

## **Legal Q&A**

By **Christy Drake-Adams**, TML Assistant General Counsel

### **Q What is an attorney general opinion?**

**A** An attorney general opinion is a written interpretation of existing law. It is defined in state law as “advice or a judgment or decision and the legal reasons and principles on which it is based.” TEX. GOV’T CODE § 402.041.

### **Q What legal weight and authority does an attorney general opinion have?**

**A** Texas Supreme Court opinions addressing this question consistently indicate that, while attorney general’s opinions are persuasive, they are not controlling or binding on the courts. *See, e.g., In re Smith*, 333 S.W.3d 582, 588 (Tex. 2011); *H.E.B. Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 661 n.148 (Tex. 2007); *Comm’rs Court of Titus Cnty. v. Agan*, 940 S.W.2d 77, 82 (Tex. 1997); *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996); *see also Ex parte Schroeter*, 958 S.W.2d 811, 812 n.2 (Tex. Crim. App. 1997).

### **Q Under what authority does the attorney general issue opinions?**

**A** The attorney general opinions to which this article refers are issued under Government Code Sections 402.042 or 402.043.

### **Q Is a mayor or member of the city council authorized to request an attorney general opinion?**

**A** No. If a city wants to request an attorney general opinion, it must be submitted through an “authorized requestor.” State law authorizes the following state and local officials to request opinions: (1) the governor; (2) the head of a department of state government; (3) a head or board of a penal institution; (4) a head or board of an eleemosynary institution; (5) the head of a state board; (6) a regent or trustee of a state educational institution; (7) a committee of a house of the legislature;\* (8) a county auditor authorized by law; or (9) the chairman of the governing board of a river authority. *Id.* § 402.042.

The attorney general also advises district and county attorneys in certain instances in which the State of Texas is interested and certain requirements are met. *Id.* § 402.043; *see also* Tex. Att’y Gen. Op. No. GA-0467 (2006) at n. 2 (“Government Code sections 402.042 and 402.043 identify the state and local officials who are authorized to request attorney general opinions, and section 402.045 provides that the attorney general may not give a written opinion to a person who is not an authorized requestor.”).

\*“Individual legislators are not among the authorized requestors.” Tex. Att’y Gen. LO-89-72 (1989). However, it is the practice of the attorney general’s office to accept requests from the chairman of a legislative committee as a request from the committee. *See* Tex. Att’y Gen. LO-88-21 (1988).

### **Q How is a request designated?**

**A** The attorney general's office assigns each request an identifying number, which is referred to as the "RQ Number." For instance, in RQ-0160-KP the "RQ" stands for "Request," the number "0160" is the numerical order in which the request was accepted, and "KP" stands for Ken Paxton (the current attorney general). The RQ Number does not coincide with the number under which the opinion will ultimately be issued. (See below for a discussion of the format in which opinions are issued).

Request letters as far back as 1991 are posted on the attorney general's website. *See* <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs>. Summaries of requests for attorney general opinions must be published in the Texas Register. TEX. GOV'T CODE §§ 2002.011(5), .012.

### **Q Are there any procedural requirements applicable to an opinion request?**

**A** Yes. "A request for an opinion must be in writing and sent by certified or registered mail, with receipt requested, addressed to the office of the attorney general in Austin, or electronically to an electronic mail address designated by the attorney general for the purpose of receiving requests for opinions." *Id.* § 402.042(c). The attorney general is required to acknowledge receipt of a request not later than the 15th day after the date that it is received. *Id.* Acknowledgement letters are generally sent via e-mail.

Persons or groups who might have a particular interest in the subject of a request are copied on acknowledgement letters. In this way, the acknowledgement letter is used to invite those persons or groups to submit legal briefing. For instance, TML is often copied on acknowledgement letters in regard to issues in which cities might have an interest.

### **Q How can your city participate in the opinion process?**

**A** A city, usually through its legal counsel, may submit a brief to the attorney general in regard to a pending request. The city does not have to be invited (as described above) in order to submit briefing. The attorney general encourages third-party briefs be submitted within thirty days of the date a request is acknowledged. While the attorney general's office routinely accepts briefs outside of this timeframe, submitting the brief in this period helps guarantee that the brief is fully considered in the opinion process. The attorney general's website has a list of pending opinion requests, along with the requested deadline to submit a brief. *See* [https://www2.texasattorneygeneral.gov/opin/opin\\_recent.php](https://www2.texasattorneygeneral.gov/opin/opin_recent.php).

The attorney general's website has more information about the opinion process here: <https://www.texasattorneygeneral.gov/attorney-general-opinions>.

