



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 12, 2021

The Honorable Christian D. Menefee
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002-1700

Opinion No. KP-0376

Re: Applicability of Local Government Code chapter 171 regarding conflicts of interest and Government Code chapter 573 regarding nepotism to a county attorney whose father-in-law is a partner at a law firm that contracts with the county (RQ-0395-KP)

Dear Mr. Menefee:

You ask about the applicability of Local Government Code chapter 171 regarding conflicts of interest and Government Code chapter 573 regarding nepotism to a county attorney whose father-in-law is a partner at a law firm that contracts with the county.¹

Background

You state that you took the oath of office as Harris County Attorney on January 1, 2021. Request Letter at 1. You tell us your “father-in-law holds an ownership interest in a law firm that has existing contracts with Harris County for the collection of delinquent receivables.” *Id.* You inform us that you have filed an affidavit with the county clerk’s office disclosing the relationship and circumstances concerning county contracts with your father-in-law’s firm. *Id.* You state that you will delegate the authority to choose a collection firm to a senior attorney in your office who has no connections to your father-in-law’s firm and you will “abstain from participating in relevant decisions regarding the County’s contracts with private law firms for the collection of delinquent receivables.” *Id.* at 1–2. You ask whether such action complies with the conflict-of-interest provisions in chapter 171 of the Local Government Code and the nepotism prohibitions in Government Code chapter 573. Request Letter at 2. Before addressing issues under chapter 171, we consider the potential application of the nepotism statutes.

¹See Letter and attached brief from Honorable Christian D. Menefee, Harris Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Jan. 11, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0395KP.pdf> (“Request Letter” & “Brief,” respectively) (Brief on file with the Op. Comm.).

Government Code Chapter 573—Nepotism

Section 573.041 of the Government Code provides as follows:

A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:

- (1) the individual is related to the public official within a degree described by [statute];

....

TEX. GOV'T CODE § 573.041(1). Chapter 573 “applies to relationships within the third degree by consanguinity or within the second degree by affinity.” *Id.* § 573.002. Thus, section 573.041 generally prohibits a public official from appointing “an individual to a position . . . compensated from public funds” who is related to the public official within the third degree by consanguinity or within the second degree by affinity. *Id.* § 573.041(1). A father-in-law is within the prohibited degree of affinity. *See id.* §§ 573.023, .024(a)(2), .025(a)–(b). But you tell us that the county has contracts for collection services with a business entity—here a law firm (operating through a business entity in the form of a limited liability partnership), and not an individual. Request Letter at 1. The nepotism statute prohibits the appointment only of a natural person, not a business entity. *See Tex. Att’y Gen. Op. Nos. JC-0585 (2002) at 3; DM-0076 (1992) at 2–3.* Accordingly, section 573.041 would not prohibit the contracts with the law firm (operating through a business entity) as you describe them.

Local Government Code Chapter 171—Conflicts of Interest

Chapter 171 of the Local Government Code restricts a local public official’s authority to participate in a vote or decision on any matters involving a business entity in which the official has a substantial interest. *See TEX. LOC. GOV'T CODE § 171.004.*² Subsection 171.004(a) requires a local public official with a substantial interest in a business entity to file, “before a vote or decision on any matter involving the business entity . . . , an affidavit stating the nature and extent

²Chapter 171 also defines the following terms that are relevant for purpose of the analysis herein. A “local public official” is “a member of the governing body or another officer, whether elected, appointed, paid, or unpaid,” of a county and certain other local governmental entities, “who exercises responsibilities beyond those that are advisory in nature.” TEX. LOC. GOV'T CODE § 171.001(1). A “business entity” refers to “a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law.” *Id.* § 171.001(2). A person has a “substantial interest” in a business entity if funds received from it exceed ten percent of that person’s gross income for the previous year. *See id.* § 171.002(a)(2). A substantial interest in a business entity may also be based on ownership of voting stock or shares of the entity. *See id.* § 171.002(a)(1). With respect to a business entity, the prohibition applies only when the public official’s “action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public.” *Id.* § 171.004(a)(1).

of the interest” and to “abstain from further participation in the matter” under certain circumstances. *Id.* § 171.004(a).³

Under a different chapter of the Local Government Code (Chapter 89), the Harris County Attorney (as a county with a population of more than 1.25 million) has a duty to make the initial selection of a special counsel for legal services, subject to commissioners court approval:

(a) The commissioners court of a county with a population of more than 1.25 million may employ an attorney as special counsel.

