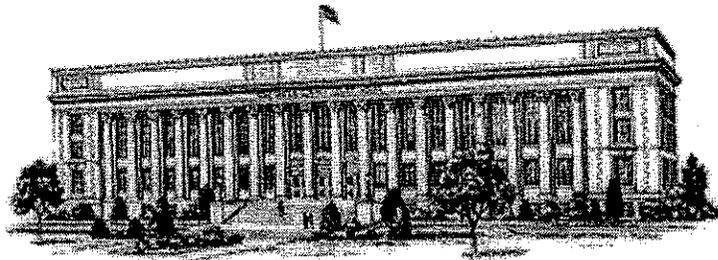


# TOM GREEN COUNTY

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OPEN RECORDS DIVISION

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FILE # ML-45510-08  
I.D. # 45510

January 8, 2007

Attorney General of Texas  
Opinions Committee- Attention Ann Fuller  
P.O. Box 12548  
Austin, TX 78711-2548

## RQ-0665-GA

Re: Request for Opinion

Dear Sirs;

On December 4, 2007 the Commissioner's Court of Tom Green County, Texas, instructed our office to seek an attorney general's opinion on two issues regarding the conduct of one J.B. Hall, Constable of Tom Green County, Precinct #1:

- (1) Whether or not a finder of fact could reasonably conclude as a matter of law, that, under the facts presented, Mr. Hall became a candidate by making a public announcement of candidacy for the office of County Commissioner, Precinct #1 while he still had more than a year to serve in his current office so as to trigger Article XVI, section 65 of the Texas Constitution.
- (2) Whether Section 251.001(1)(A), which exempts the filing of a campaign treasurer appointment from constituting "candidacy" or "an announcement" for the purposes of the automatic resignation provisions of Article XVI, section 65 of the Texas Constitution, is unconstitutional.

On December 4, 2007 the Tom Green County Commissioner's Court, at its regular meeting, entertained a request by Russ Duerstine, County Republican Party Chair, to proceed to find that a vacancy existed in the office of J.B. Hall, Tom Green County Constable, Precinct #1 due to his having engaged in conduct that constituted taking affirmative action for the purpose of gaining nomination or election to public office, to-wit: Tom Green County Commissioner, Precinct #1. Mr. Hall also appeared and addressed the court in support of his contention that, though he had

engaged in the conduct, it had not been his intention to become a candidate at that time due to having made an "announcement of a definite intent to run" for the commissioner's court position, and he, therefore, had not vacated his office. (This session was recorded and a copy could be furnished the Opinions Committee upon requests.)

The County Attorney's Office, by her Assistant County Attorney Gerald Fohn, appeared before the court and gave its requested report; and, after addressing the claimed conduct of Mr. Hall and referring to various past attorney general opinions, gave no opinion regarding whether Mr. Hall had vacated his office. He then advised the court of their options, being: (1). To choose not to enter into deliberations of the matter. (2). To find that a vacancy existed, but choose not to fill the vacancy. (3). To find that a vacancy existed, but choose to fill the vacancy, or (4). To table the matter and instruct the County Attorney to seek an attorney general's opinion for guidance. The commissioner's court chose to follow the fourth recommendation.

### **The Reported Facts:**

#### **(The County Attorney is furnishing copies of all documents and videotapes described in the following entries and the results of his research by separate attachment to this letter.)**

1. On September 5, 2007, Mr. Hall filed with the Elections Administration office a document for the appointment of a campaign treasurer by a candidate. The blank entitled "Office Held" was filled in with the words, "Constable, Pct. 1, Tom Green County, Texas". The blank entitled "Office Sought" was filled in with the words, "County Commissioner, Pct. 1, Tom Green County". It is Mr. Hall's position that he was attempting to form an exploratory committee for the commissioner's race and he knew he had to appoint a treasurer in order to raise or expend funds. Mr. Duerstine's position is that there is no legal provision for exploratory committees in Texas and, since Mr. Hall listed his present position and the one he was seeking, though the current law allows the filing of the designation of a campaign treasurer as a exception to the "resign to run" law, it is still proof of his intent to seek the other office and is a public statement of such. The County Judge in the meeting publicly took the position that such a filing is so great an evidence of intent to run for the new office that the current law should not allow such a filing to be free of the "resign to run" consequences, and that its constitutionality should be questioned on public policy grounds.
2. The Tom Green County Democratic Club newsletter for September of 2007 featured a notice of Mr. Hall's upcoming appearance at the club as the program, stating: "The Hon. J.B. Hall, currently constable in Precinct One, has an important announcement to make."
3. Mr. Hall appeared at the Tom Green County Democratic Club's September 10, 2007 meeting at a local restaurant and spoke to the group, handing out a flier entitled "We, The People" containing the words, "I want to bring my leadership, my values, and my experience of sixteen (16) years as a county elected official (Constable) to the Tom Green County Commissioner's Court". It continues to be Mr. Hall's position that his intention was to make a formal announcement at some time in the future when the timing would not be a problem, and that any references he might have made that night to the office of commissioner were of a speculative nature, something he was merely considering. As a matter of fact, a written statement furnished the County Attorney from one Linda Shoemaker, Tom Green County Democratic Party Chair, states: "He told us about his plans to run for County Commissioner in 2008. He prefaced his remarks by explaining about the requirement that he could not announce his candidacy until a certain

