TOP LEGAL QUESTIONS

Received By

TML LEGAL SERVICES

Texas Municipal League Legal Staff
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About the TML Legal Services Department

The Texas Municipal League Legal Services Department provides legal assistance to TML member cities. We answer general questions; participate in educational seminars; provide support services for the legislative department; and prepare handbooks, magazine articles, and written materials including legal opinions and amicus briefs. Since our staff of five lawyers serves over 1,160 member cities, there are limits on the types of assistance we can provide. For more information on the Legal Services Department, please go to www.tml.org, and click on "Policy," then "Legal Research."

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Introduction

Cities are formed for the purpose of managing the needs of people who live and work in close quarters. Cities provide basic services, such as streets, law enforcement, and utilities, as well as enact and enforce ordinances to protect the citizens of the community and foster a better living environment. City government in Texas, as in most of the United States, was founded on, and continues to evolve from, the premise that local communities know best how to run their local affairs. The following are some of the most common questions received by the Texas Municipal League Legal Services Department. As this is a brief overview of the area, and not intended as legal advice, local counsel should always be consulted prior to taking any action. Please contact the TML Legal Services Department at 512-231-7400 or legalinfo@tml.org with questions or comments. And without further *a due*:

Can citizens vote on property taxes?

City officials considering imposing a property tax often ask if citizen approval of property taxes is necessary. In addition, officials sometimes ask if they can go to the voters anyway for political "cover" because property taxes tend to be very controversial.

Assuming the adopted rate doesn't exceed certain statutory amounts, the answer to both questions is no. According to the Texas Tax Code: "The governing body of each taxing unit…shall adopt a tax rate for the current tax year and shall notify the assessor for the unit of the rate adopted." TEX. TAX CODE § 26.05. The decision to adopt a tax rate in the first instance belongs only to the city council.

However, cities are required to receive voter approval if they adopt property tax rates exceeding certain thresholds. For cities over 30,000 in population, in addition to a handful of cities under 30,000 in population with a large property tax base, the trigger for an automatic election to approve the property tax rate is called the "voter-approval rate." The voter-approval rate brings in 3.5 percent more maintenance and operations tax revenue than the previous year on existing properties, and cities can include "banked" amounts from the three preceding years if the city adopted a rate lower than the voter-approval rate in any of those years. *See* TEX. TAX CODE § 26.04(c).

Most cities under 30,000 in population must keep their adopted property tax rate below the "de minimis rate" to avoid an automatic election. The de minimis rate is the rate necessary to generate an additional $500,000 in property tax revenue over the previous year. *See* TEX. TAX CODE § 26.012 (8-a).

If a city adopts a rate exceeding either the voter-approval rate or de minimis rate, as applicable, it must order an election for the November uniform election date to receive voter approval. *See* TEX. TAX CODE § 26.07. In some smaller cities the voters may be able to petition for an election under certain circumstances. *See* TEX. TAX CODE § 26.075.

Beyond the mandatory election requirements when cities adopt rates exceeding specific amounts, a home rule city could potentially hold an election on the imposition of a property tax if required to do so by the city charter. The attorney general opined that a court would likely conclude that Chapter 26 of the Tax Code does not conflict with or preempt a city charter provision that requires voter approval before city property taxes may be imposed. See Tex. Att'y Gen. Op. No. GA-1073 (2014).

Of course, cities are not prohibited from gauging the will of the public when it comes to property taxes or any other issue. A city could conduct a non-binding poll or survey to find out whether the public supports imposition of property taxes. Some cities conduct such polls through inserts in utility bills, for instance.

Finally, it is sometimes asked whether home rule cities with the power of initiative and referendum may have their tax rates challenged by those charter-imposed processes. The answer is likely not. Texas cases have held that ordinances that rely on careful application of facts and figures are generally not subject to home rule voter initiative or referendum. *Denman v. Quin*, 116 S.W.2d 783 (Tex. Civ. App.—San Antonio 1938, writ ref'd).

Can we submit an ordinance to citizen referendum?

Citizen referendum and initiative are powers that only home rule cities possess, and then only if the city's charter provides for it. Thus, a city council of a home rule city would have the authority to call a referendum on an issue, including an ordinance, if the city's charter allowed for such an election. *See Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998); *Glass v. Smith*, 244 S.W.2d 645, 648—49 (Tex. 1951); Tex. Att'y Gen. Op. No. GA-0222 (2004).

For general law cities, the answer is different because the calling of an election must be authorized by a particular state statute. *See Countz v. Mitchell*, 38 S.W.2d 770, 774 (Tex. 1931) (stating that "[t]he right to hold an election cannot exist or be lawfully exercised without express grant of power by the Constitution or Legislature"); *Ellis v. Hanks*, 478 S.W.2d 172, 176 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (stating that the right to hold an election "must be derived from the law"); Tex. Att'y Gen. Op. No. GA-0001 (2002) (stating that "generally the right to hold an election depends upon statutory authorization").

