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RECEIVED RQ-0241-GA

JUN 18 2004

OPINION COMMITTEE

June 10, 2004

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

FILE # ML-43771-04
I.D. # 43771

To the Honorable Attorney General Abbott:

I am hereby requesting an opinion from the Attorney General's office regarding several matters of state law. I have requested, and received, an opinion regarding these matters of law from San Jacinto County District Attorney, Mark Price. I am attaching the opinion I received from Mr. Price. I am now requesting an opinion from the Attorney General's office because, with all due respect to Mr. Price and his position as District Attorney, I am in disagreement with the opinion he has offered.

Facts

On May 28, 2004 a notice was posted giving notification of a special meeting of the San Jacinto County Commissioner's Court on June 1, 2004 at 1:30 p.m. Agenda Item No. 4 on this notice states "Executive Session: (A) Consider and Discuss Appointment of Interim County Judge."

On June 1 this meeting was held. According to a letter from County Clerk Charlene Vann to District Attorney Price written June 3, 2004: "On June 1, 2004, about 1:30 p.m., Interim County Judge Van Brookshire determined that there was a quorum of commissioners' court and called an executive session. I prepared a tape recorder for Judge Brookshire, which he took to his office where executive session was being held and where the meeting was taped."

She continues "about 2:40 p.m. Judge Brookshire and commissioners Johnson and Hamzy returned to the courtroom, ending the executive session with no action taken. Judge Brookshire took the tape from the tape recorder forbidding me from having the tape even with my insistence that I, as county clerk, am the keeper of all tape recordings of executive session. I informed Judge Brookshire that the tape is my responsibility and must be kept in a locked, safe place in my office. In spite of that he would not give me the tape."

On Monday, June 7, 2004 I became aware of the letter Ms. Vann wrote to Mr. Price. On that date I wrote Mr. Price and asked him his opinion as to the appropriateness of Acting County Judge Brookshire taking and maintaining possession of this tape.

On Thursday, June 10, 2004 Mr. Price responded, in a letter to Ms. Vann, in which he stated that while Section 81.003 of the Local Government Code "does require the county clerk to keep the commissioners court's recordings of their proceedings, that statute does not apply to closed meetings." (emphasis added)

Mr. Price went on to cite Government Code Section 551.071, Consultation with Attorney. He stated this section "clearly states that a governmental body, the commissioner's court in the case at hand, may conduct a closed meeting when it is seeking the advice of its attorney, the District Attorney's office, in the case at hand."

Mr. Price also referred to AG Opinion JM-840. "Further, pursuant to an oft-cited Attorney General opinion, a governmental body is not required to keep a certified agenda or tape recording of such a meeting. Op. Atty. Gen. 1988, No JM-840. This is clearly noted in even the Annotated Statutes which references not only this holding of law, but this very opinion. The underlying principle is simple: attorney client privilege."

Mr. Price continues, saying "Thus, if a tape does exist of the closed commissioner's court's consultation with their attorneys, such a tape is protected by not only the attorney client privilege but also by statute, Section 551.071 of the Government Code.

Mr. Price also cites Section 551.104 of the Government Code, which states "a governmental body shall preserve the certified agenda or tape recording of a closed meeting for at least two years after the meeting."

Arguments

To summarize, Mr. Price makes the following arguments in support of his contention that Ms. Vann is not authorized to maintain possession of the tape recordings of the executive sessions:

1. Section 81.003 of the Local Government Code, which requires the County Clerk to "keep the court's books, papers, records, and effects" does not apply to closed meetings.
2. Per AG Opinion JM-840 a governmental body is not required to keep a certified agenda or tape recording of such a meeting.
3. Section 551.104 states "a governmental body shall preserve the certified agenda or tape recording of a closed meeting." The governmental body is defined as a county commissioners court and as the acting head of the commissioners court Mr. Brookshire is "responsible for its keeping unless such duty has been delegated by his office."
4. Section 551.104(c) of the Government Code "provides the certified agenda or tape of a closed meeting is available for public inspection and copying only under

a court order. Thus, Mr. Melvan Van Brookshire or his successor, Fritz Faulkner, would not be allowed by law to release the tape in question even if the meeting was not a consultation with the commissioners court's attorneys regarding pending litigation, which it was."

It is not disputed that the County Clerk is not considered a member of the commissioners court. It is also agreed that the court has the right to exclude the county clerk from an executive, or closed, session. Does this therefore mean that Section 81.003 of the Local Government Code does not apply for meetings to which the County Clerk is not privy? Could not the commissioners court delegate the safekeeping of certified agendas or tapes of executive, or closed, sessions of the court to the County Clerk?