date. He told about his plans. I remember his key phrase was 'We the People'." The County Attorney's Investigator interviewed three other individuals who stated that, although they had also attended the club meeting, they did not hear, or did not remember hearing Mr. Hall announce that he was running for office. Further, Mr. Hall disputes that statements made to such a group would not constitute a public announcement, since it was a "members only" meeting, and therefore not a public meeting.

4. At that same meeting outside the meeting room Mr. Hall appeared in a videotaped interview making references to "my campaign". The video was broadcast on KLST, one of the local television stations, but the sound portion was deleted, with the video portion serving as a background for the broadcaster's announcement that Mr. Hall had announced his candidacy for the commissioner's position at the meeting. Mr. Hall maintains he did not believe at the time that the cameraman who interviewed him was "an employee of a television station".
5. The minutes from the Tom Green County Democratic Club contain the entry: "JB Hall was the speaker. He will be running for Tom Green County Commissioner in Precinct One."
6. A candidate/officeholder campaign report signed by Mr. Hall covering the dates of September 5, 2007 through November 5, 2007 again lists in the blank for "office held" as "Constable, Pct 1 Tom Green County, Texas, and "office sought" as "Exploratory" and showing two expenditures of \$9.00 and \$41.00 for precinct maps and stamps.
7. A news article from September 9, 2007 in the online version of the San Angelo Standard-Times newspaper made reference to the committee the source of the information is not given. It states:

Precinct 1 Constable J.B. Hall announced last week that he has formed an exploratory committee- something he has to do because he isn't allowed to file for candidacy until he enters the final year of his term, said Tom Green County Democratic Chair Linda Shoemaker.

Thank you for your willingness to entertain these questions. Obviously, in light of subject matter, time is of the essence. If we can be of any further assistance in the resolution of this matter, please notify us.

Sincerely;



Chris G. Taylor

County Attorney for Tom Green County, Texas



Gerald A. Fohn

Assistant County Attorney

Encl.

## MEMORANDUM OF LEGAL RESEARCH:

### ARGUMENT AND AUTHORITIES, QUESTION #1:

1. Whether or not a finder of fact could reasonably conclude as a matter of law, that, under the facts presented, Mr. Hall became a candidate by making a public announcement of candidacy for the office of County Commissioner, Precinct #1 while he still had more than a year to serve in his current office so as to trigger Article 16, section 65 of the Texas Constitution?

The County Attorney has not found any court cases on point regarding this question, so must rely on the applicable statutes and prior opinions of the Attorney General of Texas for guidance. There are issues of interpretation of the statutes, however, and the opinions are far from consistent. The standard enunciated in question #1, whether a finder of fact could find, as a matter of law, that Mr. Hall by his announcement(s) triggered the 'resign to run law' of the above article in the Texas Constitution, is taken from the opinion GA-0210 (2004) when it addressed the effect of a Justice of the Peace making a statement to newspaper reporter. Because of its relatively recent date of issuance and our knowledge that the Opinions Committee will not make findings of fact, we are proceeding under the assumption that this would be the proper standard by which the Committee would judge the instant facts.

The said Article 16, section 65 applies to both the offices of constable and county commissioner, in that both offices are so named in that section as being governed by it. There is no dispute among the parties that Mr. Hall's current office of constable for Tom Green County, Texas will end on December 31, 2008, nor that the various acts and statements complained of occurred while he still had more than one year to serve in that office, nor that the office of county commissioner, precinct one would be up for election during 2008. (See narrative set out in request letter.)

**The focus of dispute lies in whether Mr. Hall made such a public announcement constituting "the taking of an affirmative action for the purpose of gaining nomination or election to public office" as contemplated by Section 251.001 of the Texas Election Code, thereby becoming a "candidate" under that section and creating a vacancy in his office as constable which the county commissioner's court could fill if it chose to do so. Mr. Duerstine, the complainant, takes the position that Mr. Hall's various acts as set out in the narrative do constitute such announcements, while Mr. Hall holds that, though he may have done the acts complained of, they did not constitute an "announcement" under his interpretation of the statute to be and based upon his definition of the word "announcement" he provided this office, which argument would imply his claim that he did not demonstrate the requisite intent to become a candidate on those occasions, being aware of the need to delay his formal announcement until the proper time so as not to risk his then current office holding status.**

Of major concern, for the guidance of the commissioner's court, should they enter into deliberations regarding whether Mr. Hall has vacated his office, is by what standard should they judge his actions: Whether it is a subjective test of what Mr. Hall intended when he made his statements and filed his reports or whether it is an objective, "reasonable person" test: what a reasonable person would conclude upon hearing Mr. Hall's statements, viewing news videos and reports about his candidacy, or reading the fliers he distributed. The commissioners' responsibility, should they decide to entertain the complaint of vacancy of office, places them in what amounts to a judicial role, hearing and viewing evidence, making fact findings, and applying the applicable law to those facts.

