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Maneuvering the Revolving Door





Top
Advisory
Opinion

Revolving door - 45 ethics opinions

Most common opinion topic as it relates to state employees/officers, along with PFS



Three
Separate
Provisions in
Law

Sec. 572.069, Tex. Gov't Code

- Procurement/contracts

Sec. 572.054(a), Tex. Gov't Code

- Executive Heads

Sec. 572.054(b), Tex. Gov't Code

- Particular Matter

Procurement Revolving Door

HHSC & 21CT -

<https://www.texastribune.org/2015/02/03/21ct-health-commission-recap/>

\$90 million Medicaid software contract cancelled, concerns over procurement process and leaving state employment to work on deals directly related

The HHSC-21CT Contract Investigations: How Did It Get to This Point?

A now-canceled deal between the Texas Health and Human Services Commission and a software maker is the subject of scrutiny and is also causing greater talk of state contract reforms. Here's a look back at the deal and what led to the current investigations.

BY TERRI LANGFORD FEB. 3, 2015 6 AM



Procurement Revolving Door

SB 20 (2015) took effect on September 1, 2015

- Directly addressed issues related to 21CT procurement

2015-2016 - Senate Finance interim charge to monitor implementation

SB 533 (2017) - SB 20 clarification & cleanup bill

1 AN ACT
2 relating to state agency contracting.
3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
4 SECTION 1. Section 321.013, Government Code, is amended by
5 adding Subsections (k) and (l) to read as follows:
6 (k) In devising the audit plan under Subsection (c), the
7 State Auditor shall consider the performance of audits on contracts
8 entered into by the Health and Human Services Commission that
9 exceed \$100 million in annual value, including a contract between
10 the commission and a managed care organization. The State Auditor
11 shall collaborate with the financial managers in the Medicaid/CHIP
12 Division of the commission in performing an audit described by this
13 subsection. An audit described by this subsection:
14 (1) may be limited in scope to target an area of the
15 contract that the State Auditor determines poses the highest
16 financial risk to this state; and
17 (2) must determine whether the entity contracting with
18 the commission has spent state money in accordance with the
19 purposes authorized in the contract.
20 (1) The State Auditor may contract with a private auditor to
21 audit a contract under Subsection (k).
22 SECTION 2. Subchapter B, Chapter 403, Government Code, is
23 amended by adding Section 403.03057 to read as follows:
24 Sec. 403.03057. CENTRALIZED STATE PURCHASING STUDY.



Procurement Revolving Door

Sec. 572.069. Certain Employment For Former State Officer Or Employee Restricted.

A former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept employment from that person before the second anniversary of the date the contract is signed or the procurement is terminated or withdrawn.

Procurement Revolving Door

“A former state officer or employee of a state agency...”

Department, commission, board, office, or other agency in the executive branch, is not geographically bound/limited, and was created in law.

Includes river authorities, and university systems/institutes of higher education (not incl. junior colleges)

Procurement Revolving Door


- What does it mean that the SO/employee “participated” in the procurement?
- What is the definition of “employment”? Does independent contract work count?
- The other two revolving door statutes have a definition, this one doesn't...
- Already an EAO on this statute, EAO 545.



Ethics Advisory Opinions Generally

Reasonable reliance on an ethics opinion by the Texas Ethics Commission serves as both a defense to prosecution and a defense to any applicable civil penalties (Tex. Gov't Code 571.097)

But, all facts are different.



Ethics Advisory Opinion No. 545

Former agency employee who reviewed RFP bid from client while employed there is now a consultant employed by a staffing agency and assigned to client to provide services on the same contract which she reviewed bids for.

Sec. 572.069 prohibits **employment** by client for 2 years.

Ethics Advisory Opinion No. 545

TEC applied common law “right to control” test of employment:

- The individual acts, at least in part, to serve the interests of the employer;
- The employer consents to receive the individual’s services; and
- The employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson.

Here, TEC said the threshold was met for an employment relationship, so 572.069 controls. No work for them for 2 years.



Executive Revolving Door

Sec. 572.054(a), Tex. Gov't Code

A former member of the governing body or a former executive head of a regulatory agency may not make any communication to or appearance before an officer or employee of the agency in which the member or executive head served before the second anniversary of the date the member or executive head ceased to be a member of the governing body or the executive head of the agency if the communication is made: (1) with the intent to influence; and (2) on behalf of any person in connection with any matter on which the person seeks official action.

Executive Revolving Door

Unpacked

Regulatory Agency:

- Any department, commission, board, or other agency in the executive branch, is not geographically bound, was created in law, and has constitutional or statutory authority to engage in regulation.
- Definitions exclude the Secretary of State or the Comptroller, but 572.054 adds the two back in, as well as Dept of Information Resources.
- No mention of universities or river authorities like in definition of “state agency” for procurement provision

Executive Revolving Door

Unpacked

Executive Head of a State Agency includes:

- Director
- Executive Director
- Commissioner
- Administrator
- Chief Clerk
- Other individual appointed by the governing body

TEC says – the individual in charge of the day to day operation of the agency (EAO 381 – 1997)



Executive Revolving Door

Unpacked

- May not appear before or communicate with
- Any officer or employees of the agency
 - With the intent to influence AND
 - On behalf of any person in connection with any matter on which they seek official action
- For two years after leaving the state in that role.

Note: No lobby registration exception.



Particular
Matter
Revolving
Door

Sec. 572.054(b), Tex. Gov't Code

A former state officer or employee of a regulatory agency who ceases service or employment with that agency on or after January 1, 1992, may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility.

Particular
Matter
Revolving
Door

Sec. 572.054(b), Tex. Gov't Code

A former state officer or employee of a regulatory agency who ceases service or employment with that agency on or after January 1, 1992, may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility.

Particular Matter Revolving Door

“Particular matter” means a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest or judicial or other proceeding.

- Does not apply to rulemaking proceedings that have concluded before the officer/employee terminates.
- Does not apply to pending legislation, can communicate with #txlege re: statutes affecting the agency. EAO 232 (1994)

“Particular matter” refers to a particular proceeding rather than to a particular subject matter. EAO 419 (1999)

Particular
Matter
Revolving
Door

***“Participated”** means to have taken action as an officer or employee through decision, approval, disapproval, recommendation, the giving of advice, investigation or similar action.*

Particular Matter Revolving Door

Myriad EAO's further defining "participation"

- General work on same subject matter is not prohibited. EAO 496 (2011)
- Former state employees working on the same subject area or for employers with which they became familiar during state employment not prohibited. EAO 364 (1997)
- Assuring compliance with an agency rule or policy is not part of the same matter as the matter of drafting or adopting the agency rule or policy. EAO 365 (1997)

Revolving
Door
Outside
of Texas

Nothing in Texas statutes or standards of conduct prohibit a former TX state officer/employee from engaging in consulting or advocacy in other states.

Revolving Door & Nonprofits

572.069 – “...involving a person...”

572.054(a) – “... (2) on behalf of any person...”

572.054(b) – “... on behalf of any person ...”

Definition of “person” in code includes business entities.

BUT, does not include a nonprofit corporation or a governmental entity.



Revolving Door & Nonprofits

Therefore, no restriction on representing a nonprofit corporation (including a 501(c) trade association) or a governmental body before the former agency.

But, Sec. 2252.901, Tex. Gov't Code may require a one year wait time in some circumstances.

- Employment contracts with state money
- Chinese wall may be necessary

Questions?

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