Because there is no Election Code provision or other state statute that authorizes general law city councils to submit general ordinances to the electorate through a referendum election, a general law city may not do so.

A general law city is free to conduct a poll or hold a public hearing to gauge the preferences of the voters. The results of such a poll or hearing are not binding on the council, nor could the council make it binding on itself.

Cities sometimes ask whether a non-binding election referenda may be placed on an official election ballot. The Secretary of State believes the answer is generally no, and cites attorney general opinions Nos. LO-94-091 (1994) and H-425 (1974) for that conclusion. In fact, placing

an unauthorized proposition on a ballot may be considered a misappropriation of public funds. Of course, a home rule charter could arguably provide for such authority.

How can we increase collections on delinquent utility bills?

First, cities may use late fees to encourage utility customers to pay their bills in a timely manner. A late charge on bills for utility service is neither interest nor penalty, but is a cost of doing business assessed against a delinquent customer. Tex. Att'y Gen. Op. No. H-1289 (1978). The late fee should be authorized by ordinance, and should be reasonable. Reasonableness will generally be determined by the degree to which the amount of the late fee relates to the costs the fee is meant to recoup. With regard to a utility bill, the city's cost of collection, absent the fee, plus any other city costs resulting from the tardiness of the payment, would be the costs the fee is meant to recoup. *Id.*

Next, a city may require varying utility deposits for customers as it deems appropriate in each case. TEX. LOC. GOV'T CODE § 552.0025(c). Due to the additional work related to collecting late fees and placing a lien on a property, a city should have a clear and consistent policy for the shut off of utilities due to a late payment, and for collecting an adequate deposit to cover an average month of service.

A city can discontinue utility service to a customer whose account is delinquent provided that due process is satisfied. Due process requires that the customer be given notice and an opportunity for a hearing before service is terminated. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1977). The notice must state the reasons for discontinuance, such as payment being overdue, and that service will be discontinued if payment is not made by a certain date. The notice must be reasonably calculated to inform customers of a procedure for protesting the proposed termination of service. Giving customers the opportunity for an informal consultation with designated city personnel can constitute a due process hearing. The designated officer or employee must have the authority to resolve the dispute and rescind the discontinuance order if the officer or employee determines during the hearing that the order was issued in error. This administrative procedure is necessary prior to termination of services in order to afford reasonable assurance against the erroneous or arbitrary withholding of essential services.

Cities that own more than one utility have an additional tool to encourage payment of utilities bills. Cities that own more than one utility or provide solid waste disposal may suspend service of any city-owned utility or service until the delinquent claim is fully paid. TEX. HEALTH & SAFETY CODE § 364.034(d).

Cities should be aware of the limitation on their authority set out in Section 552.0025 of the Local Government Code. Pursuant to this section, a city may not require a customer to pay for utility service previously furnished to another customer at the same service connection as a condition of connecting or continuing service. Also, a city may not require a customer's utility bill to be guaranteed by a third party as a condition of connecting or continuing service. For example, if the city contracts directly with the renters, not the property owners, then the city is not able to collect from the property owners.

Finally, if a utility bill is unpaid, a city may by ordinance impose a lien against an owner's property, unless the property is a homestead that is protected by the Texas Constitution. TEX. LOC. GOV'T CODE § 552.0025(d). To impose a lien, a city must adopt an ordinance setting out the city's intention to do so. The authority to impose utility liens has certain limitations. For example, a water lien may not be imposed for delinquent utility bills where:

1. Service is connected in a tenant's name after the property owner has given notice to the city that the property is rental property. TEX. LOC. GOV'T CODE at § 552.0025(e).
2. Service is connected in a tenant's name prior to the effective date of the ordinance imposing the lien. *Id*. at 552.0025(f).
3. The property involved is a homestead. *Id*. at §552.0025(d).

A city's utility lien, when perfected, is superior to all other liens except a bona fide mortgage lien recorded before the utility lien. TEX. LOC. GOV'T CODE § 552.0025(h).

How do we abandon or close an existing or platted street?

A city council has the authority to close a street within the city limits, subject to certain procedural requirements. Section 311.008 of the Texas Transportation Code specifically authorizes the governing body of a general law city to abandon or close a city street or alley by ordinance when it receives a petition signed by all the owners of real property abutting the street or alley. Section 311.007 authorizes a home rule city to vacate, abandon, or close a street, and no petition is required.

A city is usually required, by Chapter 272 and Section 253.008 of the Local Government Code, to sell real property by sealed bid or public auction. But Section 272.001(b)(2) provides an exception to the required notice, sealed bidding, and obtaining fair market value, when the city sells city streets to abutting property owners.

Roads are found in unlikely places. For example, city officials are frequently asked by citizens to transfer ownership of undeveloped roads platted underneath their house. In a general law city, after the city receives a petition from the land owners on both sides of the street, the council has the option to close the street and transfer all city rights to the land to the homeowner. A home rule city may close the street on its own motion.

