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Opinion No. 06-002

Disclosure Requirements under Ethics Act

QUESTIONS

1. 2005 Tenn. Pub. Acts Ch. 102 (the "Ethics Act") added new §§ 2-10-122 — 128 to the Tennessee Code. Under Tenn. Code Ann. §§ 2-10-125 and -126, various individuals and entities must disclose information regarding a contract for consulting services. What definition of "consulting services" should be used when applying these provisions?

2. Should the definition of "official in the executive branch" in Tenn. Code Ann. § 2-10-122(4) be used when determining what board and commission members are required to file under Tenn. Code Ann. §§ 2-10-125 and -126?

3. Would a board or commission member be required to file a report under Tenn. Code Ann. § 2-10-126 if that person also works for an association, corporation, or entity that employs a lobbyist?

4. Does the Registry of Election Finance have civil penalty authority for violations of the Ethics Act?

5. Which boards are included within the following:

a. "[M]ember of a commission established by and responsible to the general assembly or either house of the general assembly" under Tenn. Code Ann. § 2-10-125(a); and

b. "[M]ember or employee of a state regulatory commission, including, without limitation, directors of the Tennessee regulatory authority" under Tenn. Code Ann. § 2-10-125(a)?

OPINIONS

1. The definition of "consulting services" contained in Tenn. Code Ann. § 2-10-122(1) should be used when interpreting the disclosure requirements in §§ 2-10-125 and -126.

2. No. But board and commission members who receive only expenses or a per diem of six hundred dollars or less per month are only required to disclose consulting services with respect to the board or commission of which they are members.

3. The fact that an individual works for an association, corporation, or entity that employs a lobbyist does not necessarily mean that the individual receives compensation for consulting services. The individual must examine his or her duties to the employer, as well as the employer's purpose. If the individual receives compensation from a private entity for advising or assisting a person or entity in influencing state legislative or administrative action, or in maintaining, applying for, soliciting, or entering into a contract with the State, then the individual must disclose it under Tenn. Code Ann. § 2-10-126.

4. Yes.

5.a. This term applies to an independent commission established by either or both Houses of the General Assembly and required to report back to either or both Houses. Examples cited in the legislative history are the Sentencing Commission and the Tax Reform Commission.

b. We think a court would conclude that this term refers to any body created by state law exercising a regulatory or oversight function, particularly boards and commissions regulating commercial or industrial activity or professions. It should be noted, however, that the disclosure requirements also include any member or employee of any "executive department or agency or other state body in the executive branch." This term includes any member or employee of any state department, agency, or body whose primary duties are to administer and enforce the laws.

ANALYSIS

INTRODUCTION

This opinion concerns the applicability and enforcement of disclosure requirements under 2005 Tenn. Pub. Acts Ch. 102 (the "Ethics Act"). The Ethics Act added §§ 2-10-122 through -128 to the Tennessee Code. The Ethics Act contains prohibitions and disclosure requirements with regard to officials and employees who receive payment for "consulting services."

As an initial matter, it is not clear how much authority the Registry of Election Finance (the "Registry") was given with regard to the Ethics Act. This Office has noted that, where the Registry is authorized to administer and enforce a statute, its rules and other interpretations of the statute are entitled to deference. Op. Tenn. Att'y Gen. 98-122 (July 10, 1998). The legislative history of the Act provides little guidance regarding the issues discussed in this opinion.

Under Tenn. Code Ann. § 2-10-125, enacted under the Ethics Act:

> (a) If any person or other entity, other than the state, a county or municipality, contracts to pay a fee, commission or any other form of compensation for consulting services to any staff person or employee of the general assembly; member of a commission established by and responsible to the general assembly or either house of the general assembly; member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee regulatory authority; or

> member or employee of any executive department or agency or other state body in the executive branch, *then such person or entity shall disclose* the following to the registry of election finance:
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> (1) The person to whom the fee was paid;
> (2) The position of the person to whom the fee was paid;
> (3) The amount of the fee;
> (4) The date the services were rendered; and
> (5) A general description of the services rendered.

