



State Representative Norma Chávez's Policy Analysis and Questions
Regarding Committee Substitute to SB 1368 and HB 2301
(El Paso County Ethics Bills)¹

On behalf of the city and county of El Paso, my staff and I dedicated hours reviewing the Committee Substitute for Representative Marquez's HB 2301 and Senator Shapleigh's SB 1368, the El Paso County Ethics Bill. We have identified more than thirty-five areas of concern. While some of these may be intentional choices by the author, many are problems with the drafting of the legislation. This review, while thorough, does not claim to identify all of the issues that there are with the bill.

In order to have a meaningful discussion of these concerns, we have broken them down into various categories.

First, there are several constitutional questions regarding provisions of the bill. While ultimately decisions regarding such questions may be decided by the courts, these issues should be discussed before a law is passed so that our community understands whether it is getting what it wants, or something else entirely.

1. Under Section 161.157 (d), any ethics code adopted by an ethics commission would be considered Texas law under section 554.001 of the Government Code. Whether a County Commissioner's Court can delegate the power to make law to a County Ethics Commission is questionable.
2. Section 161.165 permits witnesses to submit a sworn, written statement. It does not provide an opportunity for cross-examination of the "witness" or limit what type of information may be in such statements. As written, the statements could contain the statement of another person, their opinion, or speculation. It would not even have to be the statement of the person submitting the "sworn statement." This provision most likely violates a respondent's due process rights, and their right to confront those testifying against them.

3. Nowhere in the bill is there a statement regarding what evidence the respondent is entitled to. It does not even go so far as to state that a respondent is entitled to exculpatory evidence that the ethics commission or an accuser may have.
4. Section 161.160, which establishes a Preliminary Review process, allows the ethics commission to submit written questions to the respondent. It does not state whether or not the respondent must answer them. If he is required to answer them, this provision may violate his right against self-incrimination, and his right to due process.
5. Section 151.159 (d) requires a respondent to include any objection he has to the ethic's commission's jurisdiction to be included in his first response to the commission. The problem with this is that the failure to object to the jurisdiction can not grant the commission jurisdiction over something that it doesn't have jurisdiction over. The commission either has or doesn't have jurisdiction. It cannot expand its legally specified jurisdiction by granting itself jurisdiction over a question or person and hoping no one objects. Its decisions in such cases would be null and void, and any statements it made regarding a respondent could subject the county to defamation or similar actions.

The next set of problems has to do with the definitions contained within the proposed statute. Some appear to be overly broad, and others lacking.

6. Under 161.002 (3) "Communicates directly with" means "contact in person or by telephone, telegraph, letter, facsimile, electronic mail or other electronic means of communication. That definition is then used to define a "lobbyist" under 161.002 (9). The language under 161.002 (9) then refers to a lobbyist being someone who is compensated in excess of some unspecified amount to communicate with a county officer or employee. The question therefore arises, if a citizen sends a letter or e-mail on a personal or business matter, will he or she also have to submit how much he was paid to do so? What if he is owner of a company, and one of his many responsibilities is to advocate some position on behalf of his firm. Who and how will his compensation for that communication be calculated?
7. Additionally, the definition of a "lobbyist" is probably too broad. Depending on where the compensation amount established by the commission is set, it is likely that many criminal defense attorneys will become lobbyists on behalf of their clients, the criminal defendants. For example, if the commission sets the compensation amount at \$1500 and an attorney takes a criminal case on and charges his client a fee of more than \$1500, the attorney is now a lobbyist. The rules of this commission won't let the "lobbyist" and the criminal prosecutor talk to each other until the "lobbyist" has taken the training required under this bill. This was, most likely, an unintended consequence.

8. Under Section 161.002 (5), the definition of a county employee includes "a person employed in the judicial branch of the county government who is not subject to the Code of Judicial Conduct." I find it difficult to believe that any judge would accept this commission's involvement in his or her staff issues, and it may violate the Separation of Powers clause of the Texas Constitution.
9. Under Section 161.105 (d), lobbyists intending to "meet with a person covered by the ethics code shall complete training on the ethics code." The problem this may cause again goes back to the definition of a lobbyist. Because the amount of money a person must receive is not defined, if it is set too low this provision could infringe on a citizen's constitutional right to petition his government.
10. Under Section 161.151, one type of Category One Violation is defined to be "a misrepresentation in a report required under the ethics code." Is this any misrepresentation or a "material misrepresentation"?
11. Section 161.156 (f) allows a sheriff to "return a complaint...under this subsection to the commission for additional proceedings...." This would, undoubtedly, violate most collective bargaining agreements. It would permit the county two bites at the apple in terms of disciplining a sheriff's deputy.
12. Section 161.167 regarding formal hearings sets a quorum of six for the formal hearing. It does not set a quorum for other business of the ethics commission such as adoption of a code of ethics, voting on a "decision" after a hearing. Earlier references to the Government Code and other Texas law may provide a sufficient definition, but it should probably be set forth under Section 161.059 so as to avoid any issues.
13. Section 151.157 (a) needs to be clarified that the county cannot suspend or terminate the employee as a result of making such a report, but may do so for other reasons. If this change isn't made, you have granted perpetual employment to every employee "who in good faith files a complaint."

