas, property insurer must be member of TWIA). Those members “participate in insured losses and operating expenses” of the Association based on each member’s proportionate share of the net direct premiums compared to all members of the Association. *Id.* § 2210.052(a).

TWIA is governed by a board of directors that includes representatives of the insurance industry and residents of the seacoast territories. *See id.* § 2210.102(a)–(c). Members of the board are individuals from the private sector appointed by the Insurance Commissioner, and when vacancies arise in the positions statutorily dedicated for representatives of the insurance industry, the Commissioner must select those members from a slate of nominees provided by the member insurance companies. *See id.* § 2210.102(f)–(g); *see also id.* § 31.001(1) (defining “commissioner” for purposes of the Insurance Code as the Insurance Commissioner); *Tex. Windstorm Ins. Ass’n v. Poole*, 255 S.W.3d 775, 777 (Tex. App.—Amarillo 2008, pet. denied) (acknowledging that what TWIA “truly is escapes easy categorization” but recognizing that TWIA’s membership derives from the private sector and that it has attributes of a private insurance business). Moreover, the board is not independent, as chapter 2210 makes it “responsible and accountable to the commissioner.” TEX. INS. CODE § 2210.101.

Members of the board are required to be trained on open meetings, public information, and conflict-of-interest laws. *See id.* § 2210.1031(b)(5) (requiring TWIA board members to be trained in specified laws). Rather than relying on the definition of “governmental body” in the Open Meetings Act or the Public Information Act, the Legislature chose to make TWIA subject to those acts through chapter 2210.⁴ *See id.* § 2210.108(a) (subjecting TWIA to chapters 551 and 552 of the Government Code).

The Association is subject to the Sunset Act but only for review and not for abolishment.⁵ *Id.* § 2210.002(b). TWIA does not have rulemaking authority. Rather, that authority resides with the Commissioner. *See, e.g., id.* §§ 2210.008(b) (authorizing the commissioner to adopt rules to implement chapter 2210); *see also id.* § 2210.107(a)(1) (requiring the board to operate in

⁴Since 2009, the Legislature has made significant changes to chapter 2210 to reshape TWIA’s governance and funding. *See* Act of June 1, 2009, 81st Leg., R.S., ch. 1408, §§ 5–48, 2009 Tex. Gen. Laws 4396, 4398–4415; Act of May 22, 2013, 83d Leg., R.S., ch. 1228, §§ 1–5, 2013 Tex. Gen. Laws 3088, 3088–89; Act of May 25, 2015, 84th Leg., R.S., ch. 615, §§ 1–34, 2015 Tex. Gen. Laws 2036, 2036–49. The Legislature is free to make TWIA expressly subject to Government Code chapter 556. *See, e.g.,* TEX. INS. CODE § 2210.108 (subjecting TWIA to the Open Meetings Act and the Public Information Act).

⁵The Sunset Advisory Commission does not consider TWIA a state agency. *See* SUNSET ADVISORY COMMISSION, STAFF REPORT WITH FINAL RESULTS (2018–2019), at A3, <https://www.sunset.texas.gov/public/uploads/files/reports/Texas%20Winstorm%20Insurance%20Association%20Staff%20Report%20with%20Final%20Results.pdf> (“SUNSET ADVISORY COMM’N REPORT”).

accordance with the commissioner's rules). The Association's authority to provide windstorm and hail insurance is not statewide but limited to the seacoast territory of the State. *See id.* §§ 2210.001 (identifying the purpose of the Association is "to serve as a residual insurer of last resort for windstorm and hail insurance in the seacoast territory"), 2210.003(10) (defining "seacoast territory"), 2210.004 (defining insurable property), 2210.053(a) (authorizing TWIA's insurance offerings "with respect to . . . insurable property").

In addition to the factors considered in our prior opinion, we note that the Association is not funded by taxes or state funds.⁶ Its revenue comes from policyholder premiums; member assessments; reinsurance proceeds; investment income; public security proceeds; and funds from the Catastrophe Reserve Trust Fund. *See id.* §§ 2210.203(a) (premiums), 2210.351–.353 (premium rates), 2210.259 (surcharge on non-compliant insured structure), 2210.453 (reinsurance), 2210.505 (reinsurance), 2210.0715 (reserves and trust fund), 2210.451–.4521 (Catastrophe Reserve Trust Fund), 2210.072–.0742 (public securities and assessments). The Fifth Circuit considered TWIA's predecessor entity—the Texas Catastrophe Property Insurance Association⁷—which had a similar funding structure and observed: "That the state holds, and exercises, the coercive power to force private insurers doing business in Texas to cover certain risks does not mean that the money coming out of the companies' bank accounts is state money. It is private money directed to pay private claims." *Tex. Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1182–83 (5th Cir. 1992).

Finally, TWIA has express authority to obtain legal counsel for representation before the Texas Legislature, which representation could include lobbying. *See* TEX. INS. CODE § 2210.055(a); 28 TEX. ADMIN. CODE § 5.4001(b)(4) (Tex. Dep't of Ins., Plan of Operation); *see also* TEX. GOV'T CODE § 305.003(a)–(b) (requiring registration of lobbyists). And the Sunset Commission has concluded in its review that "TWIA is not a state agency" and that "TWIA employees are not state employees and do not receive state benefits."⁸ For these reasons, without a legislative amendment, a court would likely conclude that chapter 2210 of the Insurance Code does not establish TWIA as a state agency for purposes of chapter 556 of the Government Code.

Your additional questions asking whether TWIA violated section 556.006 and whether a particular Association expenditure complies with chapter 2210 are fact questions outside the purview of an Attorney General opinion. *See* Tex. Att'y Gen. Op. Nos. KP-0302 (2020) at 1 (declining to opine on questions regarding the Association's compliance with various laws); GA-1033 (2012) at 1 (declining to opine on questions regarding the Association's alleged failure to perform its statutory duties); TEX. INS. CODE § 2210.056 (limiting the purposes for which the Association may use its assets).

⁶The Sunset Advisory Commission recognizes that TWIA receives no funding from tax dollars or the General Revenue Fund. *See* SUNSET ADVISORY COMM'N REPORT at A3, A8.

⁷*See* Act of Apr. 13, 1971, 62d Leg., R.S., ch. 100, § 1, 1971 Tex. Gen. Laws 843, 843–51 (creating the Texas Catastrophe Property Insurance Association); *See* Act of May 15, 1997, 75th Leg., R.S., ch. 438, § 2, 1997 Tex. Gen. Laws 1707, 1707–08 (changing the name of the Texas Catastrophe Property Insurance Association to the Texas Windstorm Insurance Association).

⁸*See* SUNSET ADVISORY COMM'N REPORT at A3. This is corroborated by TWIA itself in its statements that it is not a state agency, but rather a residual market property insurance company created by the Texas Legislature. *See* <https://www.twia.org/frequently-asked-questions> (stating that "TWIA is a residual market property insurance company and is not a state agency.").

S U M M A R Y

Government Code chapter 556 prohibits a state agency from using appropriated funds to engage in certain lobbying activities. A court would likely conclude that chapter 2210 of the Insurance Code does not establish the Texas Windstorm Insurance Association as a state agency for purposes of chapter 556.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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