(Emphasis added). Thus, § 2-10-125 requires the payer to disclose information regarding an agreement with certain state employees or officials to provide "consulting services." The disclosure "shall" be on a form designed by the Registry of Election Finance. Tenn. Code Ann. § 2-10-125(b). Disclosure forms must be filed within five days of entering into any contract for consulting services and must be updated quarterly. *Id.* The disclosure form must be made under oath and contain a statement that a false statement on the report is subject to the penalties of perjury. *Id.* It is a Class C misdemeanor for any person or entity to knowingly fail to file a disclosure form under this section. Tenn. Code Ann. § 2-10-125(d)(1). It is a Class C misdemeanor for any person or entity to file a disclosure form required under this section more than thirty days after the date on which the report is due. Tenn. Code Ann. § 2-10-125(d)(2).

Tenn. Code Ann. § 2-10-126(a) provides:

> Any staff person or employee of the general assembly; member of a commission established by and responsible to the general assembly or either house of the general assembly; member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee regulatory authority; or member or employee of any executive department or agency or other state body in the executive branch, *who contracts to receive* a fee, commission or any other form of *compensation for consulting services* from a person or entity other than the state, a county or municipality, shall be required to make the same disclosure required by § 2-10-125. The registry of election finance may devise a new form for disclosure of consulting fees or may modify the one required by § 2-10-125 for use by all parties required to disclose.

(Emphasis added). This statute, therefore, requires certain payees under "consulting services" contracts to disclose the same information that the payer must disclose under § -125. The disclosure "shall" be on a form designed by the Registry of Election Finance. Tenn. Code Ann. § 2-10-126(c). Disclosure forms must be filed within five days of entering into any contract for consulting services and must be updated quarterly. *Id.* The disclosure form must be made under oath and contain a statement that a false statement on the report is subject to the penalties of perjury. *Id.* It is a Class C misdemeanor for any person or entity to knowingly fail to file a disclosure form under this section. Tenn. Code Ann. § 2-10-126(d)(1). It is a Class C misdemeanor for any person or entity to file a

disclosure form required under this section more than thirty days after the date on which the report is due. Tenn. Code Ann. § 2-10-126(d)(2).

The first question is the definition of "consulting services" to be used in applying the disclosure requirements of Tenn. Code Ann. §§ 2-10-125 and -126. The Ethics Act states:

> As used in this section and §§ 2-10-123 — 2-10-128, unless the context otherwise requires:
>
> (1) "Consulting services" *with respect to an official in the legislative branch or an official in the executive branch* means services to advise or assist a person or entity in influencing state legislative or administrative action as such term is defined in § 3-6-102(11), including, but not limited to, services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state. The term "consulting services" does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure;
>
> (2) "Consulting services" *with respect to an elected municipal or county official, including members-elect of a municipal or county legislative body*, means services to advise or assist a person or entity in influencing municipal or county legislative or administrative action as such term is defined in § 3-6-102(11), including, but not limited to, services to advise or assist such person or entity in maintaining, applying for, soliciting or entering into a contract with the municipality or county represented by such official. "Consulting services" does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure.

Tenn. Code Ann. § 2-10-122(1) and (2) (emphasis added).

By its terms, the definition of "consulting services" in Tenn. Code Ann. § 2-10-122(1), while it refers to influencing state legislative or administrative action, states that it is to be applied "with respect to an official in the legislative branch or an official in the executive branch." These terms are also defined in the Ethics Act. The term "official in the executive branch" means:

> the governor, any member of the governor's staff or any person in the executive service as such term is defined in § 8-30-208(b); provided, however, that such term shall not include members of boards and commissions who receive only expenses or a nominal per diem not to exceed six hundred dollars ($600.00) per month, unless they provide consulting services for compensation with respect to the activities of the board or commission of which they are a member.

Tenn. Code Ann. § 2-10-122(4). Under Tenn. Code Ann. § 8-30-208(b), "executive service" refers to officials such as board members, commissioners, deputy commissioners, and wardens; under

subsection (c) of the same statute, all other regular full-time positions in state service are in the "career service."

