



FILE # ML-45047-06

I.D. # 45047

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**OPINION COMMITTEE**

**JAMES H. OWEN**

County Attorney

November 1, 2006

Honorable Gregg Abbott  
Texas Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

**RQ-0550-GA**

Attn: Opinions Committee

Re:

Whether District Judges whose Districts include Henderson County, Texas may appropriate County Funds for the County Auditor to hire legal counsel for Henderson County to perform duties of the County Attorney's Office without the consent of the Commissioner's Court or the County Attorney?

Does the approval of invoices by the County Auditor's office for payment of said legal services violate LGC 113.065?

Dear Attorney General Abbott:

Please accept this letter as a request pursuant to Texas Government Code §402.042 for an opinion from your office clarifying the procedures by which a County Auditor serving under Texas Local Government Code Chapter 84 may hire legal counsel to perform the duties of the County Attorney's Office, and audit and approve payment under Local Government Code §113.065 the invoices for those services.

#### **BACKGROUND**

The Current Henderson County Auditor was appointed effective June 29, 2006. On the day of appointment, or shortly thereafter, several employees of the audit office were discharged from employment or quit. In addition, the newly appointed Auditor terminated the Henderson County Information Technology Director (who was also sworn as an assistant auditor) from County Employment. Thereafter, numerous Open Records Requests were received in the Information Technology office and the County Auditor's office, which appear to be related to the employment terminations.

held until such time as this office could advise them with regard to the legality of these payments.

Generally a County entity may not employ outside counsel to perform the duties of the County Attorney without the consent of the County Attorney. See GA-0074 and GA-0153. Further, it is not lawful for a County Auditor to pay any claim for such outside representation. GA-0074. Unlike the facts discussed in GA-0074, rather than a Bail Bond Board seeking outside counsel, it is the Auditor who approved payment of the fees and sought outside legal advice. Generally, Government Code 41.007 imposes a duty on the County Attorney to advise the County Auditor. Likewise, that interpretation is certainly supported on the website of the Office of the Attorney General which provides:

*County Auditor's opinion requests should be submitted to the county or district attorney in accordance with the provisions of Section 41.007 of the Government Code. If the county or district attorney fails or refuses to answer the auditor's request, or if the county auditor, county judge, or any other officer affected by the opinion disagrees with the county or district attorney's opinion, or believes that it is in conflict with former opinions of this office, we will accept an opinion request directly from the county auditor.*

Further, beyond seeking advice from the county or district attorney, the law contemplates that the Auditor would then seek advice from the Attorney General's Office. The requestor is not aware of any authority for the County Auditor to seek private legal counsel to perform the statutory duties of the Henderson County Attorney's Office or the Texas Attorney General's Office.

Chapter 84 of the Texas Local Government Code generally governs the office of County Auditor but no express authority is contained therein for the auditor to retain legal counsel. Chapter 84 does provide a procedure for the District Judges to appoint assistants to the auditor but likewise does not authorize the hiring of legal counsel. In any event, the procedures required for the appointment of assistants was not followed in this instance and the counsel was purportedly retained for Henderson County for the purpose of responding to Open Records Request and not to act as an assistant auditor.<sup>6</sup>

In summary, can you please advise whether District Judges whose Districts include Henderson County, Texas may authorized the County Auditor to hire legal counsel for Henderson County to perform duties of the County Attorney's Office without the consent of the Commissioner's Court or the County Attorney and appropriate County Funds outside the normal budget process for the payment for said services?

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<sup>6</sup> See the July 27, 2006 ORDER of the District Judges attached hereto as Exhibit "B". [Although the order purports to authorize the hiring of counsel to respond to open records requests and the county has been twice invoiced for the services and has in fact paid over \$6,000 for the services, the District Judge has instructed the counsel retained on behalf of the county to not provide any information to any county official other than the Auditor.]

During the course of reviewing and formulating responses to the Open Records Requests, the County Auditor advised this office that one of the District Judges' had instructed her to retain outside legal counsel to address the open records request. This office acknowledged, but never consented to that course of action.<sup>1</sup> On July 27, 2006, a day before this office was advised of the intent of the Audit Office to retain outside legal counsel, the District Judges in Henderson County issued an Order<sup>2</sup>, which provided in part:

WHEREAS the District Judges are in receipt of the Auditor's request for authorization to retain outside legal counsel to address these and other similar requests;<sup>3</sup>

THEREFORE the Court agrees with the Auditor's request; and

1. Directs the Henderson County Auditor to retain legal counsel to advise the Auditor and represent the Auditor under these Requests and other similar Requests; and
2. Orders said legal counsel's fees to be paid from the general revenue of Henderson County, Texas.

Signed this the 27th day of July, 2006.

Thereafter, the County Auditor retained legal counsel and incurred \$6,815.50 in charges (\$6,203.00 on the initial invoice dated September 5, 2006<sup>4</sup> and \$612.50 on the second invoice dated October 2, 2006<sup>5</sup>) which were invoiced to "Henderson County c/o Henderson County Auditor". The Commissioners' Court did not approve or authorize the hiring of legal counsel prior to the Auditor incurring these charges. When the initial invoice was presented the Commissioner's Court inquired about the bill and was told the district judge had authorized it and the Commissioners' Court allowed the payment. The funds utilized to pay the invoice were not budgeted in the District Judge's Departmental Budget or in the Auditor's Departmental Budget. When the second invoice was presented the Commissioner's Court again inquired about the services and was again told the District Judge authorized it. The Commissioners' Court asked that the payment be

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<sup>1</sup> See July 28, 2006 correspondence from Henderson County Attorney to Henderson County Auditor attached hereto as Exhibit "A".

<sup>2</sup> A copy of the July 27, 2006 ORDER of the District Judges is attached hereto as Exhibit "B".

<sup>3</sup> A copy of the Auditor's request to hire counsel, notice posted for the meeting where the action was approved and a transcribed vote of the Judges approving the Auditor's Request was requested from State District Judge Carter Tarrance but as of the date of this letter none has been provided. That information will be provided in a supplemental submission when/if obtained by this office.

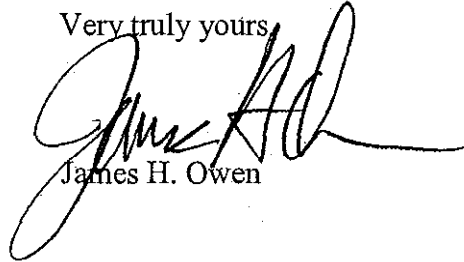
<sup>4</sup> A copy of the initial invoice is attached hereto as Exhibit "C".

<sup>5</sup> A copy of the October 2, 2006 invoice is attached hereto as Exhibit "D".

November 3, 2006  
Honorable Gregg Abbott  
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Does the approval of invoices by the County Auditor's office for payment of said legal services violate LGC 113.065?

Very truly yours,

A handwritten signature in black ink, appearing to read "James H. Owen", written in a cursive style.

James H. Owen