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February 4, 2004

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OPINION COMMITTEE OPEN RECORDS DIVISION

The Honorable Greg Abbott  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711

**RQ-0180-GA**

**Re: Request for Opinion**

FILE # ML-43482-04  
I.D. # 43482

Dear General Abbott:

Please accept this letter as one of request for an Attorney General's Opinion on the following matter:

A Board of Commissioners ("Commission") for a home rule city met in a regular meeting to consider several items of business. During that meeting, the Commission met in a closed executive session with the city manager to discuss and deliberate the appointment of a department head. Prior to the meeting, the city had conducted a formal search for the department head position.

Under the city's charter, the city manager has the authority to appoint department heads, subject to consultation with the Board of Commissioners. Specifically, the Charter grants the city manager the power and duty to:

appoint, subject to consultation with the Board of Commissioners, all department heads, and without such consultation all City employees and appointive administrative officers provided for by or under this Charter, except as otherwise provided by law, this Charter or personnel rules adopted pursuant to this Charter.

Upon conclusion of the executive session in which the department head's appointment was discussed, the Commission reconvened into regular session and then took "no action" on the department head appointment action item. Since there was no formal action taken by the Commission, the city manager's recommendation for the department head position was in effect accepted, and the position was filled.

The department head then resigned involuntarily after it was determined that there was a violation of the state's nepotism statutes due to his relationship with the mayor of the city. Section 573.041 of the Texas Government Code, in particular, provides:



A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:

- (1) the individual is related to the public official within a degree described by Section 573.002; or
- (2) the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by Section 573.002.

While the department head is related to the mayor within a degree that would allow section 573.041 of the Government Code to apply, there remains a question as to whether a public official did indeed "appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment" of the employee such that it would be proscribed by the same section of the law. *See* TEX. GOV'T CODE ANN. § 573.041 (Vernon 1994).

As mentioned, with respect to this position, no formal action was taken in the Commission's regular meeting. Pursuant to the city's charter, the mayor presides at meetings of the Board of Commissioners. He may participate in all matters coming before the Board of Commissioners and has the right to vote. In this situation, however, the city manager made the selection for the department head position, and the selection was discussed and deliberated during a closed executive session of the Board of Commissioners.

With regard to these circumstances, I respectfully request your opinion on the following questions:

- (1) Does the mayor's participation in the discussion and deliberation among the Board of Commissioners and city manager regarding the appointment of a department head under the authority of a city charter provision that allows the city manager to "appoint, subject to consultation with the Board of Commissioners, all department heads," constitute an action that is prohibited by section 573.041 of the Government Code?
- (2) Is the lack of a formal action by the Board of Commissioners regarding the appointment of a department head, whereby the city manager makes the appointment subject to consultation with the Board of Commissioners, sufficient to prevent a violation of section 573.041 of the Government Code?
- (3) If it were determined that members of the Board of Commissioners did not violate section 573.041 of the Government Code, could the former department head legally be re-employed with the city?

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Thank you for your attention and consideration of this request. Please do not hesitate to contact me or Jason Anderson, the Committee's Policy Coordinator, should you have any questions or require additional information.

Yours truly,

A handwritten signature in cursive script that reads "Frank Madla". The signature is written in black ink and is positioned above the printed name.

Frank Madla

FM/ja