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COUNTY OF MAVERICK

OPINION COMMITTEE OFFICE OF THE COUNTY ATTORNEY

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September 17, 2010

Honorable Greg Abbott
Attorney General for the State of Texas
300 West 15th Street, Suite 205
Austin, Texas 78711-2548VIA CMRRR#7160 3901 9848 5343 8016

Re: Request for an Attorney General Opinion

Subject: Official Newspapers and Newspapers of General Circulation

FILE # ML-46590-1cI.D. # 46590**RQ-0919-GA**

Dear Attorney General Abbott:

The purpose of this letter is to request your legal opinion on the options available to a home rule municipality that does not have a local newspaper that meets the requirements of TEX. GOV'T CODE § 2051.044. The City of Eagle Pass, Texas (City) is the county seat for Maverick County and the City has an estimated population of 27,183 people.¹ Maverick County has an estimated population of 53,203 people² and over 93% of the population over the age of 5 speaks a language other than English at home³ - Spanish.

In March 2010, the Eagle Pass News Guide closed⁴ for business. The Eagle Pass News Guide was the newspaper of general circulation that the municipality used for the publication of notices, ordinances, public meetings and hearings, requests for proposal or qualifications, etc. In an effort to find a replacement newspaper for the various publications required by a municipality, it was discovered that there are no local newspapers published within the county that hold or have a second-class postage permit.

Since the closure of the News Guide and in an effort to comply with TEX. GOV'T CODE § 2051.044, the municipality is using the San Antonio Express News (SAEN) for publication purposes since they have a second-class postage permit. Moreover, the municipality occasionally uses other local papers and its website to supplement the notice provided in the SAEN. However, a review of the chart below shows that the SAEN may not reach as many people as other local publications serving the municipality and the county in which it is located due to its limited number of subscriptions in the City. In addition, the cost for using the SAEN has increased the municipality's publication cost from about \$50.00 per publication to more than \$800.00 per publication.

¹ See U.S. Census Bureau Website – Population Finder accessed on August 24, 2010.

² *Id.*

³ See U.S. Census Bureau Website – Maverick County Fact Sheet (2006-2008 American Community Survey 3-Year Estimates) accessed on August 24, 2010.

⁴ The use of the internet and other forms of digital communication has increased the availability of news and other relevant information of interest to the citizens of this state; moreover, these forms of communication have apparently affected the number of subscriptions and the cost for the traditional paper versions of a public newspaper.

In preparing to contract with a public newspaper to serve as the municipality's "official newspaper," the City has done a market survey to identify the publications, circulation of various publications and the likely cost associated with the typical publication.⁵ The following is a summary of the City's market survey of publications serving the municipality:

Publication	Circulation	Cost for Publication	Spanish English	2 nd Class Postage
San Antonio Express News	Single-copy to retail outlets only Daily – 713 Fri / Sat. – 861 Sunday – 1493 Subscribers 234 ⁶	17.17 per line Mon – Sat; 17.92 per line Sunday: <i>Typical Cost of \$864.00</i>	English Only	Yes
El Latino	Saturday only – 4000 units Subscribers N/A	¼ page at \$125.00 <i>Typical Cost \$125.00</i>	Spanish Only	No
Eagle Pass Business Journal	Weekly only – 5000 units Subscribers N/A	¼ page at \$100.00 <i>Typical Cost of \$100.00</i>	Spanish & English	No
Eagle Pass News Gram	Thursday and Sunday 7000 each day; Tuesday Wednesday and Friday 3000 each day; No publication on Monday and Saturday Subscribers N/A	.18 per word <i>Typical Cost of \$50.00</i>	Spanish & English	No, but they deliver to homes and businesses

Article II, Section 2-5 of the Home Rule Charter for the City of Eagle Pass, Texas requires publication of ordinances in *the official newspaper of the city*. TEX. LOC. GOV'T CODE § 52.004 provides that: [a]s soon as practicable after the beginning of each municipal year, the governing body of the municipality shall contract, as determined by ordinance or resolution, *with a public newspaper of the municipality to be the municipality's official newspaper until another newspaper is selected.*

In selecting the official newspaper, the municipality has historically used newspapers that complied with TEX. GOV'T CODE § 2051.044 unless some other law required publication of notice in a more specific manner. (See, e.g., TEX. LOC. GOV'T CODE § 105.012 (the

⁵ An example of a typical publication is attached and incorporated by reference, as Exhibit A. Moreover, the City staff will present its market survey and other relevant data to its governing body during the public meeting for the selection of an official newspaper.

⁶ 234 Subscribers is the daily average number of subscribers to zip code 78852, which includes areas outside the City's limits.

establishment of a municipal depository requires publication in a “financial publication of general circulation”). Section 2051.044 lists the following four criteria for a newspaper in which a notice must be published:

1. devote not less than 25% of its total column lineage to general interest items;
2. be published at least once each week;
3. be entered as a second-class postal matter⁷ in the county where published; and
4. have published regularly and continuously for at least 12 months before the governmental entity or representative publishes notice.

In addition to the statutory requirements of TEX. GOV'T CODE § 2051.044, it is our understanding that in order to be a newspaper of general circulation, a newspaper must also have: (a) paid subscribers (more than a de minimis number within a particular geographic region); (b) a diverse subscribership; and (c) must contain some news, editorials, and advertisements of a general character and interest to the community. See Tex. Atty. Gen. Op., No. JC-0223 (2000). The purpose of the aforementioned requirements appears to focus on informing and notifying as many persons as possible within the territory of the municipality about a municipality's upcoming event and/or proposed action.