The term "official in the legislative branch" has the same meaning as such term is defined in § 3-6-102(17). Tenn. Code Ann. § 2-10-122(5). Tenn. Code Ann. § 3-6-102(17) provides:

> "Official in the legislative branch" means any member, member-elect, any staff person or employee of the general assembly or any member of a commission established by and responsible to the general assembly or either house thereof who takes legislative action. "Official in the legislative branch" also includes the secretary of state, treasurer, and comptroller of the treasury and any employee of such offices.

Tenn. Code Ann. § 2-10-126, however, does not contain the terms "official in the executive branch" or "official in the legislative branch." Instead, by its terms, the statute applies the disclosure requirements to *any* of the following: (1) staff person or employee of the General Assembly; (2) member of a commission established by and responsible to the General Assembly or either House; (3) member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee Regulatory Authority; or (4) member or employee of any executive department or agency or other state body in the executive branch. This list includes individuals who would not fall within the definition of "official in the executive branch" under Tenn. Code Ann. § 2-10-122(4). In fact, neither the term "official in the executive branch" nor the term "official in the legislative branch" appears outside the definitions in the Ethics Act. The terms were used in House Bill 1/ Senate Bill 1841 as they were first filed in each House; that bill contained disclosure requirements for officials in the legislative branch, officials in the executive branch, or their immediate families. But, the bill was later extensively rewritten to impose a prohibition on certain listed officials and the current disclosure requirements.

Tenn. Code Ann. § 2-10-123(a) provides that certain behavior by some state officials is prohibited. The statute provides:

> It is an offense for any member of the general assembly, member-elect of the general assembly, governor, member of the governor's staff, secretary of state, treasurer, or comptroller of the treasury to knowingly receive a fee, commission or any other form of compensation for consulting services from any person or entity, other than compensation paid by the state, a county or municipality.

Again, this provision does not use the term "official in the executive branch" or "official in the legislative branch." Clearly, however, the individual officers listed fall within the definitions of those terms in the Ethics Act. For that reason, it is clear the General Assembly intended the definition of "consulting services" in Tenn. Code Ann. § 2-10-122(1) to apply to the prohibition in Tenn. Code Ann. § 2-10-123(a).

All of the individuals listed in Tenn. Code Ann. § 2-10-125(a) are either state employees or state officials. Similarly, Tenn. Code Ann. § 2-10-122(1) defines "consulting services" to include "services to advise or assist a person or entity in influencing *state* legislative or administrative action." (Emphasis added). We think the General Assembly intended the term "consulting services" as applied to the individuals subject to the disclosure requirements in Tenn. Code Ann. § 2-10-126 to have the same definition as "consulting services" used in Tenn. Code Ann. § 2-10-122(1), that is:

> services to advise or assist a person or entity in influencing state legislative or administrative action as such term is defined in § 3-6-102(11), including, but not limited to, services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state. The term "consulting services" does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure.

Unless this interpretation is applied, the disclosure requirements imposed under Tenn. Code Ann. §§ 2-10-125 and -126 are meaningless. Criminal statutes must be construed in the light of reason, having in mind the object of the statute and the mischief it aims at. *State v. Harrison*, 692 S.W.2d 29, 31 (Tenn. Crim. App. 1985), *p.t.a. denied* (1985), citing *State v. Netto*, 468 S.W.2d 725, 728 (Tenn. 1972). It must be presumed in statutory construction that the General Assembly did not intend an absurdity, and such a result must be avoided, if possible, by reasonable construction of a statute. *Id.* For these reasons, we conclude that the definition of "consulting services" appearing in Tenn. Code Ann. § 2-10-122(1) applies to Tenn. Code Ann. § 2-10-125 and -126.