The applicable laws and opinions regarding such statements all contain some element of volition on the part of the actor in the making of the statement or announcement, signifying an element of knowledge or intent. Section 251.001 of the Texas Election Code defines a "candidate" as a person who knowingly and willingly takes affirmative action to do so by various means, including the making of a public announcement of a definite intent to run, at subsection (E), or, before a public announcement of intent, making a statement of definite intent to run for public office, at subsection (F). Letter opinion LO-95-071, at 2, cited as recently as 2004 in GA-0210 (2004), speaks of a person's statement of intent, without qualification, to run for office, and employs the "reasonable person" test on the part of the hearer to interpret that intent in such a statement. This would suggest that a finder of fact such as the commissioner's court would also have to use the same standard of interpretation of such statements.

In considering the facts to make a determination of intent, knowledge, etc., a question which must be addressed is whether these affirmative acts should be viewed as conduct oriented or whether they should be viewed as result oriented-- in other words, whether the focus should be placed on the declarer's intent to engage in the act of publishing the fact of his candidacy, or on his intent to bring about the result by his actions of becoming a candidate. This concept occurs in criminal law in the form of a jury charge requiring the finder of fact to either find whether the accused intended to engage in the conduct (such as unlawfully carrying a weapon), or whether he intended to cause the result (such as cause bodily injury or damage to property). It could be argued that a person could make an intentional statement or the filing of a report without intending the result to be that of achieving candidate status and the accompanying loss of his employment, with the legal result depending on where the intent lay. The words, "without qualification" beg the same question. These stated standards of review would also suggest that the test is subjective... what the person intended to state or what he intended the result of his statement to be. This distinction is critical in this case due to Mr. Hall's contention that he never did any of his actions (filing the reports, making the speech to the Tom Green County Democratic Club, speaking to the television cameraman) with the intent that he become a candidate, supported by the witness statement of Linda Shoemaker that he qualified the nature of his announcement before the Tom Green County Democratic Club.

There is also found, however, in the same opinion LO-95-071, what seems to be an objective test: "if a reasonable person may conclude from the statement that the individual intends, without qualification, to run for the office in question". The focus shifts under this wording from a search into what the officeholder knew or intended about the nature or effect of his statement to what a reasonable observer, hearer, or reader would conclude about the effect. This falls in with Mr. Duerstine's contention that the statements and the filing of campaign finance statements showed Mr. Hall's intent to be a candidate, since he mentioned the new office in one of the reports, even if the current law does not recognize the filing of the reports in themselves as triggering the "resign to run" law. There is also the content of the campaign flier Mr. Hall circulated at the club meeting and furnished to the Committee discussing his serving on the commissioner's court. JC-0249 is troublesome in this regard, since, on the one hand it could also be argued that the television commentator, as "a reasonable person" was evidently convinced of Mr. Hall's intent to declare his candidacy, as evidenced by the news report in the newscast in the DVD provided, yet in that opinion even though the newspaper reporter was moved to report that subject's candidacy, the opinion committee found that publishing the news story by the reporter was not dispositive of the subject having announced his candidacy and thereby become a candidate. The statements in the DVD made by Mr. Hall in his interview to the television cameraman are more problematic, since only the video portion was shown to the public. The same problem arises in the argument that a conclusion could likewise be drawn that the television employee writing the copy of the broadcast would have viewed the interview and it would have influenced the content of the news report that was broadcast. Does this mean that a news reporter cannot be viewed as that "reasonable person" in viewing the facts of a given case?

