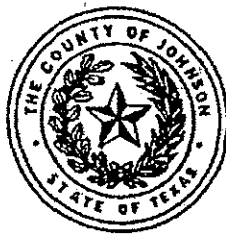


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OPINION COMMITTEE



JOHNSON COUNTY
BILL MOORE
COUNTY ATTORNEY

FILE # ML-46297-10
I.D. # 46297

January 5, 2010

Hon. Greg Abbott
Attorney General of Texas
Opinions Section
P.O. Box 12548
Austin, TX 78711-2548

RQ-0849-GA

RE: Request for Opinion

Dear Attorney General Abbott:

In my position as County Attorney for Johnson County, I am seeking an opinion from your office on the following questions:

1. Whether a conflict of interest exists for the Sheriff under Chapter 171 of the Local Government Code when the Sheriff reviews and approves a bail bond submitted by a bail bond surety who employs the Sheriff's stepson as an agent of the bail bond surety?
2. Whether a conflict of interest exists for the Sheriff under Chapter 171 of the Local Government Code when the Sheriff reviews and approves a bail bond submitted by a bail bond surety in which the wife of the Sheriff's stepson is an agent of the bail bond surety?
3. Whether a conflict of interest exists for the Sheriff under Chapter 171 of the Local Government Code in the event the Sheriff is notified that the bail bond surety has failed to pay a final judgment of forfeiture later than the 31st day after the date of the final judgment and a timely motion for new trial has not been filed, and the stepson and stepson's wife of the Sheriff are agents of that bail bond surety?
4. Whether a conflict of interest exists for the Sheriff under Chapter 171 of the Local Government Code when a bail bond forfeiture is granted on a bail bond executed by a bail bond surety in which the Sheriff's stepson and stepson's wife are agents of the bail bond surety?
5. Whether a conflict of interest exists for the Sheriff under Chapter 171 of the Local Government Code when an affidavit stating that an accused is incarcerated in federal custody, in the custody of any state, or in any county of this State is presented to the Sheriff by a bail bond surety in which the Sheriff's stepson and stepson's wife are agents of the bail bond surety?

Statement of Facts:

Johnson County has a bail board that was created prior to the population of Johnson County being 110,000 or more. The 2000 census found the population of Johnson County to be more than 110,000 and therefore said bail bond board continues to exist pursuant to the requirements of Section 1704.002 (1) of the Occupations Code. Under Section 1704.053, the Sheriff of Johnson County or his designee is a member of the Johnson County Bail Bond Board (hereafter referred to as "JCBBB") and the Sheriff currently serves as chairperson of the JCBBB. On September 9, 2009 the JCBBB approved the applications for the Sheriff's stepson and the stepson's wife as agents for a bail bond surety licensed by the JCBBB. The bail bond surety has been licensed for several years by the JCBBB, operates a bail bond business under an assumed name in Johnson County, and executes bail bonds as a surety for persons charged with felony and misdemeanor criminal offenses in Johnson County. According to information provided to the County Attorney's Office, the Sheriff's stepson is an agent and salaried employee of the bail bond surety while his stepson's wife is an agent but receives no compensation from the bail bond surety. For purposes of this opinion request, assume that the Sheriff's stepson has a substantial interest in the bail bond company under Section 171.002 (2) of the Local Government Code as the stepson is a salaried employee and the funds he receives from the bail bond surety will exceed 10 percent of his gross income for the previous year. Also, assume that any income received by the Sheriff's stepson would be community property of the stepson and the stepson's wife. All bail bonds executed by a bail bond surety in Johnson County are presented to the Sheriff and approved by the Sheriff or his deputy before a person charged with a criminal offense is released from the jail on said bail bond.

Argument

Section 171.001 of the Local Government Code defines a local public official as a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature. Tex. Loc. Gov't Code Ann. §171.001 (1) (Vernon 2007). Attorney General Opinion GA-0510 held that because a constable is a precinct officer who exercises responsibilities beyond those that are advisory in nature, a constable is a local public official and therefore generally subject to chapter 171. Tex. Att'y Gen. Op. No. GA-0510 (2007). While dealing with a separate issue of whether a sheriff may also serve as a volunteer fireman, the Attorney General held that "chapter 171 would not prevent a public official such as a sheriff from serving in the department". Tex. Att'y Gen. Op. LO-93-54 (1993). Thus, a sheriff is a local

public official. Section 171.001(2) defines a business entity as a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law. Tex. Loc. Gov't Code Ann. §171.001 (2) (Vernon 2007). Under this definition, a bail bond surety licensed by the JCBBB and operating a bail bond business under an assumed name is a business entity.

