

# 2004 TEXAS ETHICS, GIFT & HONORARIUM LAWS MADE EASY

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*Answers to the most frequently asked questions  
about Ethics, Gift, and Honorarium Laws*

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# Ethics, Gift and Honorarium Laws Made Easy

Numerous state statutes address ethical limitations that apply to elected and appointed city officials as well as to city staff. Some of the provisions are contained in the Texas Penal Code and cover the ability of city officials to accept gifts and honorariums, and to use certain official information for their own benefit. Additionally, there are laws outside of the Penal Code that place ethical limitations on city officials, such as laws, regulations and codes that regulate the conduct of certain types of city professionals, including city attorneys, city engineers, accountants and others. Throughout the law there are specific statutes and court decisions that have ethical implications, some of which are discussed in other handbooks and articles available on the Attorney General's website, and neither this handbook or these other resources can catalogue all relevant issues. Finally, cities are free to adopt ethics related limitations through the adoption of a city ordinance, city policy or city charter provision that contains such restrictions. The following questions and answers provide a lay person's explanation of the ethics-related provisions contained in state law or other sources. This guide is intended to provide general guidance on the issues raised in this area. The Municipal Affairs section of the Office of the Attorney General is available to answer questions from city officials, who should nonetheless consult with their local legal counsel regarding the application of the law to the facts of each particular situation. This handbook will give guidance to officials of other public entities, as well.

## General Ethics Requirements

### **1. Is there a general state statute that provides a code of ethics for city officials or city staff?**

There is not a general statutory code of ethics specifically for city officials or city staff. To determine whether a city official has violated any ethical duties, one must consult several Texas statutes, including the conflict of interest laws under chapter 171 of the Local Government Code, as well as any special statutes that may apply to the conduct or to the profession at issue. Additionally, the city official must look to any local provisions that the city may have adopted through a city charter or a local ordinance.

### **2. Are there state statutes that impose a set of professional and ethical requirements on certain professionals that may be employed by a city (e.g., city engineer, city attorney)?**

There are certain state statutes that impose a special set of professional responsibilities on how individuals within certain professions or offices must perform their functions. For example, municipal court judges would be subject to the standards imposed under the State Code of Judicial Conduct.<sup>1</sup> A municipal court judge who is also a licensed attorney would also be subject to the code

of professional responsibility applicable to all practicing lawyers.<sup>2</sup> Summarized below are some professional ethical and performance standards that may apply to city officials:

**Accountants:** Regulated by the Board of Public Accountancy. Phone (512) 305-7870. Legislation that contains the regulations: TEX. OCC. CODE ANN. Chapter 901 - Public Accountancy Act. The Texas State Board of Public Accountancy can be found on the internet at <http://www.tsbpa.state.tx.us>.

**Architects:** Regulated by the Board of Architectural Examiners. Phone (512) 305-9000. Legislation that contains the regulations: TEX. OCC. CODE ANN. Chapter 1051. These rules can be found on the internet at [www.tbae.state.tx.us](http://www.tbae.state.tx.us).

**Doctors:** Regulated by the Board of Medical Examiners. Phone (800)248-4062. Legislation that contains the regulations: TEX. OCC. CODE ANN. Chapters 151-165 - Medical Practice Act. The Board of Medical Examiners can be found on the internet at [www.tsbme.state.tx.us](http://www.tsbme.state.tx.us).

**Engineers:** Regulated by the Board of Professional Engineers. Phone (512) 440-7723. Legislation that contains the regulations: TEX. OCC. CODE ANN. Chapter 1001. The Board of Professional Engineers can be found on the internet at [www.tbpe.state.tx.us](http://www.tbpe.state.tx.us).

**Judges:** Regulated by the Commission on Judicial Conduct. Phone (877) 228-5750 or (512) 463-5533. Legislation that contains the regulations: TEX. GOV'T CODE ANN. Chapter 33 (Vernon 1988 & Supp. 2000) and the Code of Judicial Conduct, *reprinted in Gov't Code tit. 2, subtit. G. app. B.* The Commission on Judicial Conduct can be found on the internet at [www.scjc.state.tx.us](http://www.scjc.state.tx.us).

