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OPINION COMMITTEE



FILE # ML-45944-210  
ID # 45944

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December 22, 2008  
Via certified mail & facsimile

**RQ-0773-GA**

Honorable Greg Abbott  
Attn: Intergovernmental Relations  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

*In re: Request for Attorney General Opinion Pursuant to Texas Government Code § 402.043*

Dear Attorney General Abbott:

On behalf of the Smith County District Attorney's Office, and in the interest of justice, this office kindly requests an opinion from the Texas Attorney General to address an issue of importance relevant to compliance with the Texas Open Meetings Act by elected officials.<sup>1</sup> Specifically, we ask that your office issue a legal opinion regarding the administration of the Texas Government Code, Chapter 551 (hereinafter "The Open Meetings Act" or "The Act"), which mandates that a "governmental body" conduct publicly-noticed and open business in any "meeting" of that body. **Tex. Gov't Code §§ 551.001(3)-(4); Id. § 551.002** (stating that "Every regular, special, or called meeting

<sup>1</sup> Tex. Gov't Code § 402.43 (stating that "The attorney general shall advise a district or county attorney of this state, on the attorney's request, in the prosecution or defense of an action in which the state is interested before a district or inferior court if the requesting attorney has investigated the question involved and submitted a brief to the attorney general.").

of a governmental body shall be open to the public, except as provided by this chapter.”). The Smith County District Attorney’s Office serves as advisor to the Commissioners Court regarding compliance with The Act through the Civil Legal Department. The Open Meetings Act specifically references the role of a governing body’s attorney by stating that “It is an affirmative defense to prosecution under Subsection (a) that the member of a governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for a governmental body.” *Id.* § 551.144(c). In order to assist the county with compliance under The Act, we ask that your office consider the legal issue outlined below:

### **Issue Presented**

**Whether or not a non-quorum of a county commissioners court may meet with community leaders under specific situations to gather facts and formulate a mere proposal to the full commissioners court where that fact-finding recommendation is non-binding and may be rejected by the commissioners court or the electorate?**

### **Background**

Like many growing counties, Smith County, Texas has struggled for numerous years with jail overcrowding in its county jail. In fact, the county is under an on-going threat of being placed under a remedial order by the Texas Commission on Jail Standards. **Letter from Texas Commission on Jail Standards, dated January 6, 2004, marked as “Exhibit A,” which is incorporated herein as if copied in full.** The county’s population growth trends and need for a new jail facility have been confirmed by a formal study conducted by Carter Gopal Lee in October of 2007. **Carter Gopal Lee Final Report, dated October 2007, marked as “Exhibit B,” which is incorporated herein as if copied in full.** In recent years, the county has called various bond election proposals to build a jail, including two (2) proposals in 2006 in the amounts of \$83 and \$75 million that were defeated 63.44 to 36.56 percent. **“Exhibit C,” Election Results Summary, which is incorporated herein as if copied in full.** Again in 2007, a jail bond initiative in the amount of \$125 million was defeated 68.93 to 31.07 percent. **“Exhibit D,” Election Results Summary, which is incorporated herein as if copied in full.** After much public debate and many bond proposals, including the formulation of several detailed plans by officially-sanctioned committees of the Commissioners Court, all of the aforementioned bond proposals failed. *Supra Exhibits C & D.*

In light of years of planning and attempts to build a new jail to adequately address the county's current and future needs,<sup>2</sup> the County Judge (on his own) initiated consultation with a few community leaders with the hope of mediating and bringing forth a scaled-down proposal after the last failed bond election of 2007. Soon after the November 2007 bond failure, the County Judge met with State Senator Kevin Eltife, Precinct 2 Commissioner JoAnn Fleming, a local businessman, and an architect from Dallas for a series of approximately 8 meetings. **"Exhibits E1-E8," Judge Baker's Appointment Calendar, which are incorporated herein as if copied in full.** Occasionally, the ad hoc committee had representatives from the Sheriff's Department gather information regarding the specifications of facility needs so that the recommendation would be viable.<sup>3</sup> The ad hoc committee undertook to make a fact-finding recommendation based on the information gathered from community input.