Section 171.002(a) states that for purposes of Chapter 171, a person has a substantial interest in a business entity if: (1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or (2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year. *Id.* §171.002 (a). Section 171.002(c) states that 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, has a substantial interest under this section. *Id.* §171.002 (c). For purposes of Section 171.002(c), "the relatives of a public official within the first degree by consanguinity are his or her parents and children, while his or her spouse is a relative within the first degree by affinity". Tex. Att'y Gen. Op. No. JC-0063 (1999) citing Tex. Gov't Code Ann. §§573.023 (c) (1), .024 (a), .025 (a) (Vernon 1994). The opinion further states, "a relationship in the first degree by affinity also exists when the spouse of one of the individuals is related in the first degree by consanguinity to the other, that is, between a person and his or her parents-in-law, son- or daughter-in-law, and the children of his spouse". See *Id.* §573.024 (a) (2). "Thus, Chapter 171 imputes any 'substantial interest' of a public official's spouse, parents, children, step-children, father- and mother-in-law, or son- and daughter-in-law to the officer". See *Id.* citing Tex. Att'y Gen. Op. No. D.M.-267 (1993) at 2; Tex. Att'y Gen. Op. LO-95-080, at 3. Under Chapter 573, the stepson of the Sheriff and the stepson's wife are related to the Sheriff in the first degree by affinity, and any substantial interest in a business entity by the stepson would be imputed to the Sheriff.

Section 171.004 provides that if a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if: (1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from its effect on the public. Tex. Loc. Gov't Code Ann. § 171.004 (a) (1) (Vernon 2007). Section 171.004 (b) states that the affidavit must be filed with the official record keeper of the governmental entity. *Id.* §171.004 (b). Section 171.004(c) states that if a local public official is required to file and does file an affidavit under Subsection (a), the

official is not required to abstain from further participation in the matter requiring the affidavit if a majority of the members of the governmental entity of which the official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action. *Id.* §171.004 (c). As a member of the JCBBB, on any matter before the JCBBB that concerned the bail bond surety for which the stepson and the stepson's wife are agents, the Sheriff would be required to comply with Section 171.004 which states that if a local official has a substantial interest in a business, the official shall file, before a vote or decision on the matter involving the business entity, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public. Tex. Loc. Gov't Code Ann. § 171.004 (a) (1) (Vernon 2007).

What complicates this matter is the approval or acceptance of the Sheriff of each bail bond executed by the bail bond surety for which the stepson and the stepson's wife are agents. The Sheriff can comply with the requirements of Section 171.004 (a) (1) of the Local Government Code on matters before the JCBBB regarding the bail bond surety in which his stepson and his stepson's wife are agents; however, the question is whether the Sheriff has a conflict of interest when accepting or approving bail bonds for the bail bond surety which has as agents the Sheriff's stepson and the stepson's wife. In Attorney General Opinion GA-0510, it was stated that, "But the apparent purpose of section 171.004 does not include ordinary law enforcement decisions. For example, in JM-776 this office considered whether the predecessor of section 171.004 applied to an investigator of the district attorney's office whose spouse was a bail bondsman... The opinion concluded that a typical duty-related decision of an investigator, such as the determination of the existence of probable cause to make a warrantless arrest, 'is not a vote or decision on a matter involving a business entity in which the applicant has a substantial interest'". Tex. Att'y Gen. Op. No. GA-0510 (2009) citing Tex. Att'y Gen. Op. No. JM-776 (1987).

The issue then becomes whether the approval by the Sheriff of a bail bond is an ordinary law enforcement decision or rather a duty that is specific and distinct to the Sheriff. The Sheriff is authorized under articles 17.20, 17.21 and 17.23 of the Code of Criminal Procedure to take bail from a defendant. Additionally Section 1704.201 of the Occupations Code provides that a sheriff shall accept or approve a bail bond executed by a license holder in the county in which the license holder is licensed if: (1) the bond is for a county or district case; (2) the bond is executed in accordance with this chapter and the rules adopted by the board; and (3) a bail bond is required as a condition of release of the defendant for whom the bond is executed. Tex. Occ. Code Ann. § 1704.201 (Vernon

