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OPINION COMMITTEE

FILE # ML-44629-06

I.D. # 44629

TEXAS HOUSE OF REPRESENTATIVES
BEVERLY WOOLLEY

COMMITTEE ON CALENDARS - CHAIRMAN
CIVIL PRACTICES AND WAYS & MEANS

February 13, 2006

VIA U.S. CERTIFIED MAIL

The Honorable Greg Abbott
Office of the Attorney General
Opinion Committee
Post Office Box 12548
Austin, TX 78711

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FEB 17 2006

OPEN RECORDS DIVISION

RQ-0451-GA

Re: Opinion Request Concerning Chapter 176 of the Texas Local Government Code

Dear General Abbott:

Please accept this letter as a request pursuant to Texas Government Code Section 402.042 for an opinion from your office for clarification on the interpretation of House Bill 914, 79th Legislature, Regular Session, codified as Chapter 176 of the Texas Local Government Code ("Chapter 176"). Chapter 176 creates conflicts of interest disclosure requirements for "local government officers" and persons who contract or seek to contract with "local governmental entities" for the sale or purchase of property, goods, or services.¹ The statute's disclosure requirements became effective on January 1, 2006, and the statute carries criminal penalties for persons who fail to comply with the disclosure requirements.²

¹ Chapter 176 defines a "local government officer" as

- ... (A) a member of the governing body of a local governmental entity; or
- (B) a director, superintendent, administrator, president or other person designated as the executive officer of the local governmental entity.

TEX. LOC. GOV'T CODE ANN. § 176.001(4) (Vernon Supp. 2005). Chapter 176 defines a "local governmental entity" as

... a county, municipality, school district, junior college district, or other political subdivision of this state or a local government corporation, board, commission, district or authority to which a member is appointed by the commissioners court of a county, the mayor of a municipality or the governing body of a municipality. . . .

TEX. LOC. GOV'T CODE ANN. § 176.001(3).

² See TEX. LOC. GOV'T CODE ANN. § 176.003(c) (Vernon Supp. 2005) (stating that it is a Class C misdemeanor if a local government officer knowingly violates the section); TEX. LOC. GOV'T CODE ANN. § 176.004(3) (stating that a local government officer must acknowledge the conflicts disclosure statement under oath under penalty of perjury); TEX. LOC. GOV'T CODE ANN. § 176.006(f) (stating that it is a Class C misdemeanor if a person who contracts or seeks to contract with a local governmental entity violates the section).

The Texas Ethics Commission has promulgated a form conflicts disclosure statement for use by local government officers and a form conflict of interest questionnaire for use by persons who contract or seek to contract with local governmental entities as required by Chapter 176. However, we understand that the Ethics Commission has taken the position that it does not have jurisdiction to interpret Chapter 176. Therefore, we respectfully request an opinion clarifying the following issues:

1. What is the appropriate definition of the term "business relationship,"³ a term used in Chapter 176 to trigger disclosure requirements for local government officers? Does this term include personal or business interest bearing savings accounts which generate taxable interest for the local government officer or a family member?
2. What are the appropriate definitions of "affiliation"⁴ and "business relationships,"⁵ terms used in Chapter 176 to trigger disclosure requirements for persons who contract or seek to contract with local governmental entities? Do these terms include personal or business loans which generate taxable interest for certain vendors, such as financial institutions?
3. What does the phrase "any other affiliation or business relationship that might cause a conflict of interest,"⁶ a phrase used in Chapter 176 to trigger disclosure requirements for persons who contract or seek to contract with local governmental entities, encompass?
4. Whether Chapter 176 applies to professional services providers.
5. How long should a local governmental entity retain the conflicts disclosure statements and conflicts of interest questionnaires under Chapter 176? How long should such documents remain available on a local governmental entity's website?
6. Whether the disclosure requirements of Chapter 176, as applicable to a partnership or corporation which seeks to contract or contracts with a local governmental entity, apply solely to the partnership or corporation as a whole, or whether the disclosure requirements apply to some or all of the individual partners and/or employees of the entity contracting or seeking to contract with a local governmental entity who may be working on a contract.
7. Would a person seeking to contract with a local governmental entity comply with the requirements of Chapter 176 if the person discloses affiliations and business relationships with all business entities disclosed by the local

³ TEX. LOC. GOV'T CODE ANN. §176.003

⁴ TEX. LOC. GOV'T CODE ANN. §176.006

⁵ TEX. LOC. GOV'T CODE ANN. §176.006

⁶ TEX. LOC. GOV'T CODE ANN. §176.006(c)(7)

governmental entity to the person as having a triggering relationship with a local government officer and discloses affiliations and business relationships with all employees and outside contractors disclosed by the local governmental entity to the person as making recommendations concerning the proposed contract, even if that disclosure proves to be incomplete or the local governmental entity fails to make any such disclosure despite the person's request, absent actual knowledge of the person to the contrary?

8. What does the phrase "contracts or seeks to contract for the sale or purchase of property, goods or services with a local governmental entity,"⁷ a phrase triggering disclosure requirements under Chapter 176, encompass? Does Chapter 176 apply to small or routine purchases?

