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May 11, 2010

CONFIDENTIAL
ATTORNEY/CLIENT PRIVILEGE

Via Email: Paul.Brandenburg@georgetown.org
Mr. Paul Brandenburg
City Manager
City of Georgetown
113 E. 8th Street
Georgetown, TX 78626

Re: Appointment of the City Attorney: Clarification of Earlier Opinion Letter

Dear Mr. Brandenburg:

After transmitting our earlier opinion letter to you, we understand that there may be opportunities for possible misinterpretations. In an attempt to clarify some points, we submit this letter to you.

Hiring of the City Attorney

This is a major point that should be clarified. We did not see any issues with the *hiring* of Mr.Sokolow, as noted in our letter dated yesterday. The City Council, speaking as a whole, *did* set the compensation of the City Attorney and it did so through a public meeting (by directing the Human Resources Director to take actions as he was instructed). Mr. Sokolow's hiring as City Attorney was lawful, and we believe he has been an *at-will* employee of the City Council since the time of his hiring.

The *hiring* of the City Attorney is a separate matter from the execution of the employment agreement. As we stated in our earlier letter, Mr. Sokolow has served as the *de facto* City Attorney since his hire and his opinions are not void in our view.

Employment Agreement of the City Attorney

The authority of the Mayor to sign the employment agreement with Mr. Sokolow, in the manner that he did, was not addressed in our previous letter. The City Charter does not grant the Mayor any independent authority to enter into contracts on behalf of the City; only the City Council, acting as a whole, may do so. We do not think it is advisable for the City Council to "ratify" the agreement that was signed only by the Mayor and make it have a retroactive effect.

306 WEST BROADWAY AVENUE * FORT WORTH, TEXAS 76104
PHONE 817.332.8505 FAX 817.332.8548

Rather, we believe it may be advisable for the City Council to consider executing a new agreement with the City Attorney. The Personnel Action on this evening's Agenda reads:

> Sec. 551.074 "Personnel Matters"
> 1. To discuss with the City Attorney his evaluation.

It is also posted that the Council may take action in Regular Session, based on what was discussed in Closed Session. The posting language for the closed session states only discussion of an "evaluation." Based on its evaluation, the City Council can then return to open session, discuss the City Attorney's evaluation, and authorize the terms of an agreement. The City Council could also direct the [Human Resources Director, City Manager, outside legal, or whomever it chooses to designate] to discuss the terms with the City Attorney. We believe that the City Council could also *authorize* the Mayor to sign the agreement on behalf of the City Council.

If you wish to discuss this further with us, please call.

Sincerely,

Julia Gannaway

Julia Gannaway
Gannaway@laborcounsel.net
817.332.8505

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May 10, 2010

CONFIDENTIAL
ATTORNEY/CLIENT PRIVILEGE

Via Email: Paul.Brandenburg@georgetown.org
Mr. Paul Brandenburg
City Manager
City of Georgetown
113 E. 8th Street
Georgetown, TX 78626

Re: Appointment of the City Attorney

Dear Mr. Brandenburg:

You have asked our opinion whether the City Council's appointment of the City Attorney, Mr. Mark Sokolow violated the Texas Open Meetings Act. A news publication, the "Austin Bulldog" published a news story by one reporter in his article, "Georgetown City Attorney Hired in Secret."

Based upon our reading of the Georgetown City Charter, Texas Government Code Chapter 551, and our research, we believe that the appointment of the City Attorney was proper and complied with the law. Moreover, the actions that the City Attorney has taken are not void, because he is the *de facto* City Attorney. However, should the City Council wish to avoid further scrutiny, the City Council could consider ratifying its prior appointment in an upcoming meeting. Our reasoning follows.

City Charter Provision

The Charter provision at issue in this matter is Article V, Section 6:

> The City Council shall appoint a competent attorney who shall have practiced law in the State of Texas for at least two (2) years immediately preceding the appointment. The City Attorney shall be the legal advisor of, and attorney for, all of the offices and departments of the City, and shall represent the City in all litigation and legal proceedings.
>
> ***
>
> The City Attorney(s) and any assistant City Attorney(s) serve solely at the will of the Council.