(b) The special counsel may be employed to:

(1) represent the county in any suit brought by or against the county;

...

(c) The county attorney shall select the special counsel. If the county does not have a county attorney, the district attorney or criminal district attorney shall select the special counsel. The selecting officer shall determine the terms and duration of employment of the special counsel, subject to the court’s approval.

Id. § 89.001(a)–(c); *see also* TEX. TAX CODE § 6.30(a), (c) (authorizing county to contract with a competent attorney for the collection of delinquent taxes). Undoubtedly, the award of a services contract to a law firm will have a special economic effect on the firm, but that is not the county attorney’s decision to make. Rather, the ultimate decision is vested in the commissioners court. *See* TEX. LOC. GOV’T CODE § 89.001(a)–(c).

Thus, the remaining issue with respect to application of section 171.004 is whether a county attorney’s selection of special counsel constitutes a “vote or decision” prohibited by subsection 171.004(a)(1). Chapter 171 does not define “vote or decision.” Where an individual official such as a county attorney “exercises responsibilities beyond those that are advisory in nature,” an

³While it does not apply to the facts set out in herein, we note that where a local public official is making vote or decision on a matter, the interest of certain relatives may be imputed to such local public official under subsection 171.002(c):

A local public official is considered to have a substantial interest under this section if a person related to the official in the first degree by consanguinity or affinity, as determined under Chapter 573, Government Code [the nepotism statutes], has a substantial interest under this section.

Id. § 171.002(c).

individual official's duties generally do not include voting.⁴ *Id.* § 171.001(1). An individual official's participation in certain decisions may constitute a violation of section 171.004. *See Walk v. State*, 841 S.W.2d 430, 434–35 (Tex. App.—Corpus Christi 1992, writ ref'd) (holding that a county judge's purchase of supplies under the circumstances constituted a violation).

Under section 89.001, the county attorney proposes or recommends a firm as special counsel but does not vote or decide whether to award a contract—that is the exclusive responsibility of the commissioners court. *See* TEX. LOC. GOV'T CODE § 89.001(a)–(c). In Attorney General Opinion KP-0244, this office considered the potential application of section 171.004 to a city attorney and city administrator who negotiated a real estate transaction on behalf of the city that would beneficially affect real property that they owned. Tex. Att'y Gen. Op. No. KP-0244 (2019) at 1. In the previous opinion's underlying fact pattern, because the city administrator and the city attorney did not possess the authority to vote or make a decision on the city's acceptance of the proposed agreement, this office determined that section 171.004 did not apply to those officials. *Id.* at 2–3; *see also* Tex. Att'y Gen. Op. No. GA-0510 (2007) at 2 (stating “section 171.004 applies only to a local official who may participate in a vote or decision of the governmental entity that will result in a ‘special economic effect’” on the official's business or property). No judicial opinion has considered the present question. However, a court would likely conclude that the duty of county attorneys in counties with a population more than 1.25 million under section 89.001 of the Local Government Code to select special counsel to collect the county's delinquent receivables, subject to the approval of the commissioners court, does not constitute a “vote or decision” requiring the county attorney to comply with the conflict-of-interest procedures under subsection 171.004(a) of the Local Government Code.

⁴When the public official at issue is a voting member of a governmental body, subsection 171.004's application is relatively straightforward—the member before a vote or decision must file the affidavit and must abstain from subsequent participation in the matter unless a majority of the governing body has a similar interests on the same official action. *Id.* § 171.004(a)–(c). Thus, abstention by a member from further voting or other participation allows a governmental action to occur without involvement of the conflicted public official.

S U M M A R Y

The nepotism statute, subsection 573.041(1) of the Government Code, prohibits a public official from appointing specified relatives to a position but does not apply to a county's award of a collections services contract to a business entity, namely a law firm.

The duty of county attorneys in counties with a population of more than 1.25 million under section 89.001 of the Local Government Code to select special counsel to collect the county's delinquent receivables is subject to the approval of the commissioners court. Accordingly, this does not constitute a "vote or decision" requiring the county attorney to comply with the conflict-of-interest procedures under subsection 171.004(a) of the Local Government Code.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

MURTAZA F. SUTARWALLA
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee

WILLIAM A. HILL
Assistant Attorney General, Opinion Committee