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OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION

RQ-0489-JC

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

FILE # ML-42361-02

I.D. # 42361

RE: Request for Attorney General's Opinion Regarding Applicability of Texas Local Government Code Section 402.909 concerning Prohibited Employment of or Contracting with Former Trustee or Board Member of Municipally-owned Water Utility

Dear General Cornyn:

On May 26, 2001, the 77th Legislature passed Senate Bill 1444, which became effective June 17, 2001. In section 38 of the legislation, SB 1444 adds the new Section 402.909 to Subchapter Z, Chapter 402, Local Government, concerning municipal utilities.

The new section provides:

Sec. 402.909. PROHIBITED EMPLOYMENT OF OR CONTRACTING WITH FORMER TRUSTEE OR BOARD MEMBER. (a) This section applies to a municipality that creates a board of trustees or other board to manage and control a water, wastewater, storm water, or drainage utility system that the municipality owns.

(b) The municipality or a board of trustees or other board described by Subsection (a) may not employ or contract with an individual who was a member of the board before the second anniversary of the date the individual ceased to be a member of the board.

It is my understanding that the City of San Antonio, by an ordinance adopted in 1992, combined three water-related functions owned and operated by the city into a single system, the San Antonio Water Systems (SAWS), and established a board of trustees to manage the system. Members of the SAWS board are appointed by the San Antonio City Council. The City Council appointed a member of the SAWS board in September 1998 to complete a four-year term which commenced June 1, 1998. The board member resigned effective April 18, 2001, pursuant to a letter submitted to the mayor and filed with the city clerk on April 13, 2001. Under applicable city ordinance and SAWS bylaws, no holding over applies to resigning board members and a vacancy is created on the effective date of a member's resignation, in this case, on April 18, 2001. Several new board members were appointed by the San Antonio City Council in May of 2001, including on May 17, 2001, the person who filled the vacancy created by the resignation of the former board member.

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On June 18, 2001, the former board member began employment with a law firm which is interested in being considered to perform legal services for SAWS. SAWS' engagement of the law firm is not prohibited by the City of San Antonio's Ethics Ordinance.

The addition of Section 402.909 was added in a floor amendment during second reading of the bill in the Texas House of Representatives. It is my understanding that there is no relevant legislative history indicating the legislative intent to apply §402.909 retrospectively, either to a board created prior to the effective date of the act or to a former board member who was no longer on the board on that effective date. The express language of §402.909 indicates the new law should be construed to apply prospectively, and then only to hiring and contracting with an individual former board member and not to a firm which employs a former board member.

The general counsel of the SAWS has expressed interest in retaining the law firm to perform legal services on SAWS' behalf, provided there is first a "judicial or quasi-judicial determination" that §402.909 does not prohibit such engagement.

Based on the foregoing, I respectfully submit the following questions for your opinion:

1. **Does Local Government Code §402.909 apply to the San Antonio Water System and the San Antonio Water System board, both of which were established in 1992?**
2. **Does §402.909 prohibit the San Antonio Water System from employing or contracting with a former San Antonio Water System board member whose resignation was effective prior to the effective date of SB 1444?**
3. **Does §402.909 prohibit the San Antonio Water System from contracting with a law firm which employs a former San Antonio Water System board member whose resignation was effective prior to the effective date of SB 1444?**

Thank you for your consideration of this request. Your prompt attention to this issue would be greatly appreciated. Please do not hesitate to contact me if you should require any additional information.

Sincerely,



JEB:jlb