**Lawyers:** Regulated by the State Bar of Texas. Phone 1-800-204-2222. Legislation that contains the regulations: Texas Disciplinary Rules of Professional Conduct (1990), *reprinted in Gov't Code tit. 2, subtit. G. app. A.* The State Bar of Texas can be found on the internet at [www.texasbar.com](http://www.texasbar.com).

**Nurses:** Regulated by the Board of Nurse Examiners. Phone (512) 305-7400. Legislation that contains the regulations: TEX. OCC. CODE ANN. Chapter 301. The Board of Nurse Examiners can be found on the internet at [www.bne.state.tx.us](http://www.bne.state.tx.us).

**Physical Therapists and Occupational Therapists:** Regulated by the Executive Council of Physical Therapy and Occupational Therapy Examiners. Phone (512) 305-6900. Legislation that contains the regulations: TEX. OCC. CODE ANN. Chapter 452. The Executive Council of Physical Therapy and Occupational Therapy Examiners can be found on the internet at [www.ecptote.state.tx.us](http://www.ecptote.state.tx.us).

**Plumbers:** Regulated by the Board of Plumbing Examiners. Phone (512) 458-2145 or 1-800-845-6584. Legislation that contains the regulations: TEX. OCC. CODE ANN. Chapter 1301. The Board of Plumbing Examiners can be found on the internet at [www.tsbpe.state.tx.us](http://www.tsbpe.state.tx.us).

**Vocational Nurses:** Regulated by the Board of Vocational Nurse Examiners. Phone (512) 305-8100. Legislation that contains the regulations: TEX. OCC. CODE ANN. Chapter 302. The Board of Vocational Nurse Examiners can be found on the internet at [www.bvne.state.tx.us](http://www.bvne.state.tx.us).

For a more complete list of state licenses issued for various occupations, see <http://www.texas.gov/>

There are also a number of city professionals that have joined certain voluntary professional associations that have a code of ethics that apply to their members. For example, city managers and city attorneys often belong to organizations that have their own code of ethics for members. If a member is found to violate the code in the performance of their profession, the organization might issue a written reprimand to the person and/or cancel the person's membership in that organization. Since membership in such an organization is voluntary, the remedies available to the organization are limited.

### **3. What role does the Texas Ethics Commission have in enforcing or advising local officials on state or local ethics requirements?**

The Texas Ethics Commission does not have a role in enforcing most state or local ethics requirements for city officials or city staff. With regard to city officials, the Ethics Commission has enforcement authority for campaign finance and political advertising issues.<sup>3</sup>

However, the State Ethics Commission can issue Advisory Opinions to any requestor on whether an individual's conduct may violate Penal Code Chapter 36 (Bribery, Gift, and Honorarium laws) or Penal Code Chapter 39 (Misuse of Government Resources).<sup>4</sup> The Commission must protect the confidentiality of the requestor's identity unless the requestor waives this requirement.<sup>5</sup> Officials also may use advisory opinions by the Commission to defend themselves when facing criminal or civil penalties if the facts of the opinion at issue are substantially similar to the official's personal situation.<sup>6</sup>

**4. Can a city council impose a specific set of ethical requirements on elected and appointed city officials and staff?**

A city council, by majority vote of its members, may impose a set of ethical requirements for elected and/or appointed city officials and staff.<sup>7</sup> If adopted, such a set of requirements are generally contained in the city ethics ordinance. In home rule cities (cities of over 5,000 population that have adopted a home rule charter), such ethical limitations may also be contained in the city charter, as well as in the city ethics ordinance or policy. These limitations are not pre-empted by state ethics laws as long as there is no direct conflict.<sup>8</sup>

**5. What types of issues are typically addressed in an ethics ordinance regarding elected and appointed city officials?**