After satisfying statutory requirements, many city councils set application fees and specific criteria for approving closure. In addition, some cities require the applicant to provide notice to surrounding landowners, and bear the costs of any required turnaround area or emergency exit. Depending on its size, some cities require city staff to conduct studies of how a road closure will effect traffic patterns, report on the accident history for the area, and identify alternative traffic calming and traffic control solutions to address a traffic problem.

Is it permissible for a city to make a donation?

The issue is not whether it is okay to make a donation or give a gift, but whether an expenditure of public money serves a valid public purpose. If it is purely a charitable donation, it is prohibited by the Texas Constitution. If it is an expenditure of public funds for the achievement of a legitimate public purpose, it is acceptable.

As a general rule, a gratuitous donation or gift by a city is prohibited by the Texas Constitution, art. III, §52, and art. XI, §3, which, in part, state that the legislature may not authorize any county, city, or other political subdivision of the state to lend its credit or grant public money or anything of value in aid of an individual, association, or corporation. The purpose of these provisions is to prevent local governments from appropriating public money for private purposes.

However, the fact that private interests are *incidentally* benefited by a public expenditure does not invalidate an expenditure for a legitimate public purpose. *Barrington v. Cokinos*, 338 S.W.2d 133, 145 (Tex. 1960); Tex. Att'y Gen. Op. No. GA-747 (2009). In other words, if a city determines that an expenditure accomplishes a valid public purpose, the fact that one or more individuals or corporations might benefit does not invalidate the expenditure. The key question is whether a valid public purpose is being *directly* accomplished by the expenditure. Numerous courts have been asked to invalidate or uphold particular expenditures based on whether a public purpose was being served. See *Brazos River Authority v. Carr*, 405 S.W.2d 689, 693 (Tex. 1966); *Zimmelman v. Harris County*, 819 S.W.2d 178, 184 (Tex.App.— Hous. [1st Dist.] 1991, extension of time to file for writ of error overruled); *Key v. Commissioners Court of Marion County*, 727 S.W.2d 667, 669 (Tex.App. — Texarkana 1987); *Parks v. Elliott*, 465 S.W.2d 434, 438 (TexCivApp — Houston [14th Dist.] 1971, writ refused n.r.e.).

The test established by several attorney general opinions is that the donation must go to a legitimate municipal purpose, the city must receive adequate consideration for its donation, and the arrangement must have sufficient controls to guarantee that city money is being used for a municipal public purpose. Tex. Att'y Gen. Op. No. DM-394 (1996), Tex. Att'y Gen. Op. No. JC-439 (2001), Tex. Att'y Gen. Op. No. JC-582 (2002), Tex. Att'y Gen. Op. No. LO 98-024 (1998).

The determination of whether a particular expenditure accomplishes a public purpose must be made by the city council. Some expenditures, such as those for street repair or police protection are easily deemed to serve a public purpose, while others, such as contributing to Meals on Wheels or Crimestoppers, are more difficult. Cities may not expend public funds simply to obtain for the community the general benefits resulting from the operation of the corporate enterprise. *Barrington*, 338 S.W.2d at 145; *City of Corpus Christi v. Bayfront Assoc., Ltd*., 814 S.W.2d 98 (Tex. App. — Corpus Christi 1991, writ denied).

The council's determination as to public purpose is subject to judicial review. According to the attorney general's opinions, what is a public purpose "cannot be answered by any precise definition" beyond "if an object is beneficial to the inhabitants and directly connected with the local government it will be considered a public purpose." Tex. Att'y Gen. ORD-660 (1999), Tex. Att'y Gen. Op. No. JC-212 (2000). However, if the council goes on record recognizing the expenditure as a valid public purpose, the courts are not likely to overturn that determination.

Courts are hesitant to second guess the legislative determinations of local governments. Accordingly, in the absence of fraud on the part of the council, or a total lack of evidence that an expenditure serves a public purpose, a court is not apt to declare a particular city expenditure to be invalid. *See* Tex. Att'y Gen. Op. GA-0706 (2009).

Once a legitimate public purpose is identified, the city must consider whether contractual obligations or other forms of formal control are necessary in order for the council to ensure that the city receives its consideration — the accomplishment of the public purpose. Tex. Att'y Gen. Op. No. LO 94-008 (1994), Tex. Att'y Gen. Op. No. DM-394 (1996), Tex. Att'y Gen. Op. No. JC-439 (2001), Tex. Att'y Gen. Op. No. JC-582 (2002), Tex. Att'y Gen. Op. No. LO 98-024 (1998), Tex. Att'y Gen. Op. No. GA-88 (2003).

What notice is required by the Texas Open Meetings Act?