Thirdly are the problems with establishing the ethics commission.

14. There are two ways to establish the ethics commission within the bill. The first allows the voters of a county (El Paso) to establish the commission upon voting to do so. The second allows the County Commissioner's Court to establish the ethics commission even if the voters reject the establishment of the ethics commission. Why make this subject to a vote of the people and then give the commissioners the power to establish the commission even if the voters reject it?
15. There does not appear to be a number of initial members (those appointed by the Commissioner's Court) who have to be present to select a Chairman for the ethics commission. Why not?

16. Why is it that the appointed members of the commission select the chairman of the ethics commission? Even if that is necessary to complete the selection of the public members, after they are selected shouldn't there be a new selection process for the chairman?
17. If a vacancy on the ethics commission occurs, filling it under the provisions of Section 161.058 would be a problem. This is due to the language used under subsection (1) stating: "If the vacancy represents" Vacancies don't represent anyone. They may occur because a public member or an appointed member has left the commission, but that is different. Any vacancy filled under this provision as written would be subject to legal attack, as would any action taken by the commission if the filling of a vacancy had occurred.
18. Section 161.060 dealing with the removal of a commission member specifies that Chapter 87 shall apply. The problem with applying Chapter 87 is the District Court's authority to remove someone under Chapter 87 is narrowly tailored and does not include a member of an ethics commission. Chapter 87 would need to be amended in order for this section to have any meaning.
19. The voters of the county and county officials need to carefully consider the extent and expense of the training required under this code. Vendors, lobbyists, employees, ethics commissioners, and others all have various levels of mandatory training. Who will provide that training? If done by the County Attorney's office, that will make the County Attorney or his staff a witness at any hearing or in any dispute in which what was said at the training comes into question. If done by the ethics commission, the members or staff will become witnesses.
20. Another training issue has to do with Section 161.105 and the requirement that "before submitting a bid...an officer, principal, or other person with authority to bind the vendor shall complete training on the ethics code." While a great aspirational goal, getting a vendor such as IBM or Blue Cross/Blue Shield to send a senior level executive to El Paso for ethics training is unlikely.
21. Section 161.152 states: "The commission may adopt the complaint procedures and hearings set forth in this chapter." It does not make the adoption of those procedures mandatory. That implies that the ethics commission could adopt another, as yet unknown, set of procedures. Why would they be given this option? Further, could it result in less fair, more error-ridden set of procedures being adopted without public input or review?

Then there are the problems under the procedures to be used to handle complaints and hearings.

22. Under Section 161.170 dealing with subpoenas, the ethics commission appears to assert jurisdiction over members of the public. This is an issue that is likely to be litigated as there is no express grant of jurisdiction over members of the public by the legislature to the ethics commission. Further, while there is a weak procedure for a respondent to attempt to quash a subpoena, there is no stated procedure for a member of the public to quash a subpoena if they are served with one. The problem with the procedure for quashing a subpoena served on a respondent is that there is no place to file the motion to quash, except perhaps District Court. It would be far better to state a court in which to bring such motions.
23. Under Section 161.202 the ethics commission has the authority to impose a civil fine of not more than \$4,000. While they can impose the fine, nowhere in the proposed statute are they given the authority to enforce or collect the fine.
24. Section 161.204 gives the ethics commission the authority to notify other regulatory agencies such as the State Bar of Texas or the Commission on Judicial Conduct. People subject to the Commission on Judicial Conduct are not subject to this ethics commission. This is clearly stated under Section 161.002 (5). Additionally, this ethics commission has no authority to find that an attorney has violated the Code of Professional Responsibility. If there is an independent basis for believing a lawyer has violated the Code of Professional Responsibility, it would have to be addressed through the procedures already in place for attorney discipline. Further, and perhaps most importantly, any Code of Ethics adopted by this ethics commission would have to be 100% consistent with the State Bar's Code of Professional Responsibility or it would put an attorney in an untenable situation of having to choose which rules to follow. Failure to follow the Code of Professional Responsibility could lead to State Bar sanctions or loss of his license. Failure to follow an inconsistent requirement of this ethics code could subject him to a \$4,000 fine and a referral to the State Bar. A lawyer, having to choose, will likely choose the State Bar's Code of Professional Responsibility, a detailed, tried and true basis for attorneys deciding what to and not to do.
25. Section 161.205, which permits a person accused of an ethical violation, is likely to lead to a counter-complaint every time an original complaint is filed. This is fine if that is what the county wants, but should be considered carefully.
26. Section 161.207 and Section 161.208 basically make an appeal of the decision of the ethics commission almost unassailable. It emasculates any review by a District Court, and makes the decisions of the ethics commission almost imperial

