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DEC 15 1999

Opinion Committee

December 13, 1999

The Honorable John Cornyn
Attorney General, State of Texas
Opinion Committee
P.O. Box 12548
Austin, Texas 74711-2548

RQ-0160-JC

Re: Request for an Attorney General's Opinion

FILE # ML-41160-99

I.D. # 41160

Dear Mr. Cornyn:

I request your assistance regarding the phrase "newspaper of general circulation" as that phrase is used in the requirements for publication of legal notices by county governments.

BACKGROUND

The Fort Bend County Purchasing Department recently solicited bids for a term contract for newspaper publication of legal notices in Fort Bend County. Bid specifications included:

1. Compliance with all applicable statutes regarding the publishing of legal notices and advertisements required of county governments in the State of Texas;
2. Compliance with the requirements of Texas Government Code § 2051.044;
3. Submission of a copy of the newspaper's circulation data audit, for paid and unpaid circulation, for the twelve (12) month period ending December 31st of the previous year; and
4. General circulation in Fort Bend County, Texas.

Five newspapers submitted bids, four of which were rejected for not meeting the bid specifications.

FACTS

One of the bidding newspapers (Newspaper "A"), is a local weekly newspaper that has a circulation of approximately 200 paid and/or requested mail subscriptions. Slightly less than half of these 200 subscriptions are paid/requested outside-county mail subscriptions with the remainder being paid in-county subscriptions. Newspaper "A" devotes more than 25 percent of its total column lineage to general interest items and has been published regularly and continuously at least once each week for a number of years. Additionally, Newspaper "A" is entered as a second-class postal matter (or "Periodicals" as the U.S. Postal Service now refers to it) in Fort Bend County, Texas.

The publisher of Newspaper "A" also publishes another weekly newspaper (Newspaper "B"). Newspaper "B" is a local weekly that has a press run of approximately 56,000 newspapers and is distributed free to homes and businesses in Fort Bend County. Like Newspaper "A", Newspaper "B" devotes more than 25 percent of its total column lineage to general interest items and has been published regularly and continuously at least once each week for a number of years. However, Newspaper "B" is not entered as a Periodicals postal matter in Fort Bend County, Texas.

It has been proposed that, if the contract for publication of legal notices is awarded to Newspaper "A", then Newspaper "B" will also print the legal notices in its newspaper at no additional charge to the county. Newspaper "B" cannot in and of itself be awarded the contract since it is not entered as a Periodicals postal matter and as such does not meet the requirements of Texas Government Code § 2051.044.

QUESTIONS

- Question 1: What constitutes a "newspaper of general circulation" as that phrase is used in the requirements for publication of legal notices?
- Question 2: Is there an objective standard to determine whether a newspaper is one of general circulation in a given county?
- Question 3: In a county with a population of approximately 325,000, is a weekly newspaper that meets the requirements of Texas Government Code § 2051.044 and that has a subscriber base of approximately 200, a newspaper of general circulation?
- Question 4: In determining whether to award the contract for publication of legal notices to Newspaper "A", is it permissible to consider the circulation numbers of Newspaper "B", even though Newspaper "B" would not in and of itself qualify for the award of the contract (because Newspaper "B" is not entered as a Periodicals postal matter in Fort Bend County, Texas)?
- Question 5: Is it permissible for Commissioners Court to set the minimum number of subscribers a newspaper must have in the bid specifications?
- Question 6: Is it permissible for Commissioners Court to base its lowest and best bid criteria on the cost per unit or subscriber rather than the price per column inch?
- Question 7: Since there are both special and general statutes, each requiring a different standard for publication, may Commissioners Court require that the newspaper be one of general circulation when it determines its bid specifications?

CASE LAW

The phrase “newspaper of general circulation,” as that phrase is used regarding publication of legal notices in newspapers, is not defined in either statute or case law. In fact, there is little Texas law on the issue.

Texas

“The primary purpose of the printing of legal notices is to give the widest publicity practicable.” 24 ALR4th 822, 825. The word “general” is a relative term, and its meaning is ordinarily determined by a process of inclusion and exclusion. Therefore, that which may constitute general circulation in a town with a small population may not be general in a populous city. *Id.* “As stated by one of the learned appellate courts, notice by publication is a poor expedient at best to give general notice of a sale, and such notice should not be published in a publication of extremely limited circulation.” *McGlothlin v. Scott*, 6 S.W.2d 129, 133 (Tex.Civ.App.-Fort Worth, Mar 01, 1928) (NO. 11928).

The Attorney General has offered some guidance on the issue. In footnote 1 of Opinion No. JM-1248, Attorney General Jim Mattox opined, “You neither ask about nor supply information relative to the question of whether the newspaper is one of general circulation; thus we do not address that issue but assume that the newspaper meets the requirement. See *Robinson v. State*, 143 S.W.2d 629, 633 (Tex.Civ.App.—Dallas 1940, writ dismiss’d, judgment cor.)” In *Robinson*, a notice of sale was published in a newspaper of general circulation when it was “published in a daily newspaper which had 26 years’ standing in the city of Dallas, and had a circulation of about 1,000 among people in different walks of life.” *Robinson v. State*, *supra* at 633.

