

January 2005 Legal Q&A
Bennett Sandlin
General Counsel

Q: Our city police department is conducting an internal affairs investigation into the conduct of a police officer. Are documents related to the investigation subject to open records requests?

A: This is a tricky area, and consultation with the city attorney is always recommended. Generally, whether the results of an internal affairs investigation by a police department are open records will depend on whether the investigation is criminal in nature. If not criminal in nature, the final disposition of such investigations are generally considered open records. Open Records Decisions No's 350 (1982); 342 (1982); and 329 (1982). If the investigation was criminal in nature, however, and the investigation did not result in a prosecution, then the internal law enforcement exception contained in Texas Government Code Section 552.108(b)(2), the so-called "closed case" exception, would likely permit the police department to withhold the records. Further, if the investigation is criminal in nature and is still ongoing, then the internal law enforcement exception contained in Texas Government Code Section 552.108(b)(1) would likely permit withholding of such records. Finally, criminal investigations that do result in prosecution will ultimately be considered public records after the case is concluded.

Any documents sought to be withheld from an open records request require a timely brief to the attorney general as well as other procedural steps.

Q: May a city waive building inspection or impact fees as an economic development incentive?

A: Yes. A city may waive inspection or impact fees within "neighborhood empowerment zones." TEX LOC. GOV'T CODE ANN., § 378.004(1). Such zones are created by city council after a finding that the zone will encourage affordable housing or an increase in economic development.

Q: If the mayor is absent or incapacitated in a general law city, does the mayor pro tem become mayor?

A: If the mayor is absent or unable to perform the mayor's duties, the mayor pro tem does not actually become mayor, but does assume the duties of the mayor. Such duties include presiding at council meetings. TEX LOC. GOV'T CODE ANN., § 22.037(b). In such a capacity, the mayor pro tem retains the power to vote, even when presiding at the meeting.

Q: If the mayor's office ultimately becomes vacant in a general law city, is the mayor pro tem entitled to be appointed as mayor?

A: No. While it is often customary for the mayor pro tem to be appointed mayor in the case of a vacancy, this is not legally required. Any person otherwise eligible to run for the office of mayor can be appointed to fill a vacancy in that office.

Q: When is appointment not permitted to fill a vacancy in a general law city?

A: When a Type A general law city has more than one vacancy, appointments to fill the vacancies are not permitted. TEX LOC. GOV'T CODE ANN., § 22.010(d). Two or more vacancies in a Type A city require a special election to fill. Type B general law cities may fill any number of vacancies by appointment, assuming there is a quorum present to transact business.

Q: If two councilmembers resign simultaneously in a Type A general law city, is the council therefore powerless to avoid a special election?

A: Not necessarily. Resignations do not result in legal vacancies until the council votes to accept the resignation, or until eight days have passed, whichever occurs earlier. TEX. ELEC. CODE ANN. § 201.023. If a city council can act prior to the passage of eight days, it may accept one of the two resignations, fill that vacancy by appointment, *then* accept the second resignation, and fill that position by appointment as well. By precisely timing its actions in this way, the council avoids two vacancies from occurring simultaneously, and can thus avoid the considerable expense of a special election.

The TML Legal Department has long suggested such a procedure, and the Texas Attorney General's office recently affirmed its legality. Op. Tex. Att'y Gen. No. GA-0046 (2003).

Q: Are there any potential problems with circumventing two vacancies by the procedure outlined above?

A: One frequent problem (cities face the dilemma of multiple resignations surprisingly often) is that a quorum for a special meeting of a Type A city is four out of five councilmembers. Two resignations often indicate two disgruntled councilmembers, thereby making it difficult to gather a quorum within the eight day window of opportunity. Fortunately, cities often have success at explaining to resigning councilmembers that attendance at one more council meeting—the meeting to create and then fill the vacancies by the above procedure—can save the city the expense of a special election. Even the most disgruntled councilmember can often be persuaded to attend one meeting if it will save taxpayer money.