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OPINION COMMITTEE

Susan D. Reed
Criminal District Attorney
Bexar County, Texas
May 2, 2000

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Honorable John Cornyn
Texas Attorney General
Supreme Court Building
Administrative Office
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0228-JC
FILE # ML-41408-00
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OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION

Re: Opinion Request regarding Utilization of Water Utility System Revenues to Pay Legal Counsel for Defense of Mayor and City Council Members on Indictments related to Texas Open Meetings Act Violations.

Dear Attorney General Cornyn:

Certain actions taken by members of the Elmendorf City Council in employing and ordering payment to attorneys to represent them in connection with their indictments for Texas Open Meetings Act violations on November 23, 1999 raise the following issues for which this office is requesting an opinion be issued:

1. Can a member of a city council that was indicted for Texas Open Meetings Act violations vote on resolutions to employ and pay legal counsel to represent other members of the city council that were indicted for the same violations and to which the voting member is alleged to be a party?
2. May the governing body of a municipality authorize payment of attorneys' fees incurred in defending the mayor and certain city council members following their indictments for Open Meetings Act violations occurring during a meeting of the city council?
3. Can revenues from a municipal water utility system be utilized to pay legal counsel for representation of the mayor and certain city council members on Open Meetings Act violations if the resolution authorizing payment specified that the monies were to be derived from the city budget (i.e. general fund)?

BACKGROUND

Indictments for Texas Open Meetings Act violations occurring on November 23, 1999 were brought against the mayor, four city council members, and the chief of police of the City of

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Elmendorf. A special meeting of the Elmendorf City Council was held on April 16, 2000 in order to vote on a resolution which would authorize the engagement and payment of counsel to represent the city council members. The resolution recited that the mayor and certain city council members attending a November 23, 1999 city council meeting were acting in good faith and within the scope of their official duties while in attendance at the meeting and that the engagement and payment of attorneys to represent the mayor and certain city council members "involves a public interest requiring a vigorous defense so that the payment of their legal fees serves a public interest as opposed to a private interest."

The resolution approved amending the City of Elmendorf budget for the purpose of employing counsel to represent the mayor and three city council members. The resolution did not specifically state the budget item from which the funds were to be drawn. However, this office has copies of four checks drawn on the "City of Elmendorf Water System" fund made payable to the attorneys named in the resolution and in the amounts stated.

The resolution to hire legal counsel was voted on by five of the city council members. One of the voting city council members had recently been appointed to replace a former city council member who resigned following his indictment on the Open Meetings Act violations and a second voting city council member had received immunity from prosecution. The three city council members voting for approval of the resolution have criminal charges pending for violations of the Open Meetings Act and the two city council members voting against approval of the resolution were the new appointee and the city council member who received immunity from prosecution.

The Elmendorf City Council called a special meeting on April 20, 2000 to reconsider the April 16th resolution because three of the indicted city council members had voted for approval of payment of their own legal fees. During the April 20th special meeting, approval of the payment of legal counsel for the three indicted city council members was obtained through separate resolutions for each of the city council members with the city council member whose legal fees were under consideration abstaining from voting. Votes were cast on each resolution by two of the three members of the city council indicted as well as the indicted city council member that received immunity from prosecution and the appointee. The three resolutions were approved with the city council member that received immunity from prosecution being the only city council member voting against approval of the resolutions. Copies of the April 16th and April 20th resolutions and the four checks drawn on the water system are included for reference purposes.

ISSUE 1 **Can a member of a city council that was indicted for Texas Open Meetings Act violations vote on resolutions to employ and pay legal counsel to represent other members of the city council that were indicted for the same violations and to which the voting member is alleged to be a party?**

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While Chapter 171 of the Texas Local Government Code has pre-empted the common law of conflict of interests as applied to local public officials, it is not applicable to this fact situation as Chapter 171 addresses local public officials who have a substantial interest in a business entity. The circumstances being examined relate to the propriety of a public officer voting on a resolution pertaining to a matter in which the public officer has a substantial interest but which does not involve a business entity as defined in Chapter 171.

To the extent the municipal charter of the City of Elmendorf or a code of ethics adopted by the City addresses conflicts of interest with regard to situations in which city council members are required to abstain from voting, the provisions of the city charter or code of ethics could be applied to determine which members of the governing body may vote on the resolution to hire counsel.

Attorney General Opinion No. JM-824, issued November 23, 1987, recognizes that public policy in Texas forbids a public official from casting a deciding vote in a matter concerning an issue in which he has a direct, adverse interest. In Hager v. State ex. rel. DeWayne TeVault et al., 446 S.W.2d 43, 49 (Tex. Civ. App.-Beaumont 1969, writ ref'd n.r.e.), a city council member voted on a resolution appropriating city funds for payment of legal expenses which would directly benefit the city council member. The Court in Hager held that the authorities are generally in accord that a public official is not eligible to vote on a matter which "affects his personal pecuniary interest" and, further, that public policy forbids sustaining municipal action based upon a vote of one member of its governing body on a matter which directly and immediately affects him individually. Since the city council member in Hager was disqualified from voting on the resolution the Court held his vote was an invalid vote. Without his vote, the result was a tie vote which was ineffective to provide authorization.