The Texas Open Meetings Act (Act) requires written notice of the date, hour, place, and subject of all meetings. TEX. GOV'T CODE § 551.041 (*See also* § 551.056 and § 2051.152 relating to internet posting of meeting notices). The agendas for all meetings subject to the Act must be posted at least 72 hours before the meeting. A city that maintains a website must post the agendas of the city council within that timeframe on the website, and it must also post the adopted minutes of each city council meeting.

Any action taken in violation of Act's notice requirements is voidable. TEX. GOV'T CODE § 551.141; *Swate v. Medina Community Hospital*, 966 S.W.2d 693, 699 (Tex.App. — San Antonio 1998, pet. denied). This means that an action in violation of the Act may be voided by a court pursuant to a lawsuit filed for that purpose. *See Collin County v. Home Owners' Association for Values Essential to Neighborhoods*, 716 F.Supp. 953, 960 (N.D. Tex. 1989), *City of Bells v. Greater Texoma Utility Authority*, 744 S.W.2d 636, 640 (Tex.App. — Dallas 1987, no writ). If some, but not all, actions in a meeting are in violation of the Act, only those actions in violation may be voided. *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 182—183 (Tex.App. — Corpus Christi 1990, writ denied).

While the date, hour, and place of a meeting are self-explanatory, whether the agenda gives the general public sufficient notice of the subjects to be discussed is often a source of confusion for city officials. The agenda serves to give the general public access to decision making by their governing body, and the specificity of the subjects listed on the agenda depends upon the situation. For example, a posted agenda listing "personnel" as a subject to be discussed may be sufficient notice in one situation, but not in another. The Supreme Court of Texas has held that a subject listing of "personnel" was not sufficient notice of a discussion surrounding the hiring of a new superintendent of a school district. *Cox Enterprises, Inc v. Board of Trustees*, 706 S.W.2d 956, 959 (Tex. 1986). The hiring of a new superintendent is a matter of great public interest, held the court, and "personnel" was not specific enough to notify the general public of the discussion to be held in executive session. *Id*. The same was held to be true for the termination of a police chief. *Mayes v. City of De Leon*, 922 S.W.2d 200 (Tex.App. – Eastland 1996, writ denied). While the posting of "personnel" may be sufficient for less publicized positions, such as clerks, the TML Legal Services Department advises that more specific notice, listing the

reason for the discussion and/or action, and the employee's or officer's name or position, is the better practice.

Phrases such as "old business," "new business," "regular or routine business," or "other business" do not address the subjects to be discussed in any way, and have been declared insufficient notice to the general public for the purposes of the Act. Tex. Att'y Gen. Op. No. H-662 (1975) at 3. In addition, "presentation," "mayor's report," or "city manager's report" is not sufficient where a presentation is to be made by a city employee or official. In that case, the governing body has the ability to ascertain what the city employee or official will discuss prior to the meeting. Thus, the specific subject matter of the presentation should be posted. *Hays County Water Planning P'ship v. Hays County*, 41 S.W.3d 174, 180 (Tex.App. – Austin 2001, pet. denied); Tex. Att'y Gen. Op. No. GA-668 (2008).

The phrase "public comment" may be used in a posted agenda to provide notice of a period in which members of the public may address the governing body regarding subjects not listed on the agenda. The city is not generally expected to post notice of the subjects to be discussed in this case because the city has no way of knowing what subjects members of the public may wish to address. Tex. Att'y Gen. Op. JC-0169 (2000). City officials may respond to questions asked during the public comment period only with factual statements, a recitation of existing city policy, or by placing the subject on the agenda for a future meeting. *Id*.; TEX. GOV'T CODE § 551.042.

Posting that certain subjects will be discussed in executive rather than open session is not required. Tex. Att'y. Gen. Op. No. JC-0057 (1999). However, all subjects that are to be discussed in executive session must be described on the agenda in a manner that will provide sufficient notice to the public (i.e., they must be just as detailed as open meeting agenda items). In addition, if a city has historically indicated on its posted agenda which subjects are to be discussed in executive session, and then changes that practice, the city must give adequate notice to the public. *Id*. Many governing bodies include a statement at the end of the agenda informing the public that the body may go into executive session, if authorized by the Act, on any posted agenda item. Such a statement serves as additional notice to the public of the body's intentions.

Cities should be aware that any major change in the way that agenda items are listed, even if valid under the Act, can affect the validity of the notice. For example, if the phrase "Discussion/Action" is historically used on the posted agenda to indicate when a governing body intends to take action on a measure, then a posting of "Discussion" with no notice of the change in posting procedures renders any action taken by the council on that subject voidable. *River Road Neighborhood Association v. South Texas Sports*, 720 S.W.2d 551 (Tex.App. – San Antonio 1986, writ dismissed); *see also Hays County Water Planning P'ship*, 41 S.W.3d at 180. Without proper notice of the change, the general public has no way of knowing that there has been a change in posting procedures.