An ethics ordinance regarding elected and appointed city officials typically addresses issues such as: conflicts of interest<sup>9</sup>; voting on zoning classifications effecting property owned by an official within a certain distance; supplemental compensation; outside employment; representing business entities before a city board, city commission, or city council<sup>10</sup>; post-employment restrictions; restrictions on lobbying for city ballot items; requiring annual financial disclosure statements; and the receipt of gifts.<sup>11</sup>

**6. What types of issues are typically addressed in an ethics ordinance regarding city employees?**

An ethics ordinance regarding city employees typically addresses issues such as: supplemental compensation; outside employment; representing business entities before a city board, city commission, or city council<sup>12</sup>; post-employment restrictions; restrictions on lobbying for city ballot items; and the receipt of gifts.<sup>13</sup>

**7. Where can a city obtain sample ethics ordinances that would apply to elected officials and/or city staff?**

A city can obtain sample ethics ordinances from the legal department of the Texas Municipal League. The Texas Municipal League can be reached at (512) 231-7400.

## **Bribery and Illegal Gift Statutes**

### **8. Is it illegal for a person to offer, or for a public official to accept, a gift or benefit in exchange for an exercise of official discretion?**

Texas Penal Code Section 36.02 makes it a crime of bribery for a person to offer, or for a public official or employee to accept or solicit, any “benefit as consideration in exchange” for a decision, opinion, recommendation, vote or other exercise of official discretion.<sup>14</sup> The Penal Code defines a prohibited “benefit” as:

Anything reasonably regarded as pecuniary [monetary] gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest.<sup>15</sup>

In other words, a benefit would include anything that is offered that a reasonable person would consider to have some monetary value, whether it is given to the public official or to someone in whom the official has a direct and substantial interest (such as a family member or a business associate).

The state law on bribery does not contain a monetary threshold at which point a benefit that is provided could be considered a potential bribe. Therefore, anything that a reasonable person would find as having a monetary value should be refused. The State Ethics Commission, however, has advised that a plaque, unless it was quite elaborate, would not be considered a benefit under the bribery law.<sup>16</sup>

To prove bribery, a prosecutor must show that the benefit that was given to a city official was “as consideration in exchange” for an official’s exercise of some decision, vote, recommendation or other exercise of official discretion. Whether an item was given “as consideration in exchange” for such actions remains a fact question that would have to be addressed on a case by case basis by the local prosecutor.

However, it is important to note that the Penal Code prohibits, with certain exceptions, a public official from ever accepting a gift or benefit valued at \$50 or more from a person subject to his jurisdiction with whom the city official interacts, regardless of whether it was in consideration or in exchange for any official action.<sup>17</sup>



**9. Does state law prohibit a city official or employee from accepting a gift or benefit if the item was offered or accepted after the exercise of official discretion?**

Even if an item was offered or accepted after the exercise of an official action, it still is considered bribery of a public official or employee. Penal Code section 36.02(c) states the fact that a benefit was not offered or accepted until after the exercise of some official discretion is not considered a defense to a prosecution for bribery.

**10. Does state law prohibit a city official or employee from accepting a gift or benefit if it was unsolicited and it can be shown that it did not influence the exercise of official discretion?**

Even if an item was not solicited and had no influence over the decision that was made, it may still be considered bribery of a public official or employee. These factors are not listed as defenses to a prosecution for bribery. In fact, section 36.02(b) states that the fact that the official is unqualified to carry out the act for which the benefit is given to him is not a valid defense.