The Corpus Christi Church Press and Weekly News was held to be a newspaper of general circulation when it “had a circulation of about 4000 in a city of about 45,000 population” ...with “about 1200 copies being delivered to paid subscribers.” *City of Corpus Christi v. Jones* 144 S.W.2d 388, 393 (Tex.Civ.App.-San Antonio 1940).

The Court of Appeals in *Christy v. Williams* held that the South Houston Mirror was a paper of general circulation when it said “Thus the purpose which the Legislature had in mind was duly served because the notice was brought home to voters in a paper of general circulation and at the material times more than 1,000 copies of the paper were mailed out to voters of South Houston.” *Christy v. Williams* 292 S.W.2d 348, 351 (Tex.Civ.App. 1956).

Other Jurisdictions

The court in *Moore v. State* (1976, Alaska) 553 P2d 8, held that a newspaper which contained news of general interest to the community and which reached a diverse readership was one of general circulation. The court said that the proper construction of the term “general circulation” required consideration of both the quantitative and the qualitative aspects of the publication. The

court noted that at the time the notice was published, the population of the area was approximately 3,500 and the circulation of the newspaper in the area was approximately 130. The court reasoned that although the number of readers was small, it was not so insignificant that the newspaper would fail to reach a diverse group of people in the community.

It was held in *McIntyre v. Mohave County* (1980, App) 127 Ariz 127, 618 P2d 621, *revd*, vacated on other grounds 127 Ariz 317, 620 P2d 696, as a matter of law, that a newspaper was one of general circulation where the newspaper carried news of interest to the people of the area, and where the breadth of its advertisers was certainly indicative of the diversity of its subscribers. The court said that while the circulation of the newspaper was much less than another newspaper, it was not so limited as to disqualify it as a newspaper of general circulation. The court noted that between 200 and 300 newspapers were dispersed throughout the area, 30 to 50 of which were mail subscriptions.

It was held by the court in *Great Southern Media, Inc. v. McDowell County* (1981) 304 NC 427, 284 SE2d 457, 24 ALR4th 803, that a newspaper qualified under the general circulation provisions of a statute for publication of notices of ad valorem tax lien sales. Observing that cases from sister jurisdictions made it clear that the term "general circulation" as applied to newspapers refers not so much to the numerical or geographic distribution of the newspaper itself, and that the primary consideration is whether the newspaper contains information of general interest. The court stated that for a newspaper to be one of general circulation to actual paid subscribers in the taxing unit, it has to have a content which speaks to the public generally, it must have more than a de minimis number of actual paid subscribers in the taxing unit, its paid subscriber distribution must not be entirely limited geographically to one community, or section of the taxing unit, and it must be available to anyone in the taxing unit who wishes to subscribe to it.

In *Barrett v. Cuskelly* (1966) 52 Misc 2d 250, 275 NYS2d 280, *affd* on other grounds (2d Dept) 28 App Div 2d 532, 279 NYS2d 380, the court held that a newspaper which had a circulation of 5,000 readers in a district containing 15,000 qualified voters was a newspaper of general circulation within the meaning of a statute which required notice of a special election. Observing that the statutory provision contained no definition of what constituted a newspaper having a general circulation, the court noted that courts have construed similar phraseology to mean that the newspaper must be circulated throughout an entire area in which the notice was intended to be read.

It was held by the court in *Joint School Dist. v. Joint County School Committee* (1965) 26 Wis 2d 580, 133 NW2d 317, that a newspaper containing general news and having a circulation of only 139 in a county, where 15,309 people within a school district resided, had a general circulation in that district. The court noted that decisions in other jurisdictions indicated that whether or not general circulation exists hinges not upon the number of people who receive the newspaper, but rather upon whether the news coverage is directed to the interests of a particular

class of people. The court explained that a paper containing general news which was available to the public at large was ordinarily considered to be one of general circulation.

The court in *State ex. rel. Yaeger v. Rose* (1927) 93 Fla 1018, 114 So 373, held that a newspaper with a subscription list of 350 or less in a county with a population of over 150,000, which was devoted primarily to reporting the proceedings and transactions of the courts, which reported little or no news in which the general public would have an interest, and which was devoted largely to matters of interest to the legal profession was not a newspaper within the contemplation of a constructive service statute which called for the publication of notice in a newspaper of general circulation.

In *N. H. Ranch Co. v. Gann* (1938) 42 NM 530, 82 P2d 632, the court said that the question as to whether a newspaper is one of general circulation involves other elements besides the number of its subscribers, that whether a newspaper is of general circulation must depend largely upon the diversity of its subscribers, rather than upon mere numbers, and that the extent of circulation is also involved.

In *State ex rel. Sentinel Co. v. Wood County* (1910) 14 Ohio CC NS 531, 33 Ohio CC 93, the court held that a newspaper was one of general circulation in the county in which it was published. The newspaper had a circulation of about 800 or 900 copies in a county that had a population of 50,000.

