

The Senate of The State of Texas



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OPINION COMMITTEE

TROY FRASER

December 21, 2004

RQ-0304-GA

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

FILE # MC-44063-04

I.D. # 044063

Re: Request for Attorney General's Opinion
Pursuant to Tex. Gov't Code § 402.041, *et seq.*

Dear General Abbott:

Please accept this letter as a formal request for a legal opinion interpreting Texas law governing the following and related issues: (1) conflicts of interest for board members serving on a groundwater conservation district ("GCD") board; (2) when a threat of litigation meets the threshold requirement of "contemplated litigation" to justify a GCD's board entering executive session; and (3) whether a GCD's board of directors has authority to exclude a board member who has threatened to sue the GCD on behalf of his employer from an executive session with its legal counsel related to that threat of litigation. For convenience of your review, I have provided background information immediately below that describes the situation for which I am interested in your assessment and opinion, followed by a list of specific questions arising from this set of facts on which I request your opinion.

BACKGROUND

A groundwater conservation district ("GCD") in my senatorial district was confronted with a situation in which a non-profit water supply corporation ("WSC") filed an application for a groundwater well permit from the GCD while the general manager of the WSC served as a member of the GCD's board of directors. Based on Chapter 36 of the Texas Water Code, GCDs have the statutory authority to require permits "for the drilling, equipping, or completing of wells"¹ and "no person, firm, or corporation may operate a well without first obtaining a permit"² from the GCD. The WSC that filed the permit application with the GCD needed to drill a

¹ Tex. Water Code § 36.113(a).

² Tex. Water Code § 36.115(a).



groundwater well within the boundaries of the GCD for water supply purposes. The GCD properly scheduled a permit hearing for the well permit application filed by the WSC, and required the board member who also was employed as the general manager for the WSC (the "affected board member") to fill out an affidavit which stated the nature and extent of his interest in the WSC in accordance with section 171.004 of the Texas Local Government Code.³ After completing the required affidavit, the affected board member made comments to the other GCD board members and the staff of the GCD that his employer, the WSC, expected the GCD to grant the WSC a well permit that authorized a specific amount of groundwater production for the WSC. The affected board member also stated that the WSC intended to file suit against the GCD if the WSC was not granted a well permit with the authorized groundwater production amounts it desired.

After providing proper notice, the board of directors of the GCD called an executive session pursuant to section 551.071 of the Texas Government Code to discuss the threat made by the WSC to file suit against the GCD.⁴ The affected board member informed the other GCD board members and the GCD staff that he intended to attend the executive session in which his employer's threat to file suit and the affected board member's conflict of interest would be discussed. The threat of the affected board member attending the executive session led the GCD to ask the aforementioned questions concerning the legal authority of governmental bodies and GCDs, in particular, to take action in several areas. The GCD and its attorney were concerned that numerous negative legal consequences would result from the attendance of the affected board member at an executive session at which the litigation contemplated by the WSC and the affected board member's conflict of interest issues would be discussed. Some of the possible legal ramifications that the GCD was concerned could occur include (i) the GCD and its attorney potentially waiving the attorney/client privilege on matters reviewed during the meeting in the presence of the third-party, potential litigant (the affected board member), (ii) the potential invalidity of action taken by the GCD that involved the "participation" of the affected board member, and (iii) the affected board member's violation of section 171.004 of the Local Government Code by his continued participation in his employer's permitting matter.

It was the GCD's experience that there is a lack of legal guidance for governmental bodies and GCDs to address the factual situation detailed above. In light of the GCD's situation, I respectfully submit this request for an Attorney General's Opinion to address the questions set forth below and to provide guidance for governmental bodies and GCDs statewide.

QUESTIONS PRESENTED

I. **Legal Interpretation of Term "Further Participation in" as Used in Tex. Loc. Gov't Code § 171.004**

³ Tex. Loc. Gov't Code § 171.004.

⁴ Tex. Gov't Code § 551.071.

- A. What is the meaning or definition of the phrase "further participation in" in the context of §171.004(a)?
- B. What objective activities or conduct can be considered "further participation in" as that phrase is used in §171.004(a)?
- C. Does attendance by an affected board member of a governmental body at an executive session of the governmental body which is specifically called to discuss possible litigation contemplated by the affected board member or his employer constitute "further participation in" a matter within the context of §171.004(a)?
- D. Does attendance by a board member of a governmental body at an executive session of the governmental body which is specifically called to discuss a conflict of interest of the board member constitute "further participation in" a matter in the context of §171.004(a)?