9. Whether local governmental entities have a responsibility to require persons who contract or seek to contract with local governmental entities to comply with Chapter 176 prior to entering into a contract with the local governmental entity? Would the failure of a contractor to comply with the requirements of Chapter 176 have any impact on the validity of a contract between the local governmental entity and the contractor?

10. Whether Chapter 176 requires a person who contracts or seeks to contract with a local governmental entity to file a disclosure questionnaire if the person has no business or financial relationships or affiliations to disclose.

The legislative intent of H.B. 914, which added Chapter 176, is to increase transparency and accountability of government by requiring the disclosure of certain business and financial relationships that local government officials may have with persons contracting with the local government. H.B. 914 provides local government officials and taxpayers access to information concerning these business or financial relationships or affiliations and thus provides a more accurate account of the allocation of tax dollars.

Thank you for your consideration of these issues. If we can be of any assistance, please let us know. We look forward to your reply.

Kind regards,

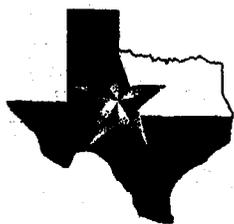


Beverly Woolley
State Representative, District 136
Chairman, House Committee on Calendars



John Smithee
State Representative, District 86
Chairman, House Committee on Insurance

⁷ TEX. LOC. GOV'T CODE ANN. §176.002(a)(1)



TEXAS EDUCATION AGENCY

1701 North Congress Ave. ★ Austin, Texas 78701-1494 ★ 512/463-9734 ★ FAX: 512/463-9838 ★ <http://www.tea.state.tx.us>

Shirley J. Neeley, Ed.D.
Commissioner

March 2, 2006

Honorable Greg Abbott
Texas Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

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MAR 21 2006
OPINION COMMITTEE

RQ-0451-GA

FILE # RQ-0451-GA
I.D. # 44699

Re: Construction and Applicability of Chapter 176, Texas Local Government Code

Dear General Abbott:

I am writing to request your advice concerning the proper construction and application of Chapter 176 of the Texas Local Government Code. As you know, that chapter was added during the 2005 legislative session. I understand that you also have a pending opinion request from Representatives Woolley and Smithee dated February 13, 2006 regarding that chapter. I am submitting additional questions that we have received from school districts, charter schools and regional education service centers about the same provisions so that you may consider all of those questions together.

I have enclosed a letter from Mr. Jason Scott of the Schwartz & Eichelbaum law firm posing several questions they have received from their school district clients. The Texas Education Agency, on behalf of school districts also puts forth the following questions:

1. Are existing vendors (prior to the January 1, 2006 effective date) required to complete the new vendor questionnaire and file it with the District for existing contracts?
2. If a vendor does not comply with a Chapter 176 disclosure requirement, does the District have any enforcement responsibility? Must the District cease doing business with the vendor?
3. If the District receives a questionnaire that indicates there is no conflict of interest, must it be posted on the District's website?
4. What is the responsibility of the District to notify vendors regarding the requirements of Texas Local Government Code Chapter 176? Must the District notify the vendor in writing? Does a notice posted on the District's website meet the requirement?
5. Does Texas Local Government Code Section 176.002(a)(2) require all sales personnel or agents of a vendor to also complete the questionnaire?

"Good, Better, Best—never let it rest—until your good is better—and your better is BEST!"

Finally, I would ask your advice as to whether the provisions of Chapter 176 apply to open-enrollment charter schools operating under Subchapter D, Chapter 12 of the Texas Education Code¹, or to Regional Education Service Centers organized under Chapter 8 of the Texas Education Code.

Thank you for your consideration of this request. Should you have any questions, please feel free to contact me or David Anderson, General Counsel, at (512) 463-9720.

Sincerely,



Shirley J. Neeley, Ed. D.
Commissioner of Education

Attachment

¹ Open-enrollment charters are generally held by non-profit corporations. They are specifically subject to the disclosure and conflict of interest provision of Chapter 171 of the Texas Local Government Code (see, Section 12.1054 and 12.1055, Texas Education Code). We are not aware of a definition that would be applicable to charters in Chapter 176, but Section 12.103 of the Education Code provides that charters are "subject to federal and state laws and rules governing public schools..." That section goes on to provide wide-ranging exemptions from the Education Code, but not other state laws.

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SCHWARTZ & EICHELBAUM, P.C.