**11. Can a city official or staff member accept a gift that is simply provided in appreciation for superior public service and that is not in exchange for any official exercise of discretion?**

The Penal Code generally prohibits a public official from ever accepting a gift or benefit valued at \$50 or more from a person subject to his jurisdiction with whom the city official interacts in his official capacity, regardless of whether it was in recognition of superior service or a token of gratitude or friendship.<sup>18</sup>

**12. What is considered a “gift or benefit” for purposes of the general prohibition against the acceptance of gifts by public officials and public employees?**

A gift or benefit would be considered anything that would have a monetary value of \$50 or more.<sup>19</sup> An expensive floral arrangement, gift basket or other item that would be valued at \$50 or more and is delivered to a government office would likely constitute a gift.<sup>20</sup> So might a magazine subscription.<sup>21</sup> Similarly, tickets to an event or the provision of complimentary services or products that would have a monetary value of \$50 or more might likewise constitute a gift. Conversely, caps,

coffee mugs, tee shirts, and key rings will not be considered to have a monetary value of \$50 or more.<sup>22</sup> Nor would a cup of coffee.<sup>23</sup> Whether an item has such a value is a fact question that must be determined on a case by case basis by the local prosecutor. Even if the item is under \$50, it cannot be accepted in exchange for an act of discretion, as this would violate the bribery statute, section 36.02.

### **13. Are there exceptions to the gift or benefit limitations that apply to public officials and public employees?**

There are a number of exceptions to the prohibition against providing a gift to a public official or public employee. The following are not prohibited:

1. **Token Gifts:** A gift that has a value of less than \$50, excluding cash or a negotiable instrument, if it was not given in exchange for any exercise of official discretion;<sup>24</sup>
2. **Gifts from Family or Close Friends:** A gift conferred from an official's family or from a personal friend if there is an independent relationship that is not related to the status or work of the official;<sup>25</sup>
3. **Gifts from Individuals With Whom You Have an Independent Business Relationship:** A gift conferred from a professional or business contact if there is an independent relationship that is not related to the status or work of the official;<sup>26</sup>
4. **Statutorily Provided Fees:** A fee that is provided by law that an official is lawfully entitled to receive for which he performs some function other than as a public servant (e.g., jury duty fee);<sup>27</sup> and
5. **Political Contributions as defined by Title 15 of the Election Code.**<sup>28</sup>

### **14. Can a public official or public employee donate an unsolicited gift to a charitable entity to avoid an illegal gift problem?**

A public official or employee that receives an unsolicited gift can avoid an illegal gift problem by donating the gift to a recognized tax-exempt charitable organization formed for educational, religious or scientific purposes.<sup>29</sup> However, this exception does not apply if the gift was provided as part of an honorarium.<sup>30</sup> In such a case, the gift should be refused. The offering entity would be free to donate the gift to a charitable entity or make some other use of the item.

**15. Can a public official or employee be criminally prosecuted if found to have illegally accepted a gift or benefit?**

A public official who accepts or solicits a gift or benefit in exchange for some exercise of official discretion may be prosecuted for bribery, which is a felony of the second degree.<sup>31</sup> A public official who accepts or solicits a gift or benefit valued at \$50 or more from a person subject to her jurisdiction with whom the city official interacts can be prosecuted for accepting an illegal gift, which is a Class A misdemeanor.<sup>32</sup>

**16. Can a public official or public employee be removed from office if found to have illegally accepted a gift or benefit?**

There is no special remedy under the Penal Code that provides for removal of a public official due to a violation of the gift laws. However, if a person is criminally convicted of such an offense, it may affect his eligibility for office. Additionally, such a conviction may act to automatically remove the official from office or be a ground for seeking the removal of a city council member through a recall or other removal action if such is authorized under state law or the city charter.<sup>33</sup>

## **Honorarium Statutes**

**17. Does state law prohibit a public official or public employee from accepting an honorarium or other item of value in exchange for providing a speech or other service?**

State law generally prohibits a public servant from soliciting, accepting, or agreeing to an honorarium in exchange for providing a speech or other service. Penal Code Section 36.07 states:

A public servant commits an offense if the public servant accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties.<sup>34</sup>

In other words, acceptance of an honorarium by a city official or employee is prohibited if the public servant was asked to provide the speech or the service because of his official position or knowledge that was gained in his official position.