in nature. It will certainly make the statute subject to legal challenge, including on issues such as the right to a trial by jury, the right to discovery (such as depositions....). A more appropriate standard of review, as in most administrative hearings, would be a de novo review, with a jury, governed by the Texas Rules of Civil Procedure. Even the Texas Ethics Commissions rules under Section 571.133 (d) adopt the de novo standard of review, and make it abundantly clear that the "substantial evidence" rule does and should not apply. The standard in HB 2301 is used to remove the ability for a respondent to get meaningful review by qualified judges and legal professionals.

27. Section 161.304 appears to state that even if the ethics commission is dissolved, it can continue to conduct business on matters brought to its attention prior to the dissolution. This could lead to bizarre results regarding counter-claims and other matters. If the commission is dissolved, the work of the commission should be terminated.
28. Questions arising under Section 161.162 include:
 - a. (c) Violates respondent's rights against self-incrimination if Section 166.166 (b) does not apply. The way the statute is written, it does not apply.
 - b. This Section does not require that the questions sent to the complainant be given to the respondent, or the answers. This would violate the respondent's due-process rights.
 - c. The Section most likely violates the respondent's right of confrontation of witnesses against him.
 - d. The Section (and the bill) fails to set any standard for admitting evidence. No indication if hearsay rules under Texas Rules of Evidence apply. No indication if Texas Rules of Evidence apply. If they do, they are best administered by knowledgeable judges, not a public commission.
 - e. Section (d)(3) does not define or limit the term "cause." It is unclear whether it refers to any cause, probable cause, likely, by a preponderance....
 - f. Section (e) does not state whether if a respondent appears at the preliminary review hearing any statement he or she makes can later be used at a formal hearing.
 - g. The entire bill does not state what will be considered as part of the record of the proceedings, or if transcripts of hearings will be made. This is a major appellate problem.

29. Section 161.163 (b) indicates that if the commission successfully resolves and settles the complaint it shall send a "decision" to the complainant and respondent. Later, in the same sub-Section (b)(2)(A), under the provisions dealing with a situation where the commission was unsuccessful in resolving the complaint, the commission is required to send a copy of the decision to the complainant and respondent. The question then becomes, what decision is sent to these people if the matter is not resolved? There is no authority for the ethics commission to issue a decision if the matter is unresolved.
30. Section 161.163 (d) appears to permit the ethics commission to conduct a formal hearing even in those circumstances where "there is insufficient credible evidence for the commission to determine that a violation within the jurisdiction of the commission has occurred...." Why can a hearing be conducted if a threshold showing has not been made? In other words, a respondent can have to spend the time, money, and undergo the stress of a formal hearing even when there is insufficient evidence to believe an offense has been committed. This is likely to include having to hire legal counsel or secure union representation. This probably violates a respondent's due process as he or she will have to defend him or herself against a phantom allegation. This is exactly opposite of the rules used by the Texas Ethics Commission.
31. Section 161.164 allows a person's reputation to be forever sullied on the lowest level of proof allowed under the law. Reputations are all many people have. Quoting Benjamin Franklin, "Glass, china, and reputation are easily cracked and never mended well." Attacking the character and integrity of an individual and allowing it to be destroyed on such a lowly standard of proof is ethically suspect. Further, it will not be a jury with instructions from a Judge, or a trained Judge, making the determination whether the burden of proof has been met. It will be a small group of appointed and elected individuals who have directed not only the gathering of the evidence, but the review of that evidence, the admittance of the evidence, the process of the "trial". They will, for the most part, not be trained in the law, or knowledgeable to the level necessary to run a court.
32. Section 161.165 (c) allows a witness to read a written statement or present a brief oral opening statement at a formal hearing. Nowhere in the legislation is it indicated that such witnesses would be subject to cross examination. Even if they were, the ability to submit a written statement or oral opening statement when they are not parties to the proceeding is probably unconstitutional under the Texas and U.S. Constitution confrontation clauses. There is a series of US Supreme Court cases praising the virtues of cross-examination as the best and preferred method of developing evidence in front of the trier of fact. This Section wouldn't survive a challenge under that line of cases.
33. Section 161.166 requires the commission to provide various lists and documents to the complainant and the respondent. Why is this information provided to the

complainant? He or she is not a party to the action and has no standing to be treated as one. Additionally, how will the commission get this information as to the respondent's witnesses or documents? There are no procedures in the bill requiring the respondent to disclose his witnesses or evidence to the commission prior to the hearing.

