

TEXAS ETHICS COMMISSION

**IN THE MATTER OF
MICHAEL QUINN SULLIVAN,
RESPONDENT**

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**BEFORE THE
TEXAS ETHICS COMMISSION
SC-3120487 AND SC-3120488**

FINAL ORDER

On June 25, 2014, the Texas Ethics Commission held a formal hearing on two sworn complaints alleging that Michael Quinn Sullivan was a paid lobbyist who failed to register. At the hearing, the evidence revealed that part of Mr. Sullivan's regular employment involved making direct contact with members of the Texas Legislature and their staffs to influence the outcome of bills, nominations, and other matters that were subject to legislative action. Accordingly, Texas law required him to register as a lobbyist. Mr. Sullivan failed to respond to the evidence of his paid lobbying with any meritorious defense. Instead, Mr. Sullivan presented the Commission with baseless arguments that would destroy the ability of the State of Texas to require public registration of paid lobbyists, while never denying that he was paid to tell legislators how to vote. For the reasons summarized below, the Commission imposes the maximum civil penalty allowed by law for the violations raised in the sworn complaints.

I. Findings of Fact

The Texas Ethics Commission unanimously finds that Mr. Sullivan, as part of his regular employment, communicated directly with members of the legislative branch to influence legislation without properly registering as a paid lobbyist.

1. In 2010, Mr. Sullivan was paid \$132,399 in compensation by Empower Texans and its related entities.

2. In 2011, Mr. Sullivan was paid \$128,571 in compensation by Empower Texans and its related entities.

3. On behalf of Empower Texans, Mr. Sullivan directly communicated with members of the Texas Legislature in 2010 and 2011. The evidence at the hearing showed that Mr. Sullivan made dozens of communications to legislators and legislative staff during the fourth quarter of 2010 and the first and second quarters of 2011 regarding pending matters before the Legislature.

4. The evidence reflected dozens of direct communications from Michael Quinn Sullivan with direct assertions, often sent to multiple members of the Texas House of Representatives, for example:

- a. Exhibit 34, Page 687, 5/23/2011 email sent to Representative Perry: “*support* the Geren Amendment” [SB 5 and SB 1581].
- b. Exhibit 25, Page 519, 3/4/2011 memo sent to Representative Harless: “opposed taking such an action at this time” [use of Economic Stabilization Fund for current biennium].
- c. Exhibit 33, Page 653, 4/28/2011 email sent to Matthew Miller, Legislative Director for Representative Orr: “As you consider SB 655, please know that we **support** the bill as carried by Rep. Keffer.”
- d. Exhibit 33, Page 652, 5/3/2011 email sent to Matthew Miller, Legislative Director for Representative Orr: “recommend opposing HB 3640.”
- e. Exhibit 33, Page 636, 5/20/2011 email sent to Matthew Miller, Legislative Director for Representative Orr: “*do not support the swap*” [CSSB1811].
- f. Exhibit 41, Page 783, 5/24/2011 email sent to Representative Zedler: “I urge you to support SB 8.”
- g. Exhibit 13, Page 297, 6/9/2011 email sent to Mark Dalton, Chief of Staff for Representative Anderson: “Senate Bills 1 and 2 are subject to scoring.”

Such communications are plainly evidence of direct communications intended to influence legislative action.

5. Moreover, Mr. Sullivan operates a sophisticated scorecard system to direct legislative action. The creation and publication of a “legislative scorecard” in the public domain is not in and of itself direct communication requiring registration as a lobbyist. However, the

evidence presented at the hearing showed that Mr. Sullivan used the scorecard as a means of directly influencing votes on pending legislation, as part of his paid employment. He notified members of the Legislature directly that if they did not vote on pending legislative matters in the manner advocated by Empower Texans and its related entities 80% of the time, the members would not receive the endorsement of Empower Texans and its related entities, and would be subject to a political challenge. Mr. Sullivan would then send notices in advance of each vote and give members of the Legislature individualized “draft” scores just a few weeks before the legislative session was over. Exhibit 43, Page 836 is an instance of the “draft” score letter sent to Representative Laubenberg: Her draft score was listed as 87%. Exhibit 43, Page 835 is an instance of the direction: “we will be including HB 272 on the 2011 Fiscal Responsibility Index. We hope you will support this important legislation.” Exhibit 43, Page 830 shows her final score: A+, for 95% or higher. Notably, the final score letter is not a direct communication to influence pending legislation. However, the draft score, combined with the direction on how to vote, resulting in an “improved” final score is direct communication to influence pending legislation.

6. The Commission heard testimony that often written communications from Mr. Sullivan would be placed on the desk of every legislator in the Texas House prior to votes on bills or amendments that Empower Texans and its related entities supported or opposed. Such additional direct advocacy falls directly within the plain language of the lobby disclosure statute that we must construe.

