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OPINION COMMITTEE



JIM MURPHY

Member

HOUSE OF REPRESENTATIVES FILE # ML-47154-12

District 133 • Harris County

I.D. # 47154

October 18, 2012

RQ-1093-GA

The Honorable Greg Abbott
Attorney General
Price Daniel Building
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78701-2548

Dear General Abbott:

As chair of the Partnership Advisory Commission, I respectfully request a formal opinion from you on the question of whether the Partnership Advisory Commission is subject to the requirements of the open meetings law. I want to waive the section 402.042 "c" requirement. As the committee anticipates receiving proposals in the immediate future that must be processed promptly, I would greatly appreciate your expediting the opinion process.

The Partnership Advisory Commission ("commission") is an "advisory commission in the legislative branch that advises" certain state governmental entities on public-private partnership proposals submitted under Chapter 2267, Government Code, as added by Chapter 1334 (S.B. 1048), Acts of the 82nd Legislature, Regular Session, 2011. Sec. 2268.051, Government Code. The commission consists of 11 members, including four state senators, four members of the state house of representatives, and three members appointed by the governor. Sec. 2268.052(a), Government Code. A state governmental entity that intends to negotiate a public-private partnership agreement to develop or operate a qualifying project under Chapter 2267 is required to submit the proposal to the commission before beginning negotiations. Sec. 2268.058(a), Government Code. The commission's only duty is to review proposals and then provide the following findings and recommendations to the submitting entity within a specified period:

(1) a determination on whether the terms of the proposal and proposed qualifying project create state tax-supported debt, taking into consideration the specific findings of the comptroller with respect to the recommendation;

(2) an analysis of the potential financial impact of the qualifying project;

(3) a review of the policy aspects of the detailed proposal and the qualifying project; and

(4) proposed general business terms.

Sec. 2268.058(g), Government Code. Importantly, a submitting governmental entity is not bound by any finding or recommendation of the commission. The commission has no actual or implied authority to approve or disapprove a proposed project or to place any condition on the approval of a proposed project. Each submitting entity is ultimately responsible for independently deciding whether to proceed with a proposed project. The commission acts in an advisory capacity only.

The open meetings law (Chapter 551, Government Code) requires that "[e]very regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter." Sec. 551.002, Government Code. To be subject to Chapter 551, an entity must be a "governmental body," a defined term that includes "a . . . commission . . . within the . . . legislative branch of state government that is directed by one or more elected or appointed members." Sec. 551.001(3)(A), Government Code. The commission appears to fit within the parameters of this definition. However, to be subject to the requirements of Chapter 551, a "governmental body" must also conduct a "meeting" as that chapter defines the term. The definition of "meeting" includes several elements, including a component requiring a "deliberation . . . during which public business or public policy over which the governmental body has supervision or control is discussed or considered." Sec. 551.001(4)(A), Government Code.

Texas courts and your office have repeatedly concluded that in order for the open meetings law to apply to a meeting of a statewide public body, five prerequisites must be met, including that "[t]he entity must have supervision or control over . . . public business or policy." See *Gulf Reg'l Educ. Television Affiliates v. Univ. of Houston*, 746 S.W.2d 803, 809 (Tex. App.--Houston [14th Dist.] 1988, writ denied); Op. Tex. Att'y Gen. No. H-772 (1976). A purely advisory statewide public body that has no actual supervision or control over public business or policy is not subject to the requirements of Chapter 551. See *Beasley v. Molett*, 95 S.W.3d 590, 606 (Tex. App.--Beaumont 2002, pet. denied) (criminal offender assessment team); Op. Tex. Att'y Gen. Nos. GA-0232 (2004) (statutorily created student fee advisory committees), JM-331 (1985) (citizen advisory panel of the Office of Public Utility Counsel), H-994 (1977) (advisory committee studying selection process for university president), H-772 (1976) (Texas Tech University Athletic Council); Tex. Att'y Gen. LO-94-064 (State Employee Charitable Campaign Advisory Committee); Tex. Att'y Gen. LO-93-64 (university Student Service Fee Advisory Committee).

It appears that the legislature intended the commission to act as a purely advisory body that is not subject to the requirements of the open meetings law. The commission lacks actual or implied authority to supervise or control any public business or policy. The commission has no power, either granted by law or exercised in practice, except for the limited statutory authority to review certain proposed projects and then provide prescribed factual findings and recommendations to the state governmental entity submitting the proposal. A submitting entity is not bound by any finding, recommendation, or other action of the commission. Each submitting entity is ultimately responsible for independently deciding whether to proceed with a proposed project.

Thank you in advance for your consideration of this matter. Please do not hesitate to contact me if you need any additional information regarding this request.

Best Regards,

A handwritten signature in dark ink, appearing to read "Jim Murphy". The signature is fluid and cursive, with a long horizontal stroke at the end.

Rep. Jim Murphy
Chairman
Partnership Advisory Commission