2004). Attorney General Opinion JM-1057 recognized that the 67th Legislature in 1981 amended section 4 of Article 2372p-3 (the predecessor to section 1704.201 of the Occupations Code) and removed the sheriff's discretionary power to refuse to accept any bond if in the exercise of his discretion, he is satisfied that the security is insufficient, any portion of the security has been feloniously obtained, or the provisions of this Act have been violated. Tex. Att'y Gen. Op. No. JM-1057 (1989) citing *Minton v. Frank*, 345 S.W.2d 442 (Tex. 1976), *Bexar County Bail Bond Bd. v. Deckard*, 604 S.W. 2d 214 (Tex. Civ. App. – San Antonio 1980, no writ). Nevertheless, the Sheriff is making a determination if a bond executed by a bail bond surety meets the requirements of Section 1704.201. Therefore, pursuant to Section 1704.201, the Sheriff is making a decision on a bail bond which is a decision or matter involving a business entity (bail bond surety) which will have a special economic effect on the business entity that is distinguishable from the effect on the public. The acceptance or approval by the Sheriff of a bail bond is clearly distinguishable from an ordinary law enforcement decision such as the determination of whether probable cause exists to make a warrantless arrest as addressed in Attorney General Opinion JM-776.

It appears that Section 171.004 contemplates the situation where a public official is a member of a group of public officials wherein a public official, who has a substantial interest in a business entity or in real property, can abstain from participating in the discussion and vote on a matter that will have a special economic effect on the business entity or a special effect on the value of the real property. The situation with the Sheriff accepting or approving a bail bond is a specific statutory duty placed on the Sheriff and not one authorized for other county public officials. Section 85.003 of the Local Government Code provides that a deputy may perform the acts and duties of the deputy's principal. Tex. Loc. Gov't Code Ann. §85.003 (Vernon 2007). The deputy may therefore accept and approve a bail bond as the Sheriff may. A deputy sheriff is still an agent of the sheriff and subject to the orders of the sheriff. Tex. Att'y Gen. Op. No. GA-0101 (2003) citing Tex. Att'y Gen. Op. No. DM-212 (1993) at 5, citing *Naill v. State*, 129 S.W. 630, 631 (Tex. Crim. App. 1910). If the Sheriff, as principal, has a conflict of interest under Chapter 171 of the Local Government Code regarding accepting and approving a bail bond then his deputy, as an agent, would also have a conflict of interest. Therefore, the statutory procedures of Section 171.004 (a) (1) of the Local Government Code for dealing with a conflict of interest would not be applicable for the Sheriff in the event he has a conflict of interest due to a substantial interest in a bail bond company since a conflict for the principal is a conflict for the agent. Tex. Loc. Gov't Code Ann. § 171.004 (a) (1) (Vernon 2007). My research has not indicated a method for the Sheriff to cure this conflict of interest.

An additional issue is whether a conflict of interest exists in the event the Sheriff is notified that the bail bond surety, has failed to pay a final judgment of forfeiture later than the 31st day after the date of the final judgment and a timely motion for new trial has not been filed, and the stepson and stepson's wife are agents of that bail bond surety. Under Section 1704.2535 of the Occupations Code, the board or its authorized representative shall notify the sheriff if a person fails to pay a final judgment on a forfeiture of a bail bond executed by the person not later than the 31st day after the date of the final judgment unless a timely motion for new trial has been filed. Tex. Occ. Code Ann. § 1704.2535 (a) (Vernon 2004). After receiving notification, the Sheriff may not accept any bonds from the bail bond surety until the surety pays the judgment. *Id.* § 1704.2535 (b). Section 1704.2535 (d) states that a board is not required to provide notice or a hearing before making the notification required by this section. *Id.* § 1704.2535 (d). Based upon the assumed facts for this opinion request, the Sheriff has a substantial interest in the bail bond business by imputation with the bail bond surety in which the Sheriff's stepson and stepson's wife are agents. In the event that the bail bond surety fails to pay a judgment on a forfeiture on a bail bond later than the 31st day after the date of the final judgment and a timely motion for new trial has not been filed, the Sheriff would be making a decision on a bail bond business that is a business entity in which the Sheriff's action on the matter would have a special economic effect on the bail bond surety that is distinguishable from the effect on the public. Chapter 171 of the Local Government Code does not provide a method for the Sheriff to cure this conflict of interest.