### **Q May an authorized requestor ask for an attorney general opinion about any subject matter?**

**A** No. Section 402.042 provides that “the attorney general shall issue a written opinion on a question affecting the public interest or concerning the official duties of the requesting person.” TEX. GOV’T CODE § 402.042(a); *see also* Tex. Att’y Gen. Op. No. GA-0685 (2008) at 3 (explaining that a question may concern either a matter of public interest or the official duties of the requestor, but does not have to relate to both). The attorney general would not, for instance, issue an opinion to resolve a private legal dispute regarding on whose property a fence is located.

The attorney general has indicated that “[q]uestions involving cities . . . should be submitted by a statutorily authorized requestor only if they concern subject matter covered by the jurisdiction and duties of the office submitting the request.” Tex. Att’y Gen. Op. No. GA-0356 (2005) at 2.

### **Q In what format are attorney general opinions issued?**

**A** Opinions are issued in a letter format. Opinions as far back as 1939 are available for review on the attorney general’s Website at <https://www.texasattorneygeneral.gov/opinions>. In most cases, an opinion is designated by: (1) the initials of the attorney general that issued the opinion; and (2) a number representing the numerical order in which the opinion was issued. For instance, KP-0001 was issued in 2015. The “KP” stands for Ken Paxton and “0001” was the first opinion he issued. You might see this cited as “Tex. Att’y Gen. Op. No. KP-0001 (2015).” Summaries of attorney general opinions must be published in the Texas Register. TEX. GOV’T CODE §§ 2002.011(6), .012.

In the past, some opinions were issued as “letter opinions”; these generally addressed issues that were local in nature or affected the interests of a particular person or group. The opinions were designated with “LO.” The attorney general’s Website explains that the “LO” designation does not mean that a document is less authoritative than one designated by the initials of the attorney general. *See* <https://www2.texasattorneygeneral.gov/opinion/information-on-letter-opinions>. At the beginning of 1999, the practice of issuing letter opinions was discontinued.

### **Q Is there a deadline in which the attorney general must issue an opinion?**

**A** State law requires that the attorney general issue an opinion not later than the 180th day after the date that a request is received, unless the attorney general notifies the requestor in writing that the opinion will be delayed or not rendered and states the reasons for the delay or refusal. TEX. GOV’T CODE § 402.042(c). There are various examples of opinions that have been issued well outside of this 180-day timeframe. *See, e.g.*, Tex. Att’y Gen. Op. No. GA-0795 (2010) (requested July 16, 2009 and issued August 27, 2010).

### **Q What are some of the reasons that the attorney general might refuse to issue an opinion or address a question raised in a request?**

**A**

- The attorney general has declined to address questions that are the subject of pending litigation, including matters that are the subject of administrative proceedings. *See, e.g.*, Tex. Att’y Gen. Op. Nos. KP-0118 (2016) at 2, GA-0498 (2007) at 8; RQ-0832-GA

(2009) (this request involved an issue before the Texas Board of Professional Engineers and was “closed for litigation”).

- The attorney general has declined to address issues that are, in effect, an appeal of a judicial decision or that require the construction of a court order. *See, e.g.*, Tex. Att’y Gen. LO-93-74 at 4.
- The attorney general will not, through the opinion process, determine disputed fact questions. *See, e.g.*, Tex. Att’y Gen. No. KP-0240 (2019) at 1.
- The attorney general has refused to answer questions that require the review and construction of a particular contract. *See, e.g.*, Tex. Att’y Gen. Op. No. GA-0883 (2011) at 4.
- The attorney general typically will not construe a city charter provision or address whether particular actions constitute a violation of a city charter. *See, e.g.*, Tex. Att’y Gen. Op. No. KP-0026 (2015) at 1.

**Q What topics do attorney general opinions frequently deal with that concern cities?**

**A** Some of the most frequently covered topics in attorney general opinions that concern cities include dual office holding issues, open government questions, and conflicts of interest problems. *See, e.g.*, Tex. Att’y Gen. Op. Nos. KP-0125 (2017) (regarding simultaneous service on the board of trustees of a public library district and on the city council), GA-0717 (2009) (addressing whether a city charter provision that permits a majority of city councilmembers to call a special meeting violates the Open Meetings Act), KP-0244 (2019) (regarding whether the city attorney and city administrator are local public officials subject to Chapter 171 of the Local Government Code).

**Q How do I determine whether an older attorney general opinion has been overruled, modified, affirmed, or withdrawn?**

**A** The attorney general’s website contains information about opinions that have been overruled, modified, affirmed or withdrawn. *See* <https://www2.texasattorneygeneral.gov/opinion/opinions-overruled-modified-affirmed-withdrawn>.