

HUDSON & O'LEARY LLP
ATTORNEYS AT LAW

1010 MOPAC CIRCLE, SUITE 201
AUSTIN, TEXAS 78746
(512) 441-9941 FAX (512) 441-1501
GHUDSON@HOLAW.NET
TOLEARY@HOLAW.NET

November 2, 2010

VIA EMAIL & FIRST CLASS MAIL

Mr. Bill Bilyeu
Director, Administrative Services
2300 Bloomdale Rd., Suite 4192
McKinney, TX 75071

RE: Open Meetings Act issues

Dear Bill:

Pursuant to our telephone conversation this morning, please let this letter memorialize my statement to you that the executive session conducted at last night's meeting was held in strict compliance with the Texas Open Meetings Act, namely section 551.071(2).

Section 551.071(2) of the Act authorizes a governing body to consult with its attorney in executive session to receive advice on legal matters in situations where the attorney-client privilege is sought to be invoked.

Interpretations of the Act by the Texas Attorney General have confirmed that the governing body may not conduct general discussions among themselves under section 551.071(2); however, members may ask and receive legal advice that is intended to be protected under the attorney-client privilege.

Excerpts from the Texas Attorney General's publication titled "2008 Open Meetings Act Made Easy" which confirm this interpretation of section 551.071(2) are enclosed for your reference.

Although I cannot divulge the content of the executive session from last night's meeting, I am comfortable stating that the executive session consisted of questions posed to me in my role as outside legal counsel for the Commissioners Court and my responses to those questions. The questions asked of me were of a legal nature.

Lastly, Judge Self had prepared some materials he intends to share with the Commissioners regarding the subject matter of the executive session. However, those materials were not shared nor discussed in executive session. Rather, it is my understanding from statements made in open session (after the executive session) that such materials will be shared and discussed at a future meeting of the Commissioners Court.

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Please contact me if you have any further questions regarding these or other matters.

Sincerely,



J. Greg Hudson

Enclosure

May a governing body admit members of the public selectively to an executive session to give feedback on an employee or official being evaluated in the session?

No, the executive session is for the benefit of the governing body to meet away from public scrutiny under limited exceptions; this purpose is defeated by selectively admitting the public and the Act does not condone this type of procedure.⁹⁶

Executive Sessions for Consultations with an Attorney

When may a governing body have an executive session using the exception for consultations with an attorney?

The Act allows a governmental body to meet with its attorney to receive legal advice about pending or contemplated litigation or about settlement offers. The Attorney General has also concluded that a governmental body may meet with its attorney to receive legal advice on any matter.⁹⁷ However, the Attorney General has warned that discussions in an executive session under the attorney-consultation exception must relate solely to legal matters. The governing body may not discuss general policy matters that are unrelated to receiving legal advice from the attorney while in executive session under this exception.⁹⁸

May a governing body meet in executive session for consultations with an attorney if the attorney is not physically present?

An entity may use a telephone conference call, video conference call, or Internet communications to consult with certain attorneys in an open meeting or in an executive session. Each part of the public consultation with the attorney in open session must be audible to the public at the location specified in the agenda. Further, only certain attorneys may consult with the governing body via these means. If the attorney is an employee of the local unit, such consultations via the Internet, telephone, or video conference are not permitted. An attorney who receives compensation for legal services from which employment taxes are deducted by the unit is considered to be an employee of the unit.⁹⁹

May a governing body meet in executive session with its attorney to discuss a proposed contract?

A governing body may consult with its attorney in executive session to receive advice on legal issues raised by a proposed contract. However, the body may not discuss the merits of a proposed contract, financial considerations, or other nonlegal matters related to the contract simply because

⁹⁶ Op. Tex. Att'y Gen. GA-511 (2007) at 4.

⁹⁷ Op. Tex. Att'y Gen. No. JM-100 (1983); see Op. Tex. Att'y Gen. No. JM-238 (1984) (governing body may admit to executive session persons aligned with governing body and necessary to governing body's full communication with its attorney) (modified by Op. Tex. Att'y Gen. No. JC-506 (2002) to require in addition that presence of person must not waive attorney-client privilege if person is admitted under attorney consultation exception).

⁹⁸ Op. Tex. Att'y Gen. No. JM-100 (1983) at 2.

⁹⁹ TEX. GOV'T CODE ANN. § 551.129 (Vernon 2004).

its attorney is present.¹⁰⁰ General discussion of policy unrelated to legal matters is not permitted in executive session under the Act merely because an attorney is present.

Other Types of Executive Sessions

May a governing body discuss the acquisition of real estate in an executive session?

The Act allows a governmental body to hold an executive session to discuss the purchase, exchange, lease, or value of real estate.¹⁰¹ However, such an executive session is allowed only if discussion of the real estate in an open meeting would have a detrimental effect on the ability of the governmental body to negotiate with a third party.¹⁰² For example, an executive session may in certain cases be permitted to discuss what the local unit is willing to pay for real property that it plans to acquire. The unit should not use this exception when the other party in the transaction is present. There is no comparable authority for a governing body to go into an executive session to discuss the acquisition of items of personal property, such as the purchase of a new computer system.

May a governing body discuss security personnel, security devices, or a security audit in an executive session?

The Act has permitted a governing body to discuss security personnel or security devices in an executive session; it now also allows discussion of security audits.¹⁰³

May a governing body discuss a contract involving a prospective gift or donation in an executive session?

A governing body may meet in executive session to discuss the negotiations for a contract for a prospective gift or donation.¹⁰⁴ Such a contract must relate to a gift to be given to the State or to the governmental body. However, similar to the real estate exception, the body may only meet in an executive session if its negotiating position with a third person would be negatively affected by the body's discussion of the contract in open session.

¹⁰⁰ *Olympic Waste Servs. v. City of Grand-Saline*, 204 S.W.3d 496, 503-04 (Tex. App. – Tyler 2006, no pet.); Op. Tex. Att’y Gen. No. JC-233 (2000) at 3; see also *Finlan v. City of Dallas*, 888 F. Supp. 779, 782 n.9 (N.D. Tex. 1995).

¹⁰¹ TEX. GOV’T CODE ANN. § 551.072 (Vernon 2004).

¹⁰² *City of Laredo v. Escamilla*, 219 S.W.2d 14, 19 (Tex. App. – San Antonio 2006, pet. denied); Op. Tex. Att’y Gen. No. MW-417 (1981).

¹⁰³ TEX. GOV’T CODE ANN. § 551.076 (Vernon Supp. 2007) (as amended by Tex. S.B. 11, 80th Leg., R.S. (2007)).

¹⁰⁴ *Id.* § 551.073.