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There is no requirement of the City Charter that any particular process for appointment be followed, nor is there any mandate that a public announcement be made of the selection or removal of a City Attorney. Accordingly, we conclude that the City of Georgetown complied with its Charter in the hiring of the City Attorney.

Chapter 551 of the Texas Government Code, the "Texas Open Meetings Act."

Texas Government Code, §551.041, "Notice of Meeting Required," states the following:

> A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body.

(West 2010). All meetings of a governmental body must be open to the public. *Weatherford v. City of San Marcos, Texas,* 157. S.W.3d 473, 485 (Tex.App.—Austin 2005, review denied). §551.002, TEX. GOV'T CODE ANN. The Austin Court of Appeals set out a good overview of the Act and its obligations:

> 'Actions' taken in violation of the Act are voidable. §551.141. . . . Before closing a meeting, the presiding officer must publicly announce an intent to go into a closed meeting and identify the statutory basis for doing so. §551.101. The Act does not prohibit the expression of opinions in a closed session, as long as the actual vote or decision is made in an open session. *Thompson v. City of Austin,* 979 S.W.2d 676, 685 (Tex.App.—Austin 1998, no pet.).[1]

Weatherford, supra. Several Texas courts have been called upon to construe whether notices that were posted were "sufficient:"

> The notice requirements . . . apply to executive sessions, and the notice must be sufficiently specific to alert the general public to the topics to be considered. As long as the reader is alerted to the topic for consideration, it is not necessary to state all of the consequences which may flow from consideration of the topic.

Weatherford, supra, at 485, *citing Cox Enterprises, Inc., v. Board of Trustees,* 706 S.W.2d 956, 958 (Tex. 1986); *Rettberg v. Texas Department of Health,* 873 S.W.2d 408 (Tex.App.—Austin 1994, no pet.), *citing Lower Colorado River Authority v. City of San Marcos, Texas,* 523 S.W. 2d 641, 646 (Tex. 1975).

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[1] "A final action, decision, or vote on a matter deliberated in a closed meeting under this chapter may only be made in an open meeting that is held in compliance with the notice provisions of this chapter." TEX.GOV'T CODE ANN. §551.102. (West 2010).

a. **Employment Matters and Sufficiency of Notice**

To determine if a notice of a meeting sufficiently informs the public of the topic under discussion, the court will focus its analysis on comparing the content of the notice and the action taken at the meeting. *Markowski, et al., v. City of Marlin, Texas,* 940 S.W.2d 720, 726 (Tex.App.—Waco 1997) (termination of a fire chief and fire captain). A city is only required to provide "reasonable specificity of the subject matter to be considered" at the meeting. *Rogers v. City of McAllen, Texas,* 2008WL3867679, *4 (Tex.App.—Corpus Christi, no pet.) (not designated for publication), *citing Cox Enterprises, supra.*

Cox Enterprises, supra, involved the hiring of a superintendent and a newspaper (the Austin American Statesman) alleged that the school district trustees (the "Board") violated the Open Meetings Act. The Supreme Court analyzed the adequacy of the posting for executive session for "personnel":

> A 1977 Attorney General Opinion addressing the adequacy of notice for an executive session discussed the balance of interests served by the Open Meetings Act: The primary interest protected by section 2(g) permitting personnel matters to be discussed privately is that in avoiding possible unjustified harm to the reputation of the individual officer or employee under consideration. . . . *While the public is not entitled to observe and participate in the Board's closed discussions of the qualifications of individuals under consideration for appointment to such a position, we believe that the public is entitled to reasonable notice that the Board will consider filling such positions at its meeting* . . . Thus, the legislature has decided that the governing body must inform the public of the fact of its action, even though it may deliberate in private.

