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July 8, 2019

Mr. Webb Melder, President, Board of Directors *Via Email*
Board of Directors
Lone Star Groundwater Conservation District
655 Conroe Park North Drive
Conroe, Texas 77303

Re: Legal Opinion Regarding Texas Open Meetings Act Executive/Closed Session Matters

Dear Mr. Melder and Board of Directors:

The purpose of this letter is to provide the Lone Star Groundwater Conservation District ("District") Board of Directors ("Board") with a legal opinion regarding the Texas Open Meetings Act ("Act") requirements related to conducting executive sessions, also commonly referred to as closed sessions, of the District Board. The advice provided in this memo is based upon my knowledge of the District's practices related to receiving legal advice from its attorney in executive sessions under Section 551.071 of the Texas Government Code. This letter addresses three main topics related to executive sessions of the District Board, as follows:

1. Written Notice of Executive Session Agenda Items

The issue of how executive session matters must be noticed is well established in Texas law. The Attorney General's office has interpreted the law on this topic on several occasions, and concluded that the Act does not require an agenda to state exactly which items will be discussed in executive session.[1] The Act does require any item to be discussed at a meeting—whether in open or executive session—to be listed as an agenda item.[2] The key distinction, however, is that while any item discussed in executive session must be listed on the agenda, there is no judicial decision or Attorney General ruling requiring a governmental entity to distinguish which of the agenda items will be discussed in executive session.

The Texas Supreme Court ruled in *Cox Enterprises, Inc. v. Board of Trustees of Austin ISD* that Austin ISD's notice of items discussed in executive session was inadequate. The reason the Court found the notice to be inadequate was due to the lack of description for the agenda items at issue, and not because the board failed to state which items were to be discussed in executive session. The *Cox Enterprises* decision does not state that an entity must specifically indicate

[1] Op. Tex. Att'y Gen. No. JC-0057 (1999); Tex. Att'y Gen. LO-90-27; Texas Municipal League, "Open Meetings Act Made Easy" at 8 (2017 Editor); The Office of the Attorney General of Texas, "Open Meetings Act Handbook 2018" at 26.
[2] *Cox Enters., Inc. v. Bd. of Trs. of Austin Ind. Sch. Dist.*, 706 S.W.2d 956, 958 (Tex. 1986).

which items are to be discussed in executive session, and as stated previously, nor does any other court opinion that is binding precedent on the District.

The law is also clear that the District must first convene in open session, and must provide a statement as to which section its intends to rely upon to convene in executive session.[3] According to the relevant statute and related judicial interpretation of the statute, this statement may be made verbally during the Board meeting, and does not impact the District's ability to go into executive session to receive legal advice on any matter listed in executive session.[4]

Although some entities do voluntarily distinguish in their agendas exactly which items will be discussed in executive session, the Texas Attorney General cautions that, "an abrupt departure from this practice could deceive the public and thereby render the notice inadequate."[5] As a result, I counsel clients against providing notice of exactly which items will be discussed in executive session on the agenda. First, as the Attorney General cautions, any future departure from this voluntary practice could be an issue. Second, because many entities like the District meet monthly, I recommend against limiting which items can be discussed in executive session in the event an item on the agenda that we did not foresee as needing legal advice does in fact require legal advice at the Board meeting. For example, the agenda for a Tuesday regular Board meeting like the District's is posted on the Friday before the meeting, and a lot can, and often does, happen in the four (4) days before the Board meeting that could require legal advice on one of the items listed in the agenda. If the District were to voluntarily distinguish which items are to be discussed in executive session, then the District would not be able to receive legal advice on any item not specifically called out as being an executive session item. This means the District would have to call a special Board meeting or wait until the following regularly scheduled meeting a month later in order to receive legal advice on the topic. The intent is not to prevent transparency, but rather to allow the District to conduct business in an efficient and prudent manner under the law.

