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July 27, 2001

FILE # ML-42083-01  
I.D. # 42083

The Honorable John Cornyn  
Attorney General of Texas  
Price Daniel Sr. Building  
209 West 14th Street  
Austin, TX 78701

RQ-0409-JC

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JUL 31 2001

OFFICE OF THE ATTORNEY GENERAL  
EXECUTIVE ADMINISTRATION

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Re: Request for Opinion

Dear General Cornyn:

The Texas Department of Housing and Community Affairs (TDHCA) requests your assistance in determining whether §§2306.1113, 2306.6703 and 2306.6733 of the Texas Government Code, as amended by the 77<sup>th</sup> Legislature pursuant to SB 322, comply with the Texas Constitution, and if so, the manner in which an affirmative defense to prosecution may be secured.

The three new provisions of Chapter 2306 with which we have questions are as follows:

Section 2306.1113, "Ex Parte Communications," which states:

(a) *During the period beginning on the date a project is filed and ending on the date the board makes a final decision with respect to any approval of that application, a member of the board or a member of the advisory committee established under Section 2306.1112 may not communicate with the following persons:*

(1) *the applicant or a related party, as defined by state law, including board rules, and federal law; and*

(2) *any person who is:*

(A) *active in the construction, rehabilitation, ownership, or control of the proposed project, including:*

(i) *a general partner or contractor; and*

(ii) *a principal or affiliate of a general partner or contractor; or*

(B) *employed as a lobbyist by the applicant or a related party.*

(b) *Notwithstanding Subsection (a), a board member or advisory committee member may communicate with a person described by that subsection at any board meeting or public hearing held with respect to the application.*

Although no specific penalty is provided for a violation of §2306.1113, it appears to be overly broad in its attempt to restrict TDHCA board members and the TDHCA employees who are designated to be members of the executive award and review advisory committee established pursuant to §2306.1112 from communicating with a project applicant concerning its application for funding while the application is pending at TDHCA. The restriction on the speech of the board members and the employees is not limited, however, to only those communications regarding the application or to only communications with the project applicant. The board members and employees are restricted from speaking to a project applicant at any time during the period specified in §2306.1113 on any topic. A violation of §2306.1113 would seemingly occur if an "administrator" of TDHCA's "compliance functions," for example, ran into a project applicant at a PTA meeting and exchanged pleasantries. The greater detriment to TDHCA would be the severe restriction placed on the ability of such employees to perform their regular duties during this time period since many project applicants would also have an existing project with TDHCA in a program other than the one in which its application is being considered. The employees would be prevented from responding to questions from the "project applicant" concerning its existing grant or loan or from having any other form of "communication" with him.

In addition, to restricting communications with applicants, the board members and employees are also prohibited from speaking with a "related party."<sup>1</sup> The term "related party" is defined in

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<sup>1</sup> 2306.6702(a)(11) "Related party" means the following individuals or entities:

- (A) the brothers, sisters, spouse, ancestors, and descendents of a person within the third degree of consanguinity, as determined by Chapter 573;
- (B) a person and a corporation, if the person owns more than 50 percent of the outstanding stock of the corporation;
- (C) two or more corporations that are connected through stock ownership with a common parent possessing more than 50 percent of:
  - i. the total combined voting power of all classes of stock of each of the corporations that can vote;
  - ii. the total value of shares of all classes of stock of each of the corporations;;
  - iii. the total value of shares of all classes of stock of at least one of the corporations, excluding, in computing that the voting power or value, stock owned directly by the other corporation;
- (D) a grantor and fiduciary of any trust;
- (E) a fiduciary of one trust and a fiduciary of another trust, if the same person is a grantor of both trusts;
- (F) a fiduciary of a trust and a beneficiary of the trust;
- (G) a fiduciary of a trust and a corporation if more than 50 percent of the outstanding stock of the corporation is owned by or for:
  - i. the trust; or
  - ii. a person who is a grantor of the trust;
- (H) a person or organization and an organization that is tax-exempt under Section 501(a), Internal Revenue Code of 1986 (26 U.S.C. Section 501), and that is controlled by that person or the person's family members or by that organization;
- (I) a corporation and a partnership or joint venture if the same persons own more than:
  - i. 50 percent of the outstanding stock of the corporation; and
  - ii. 50 percent of the capital interest or the profits' interest in the partnership or joint venture;
- (J) an S corporation and another S corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;

§2306.6702(a)(11), as added by SB 322, to mean, for example: “*the following individuals or entities: (A) the brothers, sisters, spouse, ancestors, and descendants of a person within the third degree of consanguinity, as determined by Chapter 573...*” Section 2306.6702(a)(11) includes thirteen similarly diverse categories of individuals and entities. Pursuant to section 2306.1113, board members and certain employees would be restricted from communications on any topic with, for example, any person’s mother, “a fiduciary of a trust and a beneficiary of the trust<sup>2</sup>” or any of the other diverse persons and entities described as “related parties.”