2. Board and Commission Members Required to Disclose

The next question is whether the definition of "official in the executive branch" should be applied to determine which officials must disclose under Tenn. Code Ann. §§ 2-10-125 and -126. The Ethics Act provides the following definition of "official in the executive branch:"

> "Official in the executive branch" means the governor, any member of the governor's staff or any person in the executive service as such term is defined in § 8-30-208(b); provided, however, that such term shall not include members of boards and commissions who receive only expenses or a nominal per diem not to exceed six hundred dollars ($600.00) per month, unless they provide consulting services for compensation with respect to the activities of the board or commission of which they are a member.

Tenn. Code Ann. § 2-10-122(4). Under Tenn. Code Ann. § 8-30-208(b), "executive service" refers to officials such as board members, commissioners, deputy commissioners, and wardens; under subsection (c), all other regular full-time positions in state service are in the "career service." The last proviso of the definition of "official in the executive branch" excludes many board members.

By its terms, Tenn. Code Ann. § 2-10-126(a) applies the disclosure requirements to *any* of the following:

> (1) Staff person or employee of the General Assembly;
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> (2) Member of a commission established by and responsible to the General Assembly or either House of the General Assembly;
>
> (3) Member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee Regulatory Authority; or
>
> (4) Member or employee of any executive department or agency or other state body in the executive branch.

Section 126 nowhere uses the term "official in the executive branch." That definition, therefore, should not be used in determining which officials are subject to the disclosure requirements.

But the Ethics Act limits the "consulting services" that these board members must disclose. The definition of "consulting services" in Tenn. Code Ann. § 2-10-122(1) is "with respect to an official in the legislative branch or an official in the executive branch." We think a court would conclude that, by including the defined term "official in the executive branch" in the definition of consulting services, the General Assembly meant to require many board and commission members to disclose only services provided with respect to the boards of which they are members. Otherwise, the separate definition of "official in the executive branch" has no statutory effect at all. Further, the Ethics Act imposes criminal sanctions for failing to meet the disclosure requirements. A statute that prescribes a criminal offense must be construed strictly in favor of the defendant. *State v. Eberhardt*, 659 S.W.2d 807 (Tenn. Crim. App. 1983). For these reasons, while a board member who receives a per diem of six hundred dollars or less per month for his or her board service must file a disclosure statement, he or she is only required to disclose consulting services for compensation with respect to the board or commission of which he or she is a member.

3. Triggering the Disclosure Requirements

The next question is whether a board or commission member would be required to file a report under Tenn. Code Ann. § 2-10-126 if that person also works for an association, corporation, or entity that employs a lobbyist. By its terms, Tenn. Code Ann. § 2-10-126(a) applies the disclosure requirements to *any* of the following persons who contracts to receive a fee, commission, or other form of compensation for "consulting services" from a person or entity other than the state, a county, or municipality:[1]

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[1] The terms "fee, commission, or any other form of compensation" do not include anything of value that may be accepted under Tenn. Code Ann. § 2-10-116 or identified in § 3-6-114(b) or (c). Tenn. Code Ann. § 2-10-122(3).

> (1) Staff person or employee of the General Assembly;
>
> (2) Member of a commission established by and responsible to the General Assembly or either House of the General Assembly;
>
> (3) Member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee Regulatory Authority; or
>
> (4) Member or employee of any executive department or agency or other state body in the executive branch.

As discussed above, the definition of the term "consulting services" is problematic but appears to refer to "services to advise or assist a person or entity in influencing state legislative or administrative action as such term is defined in § 3-6-102(11), including, but not limited to, services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state." The term excludes the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding, or rule making procedure.

This Office has discussed the scope of the term "consulting services" in interpreting prohibitions under the Ethics Act. Op. Tenn. Att'y Gen. 05-126 (August 22, 2005); Op. Tenn. Att'y Gen. 05-098 (June 20, 2005). Whether any particular activity falls within the definition of "consulting services" under the Ethics Act depends on facts and circumstances. An individual who falls within any of the four groups listed in Tenn. Code Ann. § 2-10-126(a) should review any payment from a private party. If the payment is in exchange for that individuals's services to influence state administrative or legislative action, then it must be disclosed. The fact that an individual works for an association, corporation, or entity that employs a lobbyist does not necessarily mean that the individual receives compensation for consulting services. The individual must examine his or her duties to the employer, as well as the employer's purpose. If the individual receives compensation for advising or assisting a person or entity in influencing state legislative or administrative action, or in maintaining, applying for, soliciting or entering into a contract with the State, then the individual must disclose it under Tenn. Code Ann. § 2-10-126. In Opinion 05-126, for example, this Office concluded that the president of an association whose purpose is to promote legislation would probably be found to be receiving compensation for consulting services under the Ethics Act. We reached this conclusion even though the president himself did not directly attempt to influence state administrative or legislative activity.