In addition, Attorney General Opinion JC-0121 held that a bail bond forfeiture judgment is debt owed to the county rather than a debt owed to the state and stated, "In sum, a bail bond is a contract in which the surety has an interest and to which the county is a party". Tex. Att'y Gen. Op. No. JC-0121 (1999). Bond forfeitures on bail bonds executed by the bail bond surety in which the Sheriff's stepson and his stepson's wife are agents also appear to create a conflict of interest for the Sheriff. Article 22.13 of the Texas Code of Criminal Procedure provides causes which will exonerate the defendant and his sureties from liability upon a forfeiture taken. The statute provides that incarceration of the principal in the case of a misdemeanor, at the time of, or not later than the 180th day after the date of the principal's failure to appear in court, and the incarceration of the principal in the case of a felony, at the time of, or not later than the 270th day after the date of the principal's failure to appear in court will exonerate the defendant and his sureties from liability upon the bond forfeiture. Tex. Code of Crim. Proc. Ann. art. 22.13 (a) 5 (A) and (B) (Vernon 2007). The question is whether incarcerating those defendants who have bond forfeitures of bail bonds executed by the bail bond surety which has as agents the Sheriff's stepson and the stepson's wife is an ordinary law enforcement decision. The court in which the defendant's case is pending has entered a judgment forfeiting the bond and issuing a warrant for the arrest of the

defendant. Attorney General Opinion GA-0510 held that the apparent purpose of section 171.004 does not include ordinary law enforcement decisions. Tex. Att'y Gen. Op. No. GA-0510 (2007). Under Chapter 171 of the Local Government Code, the Sheriff has a substantial interest in any business in which a close family member has a substantial interest. Tex. Att'y Gen. Op. No. JC-0121 (1999). The Sheriff is placed in the position of being able to exonerate the defendant and the bail bond surety from liability in the event the Sheriff and/or his deputies arrest the defendant in the time frame set forth on Article 22.13. This involves the Sheriff making a decision on a matter that will have a special economic effect on the business entity that is distinguishable from the effect on the public. Even though the act of arresting a defendant on a warrant is a law enforcement function, the decision determining which particular bond forfeiture warrants to actively pursue and in what order to pursue them is discretionary and could be characterized as not being an ordinary law enforcement decision, and Chapter 171 of the Local Government Code does not provide a method for the Sheriff to cure this conflict of interest.

Article 17.16 of the Texas Code of Criminal Procedure provides that a surety may be discharged of liability on a bond forfeiture by delivering to the Sheriff where the prosecution is pending an affidavit stating that the accused is incarcerated in federal custody, in the custody of any state, or in any county of this state. Tex. Code of Crim. Proc. Ann. art. 17.16 (a) (2) (Vernon 2007). The bond is discharged and the surety is absolved of liability on the bond on the sheriff's verification of the incarceration of the accused. *Id.* art. 17.16 (b). Under Chapter 171 of the Local Government Code, the Sheriff has a substantial interest in any business in which a close family member has a substantial interest. Tex. Att'y Gen. Op. No. JC-0121 (1999). In the event that the bail bond surety in which the Sheriff's stepson and his stepson's wife are agents presents to the Sheriff an affidavit pursuant to Article 17.16, the Sheriff is placed in the position of making a decision on a matter that will have a special economic effect on the business entity that is distinguishable from the effect on the public which would include how to prioritize existing affidavit verifications as well as how to allocate county resources to accomplish the verifications. Arguably, the Sheriff's verification under Article 17.16 (b) is not an ordinary law enforcement function decision and Chapter 171 of the Local Government Code does not provide a method for the Sheriff to cure this conflict of interest.

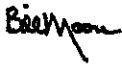
Summary

Chapter 171 of the Local Government Code provides a procedure whereby a local public official who has a substantial interest in a business entity may file an affidavit and abstain from voting on an action on the matter that will have a special economic effect on the

business entity that is distinguishable from the effect on the public. As a member of the JCBBB, Chapter 171 provides the Sheriff with the procedures for dealing with a conflict of interest on matters presented to the JCBBB due to the Sheriff's stepson and stepson's wife being agents of the bail bond surety that is licensed by the JCBBB. It appears that additional conflicts of interest arise that cannot be cured by the procedures of Chapter 171 when: (1) the Sheriff accepts or approves a bail bond executed by the bail bond surety that has as agents the Sheriff's stepson and the stepson's wife; (2) the Sheriff is notified that the bail bond surety, that has as agents the Sheriff's stepson and the stepson's wife, has failed to pay a final judgment of forfeiture later than the 31st day after the date of the final judgment and a timely motion for new trial has not been filed; (3) a bail bond forfeiture is granted on a bail bond executed by a bail bond surety that has as agents the Sheriff's stepson and the stepson's wife; and (4) an affidavit regarding a bail bond executed by a bail bond surety, that has as agents the Sheriff's stepson and the stepson's wife, is presented to the Sheriff stating that the accused is incarcerated in federal custody, in the custody of any state, or in any county of this State.

Thank you for your time and consideration with regard to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,



Bill Moore
Johnson County Attorney

cc: Johnson County Sheriff