It appears that §2306.1113 suffers from overextending its reach from the proper role of seeking to prohibit inappropriate communications between applicants and TDHCA board members and certain employees, to restricting protected speech in violation of the First Amendment to the U.S. Constitution as well as Art. 1, Section 8 of the Texas Constitution. As stated by the U.S. Supreme Court,

*It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society...it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.<sup>3</sup>*

The Texas Supreme Court favorably cited *Broadrick in Commission For Lawyer Discipline v. Benton*,<sup>4</sup> for the following statement: “A statute that is found to be overbroad may not be enforced at all, even against speech that could constitutionally be prohibited by a more narrowly drawn statute.<sup>5</sup>” For the reasons discussed above, it appears that this should be the fate of §2306.1113.

The term “related party” also causes difficulties of interpretation with two conflict of interests provisions that were added to our low income housing tax credit program by the 77<sup>th</sup> Legislature pursuant to SB 322. Section 2306.6703, “Ineligibility for Consideration” states, in pertinent part:

*An application is ineligible for consideration under the low income housing tax credit program if:*

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- (K) an S corporation and a C corporation if the same persons own more than 50 percent of the outstanding stock of each corporation;*
  - (L) a partnership and a person or organization owning more than 50 percent of the capital interest or the profits’ interest in that partnership; or*
  - (M) two partnerships, if the same person or organization owns more than 50 percent of the capital interests or profits’ interests.*

<sup>2</sup> §2306.6702(a)(11)(F).

<sup>3</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 612 and 613 (1973).

<sup>4</sup> 980 SW2d 425 (Tex. 1998).

<sup>5</sup> *Id.* at 435.

*(1) at the time of application or at any time during the two-year period preceding the date the application round begins, the applicant or a related party is or has been:*

- (A) a member of the board; or*
- (B) the director, a deputy director, the director of housing programs, the director of compliance, the director of underwriting, or the low income housing tax credit program manager employed by the department; or....*

The other conflict of interest provision is §2306.6733, "Representation By Former Board Member or Other Person:"

*(a) A former board member or a former director, deputy director, director of housing programs, director of compliance, director of underwriting, or low income housing tax credit program manager employed by the department may not:*

*(1) for compensation, represent an applicant for an allocation of low income housing tax credits or a related party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the department ceases;*

*(2) represent any applicant or related party or receive compensation for services rendered on behalf of any applicant or related party regarding the consideration of a housing tax credit application in which the former board member, director, or manager participated during the period of service in office or employment with the department, either through personal involvement or because the matter was within the scope of the board member's, director's, or manager's official responsibility; or*

*(3) for compensation, communicate directly with a member of the legislative branch to influence legislation on behalf of an applicant or related party before the second anniversary of the date that the board member's, director's, or manager's service in office or employment with the department ceases.*

*(b) A person commits an offense if the person violates this section. An offense under this section is a Class A misdemeanor.*

Although §2306.6703 is essentially a restatement of §572.054 of the Government Code as it relates to the board members and five positions of employment at TDHCA, the addition of an application submitted by a "related party" to those applications which TDHCA is required to hold ineligible renders the section incomprehensible. Similarly, §2306.6733 purports to criminalize representation by the former board members and the five former employees and communication by them on behalf of any person or entity included in the definition of "related party."

Section 10 of Article I of the Texas Constitution, among other things, provides that a law must be sufficiently definite so as to be understandable.<sup>6</sup> It would be difficult if not impossible for TDHCA to determine whether an application was submitted by a person or entity within one of the categories of "related party" as is required by §2306.6703. If TDHCA attempted to shift this burden by requiring certification from each tax credit applicant that it was not a "related party," the result would likely be the curtailment of all applications since no applicant could certify with certainty that it did not somehow fall within the definition. In addition, the categories of "related

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<sup>6</sup> *Milligan v. State*, 859 SW 2d 117 (Tex. App.—Eastland, 1993, writ denied); *Ex Parte Meadows*, 109 SW2d 1061 (Tex. Crim. App. 1937) (en banc).

party” simply do not make sense. For example, §2306.6702(a)(11)(H)<sup>7</sup> would prohibit the submission of an application by any tax exempt 501(c)(3) organization if it is controlled “by that person or the person’s family members or by that organization.” The word “person” is not defined in Chapter 2306. It therefore would be assigned the meaning given in the Code Construction Act. The word “person” in §311.005(2) of the Government Code is given a global definition that includes a corporation, trust, partnership, etc. However, if “person” can mean a corporation, who are that “person’s family members?”

