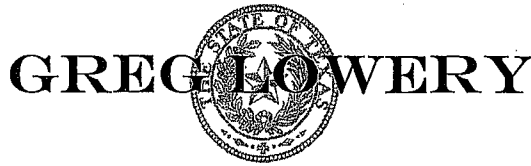


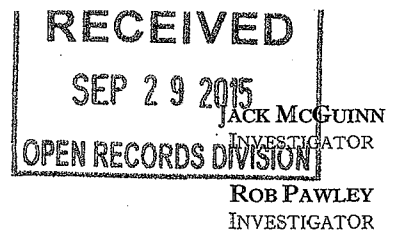
PATRICK BERRY
ASSISTANT DISTRICT ATTORNEY

LINDY BORCHARDT
ASSISTANT DISTRICT ATTORNEY

JAY LAPHAM
ASSISTANT DISTRICT ATTORNEY



DISTRICT ATTORNEY
Jack & Wise Counties
271st Judicial District
Court of Texas



FILE # ML-47826-15
I.D. # 47826

RQ-0056-KP

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SEP 30 2015

OPINION COMMITTEE

September 16, 2015

The Honorable Ken Paxton
Texas Attorney General
P.O. Box 12548
Austin, TX 78711

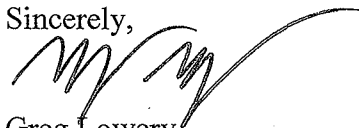
Dear Attorney General Paxton:

I have received a request from Walter W. Leonard requesting an attorney general opinion to clarify notice for executive sessions, appointment of City Administrators and powers of Mayor and City Administrators in General Law Cities.

It is my understanding that Texas law only authorizes certain officials to request an opinion from the Attorney General. As District Attorney for the 271st Judicial District, I am submitting Mr. Leonard's request on his behalf. Please find the formal request and background facts attached.

Please feel free to contact me if you need any additional information.

Sincerely,


Greg Lowery

WALTER W. LEONARD
ATTORNEY AT LAW

101 SUMMIT AVENUE
SUITE 1010
FORT WORTH, TEXAS 76102

817-335-6538
FAX 817-335-0932
EMAIL: wwlflaw@gmail.com

August 25, 2015

Opinion Committee
Office of the Attorney General, State of Texas
209 West 14th Street
Eighth Floor
Austin, Texas 78701

VIA FAX NO.: 512/475-2994

RE: City of Rhome/Issues Relating to Sufficiency of Notice for Executive Sessions, Appointment of City Administrators and Powers of Mayor and City Administrators in General Law Cities

Dear Opinion Committee:

Greg Lowery, District Attorney for Wise County, has been gracious to offer to forward on this request for an Attorney General's opinion for a matter of general interest to both of us as well as an interest which was expressed in earlier conversations with Steve Pier and other members of your staff.

The situation in Rhome revolves around events that have occurred in the last several weeks with regards to a move to appoint the existing Police Chief as City Administrator. Some of this relates to an ongoing division between the Mayor and the City Council. It is clear that there are many issues that need to be clarified with regards to the above issues as will be discussed below but they generally focus around issues relating to adequacy of notices for decisions made in Executive Session, and the relative powers of the Mayor in a general law city and extent of powers available to be granted to a City Administrator in a general law city.

On July 28th, the City Council held a regularly scheduled meeting (see agenda). The City Attorney was not able to attend owing to some family issues and, early in the meeting, the Mayor read a statement indicating her distress with current actions by the City Council attempting to make her resign as Deputy Chief of the Fire Department, alleging that these were actions being taken against her personally in an attempt to make her resign or to make her cease being a member of the Volunteer Fire Department. After reading a statement early in the meeting, the Mayor indicated that she was going to debate her future actions and left. At that point, as normal, the Mayor Pro Tem took over the meeting. Later in that meeting was an Executive Session as shown on the agenda. This Executive Session was under the generic subject "personnel". This has usually been used as a means of discussing general developments in personnel or in policies that may or may not need to be addressed in the future. It has not been a basis for taking any actions and the Council has been so warned several times.

