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OPINION COMMITTEE

December 1, 2008

VIA CERTIFIED MAIL
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FILE # 11-45933-08
I.D. # 45933

The Honorable Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0769-GA

RE: **Attorney General Opinion Request Regarding the Employment and Compensation of A Registered Lobbyist by A State Agency or Institution of Higher Education**

Dear General Abbott:

Pursuant to the Texas Government Code, I respectfully seek an opinion regarding the following questions:

- 1) Whether Sections 556.005 and 556.008 of the Government Code allow a state agency as defined by Section 556.001(2) of the Government Code or an institution of higher education as defined by Section 61.003 of the Education Code to employ as a state or contract employee a person who is a registered lobbyist for a private entity and provide compensation with appropriated money or "any money under its control."
- 2) Whether a registered lobbyist who accepts employment with a state agency as defined by Section 556.001(2) of the Government Code or an institution of higher education as defined by Section 61.003 of the Education Code is subject to the provisions in Section 572.051 of the Government Code and Chapters 36 and 39 of the Penal Code.

- 3) Whether "appropriated money" as defined in Section 556.005(1) of the Government Code is included in the phrase "any money under its control" in Section 556.005(a).
- 4) Whether the first and second sentences in Section 556.005(a) of the Government Code conflict with each other.
- 5) Whether a state agency as defined by Section 556.001(2) of the Government Code or an institution of higher education as defined by Section 61.003 of the Education Code may use private monies to compensate a registered lobbyist employed to provide services in any capacity.
- 6) Whether a registered lobbyist is required to terminate his registration with the Texas Ethics Commission before accepting employment with a state agency as defined by Section 556.001(2) of the Government Code or an institution of higher education as defined by Section 61.003 of the Education Code.
- 7) Whether Sections 556.005 and 556.006 of the Government Code conflict with each other.
- 8) Whether Article IX, Sections 6.23 and 6.24 of the 2007 General Appropriations Act conflict with Sections 556.005 and 556.008 of the Government Code.

Rules of Statutory Construction

The first step in determining legislative intent is to look at the plain language of the statute because the words used by the Texas Legislature provide a clear guide to the statute's intent. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997) ("We endeavor to discover what the Legislature intended from the actual language it employed."). Words or phrases are to be construed according to their common usage. *See* TEX. GOV'T CODE ANN. § 311.011 (a) (Vernon 2005) (Code Construction Act). If statutory language is unambiguous, the statute is interpreted according to its plain meaning. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). "[I]f a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity." *Id.* "[A] court will not give effect to legislative history where it contradicts the unambiguous language of a statute". Tex. Att'y Gen. Op. No. GA-0614 (2008). Letters by lawmakers attempting to explain legislative intent of a bill after it passed "are not statutory history and can provide little guidance as to what the legislature collectively intended". Tex. Att'y Gen. Op. No. GA-0016 (2003) (quoting *In Re Doe*, 19 S.W. 3d 346, 352 (Tex. 2000)); *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex.

1993) (after bill is enacted, "the intent of an individual legislator, even a statute's principal author, is not legislative history controlling the construction to be given a statute"). Statutory language will not be applied literally if it will lead to absurd consequences. *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 249 (Tex. 1991).

Analysis

In 1999, the 76th Texas Legislature passed Senate Bill 177. According to the bill analysis, the purpose of the bill was to codify "certain provisions in the General Appropriations Act that authorize or prohibit expenditures by public entities, including codification of provisions in the General Appropriations Act." The bill added various provisions to the Government Code, including a subsection defining "appropriated money" and three new sections that are relevant to this request: Section 556.001(1) (Definition of "appropriated money"), Section 556.004 (Prohibited Acts of Agencies and Individuals), Section 556.005 (Employment of A Lobbyist), and Section 556.008 (Compensation Prohibition).

Sections 556.005(a) and 556.008 of the Government Code have raised questions regarding whether a registered lobbyist may be employed as a state or contract employee by a state agency or institution of higher education to provide services in any capacity and compensated with appropriated money. One interpretation of the first sentence in subsection (a) is that the language creates a blanket prohibition against the hiring of a person who is a registered lobbyist for a private entity. If a registered lobbyist is employed as a state or contract employee and compensated with appropriated money, including federal funds, strict liability is imposed on a state agency or an institution of higher education and it could subject it to a reduction in appropriations under Section 556.005(c). See Section 556.005(c) ("A state agency that violates Subsection (a) is subject to a reduction of amounts appropriated for administration by the General Appropriations Act for the biennium following the biennium in which the violation occurs for an amount not to exceed \$100,000 for each violation."); See also Tex. Attn'y Gen. Op. No. JC-0161 (1999) (federal funds that pass through the General Appropriations Act are "appropriated money" under Chapter 556 of the Government Code). The language in the first sentence is not permissive. According to the Code Construction Act, the words "may not" have the same prohibitive effect as "shall not". See TEX. GOV'T CODE ANN. §311.016(5) ("May not" imposes a prohibition and is synonymous with "shall not"). There is no language in Section 556.005(a) indicating that the lobby registration requirement is "because of" the job duties a person would perform at a state agency or an institution of higher education. It is plausible that the registration requirement is "separate and apart" from the person's employment duties.

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According to this view, Sections 556.005(a) and 556.008 prohibit a person from being a state or contract employee and a registered lobbyist for a private entity at the same time. Simply put, a person's status as a "registered lobbyist" prohibits employment and compensation under Sections 556.005(a) and 556.008 of the Government Code and Article IX, Sections 6.23 and 6.24 of the General Appropriations Act (hereinafter "riders").