The County Judge acted relying on both a legal opinion from the Civil Assistant District Attorney assigned to the Commissioners Court and a Texas Attorney General opinion, which indicates that a non-sanctioned committee (ie, one that has not been formally appointed by the governing body) may meet to gather information. *See Op. Tex. Att'y Gen. No. GA-0504 (2007)* at 4 (concluding that "A group of elected and appointed officials and public employees . . . [may] meet to share information . . . [that] does not supervise or control public business or public policy and is accordingly not subject to the Open Meetings Act.").

The ad hoc committee was not starting from scratch, but rather gathering a body of work consisting of years of examination by prior committees that had been formally sanctioned by the Commissioners Court. The information obtained was whittled down to make a scaled-down proposal. In fact, the County Judge already had architectural plans on his computer titled "Option 10," which were e-mailed to his office by the architect on November 13, 2007 (almost immediately after the failed 2007 bond election). **The ad hoc committee, while not viewing nor directly modifying "Option 10," gathered information to make a fact-finding recommendation relevant to "Option 10."** The Texas Attorney General Opinion that the County Judge relied on states as follows:

**An advisory committee without authority to control or supervise public business or policy does not hold "meetings" under the Act and thus is not subject to the Act. *See Op. Tex. Att'y Gen. No. GA-0504 (2007)* at 3 (citing *Op. Tex. Att'y Gen. No. GA-0232 (2004)* at 3-5.).**

<sup>2</sup> Carter Goble Lee Final Report, dated October 2007 at 3-23 (indicating a 34.8% growth rate in county's jail space needs).

<sup>3</sup> It is illogical to submit a proposal to the Commissioners Court if it is not viable.

**Authorities**

§ 551.001(3) of the Texas Government Code states in pertinent part:

**"Governmental body" means:**

- (A) a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members;**
- (B) a county commissioners court in the state;**
- (C) a municipal governing body in the state;**
- (D) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;**
- (E) a school district board of trustees;**
- (F) a county board of school trustees;**
- (G) a county board of education;**
- (H) the governing board of a special district created by law;**
- (I) a local workforce development board created under Section 2308.253;**
- (J) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and**
- (K) a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code.**

§ 551.001(4) of the Texas Government Code states in pertinent part:

**"Meeting" means:**

**(A) a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or**

**(B) except as otherwise provided by this subdivision, a gathering:**

**(i) that is conducted by the governmental body or for which the governmental body is responsible;**

**(ii) at which a quorum of members of the governmental body is present;**

**(iii) that has been called by the governmental body; and**

**(iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.**

The term does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, or the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.

The term includes a session of a governmental body.

§ 551.002 of the Texas Government Code states in pertinent part:

**OPEN MEETINGS REQUIREMENT. Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.**

### Request for Legal Opinion

The ad hoc committee met for a series of information gathering sessions to examine recommending a reduction in both the scope and monetary amount of the project by incorporating lessons learned from past failed bond elections. Key facts regarding the County Judge's scaled-down proposal include, but are not limited, to the following:

- The ad hoc committee was not sanctioned or appointed by the Commissioners Court;
- The ad hoc committee consisted of the County Judge, one commissioner, a state senator, a local businessman, an architect, and occasionally representatives from the Sherriff's Office. The ad hoc committee did not operate under the control of the Commissioners Court, nor did it have any power to tell the Commissioners Court what to do;<sup>4</sup>
- The ad hoc committee simply made a fact-finding recommendation by taking prior bodies of work and gathering additional information resulting in a scaled-down proposal in both scope and monetary amount from the previous bond proposal of \$125 million down to \$59.6 million (after several failed bond elections);
- There was no guarantee that the full Commissioners Court would accept the ad hoc committee's fact-finding recommendation, which would still be subject to approval of the voters;
- The Commissioners Court required a series of facilities planning workshops and consideration of the proposal in the form of a formal slide presentation by the ad hoc committee. Once this was done, a bond election was called by the Commissioners Court on the scaled-down recommendation,<sup>5</sup> and

<sup>4</sup> See Op. Tex. Att'y Gen. No. GA-0361 (2005) at 4 (discussing definition of "governmental body" under The Act and stating "To be a governmental body under section 551.001(3)(D), an entity 'in its organization and authority must have (1) rule-making power or (2) possess quasi-judicial power, and be classified as a department, agency, or political subdivision of a county or city.'" (citing *City of Austin v. Evans*, 794 S.W.2d 78, 82 (Tex. App.—Austin 1990, no writ))).

