

Legal Q&A

By **Zindia T Thomas**, TML Assistant General Counsel

Q. What is “bribery”?

A. Under Section 36.02(a) of the Penal Code, a public official or public employee commits the offense of bribery when he/she accepts, agrees to accept, or solicits any benefit as consideration for a decision, opinion, recommendation, vote, or other exercise of discretion. To prove bribery, a prosecutor must show that the benefit offered or given to an official was offered or given as consideration for an official’s decision. This is a fact question that would have to be addressed on a case-by-case basis.

Q. What is considered a “benefit”?

A. A “benefit” is anything reasonably regarded as pecuniary gain or pecuniary advantage, including a benefit to any other person in whose welfare the beneficiary has a direct and substantial interest (such as a relative or business partner). Tex. Penal Code § 36.01(3). In other words, a benefit would include anything that is offered that a reasonable person would consider having some monetary value.

Q. May a public official or employee accept a benefit if it was offered or accepted after the exercise of official discretion?

A. Even if a benefit was offered or accepted after the exercise of official discretion, it may still be considered bribery of a public official or employee. According to section 36.02(c) of the Penal Code, the fact that a benefit was not offered or accepted until after the exercise of some official discretion is not a defense to bribery.

Q. What is the punishment for bribery?

A. Accepting, agreeing to accept, or soliciting any benefit as consideration for a decision, opinion, recommendation, vote, or other exercise of official discretion is a second degree felony, punishable by two to twenty years of imprisonment and a fine of up to \$10,000. Tex. Penal Code §§ 36.02(e), 12.33.

Q. May a public official be removed from office if the public official is convicted of bribery?

A. If a public official is convicted of bribery, then the public official is immediately removed from office. Tex. Loc. Gov't Code § 21.031. The judge shall include an order of removal in the conviction judgment.

Q. May a public official or employee 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?

A. Public officials and employees are prohibited from accepting gifts of any kind from a person subject to his/her jurisdiction, regardless of whether it is in recognition of superior service or a token of gratitude. Tex. Penal Code § 36.08. These gifts are also considered a benefit as defined above. A floral arrangement, gift basket, gift certificate, tickets to an event, or complementary/discounted services or products would constitute a gift.

Q. What if the gift is unsolicited?

A. Even if a gift is unsolicited, it may still be considered bribery of a public official or an employee or a gift from a person subject to his/her jurisdiction if the public official or employee accepts or agrees to accept the unsolicited gift, and the gift is considered a benefit a reasonable person would consider to have some monetary value.

Q. What may a public official or employee do if he/she receives an unsolicited gift?

A. A prohibited unsolicited gift may be donated to a governmental entity that has the authority to accept the gift or to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes. Tex. Penal Code § 36.08(i).

Q. Are there any gifts a public official or employee may accept?

A. There are some gifts that a public official or employee may accept. Section 36.10 of the Penal Code lists some exception to gifts to public official or employees subject to his/her jurisdiction. The exceptions include:

- 1) An item that has a value of less than \$50 (excluding cash or a negotiable instrument);
- 2) A gift given by a person with whom the official or employee has a familial, personal, business, or professional relationship that is independent of the official or employee's status or work;
- 3) Any benefit that the official or employee is entitled to receive by law or for which the person has performed a duty independent of the person's status as a public servant (e.g. jury duty fee); or
- 4) Political contributions as defined by Title 15 of the Election Code.

Q. May a public official or employee receive food and entertainment?

A. A public official or employee may lawfully accept food, lodging, transportation, or entertainment as a guest – meaning that the recipient must be in the presence of the donor. Tex. Penal Code § 36.10(b); Tex. Ethics Comm'n Op. Nos. 261 (1995), 118 (1993). If the public official or employee is required by state law to report such a gift, it must be done in accordance with the law for the exception to apply. *Id.*

Q. What is the punishment for accepting a gift from a person subject to a public official or employee's jurisdiction?

A. The acceptance by a public official or employee of a gift offered by a person under the official or employee's jurisdiction is a Class A misdemeanor punishable by a fine of up to \$4,000 and/or jail time of up to one year. Tex. Penal Code §§ 36.08(h), 12.21.