34. The savings provision under Section 161.166 that allows the commission to adopt rules governing discovery, hearings and related procedures will undoubtedly lead to legal challenges every time a rule that a respondent believes is inconsistent with the Administrative Hearings Act is adopted or used.
35. Nowhere in the bill is it stated who will present the case against the respondent. It is unclear from the legislation whether that will be the County Attorney, a member of the ethics commission, commission staff, or the person filing the complaint. As the legal advisor to the commission, it cannot be the County Attorney. As the trier of fact it cannot be the commission or its staff. The complainant is not a party to the action, so it cannot be that person.
36. Under Section 161.167 regarding Formal Hearings, a quorum for the conduct of a formal hearing is set. That quorum is not set for other business of the commission such as adoption of the Code of Ethics, or voting on "decisions." While it is apparent that you need six (6) members to conduct a formal hearing, the bill is silent as to how many members you need to vote on a decision following the formal hearing. It also appears, the way it is currently written, that there is no requirement that a member must have been present for the formal hearing in order to vote on the decision following the hearing.
37. The bill should provide for a bifurcated trial at which a decision is first made whether there has been a sanctionable violation of the Code of Ethics, and then a second portion of the hearing regarding appropriate civil fines. It should be structured this way so that there is no perception that a respondent's evidence regarding the civil sanction is an admission of his or her violation of the Code of Ethics. The nature and scope of the evidence is likely to be completely different for the two halves of the hearing.
38. Section 161.169 fails to state who will be served with the Motion to Extend Deadlines, and whether there will be an opportunity for a hearing on the matter. Will the commission be deciding its own Motion if it is the one submitting the Motion? That seems rather disingenuous.
39. Section 161.170 fails to state what commonly recognized legal privileges will apply.
40. The bill fails to state whether the respondent is entitled to any exculpatory evidence in the possession of the ethics commission or the complainant. This should be made absolutely clear.

Finally there are several issues that are difficult to categorize.

The first has to do with the many roles of the County Attorney. As the County Attorney he offers legal advice and counsel to elected officials and departments of the county. In such a role he may be asked if an official's proposed actions are consistent with that official's responsibilities in his position and consistent with the requirements of the yet unspecified Code of Ethics. The County Attorney also appears to be the legal advisor to the Ethics Commission. He might well find himself in a position where his client, the government official who asked for his advice and followed it, is facing charges from the County Attorney's other client, the Ethics Commission. Would the official be able to use the County Attorney's advice as a defense? Would the County Attorney have a conflict of interest and be unable to advise the Ethics Commission? Who would present the case to the Commission if the County Attorney normally did so?

The second has to do with the concentration of power in the hands of one group, with insufficient checks and balances on their exercise of that power. The way the Ethics Commission is proposed to be established under this bill, it has the power to write a Code of Ethics with no review by elected officials or the public; adopt legal rules and procedures for the investigation of complaints; direct and conduct the investigation of complaints on which it will sit in judgment; sit in judgment on those complaints; and assess sanctions for those found to have violated the Code of Ethics. Much of this will be done by appointed members, probably not experienced in the details of Texas law. They may be unaware of the detailed procedures that could be found in the Texas Rules of Civil Procedure, Texas law concerning administrative hearings, Texas and federal Constitutional protections and privileges. It seems inappropriate that one group should investigate, prosecute, and judge the alleged offender. Normally those functions are separated in order to insure fairness and equity to a respondent. It lacks appropriate checks and balances.

Thirdly, the structure of the bill asks the legislature to grant broad and sweeping powers to an unknown, untested group, and establish them as supreme to all other entities in El Paso County, including our County and District Courts. In a County so challenged by ethical missteps, to provide this sword to one small faction is hardly a good solution. A model more like the Texas Ethics Commission, with a commission, an executive director, a professional staff, appropriate review by District Courts, and the scrutiny of the legislature would be better, but perhaps still not appropriate for El Paso County.

Finally, the legislation appears to be an attempt to control the behavior of vendors by imposing fear and sanctions on county employees. The current version of this bill fails to provide the necessary safeguards for employees, vendors and the public.

¹ Comments or questions may be sent to John Kearney, General Counsel for State Representative Norma Chavez at John.Kearney@House.State.TX.US or (512) 463-0622.