4. Civil Penalty Authority

The next question is whether the Registry has the authority to impose civil penalties for violations of the Ethics Act. This question refers to civil penalties imposed under Tenn. Code Ann. §2-10-110. Under subsection (a) of that statute, the Registry of Election Finance or a county administrator of elections may impose a civil penalty for a "violation *of this part* as provided by this section." (Emphasis added). Subdivision (1) sets forth penalties for Class 1 offenses. Class 1

offense means "the late filing of any report or statement required by this part." Subdivision (2) sets forth penalties for Class 2 offenses. Class 2 offense means "failing to file a report required by this part within thirty-five (35) days after service of process or receipt of notice by registered or certified mail of an assessment or any other violation of the requirements of this part." Tenn. Code Ann. § 2-10-110(a)(2). The Ethics Act added §§ 2-10-122 through -128 to the Tennessee Code. Therefore, disclosure statements under Tenn. Code Ann. §§ 2-10-125 and -126 are "required by this part" — that is, Part 1 of Chapter 10 of Title 2.

The Registry is an administrative agency. "Since administrative agencies are purely creatures of legislation without inherent or common-law powers, the general rule applied to statutes granting powers to them is that only those powers are granted which are conferred either expressly or by necessary implication." *Sutherland Statutory Construction*, § 65:2 at 375-76 (6th ed. 2001). Since the disclosure requirements were codified in Part 1 of Chapter 10 of Title 2, the Registry of Election Finance, by necessary implication, has the authority to impose civil penalties for violating them.

It should be noted, however, that a review of the Ethics Act and the Registry statutes as a whole reveals problems with implementing this authority. The Ethics Act does explicitly require the Registry to provide disclosure forms, accept completed forms for filing, and make them available to the public. But the Ethics Act itself expressly confers no other enforcement authority on the Registry. Further, violations of the Ethics Act are crimes. Clearly, the Registry has no criminal enforcement authority. Under Tenn. Code Ann. § 2-10-207(8):

> Where the results of its investigation indicate a willful or fraudulent violation has occurred, the registry may refer the matter to the district attorney general of the district where the alleged violator is a resident for criminal prosecution.

This statute suggests that, as a general matter, the Registry would be investigating violations that are not, on their face, willful or fraudulent. Under Tenn. Code Ann § 2-19-102, knowing violations of any requirements of Title 2 are Class C misdemeanors. By contrast, violations of the Ethics Act are all separately designated as crimes carrying varying levels of punishment. Tenn. Code Ann. § 2-10-207(8), therefore, suggests the Registry was never intended to have broad enforcement authority with regard to violations of the Ethics Act.

Tenn. Code Ann. § 2-10-110 also presents implementation problems. The Ethics Act did not amend this statute. This statute clearly addresses violations of campaign disclosure provisions by candidates for state and local public office. For example, the statute provides the method by which the "candidate or committee" should be notified of a Class 1 or Class 2 offense. The statute describes the way a "candidate for state public office" and a "candidate for local public office" may request a waiver, reduction, or contest a penalty imposed under the statute. The statute contains no method by which an official or employee subject to disclosure requirements under Tenn. Code Ann. §§ 2-10-125 and -126 may contest a penalty. The Registry may wish to promulgate regulations

addressing these ambiguities before actually imposing civil penalties for violating Ethics Act disclosure requirements.