II. Legal Interpretation of Term "Contemplated Litigation" as Used in Tex. Gov't Code § 551.071

- A. What is the meaning or definition of the term "contemplated litigation" in the context of Tex. Gov't Code § 551.071?
- B. Does "litigation" include contested hearings before administrative agencies and other governmental authorities, including a GCD, as reviewed in Tex. Att'y Gen. ORD-588 (1991), in the context of the Public Information Act (formerly Open Records Act)?
- C. What evidence must a governmental body provide the Office of the Attorney General ("OAG") or a court to demonstrate that litigation is contemplated in order to trigger the provisions of § 551.071?
- D. What objective steps towards litigation must be taken by a potential opposing party to enable a governmental body to demonstrate to the OAG or a court that litigation is contemplated in the context of § 551.071?
- E. Does the affected board member's following statement constitute contemplated litigation:
- F. That the affected board member's WSC was represented by two attorneys, and that the WSC would "tie the GCD up in court" if the GCD did not *modify* its interpretation and application of certain GCD rules to the benefit of the WSC?
- G. Has there been "contemplated litigation" where an attorney representing the affected board member's WSC has directed written correspondence to the GCD

advising that the GCD's interpretation and application of its rules to the WSC's permit application was "arbitrary and capricious and in violation of law"?

- H. Has there been "litigation" where the affected board member's WSC files a protest causing the WSC's permit hearing to be designated a "contested" hearing before the GCD's board? In this case, the GCD's rules provide that an applicant cannot sue the GCD in state court without first exhausting administrative remedies. Under the District's rules, there is a procedure for filing a protest with the GCD and then filing a request for rehearing of the GCD's decision on the application, prior to appealing the GCD's decision in state district court.

III. Ability of a governmental body to exclude board members

- A. Does a governmental body have the legal authority to exclude a board member from an executive session of the governmental body when a board member or his employer is the source of the contemplated litigation threat which serves as the legal basis for the executive session?
- B. Does a governmental body have the legal authority to exclude a board member from an executive session of the governmental body when a board member's conflict of interest serves as the legal basis for the governmental body to receive legal advice from its attorney in an executive session?
- C. In the event that a board member is an adverse party in a contested hearing before the GCD, in state court, or otherwise, or is employed by such an adverse party to the governmental body, does a governmental body have the legal authority to exclude such board member from the governmental body's executive session to avoid waiving the attorney/client privilege accruing to the governmental body?
- D. What is the definition of "adverse party"? Is a party "adverse to the GCD" if that party is in a contested hearing before the GCD? Is a party "adverse to the GCD" if that party is in a lawsuit against the GCD in state court?
- E. Does an attorney representing a governmental body waive the attorney/client privilege if the attorney provides information in an executive session to all board members of the governmental body including one or more board members who are potentially adverse to the governmental body, are actually adverse to the governmental body, are contemplating litigation against the governmental body, or become adverse to the governmental body at a later time?
- F. Can an attorney representing a governmental body provide a confidential and privileged legal memorandum to some board members of the governmental body and, at the same time, withhold the legal memorandum from board members who

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are, are affiliated with, or are employed by the potential litigant who is the source of the contemplated litigation threat to the governmental body?

- G. Does the attorney waive the attorney/client privilege by providing to the potentially adverse board member a legal memorandum regarding a threat of contemplated litigation made by the board member?
- H. Can an attorney representing a governmental body provide a confidential and privileged legal memorandum to some board members of the governmental body and, at the same time, withhold the legal memorandum from board members who have a conflict of interest that prevents them from further participation in a matter before a governmental body as contemplated by §171.004(a), assuming that the legal advice rendered in the legal memorandum addresses or implicates the interests of the conflicted board member?
- I. Does an attorney waive the attorney/client privilege by providing a legal memorandum regarding a board member's conflict of interest to the board member who has a conflict of interest?

Thank you in advance for your attention to this request and your efforts in providing your opinions on the questions and issues raised. Should you have any questions, please do not hesitate to call.

Sincerely,



Troy Fraser
Chairman