The Attorney General's opinion Mr. Price makes reference to, JM-840, addresses numerous issues concerning the Texas Open Meetings Act. This act "requires governmental bodies, as defined in the act, to deliberate and take all final actions on government policy and business in meetings that are open to the public." The act "authorizes governmental bodies to deliberate under certain limited circumstances in closed or executive sessions. It also states that "because the public has been excluded from executive sessions, the public has been unable to determine whether the governmental body met the requirements for the executive session. During the recent legislative session, the Texas Legislature responded to this problem by enacting Senate Bill 168" which "added section 2A to the act, a section requiring governmental bodies to keep a "certified agenda" or a tape recording for each of its meetings that is closed to the public."

However, there is an important exception to this rule that this opinion also discusses. A certified agenda or tape recording is required except for "consultations in accordance with subsection (e) of section 2 of this act." Subsection (e) provides "private consultations between a governmental body and its attorney are not permitted except in those instances in which the body seeks the attorney's advice with respect to pending or contemplated litigation, settlement offers, and matters where the duty of a public body's counsel to his client, pursuant to the Code of Professional Responsibility of the State Bar of Texas, clearly conflicts with this Act."

Mr. Price has stated that the executive session dealt with such items as those described in the above paragraph. However, prior to the beginning of the executive session the tape recorder, as Ms. Vann states in her letter, was given to acting Judge Brookshire. He took the tape recorder into his office "where the meeting was taped." Therefore, whether or not the law requires a tape to be kept, the fact is that the tape exists. And further, the question arises that if Mr. Price was aware of the rule that tape recordings were not required when subsection (e) matters are discussed, why did he allow the tape to be made only to later argue against the need for its existence?

Mr. Price's next argument is that, even if the meeting was not a consultation with their attorney, the proper custodian of the tape is the County Judge. As noted above, he bases this on Section 551.104 of the Government Code which states that a governmental body

shall preserve the certified agenda or tape recording of a closed meeting. He stated "Melvan Van Brookshire, is responsible for its keeping unless such duty has been delegated by his office."

Mr. Price seems to be arguing that as the County Judge, Mr. Brookshire has authority over the court and can, therefore, determine the proper disposition of the tape of the executive session. However, in JM-63, an opinion dealing with whether the county clerk or the county judge controls preparation of agenda for commissioners court it states "neither the county judge nor the county clerk controls the preparation of the agenda for the commissioners court. The commissioners court as a whole has the authority to determine and amend its own agenda." Following this line of thinking, it would seem logical that the court as a whole should determine the proper custodian of the tapes of executive sessions.

Ms. Vann normally keeps tapes of all commissioners court meetings, both open and executive sessions. This would seem to indicate that the office of County Judge has delegated this duty to her office. It also seems that acting County Judge Brookshire chose to change those procedures without consulting with the other members of the commissioners court.

Also, Mr. Price also states "it is common procedure for the acting county court judge to secure closed meeting tapes, usually secured in his own office safe." However, the county judge in San Jacinto County did not have a safe in his office at the time of the events described here. Ms. Vann, on the other hand, does have a safe in her office. That fact would seem to cast doubt on the validity of Mr. Price's argument.

Finally, Mr. Price states, under Section 551.104(c) of the Government Code "the certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order. Thus, Mr. Melvan Van Brookshire or his successor, Fritz Faulkner, would not be allowed by law to release the tape in question ..." This prohibition would also seem to apply if the tape were in the possession of Ms. Vann.


Requests for Opinions

Could you please issue an opinion as to the following:

1. Mr. Price states that Section 81.003 of the Local Government Code does not apply to closed meetings. Is this correct?
2. Can the County Clerk be delegated the duty of maintaining records of executive, or closed, sessions?
3. Given that a tape of the executive session does exist, who is the proper custodian of this tape?
4. When the previous policy was for the County Clerk to be the custodian of tapes of executive sessions, did acting County Judge Brookshire have the authority on his own to change that policy or would he be obligated to gain consensus of the entire court to effect such a change?

5. Would turning the tape of the executive session over to Ms. Vann obligate her to make the tape available for public inspection and copying in spite of Section 551.104(c) of the Government Code?

Related correspondence is included. Please let me know if you require further information. Thank you in advance for your assistance.



Ray Stelly
San Jacinto County Auditor

CC: District Judge Robert Trapp
District Judge Elizabeth Coker
Mark Price, Criminal District Attorney
Fritz Faulkner, County Judge
Commissioner James Hill
Commissioner Bill Hamzy
Commissioner Thomas Bonds
Commissioner Joe Johnson