Section 10 also provides that the accused is entitled to know the nature of the accusation against him. Similarly, Section 19 of Article I, provides for the due process of laws. It is well established in Texas that a law creating an offense, such as the quoted section, is unconstitutionally vague and indefinite if the statute provides no fair warning and insufficient information as to whether criminal liability would attach to one of the five former employees upon representation on a low-income housing tax credit application to, for example, any person’s brother [§2306.6702(a)(11)(A)], or the grantor of any trust [§2306.6702(a)(11)(D)], or “an S corporation and a C corporation if the same persons own more than 50% of the outstanding stock of each corporation” [§2306.6702(a)(11)(K)]. The scope of the prohibition is almost limitless. Representation of anyone’s brother, for example, appears to be punishable as a criminal offense, not only representation of the brother of a person who has had previous tax credit program involvement with one of the five former employees. Even if the statute could be interpreted to only apply in such situations, the type of client of the former employee that would invoke criminal liability is not readily ascertainable.<sup>8</sup> Before one of the five former employees could agree to represent someone in connection with a tax credit application, it would be incumbent upon the former employee to somehow determine if the potential client fell within one of the thirteen categories of “related party” in §2306.6702(a)(11) and to determine the appropriate definitions for the words used in the subsection. Section 2306.6733 falls far short of the requirement of the Due Process Clause that a law be specific enough to “(1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, and (2) establish determinate guidelines for law enforcement.”<sup>9</sup> It would be fundamentally unfair to attach criminal liability to an action by a board member or employee given the vagueness of §2306.6733.

Should you determine that either §2306.6703 or §2306.6733 or both sections pass constitutional muster, §571.097 of the Government Code provides a defense to prosecution or to the imposition of a civil penalty if an advisory opinion of the Texas Ethics Commission is reasonably relied upon by the accused or a civil defendant. Section 571.091 of the Government Code specifies the statutes concerning which the Texas Ethics Commission is authorized to render opinions. Chapter 2306 of the Government Code is not listed. Similarly, §8.03 of the Penal Code provides an affirmative defense to criminal prosecution if the accused reasonably relied upon either an “official statement” of the law or “a written interpretation of the law ... made by a public official

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<sup>7</sup> 2306.6702(a)(H) a person or organization and an organization that is tax-exempt under Section 501(a), Internal Revenue Code of 1986 (26 U.S.C. Section 501), and that is controlled by that person or the person’s family members or by that organization;

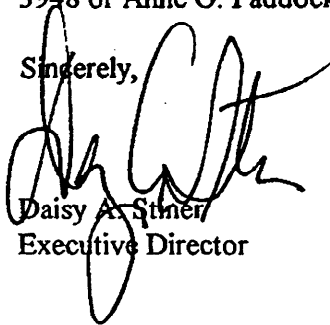
<sup>8</sup> *Long v. State*, 931 SW2d 285 (Tex. Cr. App. 1996) (en banc); *Cotton v. State*, 686 SW2d 140 (Tex. Crim. App. 1985) (en banc); *Margraves v. State*, 996 S.W.2d 290 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1999).

<sup>9</sup> *Sanchez v. State*, 995 SW2d 677 (Tex. Crim. App. 1999) (en banc).

charged by law with responsibility for interpreting the law in question.” Since the Texas Ethics Commission appears to be the agency charged with providing “official statements” concerning such laws, but does not appear to be authorized to issue an opinion concerning §§2306.6703 or 2306.6733, we request guidance as to which “public official” is charged with interpreting these sections. Is it only your office that could provide such a defense or is either the chair of TDHCA’s board of directors or TDHCA’s executive director also so authorized?

We request your opinion concerning the constitutionality of the three statutory provisions cited above as well as the operation of the provisions should they be determined to be constitutional. Since the provisions in question take effect on September 1, 2001, we also request an expedited review if possible. Please do not hesitate to contact Betty J. Marks, General Counsel, at 475-3948 or Anne O. Paddock, Deputy General Counsel, at 475-3917, should you have any questions.

Sincerely,



Daisy A. Stiner  
Executive Director