2. Discussion of Legal Matters in Executive Session

With regard to receiving legal advice in executive session under Section 551.071 of the Texas Government Code, the Attorney General's office has ruled that an entity may meet with its attorney to receive legal advice on any matter listed on the agenda.[6] These discussions must relate solely to legal matters, and an entity must be careful not to deliberate on general policy matters that do not involve receiving legal advice.[7] In addition, an executive session convened under Section 551.071 to receive legal advice does not have to be limited to litigation matters because the Act expressly states that an entity can go into executive session on matters that are attorney-

[3] TEX. GOV'T CODE § 551.101; *Martinez v. State*, 879 S.W.2d 54, 56 (Tex. Crim. App. 1994).
[4] *See Rettberg v. Tex. Dep't of Health*, 873 S.W.2d 408, 411–12 (Tex. App.–Austin 1994, no writ); Tex. Att'y Gen. Op. No. GA-0511 (2007).
[5] Tex. Att'y Gen. Op No. JC-0057 (1999).
[6] Tex. Att'y Gen. Op. No. JM-100 (1983); Texas Municipal League at 29; The Office of the Attorney General at 45-46.
[7] *Id*; Tex. Att'y Gen. No. JC-0233 (2000).

client privileged.[8] Furthermore, a number of court decisions provide that the Board can engage in a discussion of factual information and express opinions in the context of receiving legal advice from an attorney in executive session if engaging in such discussion would "facilitate the rendition of legal advice by the government's attorney."[9] The Act does not limit the amount of time the Board can convene in executive session to receive legal advice, and the judicial decisions make clear that the Board may discuss legal issues with the attorney as necessary to receive comprehensive legal advice on a topic.[10] The Board must, of course, take final action on all matters in open session.[11]

3. Statutory Affirmative Defense

Section 551.144 of the Texas Government Code makes conducting impermissible executive sessions a misdemeanor crime, but the same provision also states that it is an affirmative defense if the public official:

> "acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body."[12]

As stated previously, there are a number of authorities that unequivocally provide that the District Board does not have to specifically list which agenda items will be discussed in executive session, and that the District Board may receive legal advice on any matter listed on the agenda. As such, any allegations of impropriety by the Board with regard to the two topics addressed above are incorrect for three primary reasons: (i) the allegations conflict with the clear rulings of Texas courts and opinions of the Texas Attorney General; (ii) the allegations conflict with multiple guidance documents interpreting the court rulings and opinion of the Texas Attorney General; and (iii) the District Board has received legal advice from its attorneys stating that it is in compliance with the law. Any challenge to the District's practices related to these two topics is therefore a challenge to current law.

Finally, I have reviewed the agenda posted for the July 9, 2019, meeting of the District Board and find it to be in compliance with all current legal requirements under the Act, as interpreted by Texas courts and the Texas Attorney General. In addition, I have also received a briefing on the District Board's practices with regard to receiving legal advice under Section 551.071 of the Texas Government Code, and find such practices to also be in compliance with current law. In fact, the District's agenda format and manner of receiving legal advice in executive

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[8] TEX. GOV'T CODE § 551.071(2); *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 486 (Tex. App.–Austin 2004, pet. denied).
[9] *In re City of Galveston*, No. 14-14-01005-CV, 2015 WL 971314, *5–6 (Tex. App.–Houston [14th Dist.] March 3, 2015, orig. proceeding) (mem. op); *See also Weatherford*, 157 S.W.3d at 485; *Tex. State Bd. of Pub. Accountancy v. Bass*, 366 S.W.3d 751, 761 (Tex. App.–Austin 2012, no pet.); *City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 468 (Tex. App–Dallas 2007, no pet.).
[10] *See Id.*
[11] TEX. GOV'T CODE § 551.102.
[12] TEX. GOV'T CODE § 551.144.

session are also the standard practices of many governmental entities around the state. In the event the law were to change in the future related to the topics addressed in this letter, whether that be through a new ruling from a Texas court with binding precedent, an opinion issued by the Texas Attorney General, or a statute enacted by the Texas Legislature, I will let you know and we can discuss at that time. But for now, the District Board can rest assured that its practices related to executive sessions are in compliance with current law.

I believe this letter clarifies the issues raised, but please let me know if you have any questions. As always, I appreciate the opportunity to be of service to the District.

Regards,

Kristen Fancher

Kristen O. Fancher

cc (via email): Ms. Samantha Stried Reiter, Interim General Manager, Lone Star Groundwater Conservation District

Ms. Stacey Reese, General Counsel, Stacey Reese Law, PLLC