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OPINION COMMITTEE

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I.D. # 42300

November 28, 2001

Honorable John Cornyn
Attorney General of Texas
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Re: Request for an opinion and brief in support of that request concerning: (1) whether the presence of the Smith County Auditor in executive session of the Smith County Commissioners Court at the request of the Smith County Judge when consulting with an attorney about pending or contemplated litigation or settlement offers constitutes a violation of the Open Meetings Act or negates the attorney-client privilege; (2) when the County Auditor is present in the open session when an executive session is announced and the Commissioners know that the Auditor is present at the request of the County Judge and will remain for the executive session, has the Commissioners Court in fact admitted the Auditor by not excluding her from the executive session; and (3) who may attend an executive session properly conducted under TEX.GOV'T CODE, §§ 551.072: Deliberations about Real Property, and 551.074: Personnel Matters, other than members of the commissioners court.

Dear General Cornyn:

This office is submitting a request for an opinion covering the issues and is submitting a brief pursuant to TEXAS GOV'T. CODE §402.043. In accordance with TEXAS GOV'T. CODE §41.007 the Smith County Commissioners Court submitted a request for an opinion to my office. Thus, I am submitting this request for an opinion from your office on behalf of the Smith County Commissioners Court

Factual Background

The Smith County Judge includes the Smith County Auditor in all executive sessions of the Smith County Commissioners Court. The Auditor is present when the purpose of the meeting is announced in open session and remains for the executive session. The County Judge believes that the Auditor's presence is necessary to the deliberations of the executive session because of her position as the county's financial officer and the information and knowledge she has regarding any issue which may have any financial impact on the county budget.

Issue 1

Does the inclusion of the auditor in an executive session violate the Open Meetings Act or negate the attorney-client privilege when pending or contemplated litigation or settlement offers is discussed.

Since the County Judge believed the Auditor to be necessary to the deliberations, and she can advise the Commissioners Court on the status of liability insurance, funds, and budget allocations for litigation the Auditor's presence in the executive session is neither illegal nor destructive to the attorney-client privilege. Issues clearly may arise concerning pending or contemplated litigation or settlement offers which require the Auditor's presence. The Auditor is an agent of the county, her position is not adverse to the county, and she has information necessary to intelligently discuss the financial implications of the litigation or settlement offers. By not excluding her prior to the beginning of the executive session the Auditor has been admitted to the executive session by the Commissioners Court.

Issue 2

If the County Auditor is present at an open session of the Commissioners Court when an executive session is announced and the Commissioners know that the Auditor is present at the request of the County Judge and will remain for the executive session, has the Commissioners Court in fact included or admitted the Auditor by not excluding her from the executive session?

The County Judge believes the Auditor is necessary to the deliberations of the executive session because she has particular knowledge of the county's financial assets and related issues. Since the Auditor has, in the opinion of the County Judge, relevant information which would be particularly useful for a complete discussion of the issue before the executive session then she may be present in the executive session without violating the Open Meetings Act. Since the Commissioners Court knew the Auditor would be present in the executive session and did not act to exclude the Auditor, the Auditor was included or admitted by the Commissioners Court to the executive session with no violation of the Open Meetings Act.

Issue 3

Who may attend an executive session of the Commissioners Court properly called to deliberate on real property or personnel under TEX.GOV'T CODE, §§ 551.072: Deliberations about Real Property, and 551.074: Personnel Matters, without violating the Open Meetings Act?

The County Judge believes the presence of the Auditor is necessary to the deliberations of the executive session about real property and personnel matters. Since the Open Meetings Act does not specify who may or may not attend this type executive session and there are not Attorney General Opinions or case law directly on point, what factors must the Commissioners Court consider before including or excluding a person from an executive session so that the Act will not be violated nor the purpose of the executive session be defeated or compromised.

A copy of our memorandum of law opinion to the Smith County Commissioners Court is attached which contains our research and brief. Thank you for your consideration of this matter.

Yours very truly,

A handwritten signature in black ink that reads "Jack Skeen, Jr." in a cursive style.

JACK SKEEN, JR.
Criminal District Attorney
/db

MEMORANDUM AND OPINION OF LAW

Introduction:

TEXAS GOVERNMENT CODE, Chapter 557, Subchapter D (Exceptions to Requirement that Meetings be Open) does not specify who may or may not attend an executive session. If the purpose of the executive session is covered under one of the exceptions to the Open Meetings Act and the session is properly conducted under this statute then the presence of any person will not cause the session to be “illegal” if the person has been admitted by the Commissioners Court.

Facts and Law:

The underlying facts which have caused this question to be raised are that the County Judge has requested the County Auditor to attend all executive sessions and some members of the court questioned whether the County Auditor can be present in an executive session. The Judge believes the auditor’s presence is necessary since she is the financial officer of the County. The Auditor is present in the open session when the executive session is announced, present when the open session is closed, and when the executive session begins. She remains in the executive session. The Commissioners Court has not excluded the Auditor from the executive session of the Commissioners Court by a vote in open session.