Q. May a public official or employee accept a small gift or payment for speaking at an event because of his/her official position?

A. A public official or employee may not solicit, accept, or agree to accept a gift or payment, known as an honorarium, in return for services that would not have been requested but for the public servant's official position or duties. *Id.* § 36.07(a). Although the Penal Code does not define "honorarium," numerous ethics opinions can provide some guidance. For instance, the Texas Ethics Commission has noted that an "honorarium" is commonly understood to be "a payment in recognition of acts or professional services for which custom or propriety forbids a price to be set." Tex.

Ethics Comm'n Op. No. 401 (1998). Also, the Texas Ethics Commission has determined that fees for speaking, teaching, and certain other services are included in the term "honorarium". Tex. Ethics Comm'n Op. Nos. 305 (1996), 294 (1995). A public official or employee may accept meals, transportation and lodging expenses connected with a speaking engagement at a conference or similar event to the extent that the involvement in the event is more than merely perfunctory. Tex. Penal Code § 36.07(b)

Q. What may a public official or employee do if he/she receives an unsolicited honorarium?

A. A public official or employee should refuse an unsolicited honorarium. The offering entity is free to make some other use of the honorarium. Tex. Ethics Comm'n Op. Nos. 427 (2000), 150 (1993).

Q. What is the punishment for a public official or employee who accepts an honorarium?

A. The acceptance of an honorarium by a public official or employee is a Class A misdemeanor punishable by a fine of up to \$4000 and/or jail time of up to one year. Tex. Penal Code §§ 36.07(c), 12.21.

Q. Are public officials or employees prohibited from using government property for personal purposes?

A. State law prohibits public officials or employees from misusing government property, services, personnel, or any other thing of value belonging to the government with the intent to obtain a benefit or to harm or defraud another. *Id.* §39.02(a)(2). "Misuse" is defined as dealing with property in a way that is contrary to:

- 1) An agreement under which the public servant holds the property;
- 2) A contract of employment or oath of office of a public servant;
- 3) A law that prescribes the manner of custody or disposition of the property; or
- 4) A limited purpose for which the property is delivered. *Id.* § 39.01(2)(A)-(D).

Q. What is the punishment for misuse of government property?

A. The punishment for misuse of government property ranges from a Class C misdemeanor to a first degree felony, depending on the value of the misused property. *Id.* § 39.02(c).

Q. May a public official be removed from office if the public official is convicted of accepting an illegal gift or honorarium, or misusing government property?

A. There is no special remedy under the Penal Code providing for the removal of a public official due to a conviction for accepting an illegal gift or honorarium, or misusing government property. However, if a public official is criminally convicted of such an offense, it may affect his or her eligibility for office. Additionally, such a conviction may act to automatically remove the public official from office or be grounds for removal from office through a recall or other removal action if such is authorized under state law or a city charter. Tex. Loc. Gov't Code §§ 21.025, 21.031.

Q. Are public officials or employees prohibited from using official information to gain a benefit or an advantage?

A. Public officials or employees are prohibited from disclosing information to which the public officials or employees have access by virtue of their office or employment and that has not been made public with intent 1) to gain a benefit or advantage, or 2) to harm or defraud another. Tex. Penal Code § 39.06. "Information that has not been made public" means any information to which the public does not generally have access to and that is prohibited from disclosure under the Public Information Act. *Id.* § 39.06(d).

Q. What is the punishment for misuse of official information?

A. Generally, the punishment for misuse of official information is a third degree felony punishable by two to ten years of imprisonment and a fine not to exceed \$10,000. Tex. Penal Code §§ 39.06(e), 12.34.

Q. Can a public official be removed from office for a violation of the misuse of official information?

A. Generally, if a public official is convicted for misuse of official information, the public official is immediately removed from office. Tex. Loc. Gov't Code § 21.031. The judge shall include an order of removal in the conviction judgment.