Another issue raised in the discussion between the parties was Mr. Hall's knowledge and intent as reflected in his understanding of the meaning of the word "announcement". The definition supplied to us by Mr. Hall (and supplied to the Committee) is the Encarta definition: "Tell something publicly: to declare or report something publicly." "Say something: to say something in a formal, forceful, or aggressive way." "Declare arrival of somebody or something: to tell others formally that somebody or something has arrived." "Signify or foretell something: to be a sign that something..." Our research yielded a definition adopted in Attorney General's Opinion DM-377 (1996) from The Oxford English Dictionary, 2<sup>nd</sup> Edition at page 485: "to deliver news; to make public or official intimation of, to proclaim." As to how his interpretation of the word "announcement" bears upon his intent to make such an announcement, our investigation showed that Mr. Hall relies on the definition he supplied in terms of the concept of making a formal announcement, somewhat like a press conference, and that he did not consider his speech to the Tom Green County Democratic Club to have been made in a public venue, but to a gathering of club members only. It continues to be Mr. Hall's position that his intention was to make a formal announcement at some time in the future when the timing would not be a problem, and that any references he might have made at that meeting to the other office were of a speculative nature, something he was merely considering. He also indicated that he did not consider the cameraman who filmed the interview on the

supplied DVD to be an employee of the television station that broadcast the news segment in which the station announced his candidacy. In light of the different definitions of "announcement" that can be relied upon, it once again becomes important which standard of judging the conduct the finder of fact should look to - the subjective or the objective.

Our research has revealed the following Texas attorney general's opinions touching on the issues at the base of our request:

- (1) An officeholder who stated that he would "seriously consider running for the office" if the then-serving officeholder would resign was held not to have triggered the "resign to run" law. AG LO-95-071.
- (2) A court at law judge who announced at a meeting of the commissioner's court that "he was at that moment a candidate for district judge" was held to have triggered the law. AG DM-377 (1996).
- (3) A Justice of the Peace who issued a press release stating that he would be a candidate for another office was held to have triggered the law. AG WW-1253 (1962).
- (4) A Justice of the Peace who conferred privately with a newspaper reporter and affirmatively stated to the reporter that he intended to run for County Commissioner was held not have triggered the law, based on the fact that, though the reporter published the story of the JP's candidacy the next day, the conversation did not result in the publication of the Justice of the Peace's plans on the date of the interview. GA-0210 (2004). [So in this case, despite the fact that the reporter, based upon what he heard the JP say, was moved to report in his news article the candidacy for the new office, a finder of fact could still find that no "announcement" had occurred, such that it would trigger the "resign to run law", which would tend to point to the subjective test rather than the objective.]

#### **ARGUMENT AND AUTHORITIES, QUESTION #2:**

2. Whether Section 251.001(1)(A), which exempts the filing of a campaign treasurer appointment from constituting "candidacy" or "an announcement" for the purposes of the automatic resignation provisions of Article 16, section 65 of the Texas Constitution, is unconstitutional?

The technical nature of dealing with constitutional issues and time constraints imposed on our office by our workload and the obvious immediacy of Mr. Hall's situation have made it difficult to do an in-depth treatment of this question. Our research yielded an attorney general's opinion, JC-0249, which, though it deals with a different fact situation and a different subsection of Section 251.001 of the Texas Election Code, (whether seeking a party's executive committee's nomination to be the party's candidate in a general election) does contain guidance for the consideration of our case insofar as it explores the

compatibility of that subsection's provisions with Article XVI, section 65 of the Texas Constitution.

The Opinions Committee in that opinion, at page 3, cites the cases of Wentworth v. Meyer, 839 S.W.2d 766,767 (Tex. 1992) and Brown v. Meyer, 787 S.W.2d 42 (Tex.1990) for the proposition that the Texas Supreme Court construes constitutional and statutory provisions relating to eligibility for office narrowly. It took that same approach in deciding whether the officeholder, a county court at law judge, had vacated his office by seeking the executive committee's nomination. It is our assumption that your committee will take the same approach in determining whether the law exempting the affirmative act of designating a campaign treasurer under Section 251.001(1)(A) from the effects of Article XVI, section 65 or Article XVI, section 11 of the Constitution is unconstitutional.

The argument for the subsection in question being constitutional is that it protects the eligibility of an officer to continue to hold his office while he explores the possibility of seeking another office, while providing the financial transparency the election financial reporting laws seek to provide.

The counter argument accepts the reasoning of JC-0249, at page 5 for the proposition that the legislature may define the term "candidate" for the purposes of title 15 of the Election Code governing campaign contributions and expenditures, reporting requirements and expenditures for the purposes of transparency. But it also draws encouragement for its point of view from the language that same opinion employs at that same page regarding a provision of the Election Code's interaction with the constitutional "resign to run" provision: "Thus, we do not believe that the statutory provision controls the meaning of candidate for purposes of the constitutional provision". The legal argument could be made, then, that just as the definition of "candidate" cannot supersede the effect of the constitution in the situation, involving the seeking of an executive committee's nomination, that, in our situation by exempting the reporting portion of the subsection from the effects of the plain meaning of the constitution by the passing of a statute, the legislature might be overstepping its bounds under the separation of powers doctrine. The public-policy concern voiced by our county judge is that the filing of such a report is such a public act that it defies credulity to say that such an act should be legally shielded from its obvious proof of intent to achieve candidate status by making an "announcement to become a candidate" under subsection (E), or make "a statement of definite intent to run for public office and the soliciting of support" under subsection (F).