It is well established that "[a] rider in the Appropriations Act may not attempt to alter existing substantive law." Tex. Att'y Gen. Op. No. GA-0099 (2003); TEX. CONST. ART. III § 35(a); *Strake v. Ct. App. for the First Supreme Judicial Dist. of Tex.*, 704 S.W. 2d 746, 748 (Tex. 1986); Tex. Att'y Gen. Op. No. V-1254 at 17 (1951) (purpose of budget rider is to "detail, limit, or restrict the use of the funds or otherwise insure that the money is spent for the required activity for which it is therein appropriated.") Thus, while the 2007 riders are instructive on how appropriated money should be spent and restricted, they cannot alter the plain language in the relevant sections in the Government Code. See *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438 (Tex. 1997) ("We endeavor to discover what the Legislature intended from the actual language it employed.").

A second interpretation of the first sentence in Section 556.005(a) and of Section 556.008 is that a registered lobbyist can be employed by a state agency or an institution of higher education to provide services in any capacity and compensated with appropriated money so long as the lobbyist terminates his registration with the Texas Ethics Commission prior to commencing work. In other words, the person would only be a state or contract employee on the first day of employment. If the statute is considered as a whole, this interpretation would harmonize Sections 556.005(a) and 556.005(d) because the person would not be a lobbyist or required to register under Chapter 305. *Helena Chem. Co v. Wilkins*, 47 S.W. 3d 486, 491 (Tex. 2001) ("We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone."); See also Section 556.005(d) (allowing a state agency to contract with a contractor if the contractor is not required to register as a lobbyist under Chapter 305 of the Government Code).

Noticeably, the second sentence in Section 556.005(a) creates an exception to the hiring and compensation of a registered lobbyist by an institution of higher education as defined by Section 61.003 of the Education Code. In the second sentence, an institution of higher education, which includes a university system, is allowed to employ or contract with an individual who is a registered lobbyist and provide compensation with "any money under its control" (emphasis added). The phrase "any money under its control" is not defined in Chapter 556 of the Government Code. Thus, the words and phrase will be construed according to the rules of grammar and common usage. TEX. GOV'T CODE ANN. § 311.011 (a) (Vernon 2005) (Code Construction Act).

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The phrase "any money" is clear and unambiguous. It refers to all money regardless of source or character. The word "control" can have several meanings, but a previously issued Attorney General's opinion is directly on point for purposes of this analysis. According to Tex. Attn'y Gen. Op No. JC-0122 (1999), "control" denotes "the function or power of directing and regulating, domination, command, sway" (citing III OXFORD ENGLISH DICTIONARY 852 (1989)); *See also* BLACKS LAW DICTIONARY (6th Edition) (defining "control" as the "power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee"). Based on the common usage and understanding of the phrase "any money" and the definition of "control" in a previously issued opinion, a logical conclusion can be made that "appropriated money" is included in the phrase "any money" that is under the "control" of an institution of higher education.

Considering the statute as a whole, the reasoning in the preceding paragraph is consistent and harmonious with the language in Section 556.004(a), which was created at the same time as Section 556.005, and relates to the prohibited acts of a state agency, including an institution of higher education. *Helena Chem. Co v. Wilkins*, 47 S.W. 3d 486, 491 (Tex. 2001) ("We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone.") *See also* Section 556.004(a) ("A state agency may not use any money under its control, including appropriated money,...."). If "appropriated money" in the first sentence in Section 556.005(a) is included in the phrase "any money under its control" in the second sentence, then the exception conflicts with the prohibition in the first sentence and with Sections 556.006 and 556.008.

On the other hand, it appears that a state agency or an institution of higher education is not prohibited from employing a registered lobbyist to perform services in any capacity and compensating him with non-appropriated money, *e.g.* private contributions. While Section 556.006 does prohibit appropriated money from being used to attempt to influence the passage or defeat of a legislative measure, there is no reference regarding the use of private monies.

Nevertheless, a state agency or an institution of higher education may violate the lobbying prohibition in Section 556.006 and the 2007 riders if it uses state resources and personnel to assist the employee who is a registered lobbyist.

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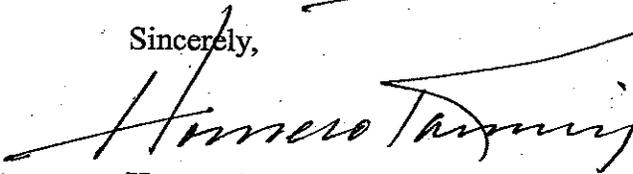
Conclusion

The two aforementioned interpretations have merit. A person required to register as a lobbyist under Chapter 305 of the Government Code may possess specialized skills and knowledge that could be useful to a state agency or an institution of higher education to perform research, management, consulting, or other services. However, based on the plain language in Sections 556.005 and 556.008, there is a risk that a violation may occur and subject the state agency or an institution of higher education to a reduction of appropriations of up to \$100,000 for each violation. Additionally, it is not clear if Chapters 36 and 39 of the Penal Code are applicable to a registered lobbyist who is employed.

In light of my concerns, I respectfully request your opinion.

Thank you for your time and attention to this important matter.

Sincerely,

A handwritten signature in cursive script that reads "Homero Ramirez". The signature is written in black ink and is positioned above the typed name.

Homero Ramirez
Webb County Attorney