Finally, a city is not required to notify an individual that he or she will be discussed at a meeting. The posted notice must be adequate, but no letter to the person or similar action is necessary in most cases. The purpose of the posted agenda is to provide notice to the general public, not to replace due process. *City of San Antonio v. Fourth Court of Appeals,* 820 S.W.2d 762, 764-765.

See Retterberg v. Texas Department of Health, 873 S.W.2d 408 (Tex.App. — Austin 1994, no writ).

Do I have to post notice of a city job opening?

Generally, there is no law that requires a city to post or advertise a job opening. Nevertheless, the best way to prevent having an Equal Employment Opportunity Commission (EEOC) discrimination complaint or lawsuit filed against an employer is to advertise a job opening and then ensure that the city hires the applicant that is best qualified for the position. Federal, state, and sometimes, local laws prohibit hiring practices that discriminate on the grounds of age, disability, race, color, religion, sex, pregnancy, citizenship, military service and national origin. A city's hiring practice of merely advertising an opening to a certain geographic area, or merely by word of mouth, for example, may be used as evidence of discriminatory intent if a claim is filed against the city. To avoid a discrimination claim, an employer should advertise a job opening so that it reaches a large cross-section of the population. Advertising in a general circulation newspaper and on the internet are good examples of places to post a job opening. Posting jobs internally that are promotional opportunities for current employees is usually a good idea and accepted as proper as long as it is pursuant to a consistent policy of doing so. If a city does not have a hiring policy, including a policy regarding the advertisement of a job opening, the city should seriously consider adopting one. Before advertising a job vacancy, an employer should ensure it contains a written job description that provides objective qualifications and responsibilities necessary to perform the job. The description should be devoid of any reference to sex, race, national origin, or any other protected class. In addition, a job description should include the essential functions of the position and other requirements, such as education, skills, and work experience. Once a job description is in place, it should be used as a template for the job advertisement.

By taking the time to adopt a hiring policy and to advertise a job opening to a wide range of people, an employer increases its chance of hiring the best qualified person for the job. In addition, an employer may avoid a discrimination claim or lawsuit.

Can I terminate this employee?

Cities often struggle with the question of when and how to fire a poor performing employee. Despite being an "at-will" employment state, where anyone can be fired for any nondiscriminatory reason, many federal and state laws protect employees. These laws often keep a city from firing an employee for fear of litigation for discrimination. Sometimes it seems that there are some people you just can't fire, no matter how incompetent or obnoxious they are. Many times supervisors hold back on firing an employee in fear of a lawsuit. They ask themselves, "How can I safely fire a poor performer who's pregnant, or on medical leave, or who just filed a worker's compensation claim?" The reality is that any time someone is terminated she can sue the city for discrimination or the violation of some right. However, there are a number of steps you can take to minimize the risks associated with terminating an employee. The following provides some basic information to consider prior to terminating an employee:

(a) Employment-at-will: First, determine whether the employee is "at-will" or whether the employee has a contract, a collective bargaining agreement, or is subject to civil service. Also, the Local Government Code puts some limitations on Type A cities on how they can terminate certain employees who are also officers. TEX. LOC. GOV'T CODE § 22.077. If one of these issues arises then the procedure outlined by these items should be followed.

(b) Documentation: Make a paper trail. This is one of the most important items involved in terminating an individual. Usually employees are not terminated for a one-time offense, but for poor performance based on violations of personnel policies. Ideally, there will be objective documentation detailing what performance measures the employee has not met or personnel policies he or she has violated. Written documentation that shows that the employee was informed of the problem and is signed by the employee is often best. Even if there is a possible discriminatory claim based on some quality of the employee, this kind of documentation is good evidence if sued. Also, if an employee is aware of problems he or she may be less likely to take action against the city when adverse action is taken against the employee. Finally, keep in mind that there are special documentation requirements for police officers. *See id.* §§ 614.021-023.

(c) Consistency: Ensure that similarly-situated employees are treated the same. If one person in the city library is late everyday and is never disciplined and another person is terminated for being late, that is a recipe for a discrimination claim. Keep an eye on how every employee is treated and ensure that your personnel policies and discipline procedures lend themselves to objectivity and consistency. However, if there could be a rational basis for treating some employees differently if they are in different departments or have different duties.

(d) Discrimination and Retaliation: Are there any legitimate claims that the employee or applicant could make? Could an injured employee make a claim under the Family Medical Leave Act, the Americans with Disabilities Act, or Workers' Compensation? Are they part of another protected class? Look at the above acts plus USERRA, the Texas Whistleblowers Act, the Age Discrimination in Employment Act, and other state and federal laws before taking action.

Certain other laws may apply to special situations, such as the termination of police officers and/or firefighters. In addition, if your city is a member of the TML Intergovernmental Risk Pool, it is recommended that you contact the "Call before You Fire" program at (800) 537-6655 before you take any major action.