Under these facts the Auditor has been admitted to the executive session by the members of the Commissioners Court. There is no statute, case law, or opinion directly on point with this conclusion. However, the Attorney General Opinion JM -6 (1983) concluded that a Commissioners Court may exclude the County Clerk from their executive sessions. Having admitted the Auditor

to executive session, the Auditor's presence does not create an illegality.

There has been some failure to distinguish the analysis of cases and opinions which discussed Gov't Code § 551.071 (Consultations with Attorney) and how the conclusions in those instances would apply to other executive sessions convened to discuss personal matters, real property or other authorized subjects. For executive sessions, other than those involving consultation with an attorney, there does not appear to be a court case or on an Attorney General's opinion that is directly on point.

Gov't Code § 551.071 allows the governmental body to meet in executive session with its attorney and discuss pending litigation. Attorney General Opinion JM - 238 (1984) discussed who might be authorized to attend a closed session of a governmental body other than the members of the governmental body and the attorney representing that body. The Attorney General's opinion concluded those parties who were agent's of the Commissioners Court and persons with "information relevant to the litigation or to evaluating a settlement offer" and who "may be essential to effective communications between the governmental body and its attorney can be present."

The summary of the JM - 238 opinion was as follows:

"The commissioners court may admit its agents or representatives to executive session meetings held under [Gov't Code § 551.071] of the Open Meetings Act, where the third party's interest is aligned with the court's and where his presence is necessary to the court's full communication with it's attorney, whether a particular person may be admitted must be decided by a case-by-case analysis of all relevant facts."

The clear implication of JM - 238 is that if there are third parties in an executive session properly held under Gov't Code § 551.071 then the purpose of the meeting, the confidentiality of the discussion and litigation, may have been negated. That is, while there is no illegality in the session,

the attorney-client privilege may have been waived by the presence of third parties – parties that are not agents of the governmental body, to those whose interests are not aligned with the governmental body and persons that are not necessary to the discussion.

The Texas Attorney General, in its publication, “Open Meetings Made Easy” has suggested that the analysis regarding who should be allowed in executive sessions other than consultations with an attorney, may follow on similar grounds. Under this reasoning, persons the Commissioners Court may allow to be present in executive session would be (1) those who would not circumvent the purpose for having a closed session, (2) those who do not have an adverse position to the governmental body and (3) those who have knowledge or information of a particular subject which may assist the governmental body in its discussions on the subject of the executive session, i.e., the person’s presence was “necessary.”

It may help as the issue relates to the county auditor to briefly examine her role as financial officer of the County. The Local Government Code sets out the many duties of the County Auditor. The County Auditor has financial oversight for all county offices and officers.

General Oversight Authority of County Auditor

- (a) The county auditor has general oversight of the books and records of a county, district, or state officer authorized or required by law to receive or collect money or other property that is intended for the use of the county or that belongs to the county.
- (b) The county auditor shall see to the strict enforcement of the law governing county finances.

Local Government Code § 112.006. The selection of the County Auditor is vested upon the District Judges.

In *Finlar v. City of Dallas* 888 F. Supp 779 (N.D. Tex 1995) a federal judge determined that even though the executive sessions were improperly held, without proper notice, the proprietary and confidential nature of some of the deliberations and property negotiations would remain confidential, but only after review by the judge. The trial court gave the plaintiffs injunctive relief, ordering the governmental body to meet according to the Open Meetings Act¹ ordering tape recordings of their meetings be provided to the trial judge for review by the trial judge (in camera). The meetings were improper because the third parties were not employees of the governmental body in the deliberations about real property.

Conclusion:

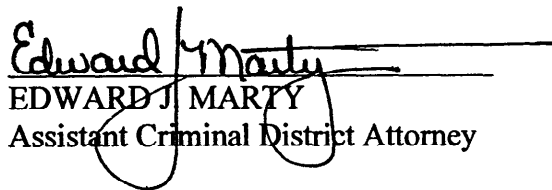
From the Statutes, the opinions of the Attorney General, case law and the information provided by the office of the Attorney General the following conclusions are made by us:

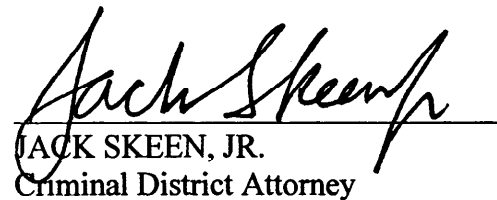
- (1) The presence of the Auditor in executive sessions of the Smith County Commissioner Court is not “illegal.”
- (2) The presence of the Auditor at the direction of the County Judge without exclusion by the Commissioner Court is an admission to the executive session by the Commissioner Court.
- (3) The Auditor has extensive statutory authority and substantial duties regarding the financial position of the county. Such extensive knowledge and information may be

¹ The body was not to meet in a closed session with third parties, the owners of the Mavericks and had to post notice of the meetings to meet the discussion of real property exception.

necessary on issues discussed in executive sessions.

- (4) The Auditor may be included or not included in executive session by the Commissioners Court.
- (5) the decision to include other persons in the executive session should be done on a case-by-case basis on a determination that the persons presence is necessary in that it will assist the Commissioners Court discussion of the subject for which the executive session was called and will not defeat the purpose for which the session was closed to the public.


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