A municipality is required to publish notices to inform its residents and persons within its territory of a variety of different types of proposed events or actions under consideration by the municipality. For example, TEX. LOC. GOV'T CODE § 211.006 concerning the procedures for the adoption of zoning regulations and district boundaries requires that:

Before the 15th day before the date of the hearing, notice of the time and place of the hearing must be published in an *official newspaper or a newspaper of general circulation* in the municipality.

TAX CODE § 26.06(d) requires notice of a public hearing on a tax increase to be provided by: (1) mail to each property owner; or (2) by publication provided the notice is not located where legal notices or classified advertisement appears.⁸ Likewise, TEX. LOC. GOV'T CODE § 374.035 requires that Tax Increment Bonds issued by a municipality may be sold at not less than par at a public sale *after notice published in a newspaper of general circulation in the municipality*. TEX. GOV'T CODE § 1251.003 regarding the issuance of bonds that are to be paid from ad valorem taxes, provides that the issuance must be approved at an election and the citizens of the municipality are entitled to notice of such election by *publishing notice of the election in a newspaper of general circulation published in the county or municipality holding the election*.

In the past, the municipality has attempted to obtain and designate an official newspaper that meets all the requirements of TEX. GOV'T CODE § 2051.044; however, at this time, there does not appear to be a local newspaper published in the county where the municipality is

⁷ As we understand it the second-class postage designation insures that each newspaper copy mailed to an individual or entity will be forwarded if that individual or entity moves, and address changes will be sent to the mailer.

⁸ The State Comptroller suggest that the statutory language must be strictly followed and the newspaper must comply with TEX. GOV'T CODE § 2051.044. See State Comptroller, *Truth-in-Taxation for Units Other Than School Districts* (July 2009) at p. 27.

located that meets all the requirements of TEX. GOV'T CODE § 2051.044. Accordingly, we seek your opinion on our options.

The Texas Attorney General has opined on a few request for opinions concerning the use and designation of official newspapers and/or standards for the same. In Tex. Atty. Gen. Op., No. JC-0223 (2000), it was concluded that a newspaper of general circulation is a newspaper that has more than a de minimis number of subscribers among a particular geographic region, that has a diverse subscribership, and that publishes some items of general interest to the community.

Moreover, in Tex. Atty. Gen. Op., No. GA-0380 (2005) it was determined that there is no express statutory or judicial requirement that directs a governmental body to make a formal determination regarding a newspaper of general circulation. The statutes that mandate notice be published in a newspaper of general circulation do not place an affirmative obligation on a governing body to formally determine whether a given publication is in fact a newspaper of general circulation. However, your office warned that if a governing body publishes a notice in a newspaper that is determined not to be a newspaper of general circulation, then the action taken by the governmental body is voidable. *Id.*


In at least one court case concerning a special bond election, it was alleged that the bond election was void due to the publication of a notice in a newspaper that did not have any paid circulation or a second class postal permit, contrary to the provisions of Article 28a, the predecessor provision to TEX. GOV'T CODE § 2051.044. See *Christy v. Williams*, 292 S.W.2d 348 (Tex. Civ. App., - Galveston, 1956 err. dism., w.o.j.). The Court found that unless otherwise provided, either expressly or by necessary implication, substantial compliance with the specified requirements is the legal equivalent of compliance. *Id.* at 352. Moreover, the court concluded that Article 28a which requires publication in a newspaper with a second-class postal permit is not binding; or if binding, it is directory and not mandatory. *Id.*

Due to the Eagle Pass News Guide closing, the municipality is faced with a dilemma on where to publish the various notices required by state law and the city charter. We are left with options that do not squarely meet the required criteria; however, each option may amount to substantial compliance. The News Gram meets all of the general criteria required by TEX. GOV'T CODE § 2051.044, with the exception of the second class postal permit and it has no subscribers. The SAEN meets the criteria of TEX. GOV'T CODE § 2051.044; however, it is not published in Maverick County, Texas and it arguably has a de minimis number of subscribers. Likewise, the Business Journal does not have a second-class postal permit and, it has no subscribers. Moreover, it is unknown at this time, if the Business Journal would be considered to have a diverse subscription, due to its apparent focus on business. El Latino also does not have a second-class postal permit and it has no subscribers. Finally, in light of the City's demographics, the City believes publication in a newspaper that prints both Spanish and English newspapers will reach more citizens than the SAEN, which is not published in Spanish.

In an effort to achieve the public policy of informing and notifying as many persons as possible within the territory of the municipality about a municipality's upcoming event and/or proposed action and due to the exorbitant cost for publication in the SAEN and their lack of significant subscriptions, the municipality believes the one or more of the local papers could effectively and economically serve as the "official newspaper" and provide notice in Spanish and

English to persons within the municipality's territory of upcoming events or proposed actions of the municipality. Moreover, the City would likely notify its resident of the selection and designation of the "official newspaper" by sending a notice, via the municipality's water and wastewater bills and/or trash bills. Despite these efforts, the City is concerned that a court may find that substantial compliance with the provisions of TEX. GOV'T CODE § 2051.044 is not enough. Accordingly, we seek your opinion on: (1) whether the City's proposal will likely be found lawful because it substantially complies with TEX. GOV'T CODE § 2051.044; and if not, (2) what options the City has, given the aforementioned facts, to comply with TEX. GOV'T CODE § 2051.044.

Sincerely,



Ricardo Ramos
County Attorney

cc: Mr. Heriberto Morales, Jr.
Ms. Mary Velasquez

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