Can I talk to other city councilmembers outside of a posted meeting?

It depends. Any gathering of members of a governmental body, such as a city council, is subject to the requirements of the Open Meetings Act (including 72 hours notice, an agenda, and minutes or a tape recording) if the following two conditions are met: (1) a quorum participates; and (2) public business is discussed. TEX. GOV'T CODE § 551.001(4); Tex. Att'y Gen. Op. No. JC-313 (2000); Tex. Att'y Gen. Op. No. GA-896 (the Open Meetings Act actually has two definitions of a "meeting," but the two-element test is the easiest way to understand when the

Act applies). For example, a regular meeting of a city council, where agenda items are discussed and formal action is taken, is clearly a meeting. If a quorum of members deliberates about public business outside of a meeting, they are in violation of the Act and can be charged with the criminal offense of having an illegal "closed meeting." *Id*. at § 551.144.

In *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012)(pet denied, 133 S. Ct. 1634, 185 L. Ed. 2d 616 (2013)), several city official challenged the closed meeting offense as unconstitutional in violation of their First Amendment right to freedom of speech. In 2013, the U.S. Supreme Court denied the petition for writ of *certiorari* (i.e., request to hear the case) in the case, which brought eight years of litigation to a close. The legal result of the court's decision is that a previous Fifth Circuit Court of Appeals opinion upholding the closed meeting offense is the law of the land in Texas. The Fifth Circuit opinion held that the provision is constitutional because it is aimed at prohibiting the negative "secondary effects" of closed meetings. According to the court, closed meetings: (1) prevent transparency; (2) encourage fraud and corruption; and (3) foster mistrust in government.

Another criminal provision was added to the law in 2019. That provision repealed and replaced the so-called "criminal conspiracy" provision in the Act, which provided that a "member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter." In *State v. Doyal*, PD-0254-18, 2019 WL 944022 (Tex. Crim. App. Feb. 27, 2019), reh'g denied (June 5, 2019), the Texas Court of Criminal Appeals struck down the criminal conspiracy provision as unconstitutionally vague. The Court found that the statute lacked specificity, and it called upon the legislature to draft a new, constitutional version.

In response, the Eighty-Sixth Legislature passed S.B. 1640, which rewrote the provision and renamed it "prohibited series of communications." Section 551.143(a) now reads that it is an offense if a councilmember:

1. **knowingly** engages in at least **one communication among a series of communications** that each occur **outside of a meeting** authorized by this chapter and that concern an issue within the jurisdiction of the governmental body in which **the members engaging in the individual communications constitute fewer than a quorum** of members but **the members engaging in the series of communications constitute a quorum of members**; and
2. **knew at the time** the member engaged in the communication that the series of communications:
    a. involved or would involve a **quorum**; and
    b. **would constitute a deliberation once a quorum** of members engaged in the series of communications.

The elements above can be met even if the quorum of members isn't physically present in the same location and the discussion doesn't take place at the same moment in time. A violation of Section 551.143 is punishable by a fine of not less than $100 or more than $500, confinement in

the county jail for not less than one month or more than six months, or both fine and confinement.

Under the new statute, it appears that two councilmembers may speak about city business outside of a formal meeting so long as they do not constitute a quorum and are not aware at the time of a series of communications that would ultimately involve a quorum. The passage of the new law calls into question many prior attorney general opinions and court cases that analyzed fact patterns by conflating the criminal closed meeting offense with the prior criminal conspiracy offense. For example, the following describe the legality of certain actions under Section 551.144 (criminal closed meeting) and the predecessor to Section 551.143 (criminal conspiracy). Interpretations based on the old criminal conspiracy provision aren't controlling based on the new statute, but they continue to provide some guidance:

- Members of a governmental body may violate the Act by signing a letter on matters relevant to public business without meeting to take action on the matter in a properly posted and conducted open meeting. The mere fact that two councilmembers visit over the phone does not in itself constitute a violation of state law. *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. — San Antonio 1985, no writ). However, if city councilmembers are using individual telephone conversations to poll the members of the council on an issue or are making such telephone calls to conduct their deliberations about public business, there may be the potential for criminal prosecution. Physical presence in one place is not necessary to violate the Open Meetings Act. Tex. Att'y Gen. Op. No. DM-95 (1992)(the reasoning in the opinion is based on both closed meeting and unconstitutional criminal conspiracy provision); *see also* Tex. Att'y Gen. Op. No. JC-0307 (2000)(this opinion was largely based on the unconstitutional criminal conspiracy provision).

- An individual member of a governing body does not violate the Act when he or she communicates in writing to a staff member indicating a desire to have an item placed on the agenda and sends a copy to other members of the board. Tex. Att'y Gen. Op. No.MW-32 (1979).