7. The Commission does not find that the conduct that required Mr. Sullivan to register as a lobbyist falls within the media organization exclusion of TEX. GOV'T CODE § 305.004(1). The conduct that required Mr. Sullivan to register was his paid direct advocacy with legislators and their staff concerning matters before the Legislature. The Commission does not

need to determine whether general publications by Mr. Sullivan, alone or through Empower Texans or related entities, would constitute materials disseminated through a “bona fide news medium,” and thus fall within the media organization exclusion. The exclusion only applies in situations where the publication of news articles, paid advertisements, or editorials is the only conduct at issue. If a person engages in other activity that requires registration, as Mr. Sullivan did, the media organization exclusion does not apply.

8. The Texas Ethics Commission unanimously finds that based on the facts presented, the following conduct, standing alone, by Mr. Sullivan would not constitute direct communication with a member of the Legislature to influence pending legislation, and would not require lobbyist registration:

- a. Writing about what is going on in the Legislature.
- b. Maintaining a website that provides information regarding the Legislature.
- c. Publishing a rating on a website of how fiscally responsible legislators are.
- d. Writing news articles and posting them to a website.
- e. Writing opinion pieces and posting them to a website.
- f. Communicating with donors to the organization.
- g. Publishing a scorecard on a website.
- h. Publishing on a website a list of bills and amendments that will be on the scorecard.
- i. Publishing on a website a list of which way to vote on bills and amendments on the scorecard.
- j. Publishing a legislator’s “fiscal responsibility grade” on a website.
- k. Telling the public through a website or otherwise how legislators will be graded.
- l. Giving awards to legislators.
- m. Owning, publishing or writing for a newspaper.

- n. Publishing paid advertisements that directly or indirectly oppose or promote legislation or administrative action.
- o. Facebook posts.
- p. Twitter posts.

II. Conclusions of Law

The findings of fact described in Section I support the following conclusions of law:

9. The Commission determines that Mr. Sullivan was required to register as a lobbyist in 2010 and 2011 because, as part of his regular employment, he communicated directly with members of the legislative or executive branch to influence legislation or administrative action on behalf of the person by whom he was compensated or reimbursed, and his compensation in 2010 and 2011 exceeded the amount triggering registration. TEX. GOV'T CODE § 305.003; 1 TAC § 34.43(a). Accordingly, Mr. Sullivan violated section 305.003 of the Government Code by failing to register as a lobbyist in 2010 and 2011.

10. Mr. Sullivan did not qualify for the media exception, because he engaged in further activities that require registration, including direct communication with members of the Legislature and their staffs regarding pending legislative action. TEX. GOV'T CODE § 305.004(1).

11. Mr. Sullivan's lawyer claims that the Commission should dismiss the complaints because the Texas lobbyist registration law is unconstitutional. During the course of our consideration of these sworn complaints, Mr. Sullivan has filed three separate lawsuits against the Commission in state and federal district courts, purportedly to stop "unconstitutional" restrictions on free speech. Mr. Sullivan has not pointed the Commission to any court decision that has held the Texas lobbyist registration statute to be unconstitutional. Rather, he asks the Commission not to enforce laws passed by duly elected representatives of the people of the State of Texas. The Texas Government Code states that a statute passed by the Legislature is

presumed to be constitutional. TEX. GOV'T CODE § 311.021(1). The Commission cannot and will not unilaterally refuse to enforce the lobbyist registration statute.

III. Procedural History of Formal Hearing

12. On April 3, 2012, sworn complaints SC-3120487 and SC-3120488 were filed with the Commission.

13. On August 8 and October 29, 2013, the Commission held preliminary review hearings on the sworn complaints and determined that there was credible evidence that Mr. Sullivan had violated the Texas lobbyist registration statute, section 305.003 of the Government Code. The sworn complaints were not resolved at the completion of the preliminary review hearings, leading to the formal hearing before the Commission.

14. On February 12, April 3, and May 28 (continued to May 29), 2014, the Commission held prehearing conferences in connection with the formal hearing.

15. At the February 12, 2014 prehearing conference, the Commission voted to issue subpoenas duces tecum in connection with the formal hearing. On April 3, 2014, the Commission voted to issue revised subpoenas. On April 21, 2014, Mr. Sullivan filed objections to the revised subpoenas.

16. On May 29, 2014, after two hearings on motions to quash, the Commission issued an order directing Mr. Sullivan to comply with production of documents responsive to the Commission-issued subpoena duces tecum. On June 13, 2014, Mr. Sullivan produced about 80 pages of documents. However, the evidentiary record at the formal hearing revealed hundreds of pages of direct communications from Mr. Sullivan located in the files of Texas legislators that were not produced pursuant to the subpoena. The Commission is left with the inescapable conclusion that Mr. Sullivan and Empower Texans have destroyed or lost thousands of emails

sent to members of the Legislature during 2010 and 2011, despite having received written requests for such information in 2012.