During this Executive Session, discussion was had on various points and the Council apparently decided that it needed to appoint a City Administrator to take over the City from the Mayor - based upon later statements of the City Administrator and other parties. Also, during this period they discussed a variety of other issues including some drug tests that had been applied to City employees and concerns were raised about two (2) particular employees, including the Public Works Director. The person who was appointed City Administrator has since indicated that they were shown as positive and the Public Works Director was shown as positive for prescription medications. From statements made by the Police Chief (the appointed "City Administrator") subsequently, it appears he has told people that the Council told him to terminate those employees within this Executive Session.

After the Executive Session, the Council returned to open session and appointed the Police Chief as Interim City Administrator using an old Ordinance which was devised before the John Cornyn opinion JC-0544 (attached) relating to the general authorities and powers of a general law City Administrator/Manager and the various issues relating to their appointment and powers. The old Ordinance essentially created a blanket grant of authority to the City Administrator very much along the lines of a City Manager. The City of Rhome has never gone through the actions necessary to create a City Manager form of government, as per the Local Government Code.

Early the next morning, the "City Administrator" proceeded to go to City Hall to announce his employment to the City employees and to fire the two (2) employees who had been discussed in Executive Session. At the time they were told that they were being fired as an act of "no confidence" - a term normally only applicable to the termination of City officers - and for which no termination procedures in the Personnel Manual were taken but he later told various parties that they were being terminated because of failed drug tests and that such instructions had been given by the City Council, apparently during the Executive Session arising out of the discussion of "personnel".

On August 3rd, the City Administrator himself called a special meeting of the City Council and specified that he was doing it on his own authority (see attachments). The Mayor protested this was improper and instructed him to cancel this meeting. He did not do so. She also sent a letter to various local agencies requesting help (see attached). The Mayor challenged him at this time on the validity of both his appointment and the calling of the meeting in contravention of Local Government Code 22.038(b) which provides that only the Mayor may call a special meeting either on the Mayor's own volition or upon the application of three (3) Members of the Council. The Administrator, as shown in the attached, claimed to be able to do this under his own authority and under the old City Administrator Ordinance (see enclosed). A great deal of criticism was focused on these actions and this refusal both by the Mayor, various other City officials and the general public. Consequently, before the meeting occurred, the "City Administrator" resigned his position as City Administrator and retired back to his position as Chief of Police and two (2) City Council

members (one his wife) also resigned. The Police Chief's wife has since withdrawn her resignation and remains on the Council. In subsequent days, the Mayor Pro Tem has requested that the agenda items which were to be placed before the City Council by the "Administrator" be reinstated and such are anticipated at some time in the very near future.

Additionally, litigation is now being threatened against the City by an attorney representing the fired Public Works Director and there are indications that the other employee may subsequently file actions as well. The Texas Workforce Commission has subsequently denied the City's attempt to prevent unemployment benefits being paid to the Public Works Director on the grounds that the actions of termination were contrary to policy and procedures for such prescription drugs, et cetera.

Arising from these facts, several questions of legal significance have arisen for which we now ask an opinion from the Committee.

From an Executive Session whose only agenda item of relevance was "personnel", was it possible to hire an official of such significance as a City Administrator without further agenda notations? With regards to this we have serious questions arising out of Supreme Court case of *Cox Enterprises, Inc. v. Board of Trustees*, 706 SW.2nd 956, (Tex. 1986) and, additionally, the commentary on page 26 of the 2014 Open Meetings Handbook of the Attorney General's Office (see enclosed). These circumstances seem four square with the ruling of the Supreme Court and the commentary by the **Handbook** that this is obviously a matter for which a decision of this significance requires a great deal more agenda notification than simply "personnel". If such action were taken, then the question of the status of such action becomes relevant. Were these actions void or merely voidable? I would also note that the voidable issue would be, therefore, subject to analysis upon it being challenged. The Mayor has clearly challenged this and we are also in the process of seeing a challenge being raised by parties aggrieved by the actions of a City Administrator who was appointed out of such circumstances and who may also have been carrying out a decision made by the Council to terminate, both contrary to the normal procedures for such termination, but also a decision apparently taken in Executive Session out of an agenda notation for "personnel". The City would like clarification on the nature of these actions, whether they were void or voidable and possibly voided by challenge and what is the exact status of the actions which were taken by someone appointed under these circumstances.