- Electronic communications could constitute a deliberation that must comply with the Open Meetings Act because: (1) "verbal exchange" means the expression of something in words, which does not need to be spoken, and (2) councilmembers do not need to be in each other's presence to constitute a quorum. Tex. Att'y Gen. Op. No.GA-896 (2011). The definition of "deliberation" was subsequently amended in 2019 to include a "written exchange."

The practical result of al this is that city attorneys still have trouble advising on the legality of speaking with other councilmembers outside of a properly-posted open meeting.

How do we move our city limits sign, i.e., how do we annex property?

Annexation has always been, and will probably always be, one of the most contentious issues in municipal law. The annexation laws were very complicated because there had been so many piecemeal, compromise bills throughout the years. House Bill 347 by Phil King (R – Weatherford) became effective May 24, 2019, and ends most unilateral annexations by any city, regardless of population or location. Specifically, the bill makes most annexations subject to three consent annexation procedures that allow for annexation: (a) on request of the each owner of the land; (b) of an area with a population of less than 200 by petition of voters and, if required, owners in the area; and (c) of an area with a population of at least 200 by election of voters and, if required, petition of landowners. It authorizes certain narrowly-defined types of "consent exempt" annexations (e.g., city-owned airports, navigable streams, strategic partnership areas, industrial district areas, etc.) to continue using a service plan, notice, and hearing annexation procedure. A detailed paper on the state of the law following the passage of the bill is available here.

Can a city mandate drug testing of all its employees or job applicants?

The TML Legal Department receives many calls from cities that either: (1) desire to implement a drug testing policy for all their employees; or (2) already have such policy in place. City officials are often surprised to learn that, unlike a private employer, a city's ability to require city employees to undergo a drug test is limited by the Fourth Amendment of the United States Constitution. Because the collection and testing of urine constitutes a "search" under the Fourth Amendment, a city may only require an employee to undergo drug testing if: (1) the city has individualized suspicion of the employee's wrongdoing; or (2) a "special need beyond the need for law enforcement" exists. *See Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (citing *Skinner v. Ry. Labor Execs. Ass'n*., 489 U.S. 602 (1989).

A city may test an employee for drugs if the city has individualized suspicion that the employee is under the influence of drugs. *See Chandler*, 520 U.S. at 313. Whether individualized suspicion exists is a fact-specific inquiry. Before requiring an employee to undergo a drug test, the city should be able to articulate specific observations that led to the individualized suspicion, such as speech, behavior, conduct, or odor that suggests that an employee is under the influence.

Drug testing of employees without individualized suspicion, also referred to as "random drug testing," is permitted only if a city has a "special need, beyond the normal need for law enforcement," for requiring the testing, and that such "special need" outweighs the employee's privacy interest. *See Skinner*, 489 U.S. 602; *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989). Applying this "special needs" standard, a city will only be able to randomly drug test city employees who hold "safety-sensitive" positions "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628. The courts have determined that employees holding the following safety-sensitive positions may be randomly drug tested: (1) CDL drivers who are subject to federal Department of Transportation regulations; (2) law enforcement employees who carry firearms or who are

directly involved in drug interdiction (*Von Raab*, 489 U.S. at 679); (3) public transporters in industries in which there is a documented problem with drug or alcohol related incidents (*Skinner*, 489 U.S. 602); (4) operators of heavy machinery, large vehicles or hazardous substances (*Skinner*, 489 U.S. 602; *Aubrey v. Sch. Bd. of Lafayette Par.*, 148 F.3d 559 (5th Cir. 1988)); and (5) employees working in high-risk areas such as highway medians (*Bryant v. City of Monroe*, at 593 Fed. Appx. 291, 297 (5th Cir. 2014)). Additionally, the court has upheld post-accident drug testing of safety-sensitive positions without individualized suspicion of wrongdoing. *Id*. at 298. A city that desires to implement a random drug testing policy should first articulate a "compelling interest" beyond the need for law enforcement that justifies such testing, and then determine which employees may legitimately be randomly tested. If a "compelling interest" beyond the need for law enforcement cannot be identified, the city should not perform random drug tests.

With respect to drug testing all job applicants, no Texas court has addressed whether a city can require such testing. However, other federal courts have struck down pre-employment drug testing of non safety-sensitive positions. *See e.g. Am. Fed'n of State, County and Mun. Emps. 79 v. Scott*, 717 F.3d 851 (11th Cir. 2013), *cert. denied*, 572 U.S. 1060 (2014) (mandatory drug testing of all job applicants struck down); *Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008) (post-job offer drug testing of a library page was unconstitutional as applied to that position because the page's duties were not safety-sensitive). Additionally, the court has concluded that an employee's submission to drug testing, on pain of termination, does not constitute voluntary consent. *See Scott*, 717 F.3d at 873. A city that has or desires to implement a policy requiring pre-employment drug testing should consult with local counsel regarding this matter.

Who can enforce city ordinances?

City ordinances may be enforced via citations from peace officers, or through notices of violation from a code enforcement officer or complaints by citizens filed with the municipal court.