17. On June 18 and 19, 2014, Mr. Sullivan and the Commission staff engaged in a prehearing exchange of exhibits and witness lists.

18. The formal hearing was held on June 25, 2014. The hearing was conducted pursuant to the Administrative Procedures Act and the Texas Rules of Evidence. The evidentiary burden was preponderance of the evidence. At the formal hearing, Mr. Sullivan and the Commission staff were allotted four hours each to present evidence and argument. The Commission staff used its four-hour time allotment. Mr. Sullivan used approximately three hours of his time allotment.

19. Also in connection with the formal hearing, the Commission issued a witness subpoena summoning Mr. Sullivan to appear before the Commission at the formal hearing. The Commission staff called Mr. Sullivan as a witness. Mr. Sullivan refused to testify. Mr. Sullivan refused to answer any questions asked by the Commission staff or the Commissioners themselves.

20. Mr. Sullivan's lawyer explained that Mr. Sullivan was asserting his rights under the First, Fourth, and Fourteenth Amendment as a basis for his refusal to testify. Mr. Sullivan did not invoke a Fifth Amendment right not to testify. The Chair overruled these objections. Mr. Sullivan still refused to testify. When asked by the Commission to explain the basis for a claimed right not to testify based on the First Amendment, Mr. Sullivan's lawyer cited a free association case from California. In *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009), private parties to a lawsuit, who intervened in a lawsuit challenging the constitutionality of a California ballot measure, obtained a protective order from a court against compelled disclosure of internal campaign documents and documents listing members of its organization, on the basis

of a First Amendment freedom of association right. The court's ruling was limited to compelled disclosure of specific information that the court determined was constitutionally protected from compelled disclosure. This case provides no support for Mr. Sullivan's global refusal to answer questions on subjects such as his employment with Empower Texans and related entities and his direct contact with legislators to influence legislation. Mr. Sullivan did not assert that answering such questions would require him to reveal constitutionally protected information. Instead, he chose not to respond, and a conclusory invocation of the First, Fourth, and Fourteenth Amendment cannot mask or justify his refusal to respond. The evidence adduced at the formal hearing allowed the Commission to make the factual conclusions set forth in this order, regardless of whether Mr. Sullivan testified or refused to testify. However, Mr. Sullivan's abject and unjustified refusal to answer questions before the Commission permitted the Commission to draw inferences adverse to Mr. Sullivan that supported the allegations of the sworn complaints. For an example of how this presumption was applied in administrative proceedings, see *Andrews v. Texas Department of Health*, 2007 WL 486488 (Tex. App. – Austin 2007, no writ).

21. In connection with a formal hearing, the Commission is authorized to subpoena documents and examine witnesses that directly relate to a sworn complaint. TEX. GOV'T CODE § 571.137(a). If a person to whom a subpoena is directed refuses to appear, refuses to answer inquiries, or fails or refuses to produce books, records, or other documents that were under the person's control when the demand was made, the Commission shall report that fact to a district court in Travis County. The district court can then enforce the subpoena by attachment proceedings for contempt in the same manner as the court enforces a subpoena issued by the court. *Id.* § 571.137.

22. If every participant in an administrative proceeding could simply refuse to participate in any meaningful way, the entire sworn complaint process would fail its statutory

purpose. The Commission does not and will not tolerate such dilatory tactics. However, a contempt action at this time would only needlessly delay resolution of these complaints because the relevant facts in question were provided by numerous sources and Mr. Sullivan's refusal to cooperate only bolsters the case against him.

IV. Conclusion

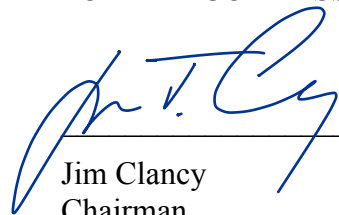
23. The Commission orders that Mr. Sullivan pay the maximum allowable civil penalty of \$10,000 (\$5,000 for each violation) to the State of Texas within 30 days of the date of this order.

24. This order is not confidential.

25. In summary, it is apparent that Mr. Sullivan is a professional lobbyist compensated by Empower Texans and its related entities for employment activities that include direct advocacy. Advocacy is indisputably legal, but being paid to directly advocate without registering as a lobbyist is not. The communications reviewed by the Commission advocate passage or defeat of specific legislative action on behalf of a special interest group. Regardless of political orientation or message, no paid advocate who engages in direct communications with Texas legislators is above the disclosure laws of the State of Texas. The Commission's unanimous opinion is that Mr. Sullivan is a paid lobbyist who is required to register under Texas law.

FOR THE COMMISSION

Date: July 21, 2014



Jim Clancy
Chairman

On behalf of the Texas Ethics Commission