5. Commissions and Boards under Tenn. Code Ann. §§ 2-10-125 and -126

The last question is what commissions and boards fall within Tenn. Code Ann. § 2-10-125(a).

a. Legislative Commissions

Tenn. Code Ann. § 2-10-125(a) includes:

> [M]ember of a commission established by and responsible to the general assembly or either house of the general assembly.

The Ethics Act contains no further definition on this point. A provision similar to the final version of Tenn. Code Ann. §§ 2-10-125 and -126 appeared in Senate Amendment 1 to Senate Bill 1841, eventually passed as the Ethics Act. In explaining Senate Amendment 1, Senator Herron discussed disclosure requirements and stated:

> On the legislative branch, those who are required to disclose are legislative employees, constitutional officers' employees, and legislative commissions. *An example of a legislative commission would be the Sentencing Commission or the Tax Reform Commission.*

Senate Session April 14, 2005, Tape No. S34 (Remarks of Senator Herron) (emphasis added). The Sentencing Commission was charged with drafting changes to the penal code that eventually became the Sentencing Reform Act of 1989. The Tax Reform Commission apparently refers to the Tax Structure Study Commission created under Section 12 of 2002 Tenn. Pub. Acts Ch. 856. The phrase "[m]ember of a commission established by and responsible to the general assembly or either house of the general assembly," therefore, applies to an independent commission established by either or both Houses of the General Assembly and required to report back to either or both Houses.

b. Regulatory Commissions

Finally, Tenn. Code Ann. § 2-10-125(a) includes any "member or employee of a state regulatory commission, including, without limitation, directors of the Tennessee regulatory authority." The Ethics Act provides no further definition of the term "regulatory commission." Based on the example cited, we think a court would conclude that this term refers to any body created by state law exercising a regulatory or oversight function, particularly boards and commissions regulating commercial or industrial activity or professions.

c. "Member or Employee of Any Executive Department or Agency or Other State Body in the Executive Branch"

Although the request expressly asks about the scope of the terms "legislative commission," and "regulatory commission," it should be noted that Tenn. Code Ann. § 2-10-125 and § 2-10-126 also apply to "any . . . member or employee of any executive department or agency or other state body in the executive branch." The Ethics Act does not define the terms "executive department," "executive agency," or "state body." As discussed above, the Ethics Act provides the following definition of "official in the executive branch:"

> "Official in the executive branch" means the governor, any member of the governor's staff or any person in the executive service as such term is defined in § 8-30-208(b); provided, however, that such term shall not include members of boards and commissions who receive only expenses or a nominal per diem not to exceed six hundred dollars ($600.00) per month, unless they provide consulting services for compensation with respect to the activities of the board or commission of which they are a member.

Tenn. Code Ann. § 2-10-122(4). We concluded in the response to Question 2 that, under this definition, board and commission members who receive only expenses or a per diem of no more than six hundred dollars a month must disclose only consulting services with respect to the activities of the board or commission of which they are a member. But the term "executive department or agency or other state body in the executive branch" is very broad. In *Richardson v. Young,* 122 Tenn. 471, 125 S.W. 644 (Tenn. 1909), the Tennessee Supreme Court noted that the powers, duties and responsibilities of a governmental entity impliedly provide for its classification within a branch of state government, stating, "the legislative power is the authority to make, order and repeal the laws; *the executive power is the authority to administer and enforce the laws*; and the judicial power is the authority to interpret and apply the laws." *Richardson*, 122 Tenn. at 492 (emphasis added); *see also Rushing v. Tennessee Crime Commission*, 173 Tenn. 308, 117 S.W.2d 4 (Tenn. 1931). The term "executive department or agency or other state body in the executive branch," therefore, includes any department, agency, or body whose primary duties are to administer and enforce the laws. Op. Tenn. Att'y Gen. 95-034 (April 7, 1995)(Public Service Commission is an executive agency even though it performs some quasi-legislative and judicial functions). As discussed in the answer to Question 2, however, board and commission members who receive only expenses or a per diem of no more than six hundred dollars a month must only disclose consulting services for compensation with respect to the activities of the board or commission of which they are members.

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