Many cities give certain employees, including code enforcement officers and animal control officers, the power to issue a "notice of violation" on behalf of the city in cases where there is an alleged ordinance violation. The notice usually includes information such as: (1) the text of the ordinance being violated; (2) the conduct that violates the ordinance; and (3) how to come into compliance. The notice serves as a warning to the alleged violator, letting him know that he is in violation of the ordinance. Typically, it also provides for a period of time in which he may rectify the situation. In addition, a notice of violation will often include a warning that, if the situation is not brought into code compliance within a certain period of time, a complaint will be filed in municipal court. A complaint is a sworn allegation charging the accused with the commission of an offense under either a state law or a city's ordinance. Subsequent to receiving a sworn complaint regarding an ordinance violation, the court may issue a summons requiring the alleged violator to appear before the court. TEX. CODE of CRIM. PROC. arts. 45.014(a) and 15.03(a). If the alleged violator does not appear on the date listed in the summons, a warrant may be issued for his arrest. TEX. CODE of CRIM. PROC. art. 45.026.

As a general rule, anyone may file a complaint in municipal court alleging a violation of a state law or a city ordinance. TEX. CODE of CRIM. PROC. art. 21.011. Under Texas Code of Criminal Procedure Article 45.019, in order to be acted on by the court, a complaint must be sworn to by an "affiant." An affiant is any credible person who is acquainted with the facts of the alleged offense. The complaint may be sworn before any officer authorized to give oaths. TEX. CODE of CRIM. PROC. art. 45.019.

Any citation, including one for a Class C misdemeanor, is issued in lieu of an arrest. Thus, the most conservative interpretation of state law holds that only a peace officer certified by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) is authorized by statute to issue a true citation. Peace officers are granted the power to issue citations in lieu of arrest by Texas Code of Criminal Procedure Article 14.06(b) and Texas Transportation Code Sections 543.002-543.005. Thus, the most conservative advice is that no one but a certified peace officer may issue a citation compelling an individual to appear in court on a certain day. That advice holds true for both a violation of state law or a city ordinance.

The TML Legal Services Department gives only the most conservative advice. In this case, that advice is to only allow TCLEOSE-certified peace officers to issue citations. However, city officials should be aware that an argument can be made that Texas Local Government Code Chapter 51 allows for the designation by ordinance of code enforcement officers, animal control officers, or other designated city employees to issue citations for code violations. On this matter, as with others, TML attorneys defer to the advice of local legal counsel.

Does a mayor or city councilmember have full access to city records?

A current member of the governing body who requests information from the city in his or her official capacity has full access to the requested information. The Public Information Act (Act) is not implicated when a request is made in a mayor or councilmember's official capacity, as the release of the documents is not viewed as a release to the general public. Tex. Att'y Gen. Op. No. JM-119 (1983).

Should a city receive such a request, the exceptions to disclosure that might otherwise apply to an open records request from a citizen would not apply to a mayor or councilperson. *Id*. In other words, information that would typically be considered confidential under the Act would need to be released to a mayor or councilperson requesting the information in their official capacity. Furthermore, because the Act would not control the handling of the request, charges for expenses associated with fulfilling the request that are usually assessed pursuant to the Act could not be imposed upon the mayor or councilmember.

If, however, a member of the governing body requests city records in his or her individual capacity for personal use, then the request would need to be treated like any other open records request from a member of the public. The exceptions to disclosure under the Act would apply, and the custodian of records could not release protected information to the mayor or

councilmember. Open records charges could be assessed against the mayor or councilmember if the information is requested in an individual capacity.

Because a release of information to a mayor or councilmember requesting in their official capacity is not a release to the public, the recipient must be cautious in maintaining the documents in the same way they are maintained by the governmental body as a whole. The Act imposes criminal provisions for the release of confidential information. *See* TEX. GOV'T CODE § 552.352. As a result, a member of the governing body who receives confidential information must ensure that it remains confidential. Disclosing confidential information would constitute official misconduct, and would be considered a misdemeanor punishable by either a fine of up to $1,000, confinement in county jail for up to six months, or both. *Id.*

Several bills have been filed to address this issue, but as of yet none has passed.

Conclusion & Other Resources

This paper is meant to provide an overview of the most common legal questions asked of the TML Legal Services Department. Remember that there are a multitude of tools available to Texas cities to protect, preserve, and revitalize their communities. There are numerous city, federal, state, and private organizations that are excited and willing to share their knowledge and experience. Cities should take full advantage of the wide range of resources that are available. The following is a non-exhaustive list of some agencies and organizations that may be of assistance:

Texas Municipal League Legal Department
www.tml.org
legalinfo@tml.org
512-231-7400

Texas Secretary of State's Elections Division
www.sos.state.tx.us
800-252-VOTE

Texas Comptroller's Office
www.cpa.state.tx.us
800-531-5441