**18. Is the prohibition on accepting honorariums waived if the official or employee provides the speech or service on his own personal time and there is no expenditure of public resources?**

The prohibition on accepting honorariums appears to apply even if the official or employee provides the speech or service on his own personal time and there is no expenditure of public resources. It also does not matter for whom or where the speech or service is being provided.<sup>35</sup>

**19. Does the prohibition against honorariums apply to reimbursement of a public official or public employee for actual expenses incurred in providing a speech or service (e.g., food, lodging, transportation)?**

The prohibition on honorariums does not apply to reimbursement of a public official or public employee for actual expenses incurred in providing a speech or service (e.g., food, lodging, transportation).<sup>36</sup>

## **Misuse of Government Property Statutes**

**20. Does state law prohibit a public official or public employee from using government property for personal purposes?**

State law prohibits a public official or public employee from misuse of government property.<sup>37</sup> Misuse is defined as using government property in a way that is contrary to the agreement under which the public servant holds the property.<sup>38</sup> State officials may not use state equipment for political work or for preparing campaign finance reports.<sup>39</sup> On the other hand, state employees can use state telephones for personal calls in most instances without violating this penal statute.<sup>40</sup> These conclusions may be relevant to city officials and employees, who nonetheless may be subject to different or additional restrictions in city charters, ordinances or policies.

**21. Does state law prohibit the use of government employees to perform private work for public officials?**

State law prohibits a public official or public employee from obtaining a benefit through the use of an employee if that use would violate the public servant's office or employment.<sup>41</sup> State officials may not use state employees for political work or for preparing campaign finance reports.<sup>42</sup> These conclusions may be relevant to city officials and employees, who nonetheless may be subject to different or additional restrictions in city charters, ordinances or policies.

**22. Can a public official or public employee be criminally prosecuted for a violation of the misuse of government property law?**

A public official or public employee can be criminally prosecuted for a violation of the misuse of government property law. See, e.g., *Megason v. State*, 19 S.W.2d 883 (Tex. App.–Texarkana 2000, pet. ref'd). Punishment for a violation of this law ranges from a Class C misdemeanor to a first degree felony depending on the value of the misused property.<sup>43</sup>

**23. Can a public official or public employee be removed for violation of the misuse of government property prohibition?**

There is no special remedy under the Penal Code that provides for removal of a public official due to a misuse of government property. However, if a person is criminally convicted of such an offense, it may affect his eligibility for office. Additionally, such a conviction may act to automatically remove the official from office or be a ground for seeking the removal of a city councilmember through a recall or other removal action if such is authorized under state law or the city charter.<sup>44</sup>

## **Misuse of Official Information Statutes**

**24. Does state law prohibit a public official or public employee from using confidential information that he receives to gain a benefit or advantage for himself or others?**

Yes, state law specifically prohibits a public official or public employee from using confidential information that he receives to gain a benefit or advantage for himself or others.<sup>45</sup>

**25. Does the prohibition on the misuse of government property apply to a public official or employee who uses information that is deemed open to the public (e.g., an open record)?**

The prohibition on the misuse of government property does not apply to a public official or employee who uses information that is deemed open to the public (e.g., an open record).<sup>46</sup>

**26. Can a public official or public employee be removed for violation of the misuse of official information prohibition?**

There is no special remedy under the Penal Code that provides for removal of a public official due to a misuse of official information. However, if a person is criminally convicted of such an offense, it may affect his eligibility for office. Additionally, such a conviction may act to automatically remove the official from office or be a ground for seeking the removal of a city councilmember through a recall or other removal action if such is authorized under state law or the city charter.<sup>47</sup>

**27. Can a public official or public employee be criminally prosecuted for a violation of the misuse of official information law?**

A public official or public employee can be criminally prosecuted for a violation of the misuse of official information law. An offense of this law is generally a felony of the third degree.<sup>48</sup>