In *People ex rel. Guernsey v. Sommers* (1912) 153 App Div 623, 138 NYS 1136, affd 208 NY 631, 102 NE 1099, it was held in a proceeding to review the appointment of a newspaper as the official newspaper of a county... that in view of the fact that the county was large and populous, and that the circulation was so limited, the newspaper did not fulfill the requirements of a statute which specified that due regard be given to a newspaper's regular and general circulation.

STATUTES

There are a number of statutes, both special and general, that require that some type of notice be published in a newspaper of general circulation. Not all of these statutes pertain to county government, but a definition of the phrase "newspaper of general circulation" would probably be beneficial to all that must comply with such a notice statute. Some statutes that require that notice be published in a newspaper of general circulation include:

- Agriculture Code s 202.043. Notice of Assessment Hearing.
- Alcoholic Beverage Code s 11.392. Notice of Private Club Application or Renewal.
- Alcoholic Beverage Code s 61.38. Notice of Application.
- Education Code s 28.03-App. Election: Petition; Order; Notice; Ballots; Conduct; Expenses.
- Government Code s 531.037. Notice of Public Hearings.
- Government Code s 2007.042. Public Notice.
- Health & Safety Code s 361.0665. Notice of Intent to Obtain Municipal Solid Waste Permit.

Health & Safety Code s 361.0791. Public Meeting and Notice Requirement.
Health & Safety Code s 775.015. Filing of Petition and Notice of Hearing.
Health & Safety Code s 775.052. Petition for Dissolution; Notice of Hearing.
Health & Safety Code s 776.015. Filing of Petition and Notice of Hearing.
Health & Safety Code s 776.053. Petition for Dissolution; Notice of Hearing.
Health & Safety Code s 794.015. Filing of Petition and Notice of Hearing.
Health & Safety Code s 794.056. Petition for Dissolution; Notice of Hearing.
Human Resources Code s 42.0461. Public Notice and Hearing in Certain Counties: Residential Child Care.
Local Government Code s 54.035. Notice.
Local Government Code s 105.012. Notice.
Local Government Code s 272.001. Notice of Sale or Exchange of Land by Political Subdivision; Exceptions.
Local Government Code s 281.014. Notice.
Local Government Code s 392.054. Notice of Public Meeting.
Local Government Code s 395.044. Notice of Hearing on Land Use Assumptions.
Local Government Code s 395.049. Notice of Hearing on Capital Improvements Plan and Impact Fee.
Local Government Code s 395.055. Notice of Hearing on Amendments to Land Use Assumptions, Capital Improvements Plan, or Impact Fee.
Local Government Code s 402.069. Notice and Hearing Requirements; Appeal.
Natural Resources Code s 152.018. Notice to Specific Landowner.
Parks & Wildlife Code s 26.002. Notice of Hearing.
Property Code s 5.092. Determination and Notice of Applicability.
Property Code s 59.044. Notice of Sale.
Property Code s 115.016. Notice.
Property Code s 201.008. Notice and Certificate of Compliance.
Tax Code s 41.70. Public Notice of Protest and Appeal Procedures.
Tax Code s 111.018. Notice of Sale of Seized Property.
Transportation Code s 257.104. Notice of Hearing on Petition.
Transportation Code s 314.022. Notice of Condemnation.
Transportation Code s 441.023. Notice of Hearing.
Transportation Code s 458.005. Public Hearing on Creation of Rural Transportation District; Notice.
Transportation Code s 683.012. Taking Abandoned Motor Vehicle Into Custody: Notice.
Water Code s 11.175. Notice.
Water Code s 26.022. Notice of Hearings; Continuance.
Water Code s 26.025. Hearings on Standards; Notice to Whom.
Water Code s 35.009. Notice and Hearing.
Water Code s 36.014. Notice and Hearing on District Creation.
Water Code s 51.028. Multi-County District: Notice of Hearing.
Water Code s 51.758. Notice of Certain Exclusions; Petition for Ratification Election.
Water Code s 51.798. Notice of Election.

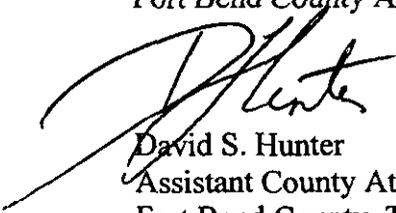
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Water Code s 54.032. Conversion of District: Notice.
Water Code s 55.026. Notice of Hearing.
Water Code s 58.028. Multicounty District: Notice and Hearing on District Creation.
Water Code s 58.798. Notice of Election.
Water Code s 60.172. Notice of Hearing on Indebtedness.
Water Code s 66.018. Notice and Hearing on District Creation.
Vernon's Ann. Texas Civ. St. Art. 1396-2.11. Notice of Members' Meetings.
Probate Code, s 33. Issuance, Contents, Service, and Return of Citation, Notices, and Writs in Probate Matters.
Probate Code, s 367. Mineral Leases After Public Notice.
Probate Code, s 632. Issuance, Contents, Service, and Return of Citation, Notices, and Writs in Guardianship Matters.
Probate Code, s 847. Mineral Leases After Public Notice.

Your assistance answering these questions would be greatly appreciated. Please contact this office if any questions arise or if any additional information is required.

Respectfully submitted,

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