Id., at 958-9, *citing* Op.Tex.Att'y Gen. No. H-1045 (1977)(emphasis added). The Supreme Court found the Attorney General's reasoning "persuasive." *Id.* In *Cox Enterprises, supra,* because the Board was hiring a superintendent, the Court found that "personnel" was not specific enough.[2],[3]

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[2] The Austin American Statesman also challenged the actions of the Board when it later announced the names of the finalists for the position; it claimed that the Board secretly deliberated about releasing the names without having properly posted that deliberation. The Court disagreed with the newspaper because the Board did not deliberate about releasing the candidate's names; the Board had received legal advice that the Attorney General had ruled that the names of candidates were subject to release under the Texas Open Records Act (now, the Texas Public Information Act.) Accordingly, when the Board announced the names of the candidates for superintendent, such action did not involve secret deliberations but was merely action taken in response to legal advice and was not illegal.

[3] Courts have held that the notice is sufficient for "personnel" if it identifies the office or officer that is going to be discussed: *Markowski v. City of Marlin, supra, Sokolow v. City of League City, Texas,* 37 F.Supp.2d 940 (S.D.Tex. 1999) (termination of the city attorney); *Rettberg v. Texas Dep't of Health, supra* (termination of the executive secretary); *Rogers v. City of McAllen, supra.* (termination of a fire chief).

Official Actions of the City Council of the City of Georgetown

Important to our analysis is the properly posted Special Meeting of the City Council which occurred on August 28, 2009. The meeting was either inadvertently omitted from the news article or was ignored. Regardless, the Notice of the City Council Special Meeting ("Agenda") of August 28, 2009 states:

> Regular Session to convene Executive Session—Call to order at 12:30 p.m.
>
> **Executive Session** . . .
> A. **Sec. 551.074: Personnel Matters**
> - City Attorney Interviews
> **Regular Session**
> B. Action from Executive Session
> C. Adjournment

Later, the Minutes of the Special Meeting reflect the following occurred:

> **Executive Session** . . .
> A. Section 551.074 Personnel Matters
> - City Attorney Interviews
> **Regular Session**
> B. Action from Executive Session
> **Motion** by Oliver, second by Ross to make an offer to the preferred candidate for City Attorney in the amount discussed in Executive Session including the relocation expenses and bonus after the successful completion of six month's service. The offer is subject to a background check and other appropriate personnel policies. **Approved 6-1 (Sattler opposed)**
> C. Adjournment.

Here, the Georgetown City Council specifically published, through the Agenda, that it was interviewing candidates for the City Attorney. A comparison between the Agenda posting, and the Minutes of the Special Meeting demonstrate that the City Council took action, in open session, on the item that had been posted for executive session. We conclude that the City Council complied with the Texas Open Meetings Act regarding this meeting.

After the Special Meeting occurred, the Agenda for the Regular Meeting on September 8, 2009, reflects the following:

***

> Executive Session . . .
> BB. Sec. 551.074 Personnel Matters
> - City Attorney

***

The Minutes of the September 8, 2009 meeting reflect the following action occurred:

***

Action from Executive Session:

***

Motion by Berryman, second by Sansing that the Human Resources have the authority to continue his discussions with the candidate for City Attorney and, upon completion of those discussions, he move forward with the recommendation addressed in Executive Session. **Approved 6-1** (Ross opposed).

The Council properly posted that it was going to deliberate in executive session relating to personnel matters of "City Attorney." In evaluating the Agenda posting and the Minutes, it is clear that the City Council's deliberations were contemplated by the language in the Agenda, and the Council's actions were consistent with posted Agenda. When an item is posted for deliberation, a governmental entity is not required to anticipate and advise every possible consequence that may result after deliberation has occurred. *Cox Enterprises, supra.* The City Council, via motion made by Councilmember Berryman, publicly gave direction to the Human Resources Director to continue negotiations with the preferred candidate for the City Attorney position. That action was put to a public vote, and it was approved 6-1. The negotiations were later completed and the Mayor signed an agreement with Mr. Mark Sokolow.[4]

While it is true that the agreement itself was not again put before the City Council, because the terms of the agreement had already been publicly voted on in the September meeting, it was not necessary to reaffirm the decision that the City Council had already publicly made. Further, the City Council has taken subsequent action relating to Mr. Sokolow's agreement, and in April, 2010 discussed the proposed re-evaluation of his duties and performance, per the six month window that had been previously agreed to by the City Council.

