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OPINION COMMITTEE

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FILE # ML-44251-05  
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June 24, 2005

Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

RQ-0356-GA

Dear Mr. Abbott:

This office is presenting, for your consideration, three questions relating to which newspapers may qualify as newspapers of "general circulation" and questions relating to how and by whom such a determination must be made.

**I. Brief Factual Background**

For the first time in recent history in Harrison County, there are two newspapers that both claim to be newspapers of "general circulation" in Harrison County, which would make them each eligible to publish a variety of official county notices. While prior Attorney General Opinions have made clear the requirements for a newspaper to be a newspaper of "general circulation," there is no specific authority relating to the procedural parameters and/or requirements for how the County makes the objective and subjective inquiries necessary to determine which newspapers are newspapers of general circulation and to determine how to specifically award contracts for the services of such newspapers.

**II. Questions Presented**

The following four questions are presented for consideration.

- A. In determining whether a newspaper is a newspaper sufficient to be considered a newspaper of "general circulation" for the purposes of publishing certain County notices, must the Harrison County Commissioners Court determine whether the newspaper meets the objective criteria contained in section 2051.044 of the Government Code as well as determine the subjective factually based questions of whether: 1) the newspaper has more than a de minimis number of subscribers in a specific geographic region; and 2) whether the subscribership of the

newspaper is diverse.

- B. If the Commissioners Court must make such a factually based determination, does the Commissioners Court have the power to hold an evidentiary hearing to determine the objective criteria of section 2051.044 and the questions of whether a particular newspaper has more than a de minimis number of subscribers and whether the subscribership is diverse.
- C. If the Commissioners Court has the power to hold an evidentiary hearing to make such a determination, what procedures, if any, must the Court follow for conducting the hearing.

**III. Questions and Briefing in Support of Each Question:**

- A. **Question 1: In determining whether a newspaper is a newspaper sufficient to be considered a newspaper of "general circulation" for the purposes of publishing certain County notices, must the County Commissioners Court determine that the newspaper meets the objective criteria contained in section 2051.044 of the Government Code as well as determining the subjective factually based questions of whether: 1) the newspaper has more than a de minimis number of subscribers in a specific geographic region; and 2) whether the subscribership of the newspaper is diverse.**

According to previous opinions from the Attorney General's Office, a newspaper of general circulation is a newspaper that: 1) has more than a "de minimus" number of subscribers within a specific geographic region; 2) has a diverse subscribership, and 3) publishes some items of general interest to the community. Tex. Atty. Gen. Op. No. JC-0223. The Texas Attorney General has also determined that Section 2051.044(a) of the Government Code is relevant to determine whether a particular publication is a newspaper in which a governmental entity may publish notice.<sup>1</sup> Id. Section

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<sup>1</sup> Section 2051.044 of the Texas Government Code outlines the requirements for the type of newspaper that a county must use to publish its notices. However, section 2051.042 of the Government Code limits the applicability of the subchapter, and, as such, the subchapter only applies to the extent that it does not conflict with general or special laws requiring or authorizing publication of notices. Of course, while too numerous to cite each such law, there are numerous general and special laws that require publication in newspapers of "general circulation." See Tex. Gov't Code Ann. 2007.042 (Vernon 2004)(taking of property requires notice in newspaper of general circulation); Tex. Gov't Code Ann. 1251.003(d)(2)(Vernon 2000)(bonds may not issue that will be paid from ad valorem taxes without an election following notice in a newspaper of general circulation); Tex. Elec. Code Ann. 4.003(a)(1)(B)(Vernon 2004)(election requires notice in a newspaper of general circulation); Tex. Loc. Gov't Code Ann 272.001(a) (Vernon 2004)(sale or exchange of land by county requires notice in newspaper of "general circulation"); see also Tex. Alco. Bev. Code Ann. 11.392(b)(Vernon 2004); Tex. Loc. Gov't Code Ann. 54.035(b); Tex. Transp. Code Ann.

2051.044(a) lists four criteria of a newspaper in which a notice must be published:

The newspaper in which a notice is published must:

- (1) devote not less than 25 percent of its total column lineage to general interest items;
- (2) be published at least once a week;
- (3) be entered as second-class postal matter in the County where published;<sup>2</sup> and
- (4) have been published regularly for at least 12 months before the governmental entity or representative publishes notice.

Id. If this Office's reading of the Texas Attorney General's prior opinions is correct, in addition to the requirements under section 2051.044(a), to be a newspaper of general circulation, a newspaper's subscribership must be more than de minimis and must be diverse. Id. In slightly different language, a newspaper of general circulation must be a newspaper for the purposes of section 2051.044, in addition to having more than a de minimis number of subscribers and a diverse subscribership. Id.

The Attorney General has also stated that the question of whether a newspaper is a newspaper of general circulation is a question of fact that cannot be determined in the attorney general opinion process. Id. The Attorney General has also generally stated that the determination of the factual issues noted above must be made by the public official or body that is required to cause the notice to be published. Id. In the same opinion, in dictum, the Attorney General cited a Virginia Attorney General's Opinion for the proposition that the commissioners court of a county would make the factual determinations regarding whether a newspaper's circulation is de minimus. Id. at 6 (citing Va. Att'y Gen. Op. No. 372, 1982 WL 175548, at 2). However, the exact question of whether the Commissioners Court has to make such factual determinations, as a body, has never actually been addressed as a direct question in this context.

The first question posed by this office is whether, in the absence of some statutory directive to the contrary, before publishing county notices does the Harrison County Commissioners Court, as a body, have to make the objective determinations in section 2051.044 and the factual determinations of whether the newspaper's circulation is de minimis and whether the newspaper has a sufficiently diverse subscribership.

**B. Questions 2 and 3: If the Commissioners Court must make such a factually based determination, does the Commissioners Court have the power to**

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314.022(d)(Vernon 2004).

<sup>2</sup> Also known as "periodical mailing privileges."

**hold an evidentiary hearing to determine the existence of the objective criteria in section 2051.044 and to determine whether a particular newspaper has more than a de minimis number of subscribers and whether the subscribership is diverse.**

Texas Local Government Code section 81.022 provides a commissioners court with authority for the process necessary for the proper execution of the powers and duties and the enforcement of the jurisdiction of a Commissioners Court. Section 81.030 of the Local Government Code allows a commissioners court to require testimony under oath. However, outside of this very broad authority, there appears to be no specific guidance for how a commissioners court should make the inquiries necessary to determine if a newspaper is a newspaper of "general circulation." Similarly, Chapter 2051 of the Government Code provides no real guidance for how such determinations are to be made by the responsible entity or official.<sup>3</sup>

Does a commissioners court have the power to hold an evidentiary hearing to make such a determination? Additionally, if the Commissioners Court has the power to hold an evidentiary hearing to make such a determination, what procedures, if any, must or should the Court follow in conducting the hearing?

Thank you for your attention to these questions, and, if you need any additional information or briefing on these issues prior to issuing an opinion, please feel free to contact my office.

Sincerely,



Joe Black  
Criminal District Attorney

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<sup>3</sup> Section 2051.049 of the Government Code merely states that "The governmental entity or representative required to publish a notice in a newspaper shall select, in accordance with this subchapter, one or more newspapers to publish the notice. Section 2051.046 of the Government Code states that a notice of a county shall be published in a newspaper that will publish the notice at or below the legal rate (which is defined in subsection 2051.045 as the lowest published rate for classified advertising), otherwise the notice may be posted at the door of the county courthouse.