LEGAL SERVICES ATTORNEYS AT LAW
www.edlaw.com • 800.488.9045

February 15, 2006

Jason S. Scott
Associate4201 W. Parmer Lane, Suite A-100
Austin, Texas 78727
(512) 476-9944
Fax: (512) 472-2599Mr. David Anderson
General Counsel
Texas Education Agency
1701 N. Congress Avenue
Austin, Texas 78701-1494

Re: Request for Attorney General Opinion on Chapter 176 of the Texas Local Government Code

Dear Mr. Anderson:

Since the broad and ill-defined disclosure provisions of House Bill 914, 79th Legislature, Regular Session, codified as Chapter 176 of the Texas Local Government Code ("Chapter 176"), went into effect on January 1, 2006, school officials across Texas have struggled with how to abide by the new law. Without guidance from the Texas Ethics Commission or the legislature they have been forced to follow the literal language of the statute. This has resulted in presents from grandparents to grandchildren, anniversary gifts to spouses, and even birthday presents given to in-laws being reported on disclosure forms across the state. Though it is doubtful that the legislature intended for these types of gifts to fall within the purview of a law meant to reveal the dealings of unscrupulous local politicians, school officials have little choice but to report them or risk prosecution for a Class C misdemeanor. School districts are also being forced to post all disclosure forms, including those filed by vendors, on their websites. This means that school resources are being expended to post hundreds of forms that merely state that there is no conflict to report.

In light of these and other problems with the interpretation and implementation of Chapter 176, Schwartz & Eichelbaum asks, on behalf of our clients, that the Commissioner of Education request clarification from the Attorney General as to the new law's requirements. Our firm represents hundreds of school districts across the state. We receive numerous phone calls every week from many of those districts regarding the disclosure requirements of Chapter 176. It is our hope that a thorough interpretation of Chapter 176 by the Attorney General would reduce the burden placed upon those districts by a literal reading of the statute.

**SCHWARTZ & EICHELBAUM, P.C.**

ATTORNEYS AT LAW

We are aware that State Representatives Beverly Woolley and John Smithee recently submitted a request to the Attorney General seeking clarification on several issues related to the statute; however, we believe that there are other questions that need to be asked. It is likely that the legislators' request and that of the Commissioner could be consolidated by the Attorney General, allowing for a fuller explanation of Chapter 176. For your convenience, a copy of the legislators' letter to the Attorney General has been attached to this request. Below is a list of additional questions that we have for the Attorney General.

1. Chapter 176 requires local government officers to file a disclosure form when they or certain family members receive gifts worth more than \$250 from a vendor in a twelve-month period.¹ Does this disclosure requirement apply even when the vendors themselves are family members? Other laws prohibiting gifts to public officials contain exceptions for such family members.² Do the same exceptions apply to Chapter 176?
2. The reporting requirements of Chapter 176 are triggered if a vendor gives gifts valued at more than \$250 to the local government official or certain family members of the local official.³ Is this amount per family member or per family unit? In other words, if the local official and each qualifying family member receive \$250 worth of gifts or less, does a disclosure still have to be filed?
3. Chapter 176 requires vendors that contract with local governmental entities for the sale of property, goods, or services to file a disclosure form.⁴ Does this provision apply to vendors who provide goods or services to the governmental entity at significantly reduced prices, as a way of giving back to the community? For instance, what if a local dry cleaner agrees to clean a school district's band uniforms for a nominal \$1 fee per uniform or a local hardware store provides paint for the district's drama department at cost? Must these businesses file disclosure forms? Similarly, must local governmental officials related to such business owners file disclosure forms?
4. Many local government officials are also attorneys and may have clients who qualify as vendors. In the vast majority of cases, the identities of an attorney's clients are not confidential.⁵ However, an exception to this general rule protects the client's identity from disclosure if that information would reveal the confidential purpose for which the

¹ TEX. LOCAL GOV'T CODE § 176.003.

² TEX. PENAL CODE § 36.10(a)(2).

³ TEX. LOCAL GOV'T CODE § 176.003(a)(2)(B).

⁴ TEX. LOCAL GOV'T CODE §§ 176.002(a)(1) & 176.006(a).

⁵ *In re Grand Jury Subpoena*, 926 F.2d 1423, 1431 (5th Cir.1991); see also, *Simpson v. Tennant*, 871 S.W.2d 301, 309 (Tex. App.—Houston [14th Dist.] 1994, no writ).

February 15, 2006

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SCHWARTZ & EICHELBAUM, P.C.
ATTORNEYS AT LAW

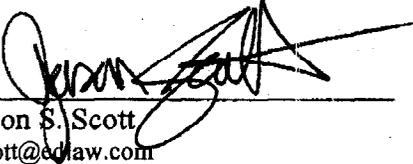
attorney was consulted.⁶ Should the requirements of Chapter 176 and the duty of confidentiality conflict, attorneys need to know which takes precedence so that clients may be informed?

The best way to promote to transparency and accountability in local government is by making sure that local officials are able to understand the law so that they may abide by it. School districts across the state are in need of interpretation of the new disclosure requirements set out in Chapter 176. Schwartz & Eichelbaum asks for the Commissioner's help in acquiring an opinion from the Attorney General on this very important topic.

Thank you for your consideration of our request. Please do not hesitate to contact me or any of our other attorneys at Schwartz & Eichelbaum should you have any questions or require further information. We look forward to hearing from you, and the Attorney General, soon.

Sincerely,

SCHWARTZ & EICHELBAUM, P.C.



Jason S. Scott
jscott@edlaw.com

Enclosures

⁶ *Grand Jury Subpoena*, 926 F.2d at 1431; *Simpson*, 871 S.W.2d at 309.