Applying the foregoing statements of public policy, the three indicted city council members should have been precluded from voting on the resolution presented at the April 16th special meeting as they have a personal pecuniary interest in its approval. Having voted, their votes on the resolution were invalid. Because the two remaining votes were against approval, the April 16th resolution failed to pass.

The Elmendorf City Council's April 20th votes on paying for legal representation were an acknowledgment of and an attempt to cure the personal pecuniary interest problem. However, carrying forward the public policy considerations set forth in Hager, a city council member would clearly be unduly influenced in his vote on a matter which affects the pecuniary interest of another city council member if the city council is to be voting during the same meeting on the identical matter as it relates to the voting city council member and the voting member is alleged to be a party to the events giving rise to the necessity to hire an attorney. Accordingly, it appears that the three indicted city council members should have abstained from voting on the resolutions presented at the April 20th special meeting. The resulting vote would then have been a tie vote with the new city council member voting for approval of the resolutions and the city council member receiving

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immunity from prosecution voting against approval. As in Hager, a tie vote would be ineffective to approve authorization. Since the attorneys hired to represent the indicted city council members through the adoption of the resolution were paid following the April 16th special meeting, it would appear those city council members benefitting from the payment of the legal fees would be personally liable for repayment of the funds expended on their behalf.

ISSUE 2 May the governing body of a municipality authorize payment of attorneys' fees incurred in defending the mayor and certain city council members following their indictments for Open Meetings Act violations occurring during a meeting of the city council?

Common law permits the governing body of a municipality to authorize payment of attorneys' fees to defend their officers and employees in certain circumstances. Op. Tex. Att'y Gen. Nos. DM-488(1998); JM-968 (1988); JM-824 (1987); JM-685 (1987). The authority to employ attorneys extends to circumstances in which the public officer is alleged to have committed a criminal act. Op. Tex. Att'y Gen. No. JM-968(1988).

The authority of the governing body of a municipality to employ counsel is limited to situations where the public officer appears to have been acting within the scope of his authority in the performance of public duties and the governing body believes in good faith that the public interest is at stake. Op. Tex. Att'y Gen. Nos. DM-488(1998); H-887(1976); JM-824 (1987); DM-107(1992). Attorneys may not be compensated from public funds when public officials have only a "direct personal interest" in the use of city funds for their own defense. Op. Tex. Att'y Gen. No. H-887(1976). Texas Attorney General Opinion No. H-887 held the authority of a city council to employ attorneys is limited to those situations in which legitimate interests of the city require assertion of a vigorous legal defense to protect the public interest.

ISSUE 3 Can revenues from a municipal water utility system be utilized to pay legal counsel for representation of the mayor and certain city council members on Open Meetings Act violations if the resolution authorizing payment specified that the monies were to be derived from the city budget (i.e. general fund)?

The Resolution approved by the Elmendorf City Council on April 6, 2000 called for the city's budget to be amended for the "stated purpose." Following the meeting, it was apparently determined there were insufficient funds in the general fund to pay the approved legal fees and the mayor ordered the city secretary to pay the attorneys' fees from the City of Elmendorf Water System fund. The monies were drawn from the Elmendorf Water System fund without a vote by the city council.

The City of Elmendorf was granted a Certificate of Convenience and Necessity by the Texas Public Utility Commission on November 1, 1979, to provide water utility service to the service area

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designated in the final order issued by the Public Utility Commission. Section 13.042 of the Texas Water Code grants the governing body of a municipality exclusive original jurisdiction over all water and sewer operations and services provided by a water and sewer utility within its corporate limits.

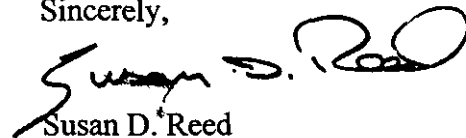
Section 1502.059 of the Texas Government Code, formerly Article 1113a of the Texas Revised Civil Statutes Annotated, allows a municipality and its officers and utility trustees to transfer to the municipality's general fund for general or special purposes revenues from the utility system in the amount and to the extent authorized in the indenture, deed of trust, or ordinance providing for payment of the public securities. This office was advised in a letter dated April 21, 2000 from Michael S. Brenan, Elmendorf City Attorney, that the City of Elmendorf did not issue public securities for the establishment of the water utility system. Accordingly, authority to transfer the water utility system revenues from the water utility system fund to the general fund was not made pursuant to the provisions of Section 1502.059 of the Texas Government Code.

The Elmendorf water utility system presumably would be subject to the provisions of Chapter 402, Municipal Utilities, of the Texas Local Government Code. Section 402.001(b) allows a municipality to purchase, construct, or operate a utility system inside or outside the municipal boundaries and to "regulate the system in a manner that protects the interests of the municipality." The above-quoted language implies that the term, "the interests of the municipality", is restricted in its application to the operation of a water utility system rather than the interests of the municipality in all city matters. Clearly the legal representation of city council members for violations of the Open Meetings Act would not fit within that criteria. In the absence of authority to transfer water utility system revenues to the general fund of a municipality pursuant to the provisions of Section 1502.059 of the Texas Government Code, revenues generated from the water utility system should not be expended for payment of legal fees under the stated circumstances.

CONCLUSION

We respectfully ask that your office make a determination on the three issues set out in this request.

Sincerely,



Susan D. Reed
Criminal District Attorney
Bexar County