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Opinion C. [unclear]

April 28, 1994

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Honorable Dan Morales
Texas Attorney General
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711

FILE # ML-26/64-94
I.D.# 26/64

Dear Attorney General Morales:

The Texas State Treasurer (the "Treasurer") requests the opinion of the Attorney General on questions relating to the eligibility of certain entities to participate in a public funds investment pool.

Some background information will be helpful in understanding the issues involved. The Interlocal Cooperation Act, Chapter 791 and Chapter 2256, Subchapter B "Investment of Local Funds", Texas Government Code provide for the creation of public funds investment pools to which local governments may delegate, by contract, the authority to hold legal title as custodian and to make investments with local funds.

The Texas Treasury Safekeeping Trust Company (the "Trust Company"), a limited purpose trust company is authorized pursuant to Section 404.103(a), Texas Government Code, to

"receive, transfer, and disburse money and securities as provided by statute or belonging to the state, agencies and local political subdivisions of the state, and nonprofit corporations, foundations, and other charitable organizations created on behalf of the state or an agency or local political subdivision of the state . . ."

Pursuant to these statutes, the Treasurer created the Texas Local Government Investment Pool ("TexPool") as a separate and distinct trust fund held in the Trust Company.

The Treasurer initially uses the definition of "local government" found in section 791.003(4) of the Interlocal Cooperation Act to determine eligibility for participation in TexPool. This definition authorizes the participation of a "county, municipality, special district, or other political subdivision." According to section 791.003(5), "'Political subdivision' includes any corporate and political entity organized under state law." Some confusion exists as to what was intended to be included in the term "corporate and political entity organized under state law."

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Section 404.103 of the Government Code is written broadly, authorizing the Trust Company to accept funds from "agencies and local political subdivisions of the state, and **nonprofit corporations, foundations, and other charitable organizations created on behalf of the state or an agency or local political subdivision of the state . . .**" (emphasis added) Because TexPool acts through the Trust Company it seems that TexPool may accept funds from these highlighted entities.

The Public Funds Investment Act, Chapter 2256, Subchapter A, Texas Government Code is written more narrowly, however, and is in apparent conflict with section 404.103. Although the Public Funds Investment Act merely enumerates authorized investments for a public funds investment pool, it suggests that nonprofit corporations may not be eligible. Section 2256.003 of this Act lists the entities to which the subchapter applies, including "a nonprofit corporation acting on behalf of an entity listed in Subdivisions (1) through (6)." *Id.* § 2256.003(7). TexPool is covered by section 2256.003(8) "a public funds investment pool created under Chapter 791 acting on behalf of a combination of entities listed in Subdivisions (1) through (6)." Because a nonprofit corporation is not an entity listed in (1) through (6) it does not seem eligible for participation in an investment pool.

Because of these ambiguities, issues have arisen with respect to the eligibility of the following types of entities to participate in TexPool:

1. A nonprofit foundation (the "Foundation") acting on behalf of a school district.

The Foundation was organized under the Texas Nonprofit Corporation Act. V.T.C.S. art. 1396. The Foundation was organized exclusively for educational purposes and to aid in the fulfillment of teaching and service functions of the school district. It is clearly within section 2256.007(7) of the Public Funds Investment Act, "a nonprofit corporation acting on behalf of an entity listed in Subdivisions (1) through (6)." Therefore, one issue to be addressed is the apparent conflict between section 2256.003(8) of the Public Funds Investment Act which does not include nonprofit corporations as one of the entities in a public funds investment pool and section 404.103 of the Government Code which gives the Trust Company and therefore TexPool the authority to receive money from foundations created on behalf of a local political subdivision.

In addition, could the Foundation come within the Interlocal Cooperation Act's definition of political subdivision as a "corporate and political entity organized under state law"? § 791.003(5) Gov't Code. If the Foundation is a political subdivision is it eligible for TexPool?

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2. A number of electrical cooperative corporations (the "Electrical Co-ops") organized under the Electric Cooperative Corporation Act. V.T.C.S. art. 1528b.

The Electrical Co-ops are formed to supply electricity to rural areas. Their applications also raise the issue of participation by nonprofit corporations and therefore the same type of conflict between the Public Funds Investment Act and section 404.103 as outlined above. If section 404.103(a) of the Government Code is sufficient authorization for participation in TexPool, would these applications require a case by case analysis as to whether the particular Electrical Co-op was "created on behalf of the state or an agency or local political subdivision of the state . . . " ?

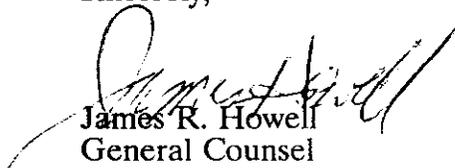
3. A nonprofit water supply corporation organized under V.T.C.S. article 1434a.

This type of corporation raises the same issues regarding the conflict between the statutes and participation by a nonprofit corporation. It also is interesting to note that a number of statutes classify a water supply corporation as a political subdivision. *See*, V.T.C.A. Water Code §§ 15.001(5); 15.731(4); 16.001(7); 17.001(6); 17.921(3); 52.001(15). Is this designation sufficient to qualify them as a political subdivision under the Interlocal Cooperation Act? § 791.003(5) Government Code. In addition, section 551.001(3)(I) of the Open Meetings Act and section 552.003(9) of the Open Records Act make certain water supply corporations subject to their requirements. These provisions seem to make it more likely that a water supply corporation is a political subdivision.

Please address the issues raised regarding the statutes that apply to TexPool. The central issue is whether an entity seemingly authorized by section 404.103 to participate in TexPool may nevertheless be ineligible because of the Public Funds Investment Act. Does the definition of "political subdivision" found in section 791.003(5) of the Interlocal Cooperation Act include any of these entities? Does the Interlocal Cooperation Act limit participation by entities otherwise eligible under section 404.103?

If you have any questions or if we can provide any additional information to assist in your decision, please contact Staff Attorney Ellen Rathgeber at 463-5971.

Sincerely,



James R. Howell
General Counsel

JRH/ER/km