## Endnotes

1. Code of Judicial Conduct, *reprinted in* Gov't Code tit. 2, subtit. G. app. B.
2. Texas Disciplinary Rules of Professional Conduct (1990), *reprinted in* Gov't Code tit. 2, subtit. G. app. A.
3. TEX. GOV'T CODE ANN. § 571.061 (Vernon Supp. 2004).
4. TEX. GOV'T CODE ANN. § 571.091 (Vernon Supp. 2004).
5. TEX. GOV'T CODE ANN. § 571.093 (Vernon 1994).
6. TEX. GOV'T CODE ANN. § 571.097 (Vernon 1994).
7. *See* Tex. Att'y Gen. Op. GA-68 (2003).
8. *See* Ethics Advisory Opinion No. 328 (1996).
9. *See* SACHSE, TEX. HOME RULE CHARTER § 14.01.
10. *See* FORT WORTH, TEX., CODE OF ORDINANCES § 2-238(b)(1).
11. *See* SOUTHLAKE, TEX., CODE OF ORDINANCES § 2-264(1); FORT WORTH, TEX., CODE OF ORDINANCES § 2-238(a); *see also* TEX. PEN. CODE ANN. § 36.08 (Vernon 2003).
12. *See* FORT WORTH, TEX., CODE OF ORDINANCES § 2-238 (b)(1).
13. *See* SOUTHLAKE, TEX., CODE OF ORDINANCES § 2-264(1); FORT WORTH, TEX., CODE OF ORDINANCES § 2-238(a); *see also* TEX. PEN. CODE ANN. § 36.08.
14. TEX. PEN. CODE ANN. § 36.02(a).
15. TEX. PEN. CODE ANN. § 36.01(3).
16. Ethics Advisory Opinion No. 36 (1992).
17. TEX. PEN. CODE ANN. § 36.08 and 36.10(a)(6).
18. *Id.*
19. *Id.*
20. Ethics Advisory Opinion No. 63 (1992).
21. Ethics Advisory Opinion No. 120 (1993).
22. Ethics Advisory Opinion No. 63 (1992).
23. Ethics Advisory Opinion No. 118 (1993).
24. TEX. PEN. CODE ANN. § 36.08 and 36.10(a)(6); Ethics Advisory Opinion No. 63 (1992).
25. TEX. PEN. CODE ANN. § 36.10(a)(2).
26. *Id.*
27. TEX. PEN. CODE ANN. § 36.10(a)(1).
28. TEX. PEN. CODE ANN. § 36.10(a)(4).

29. TEX. PENAL CODE ANN. § 36.08 (i).
30. Ethics Advisory Opinion No. 19 (1992).
31. TEX. PENAL CODE ANN. § 36.02 (e).
32. TEX. PENAL CODE ANN. § 36.08 (h).
33. *See* TEX. LOC. GOV'T CODE ANN. §§ 21.025 & 21.031 (Vernon Supp. 2004).
34. TEX. PENAL CODE ANN. § 36.07(a).
35. *See* Ethics Advisory Opinion No. 173 (1993).
36. TEX. PENAL CODE ANN. § 36.07 (b).
37. TEX. PENAL CODE ANN. § 39.02 (a)(2).
38. TEX. PENAL CODE ANN. § 39.01 (2)(A), (D).
39. Ethics Advisory Opinion No. 172 (1993), Ethics Advisory Opinion No. 386 (1997).
40. Ethics Advisory Opinion No. 134 (1993), Ethics Advisory Opinion No. 395 (1998).
41. TEX. PENAL CODE ANN. § 39.02 (a)(2).
42. Ethics Advisory Opinion No. 172 (1993), Ethics Advisory Opinion No. 386 (1997).
43. TEX. PENAL CODE ANN. § 39.02 (c).
44. *See* TEX. LOCAL GOV'T CODE ANN. §§ 21.025, 21.031 (Vernon Supp. 2004).
45. TEX. PENAL CODE ANN. § 39.06.
46. TEX. PENAL CODE ANN. § 39.06 (d).
47. *See* TEX. LOCAL GOV'T CODE ANN. §§ 21.025 & 21.031 (Vernon Supp. 2004).
48. TEX. PENAL CODE ANN. § 39.06 (e).