With regards to the apparent decision by the City Council to terminate these employees out of an Executive Session in which the City's personnel policies were not followed is possibly an internal matter for the City but an action taken in Executive Session thus noticed to require a newly appointed City Administrator to terminate without any further agenda notice and actions is also a matter which requires analysis under the Open Meetings Act.

As indicated above, the "City Administrator" himself called a Special meeting of the City Council. As shown in the attached documents, he indicated that the matter was called on his own authority and which he justified under the language of the archaic Ordinance. The Mayor was not involved nor was the Mayor Pro Tem involved in the calling of this meeting. As you can see from the emails, the Mayor challenged this, ordered him not to proceed and also directed him to cancel the meeting. None of this was done. As a result, the meeting was not canceled by the party calling it and most Members of the Council did not appear for this meeting and it was ultimately canceled for lack of quorum. This, of course, occurred after the resignation of the "City Administrator" and two (2) of the Council Members.

One of the underlying issues that needs to be analyzed in this matter is that of the relevance of the somewhat global grant of powers contained in the old Ordinance versus the commentary from JC-0544 which basically rules that the Mayor has been given certain specific powers by the Legislature and those may not be taken by a general law city. These are generally enclosed in the traditions relating to the powers of the Mayor in Chapter 22 of the Local Government Code but are also scattered in other places such as the finance portions of the Local Government Code (Chapter 102), et cetera. As a general law city, may the powers specifically given to the Mayor by the Legislature be substantially modified by the City Council without specific Legislative authority? The reasoning in JC-0544 and the cases which it cites, seem to indicate that the powers of a City Administrator in a general law city are, in fact, somewhat limited. It would appear that they have almost no independent powers but are probably relegated to peripheral matters that would not be under the executive powers of the Mayor and/or powers that the Mayor may choose to share with such an official in the name of efficiency, et cetera. Insofar as it can be ascertained, there is no limitation on the situation in which the Mayor asks the City Administrator to assist with the running of the City and to carry out various tasks but that the role, then, of the City Administrator is that of an executive officer doing such tasks under the general authority of the Mayor. Obviously, as indicated in the opinion, the City may adopt a City Manager form of government but that has not been done in this case and the reasoning in the opinion makes it quite clear in some of the Legislative pronouncements - see, for example, the matters relating to budget - that the Legislature has chosen to draw a dichotomy between the idea of a City Administrator and that of a City Manager (i.e. independent authority?) and to point out that the State only allows such after specific actions have been taken. Consequently, we would appreciate an analysis with regards to the global powers granted by the existing Ordinance with regards to the provisions of State law and JC-0544.

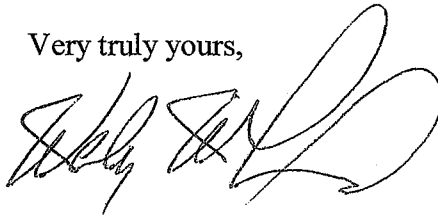
Generally speaking, therefore, we are requesting analysis and opinion with regards to:

1. The hiring of a City Administrator from an Executive Session whose agenda only provides for "personnel";

2. A firing decision made in Executive Session, likewise under a listing of only "personnel";
3. The calling of a Special meeting by a City Administrator under the authority of the existing City Ordinance which was pre-JC-0544; and
4. The validity of the existing Ordinance from 2001 which essentially creates a City Manager position for the City Administrator outside of the provisions in the Local Government Code by granting powers superceding the Mayor and some independent powers in general.

Obviously, if I can be of any further assistance or if I can provide any further authorities or information, please do not hesitate to contact me or Mayor Michelle Pittman since she has specifically asked that this request for opinion be submitted.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Walter W. Leonard', written in a cursive style.

WALTER W. LEONARD, City Attorney

WWL:cd

cc: Mayor Michele Pittman

encl.