Ratification is An Option.

Even if the actions taken by the City Council are found by a court to violate the Texas Open Meetings Act, (which we do not believe occurred), such actions are not automatically void; the action is subject to reversal only by a court of competent jurisdiction. Op.Tex.Att'y Gen. JM-985 (1988). To avoid further inquiry, the City Council could consider ratifying its prior actions with regards to the hiring of the City Attorney by posting a detailed and specific notice relating to the execution of the employment agreement of the City Attorney. Op. Tex.Atty' Gen. H-419 (1974)

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[4]Because there is no requirement under Chapter 551 that governmental entities identify particular candidates for positions, the Georgetown City Council acted legally when it identified the personnel action by position.

(when ratifying a prior action that could have lawfully been taken, a governmental body must provide specific notice of the subject matter of the actions to be ratified.)

Sokolow's Actions Are Not Void.

The actions Mr. Sokolow has taken, and the advice he has rendered, are not void. He was the *de facto* Georgetown City Attorney and has served as such since October, 2009. Actions taken by a *de facto* public official are not void.

In *Rivera v. City of Laredo, Texas,* 948 S.W.2d 787, 794 (Tex.App.—San Antonio, 1997, writ denied), the Laredo City Council had apparently discussed the appointment of a police chief in executive session, but when it re-convened in the regular session, publicly announced it was taking "no action." Two days later, the City Council held a meeting that had *not* been posted (the Council had "recessed" the earlier meeting, and reconvened without posting as was required by Chapter 551). That was clearly an illegal meeting, and it was at that illegal meeting that the City Council appointed the new police chief. The appointment of the police chief was challenged by a police officer who had been indefinitely suspended by the new police chief. The San Antonio Court of Appeals addressed the issue of whether and when a public officer is a *de facto* public official:

> A public official becomes an officer *de facto* when he exercises his duties under the following circumstances: First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give bond, or the like; *third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public*; fourth under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.

Id.[5] (emphasis added). In *Rivera, supra,* the Court found that the third circumstance was applicable to this police chief's invalid appointment, because it had occurred at an illegal meeting. Nevertheless, the San Antonio Court of Appeals concluded that the actions taken by the *de facto* police chief were not void.

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[5] *citing Forwood v. City of Taylor,* 208 S.W.2d 670, 673 (Tex.Civ.App.-Austin)(*quoting Norton v. Shelby Co.,* 118 U.S. 425, 6 S.Ct. 1121, *aff'd* 214 S.W.2d 282 (1948).

Here, there were no "illegal" meetings of the City Council relating to the appointment of the City Attorney in August or September 2009. The Agenda for the October 27, 2009 meeting does not set out any Council action relating to the appointment of the City Attorney, because Mr. Sokolow had already begun working for the City of Georgetown. His presence as the City Attorney is reflected in the Minutes of the October 27, 2009 meeting:

> **Staff present:**
> . . . Mark Sokolow, City Attorney; . . .

Mr. Sokolow was publicly seated on the dais by the October 27, 2009 meeting. Members of the City Council, City staff and the public have all acknowledged him as the City Attorney. Accordingly, even if it were found by a court that the City Attorney's appointment did not comply with the Open Meetings Act, his actions are not void, because he has been serving as the *de facto* City Attorney.

Conclusion

In conclusion, we do not believe that the City Council's actions in hiring the City Attorney violated the Texas Open Meetings Act or its City Charter. If the actions taken by the Georgetown City Council are later determined to violate the Open Meetings Act, the City Attorney's hiring of the City Attorney are not "void;" those actions are subject to being declared void through judicial action. Furthermore, even if it were found by a court of competent jurisdiction that the City Attorney's hiring did not comply with the Open Meetings Act, the actions that the City Attorney have taken in the last six months are valid because he served as the *de facto* City Attorney. However, should the City Council wish to remove any potential criticism, it could ratify the actions taken regarding the hiring of the City Attorney, after posting specific and detailed notification of the actions to be ratified and taking those actions in public session.

If you wish to discuss this further with us, please call.

Sincerely,

Julia Gannaway

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