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OPINION COMMITTEE VICKI TRUITT RECORDS DIVISION
DISTRICT 98

May 7, 2010

FILE # ML-46462-10

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

RQ-0888-GA

NO. # 46462

Re: Request for Attorney General Opinion – Section 551.074 of the Texas Government Code

Dear Attorney General Abbott:

I am respectfully requesting that an opinion from the Attorney General of the State of Texas as to the scope and extent of Section 551.074 of the Texas Government Code. Chapter 551 of the Texas Government Code is known as the Open Meetings Act (hereinafter "TOMA" or the "Act").

The City of Grapevine, Texas ("City") has met in executive session to deliberate the appointment of a City officer who is not an employee of the City. The question has arisen as to whether the City could meet in closed session under section 551.074 to deliberate considering the employment of that person for that position.

Section 551.074 of the Act permits a governing body to meet in Executive Session to deliberate the following: "the appointment, employment, . . . duties... of a public officer or employee." TOMA does not include a definition of "public officer".

Therefore, the Code Construction Act requires that the term be construed "according to the rules of grammar and common usage." Gov't Code § 311.011(a); see Attorney General Opinion JC-0419 at 3 (2001). Statutory construction should focus initially "on the literal text of the statute in question" because "the text of the statute is the law." *Getts v. State*, 155 S.W.3d 153, 155 (Tex. Crim. App. 2005); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); Attorney General Opinion GA-0354 at 2 (2005). A statute's words and phrases are to be read in context and given their common meaning unless they have acquired a technical or particular meaning by definition or otherwise. Attorney General Opinion GA-0354 at 2; see *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999). Both "public officer" and "employee" are defined in other applicable statutes. When the State of Texas defines municipal officers, as it does for general law cities, it defines municipal officers as including "the secretary, treasurer, assessor and collector, municipal attorney, marshal, municipal engineer, and any other officers or agents authorized by the governing body." (Section 22.071 of the Texas Local Government Code, *emphasis added*). In providing this definition of public officer, Section 22.071 of the Local Government Code does not provide any differentiation between a public officer who is an employee versus an officer who serves in that role on a contract basis.

Public Officers are often professionals assigned to a position by a municipality. A prime example of this concept is the City Attorney. Many cities throughout the State employ outside counsel to serve as their City Attorney. Based on the definitions above, there is no question that the position of City Attorney constitutes a Public Officer. The status of a City Attorney being a Public Officer does not change based on whether or not the City Attorney is an employee of the City or an attorney or firm that provides such services on a contract basis. Section 551.074 of the Government Code's distinction between employees and officers, and allowing either or both to be discussed in Executive Session, would not be necessary at all if the City Attorney was required to be an employee in order to qualify as an officer. The City Attorney qualifies as a Public Officer by statute regardless of their employment status. Clearly the drafters of section 551.074 were not limiting that exception to only full time employees, as such a finding would require that the words "or officers" have no meaning. Rules of statutory construction require that we find that the drafters intended that the words they use were intended for a purpose.

When looking at what position(s) fall within the scope of a Public Officer, it must be noted that for home-rule cities "[t]he municipality may: (1) create offices; (2) determine the method for selecting officers; and (3) prescribe the qualifications, duties, and tenure of office for offices." See section 26.041 of the Texas Local Government Code. Section 26.041 does not include any other limitation on what offices a home-rule municipality may appoint.

In an earlier opinion by the Texas Attorney General, (Tex. Att'y. Gen. Op. MW-129 (1980)) a question was posed as to whether the Section 551.074 of the Government Code permitted discussion about the employment of an engineering, architectural or employment firm. The opinion found that because such firms were independent contractors, the exception did not apply. However, that opinion should not apply to the questions presented here because it predates the applicable statutes relative to public officers which were adopted in 1987. As noted above, the municipal engineer is included within one of the definitions of public officer. Section 22.071 of the Local Government Code. Further, Section 26.041 of the Local Government Code provides broad authority for a home-rule municipality to appoint other public officers.

The City Council of the City of Grapevine intended to designate an officer of the City, where the scope and nature of the officer's work is highly sensitive and of critical importance and control over that work must be maintained by the City. However, such officer is not an employee of the City, but instead provides such services on a contract basis.

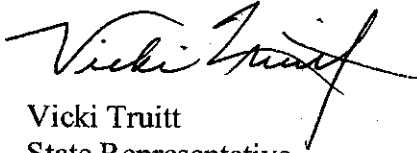
I seek your opinion regarding the following question:

- (1) Whether §26.041 of the Texas Local Government Code allows a city to create offices and select public officers for those offices?
- (2) Whether Tex. Govt. Code §26.041 allows a home-rule municipality to appoint a public officer who provides such services on a contract basis?

- (3) Whether deliberation in regard to hiring a public officer is allowed in closed session under §551.074 of the Texas Government Code, when such officer will be retained on a contract basis?

Thank you for your consideration of this important matter. Please do not hesitate to contact me if you have any questions or need further information.

Respectfully submitted,



Vicki Truitt
State Representative

VT/tdt