<sup>5</sup> Therefore, this was not a situation where the Commissioners Court would "rubber stamp" the proposal because the ad hoc committee had no power to force the Court to accept the plan, nor was there any guarantee that the proposal would be adopted for submission to the voters. See e.g., Op. Tex. Att'y Gen. No. GA-0361 (2005) at 4 (indicating that where an entity's recommendation "is advisory in nature and does not, without evidence that the commissioners court rubber-stamps the [entity's] recommendation, compel the application of the Act to a

- The information gathering sessions held by the County Judge did not meet the definition of a "meeting" under The Act. *See Op. Tex. Att'y Gen. No. GA-0504 (2007) at 3 (citing Op. Tex. Att'y Gen. No GA-0232 (2004) at 3-5.) (stating that "An advisory committee without authority to control or supervise public business or policy does not hold "meetings" under the Act and thus is not subject to the Act.")*.

The full Commissioners Court held publically posted facilities planning workshops and a regular session to receive the ad hoc committee's fact-finding recommendation. **"Exhibits F1-F2," which are incorporated herein as if copied in full.** The Court took the matter under advisement until another special session was held a few days later. **"Exhibit G," which is incorporated herein as if copied in full.** After consideration by the Commissioners Court, the Court voted to accept the recommendation on August 14, 2008. **"Exhibit H," which is incorporated herein as if copied in full (stating that "after independent review by the Commissioners Court, the Court deems it advisable to call a bond election for the proposition hereinafter stated).<sup>6</sup>** After calling the election, the public was given many opportunities to review the proposal and attend town-hall meetings. **"Exhibits I1-I4" which are incorporated herein as if copied in full.** Community groups also had an opportunity to provide input and review the recommendation, including a diverse range of community organizations such as city officials, religious leaders, minority representatives, economic development councils, and anyone who wanted to attend to see the presentation. **Roy Maynard, Jail Plan to be Presented to Officials, Public Today, Tyler Morning-Telegraph, August 1, 2008, at A1, which is marked as "Exhibit J" and incorporated herein as if copied in full.** The voters had the ultimate decision on the bond proposal, which was defeated on November 4, 2008 by a close vote of 55% against and 45% for the measure. **Adam Russell, Commissioners to Review, Possibly Revise Jail Proposal, Tyler Morning Telegraph, November 6, 2008, at A1, which is marked as "Exhibit K" and incorporated herein as if copied in full.**

Since the ad hoc committee made a fact-finding recommendation subject to approval by both the full Commissioners Court and the electorate, the procedure developing the proposal did not run afoul of the Open Meetings Act based on the facts presented here.<sup>7</sup> Additionally, the ad hoc committee working with the County Judge did

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county entity with 'the power to supervise or control public business.')

 (citing *Willmann v. City of San Antonio*, 123 S.W.3d 469, 479 (Tex. App.—San Antonio 2003, pet. denied).

<sup>6</sup> The motion passing the Order Calling Election was passed unanimously by the Commissioners Court. *See Minutes of Special Meeting of the Smith County Commissioners Court, August 14, 2008.*

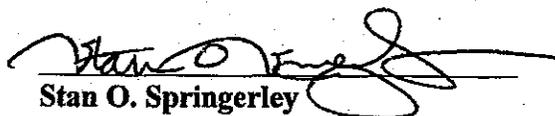
<sup>7</sup> The public was given an opportunity to comment on and question the proposal at numerous town-hall meetings.

not consist of a "governing body" under The Act. Furthermore, the ad hoc committee gatherings did not meet the definition of a "meeting" under The Act.

Based on the foregoing, the Smith County District Attorney's Office, through its Civil Legal Department, requests that the Texas Attorney General issue a legal opinion with regard to propriety of the ad hoc committee process implemented by the County Judge in this situation where numerous proposals had already been explored in depth and new information was gathered to introduce a scaled-down recommendation to submit to both the Commissioners Court and the voting public.

Thank you for your time, consideration, and attention to this matter.

Sincerely,



**Stan O. Springerley**  
**Smith County Civil Attorney &**  
**Assistant Criminal District Attorney**

Cc: Hon. County Judge Joel P. Baker  
Smith County Commissioners Court

Enclosures