



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

July 10, 1990

Honorable Michael J. Guarino
Criminal District Attorney
Galveston County
405 County Courthouse
Galveston, Texas 77550

Opinion No. JM-1185

Re: Whether a community justice council created pursuant to article 42.13, Texas Code of Criminal Procedure, is subject to the Open Meetings Act, V.T.C.S. art. 6252-17 (RQ-1879)

Dear Mr. Guarino:

You state that House Bill 2335 of the 71st regular session of the Legislature has created community justice councils for counties wishing to establish a community corrections facility. See Acts 1989, 71st Leg., ch. 785, art. 1, at 3471. You ask whether a community justice council is subject to the Texas Open Meetings Act, article 6252-17, V.T.C.S.

Some background about the structure of the criminal justice system and the state-local relationships established by House Bill 2335 is necessary to understand what a community justice council does and whether it is a governmental body subject to the Open Meetings Act. House Bill 2335 made many changes in the structure of the criminal justice system at the state and local level, some of which give the counties financial incentives for supervising felony probationers and taking other measures to reduce the number of persons sent from the counties to be incarcerated in state prisons. Acts 1989, 71st Leg., ch. 785, art. 3, at 3482. It created the Texas Department of Criminal Justice as the state agency with primary responsibility for confining felons, developing a system of state and local punishment, supervision, and rehabilitation programs, and reintegrating felons into society after release from confinement. V.T.C.S. art. 4413(401). The community justice assistance division (the division) is established within the Department of Criminal Justice. V.T.C.S. art. 4413(401), § 1.11; see Code Crim. Proc. art. 43.13. The division is responsible for establishing minimum standards for programs, facilities, and services provided at a local

level by a community supervision and corrections department, and for certifying and funding the programs, facilities, and services provided by such departments. V.T.C.S. art. 4413(401), § 1.12.

Community supervision and corrections departments are to be established by the district judge or judges trying criminal cases in each judicial district in the state. Code Crim. Proc. art. 42.131. These departments serve the courts by conducting presentence investigations and risk assessments, supervising and rehabilitating probationers, enforcing the terms of probation, and operating community corrections facilities. Id. § 2. The judge or judges appoint a department director, who employs other persons to do the work of the department. The district judge or judges may establish a community justice council to serve the department. The judges must do so before the department, county, or city may establish a community corrections facility under article 42.131 of the Code of Criminal Procedure, and before a county may establish a county correctional center under subchapter H, chapter 352 of the Local Government Code. Code Crim. Proc. art. 42.131, § 3(b). The council's primary responsibility is to prepare a criminal justice plan for submission to the division in fulfillment of a reporting requirement and as a condition of the department's receipt of state aid. Code Crim. Proc. art. 42.13, §§ 3, 6. When the division has made funds available to a department to provide facilities, equipment, and utilities for community corrections facilities, the council has a role in recommending expenditures. Finally, the council "shall provide continuing policy guidance and direction for the development of criminal justice plans and community corrections facilities and programs." Id. art. 42.131, § 3.

The council is composed of various officers from the county or counties wherein it is established. Each officer is chosen by the other persons who hold the same kind of office he does in the county or counties served by the council. For example, a council includes "a sheriff of a county to be served by the [community corrections] facility, chosen by the sheriffs of the counties to be served by the facility." Code Crim. Proc. art. 42.131, § 3(b)(1). The following officers of political subdivisions to be served by the community corrections facility are also represented on the council: a county commissioner or a county judge; a city council member of the most populous municipality in a county to be served by the facility; no more than two state legislators; the presiding judge of a judicial district, the judge of a statutory county court exercising criminal jurisdiction; a county attorney with criminal jurisdiction;

a district attorney or criminal district attorney; and an elected member of the board of trustees of an independent school district in a county to be served by the facility.

Both the composition and the function of the community justice council are relevant to determining whether it is a governmental body subject to the Open Meetings Act. The act defines "governmental body" in part as

any board, commission, department, committee, or agency within the executive or legislative department of the state, which is under the direction of one or more elected or appointed members

V.T.C.S. art. 6252-17, § 1(c).

Since the council is established and operates only at a local level, it is not "within the executive or legislative department of the state." See, e.g., Attorney General Opinions JM-596 (1986); JM-340 (1985). The definition of "governmental body" applicable to local entities is as follows:

every Commissioners Court and city council in the state, and every deliberative body having rule-making or quasi-judicial power and classified as a department, agency, or political subdivision of a county or city; and the board of trustees of every school district, and every county board of school trustees and county board of education; and the governing board of every special district heretofore or hereafter created by law.

V.T.C.S. art. 6252-17, § 1(c).

The criminal justice council is not a governing body of a city or county. As a body established by the district judges and composed of elected officers of various jurisdictions, it cannot be considered a department, agency, or political subdivision of a county or city. See Attorney General Opinions JM-740 (1987); JM-183 (1984); MW-28 (1979). Nor is it one of the education entities named in the statute.

A more detailed analysis of the council's functions is necessary to determine whether or not it is "the governing board of . . . [a] special district . . . created by law." The decision in Sierra Club v. Austin Transp. Study Policy Advisory Comm., 746 S.W.2d 298 (Tex. App. - Austin 1988,

writ denied), determined that the Austin Transportation Study Policy Advisory Committee (ATSPAC), a seventeen-member committee consisting of state, county, regional, and municipal public officials, was a special district subject to the Open Meetings Act.¹ The ATSPAC had been designated a "Metropolitan Planning Organization" pursuant to a provision of the Federal-aid highway law directed at enabling the Secretary of Transportation to cooperate with state and local officials in developing transportation plans and programs based on transportation needs. 23 U.S.C. § 134. A metropolitan planning organization is "the forum for cooperative transportation decision making." 23 C.F.R. § 450.104(b)(3).

The opinion in Sierra Club said that the ATSPAC was charged with developing various transportation plans for the use of federal agencies in determining funding for the local projects. 746 S.W.2d at 300. "As a result, ATSPAC plays a vital role in deciding which highway projects are planned, built and funded in the Austin area." Id. at 300-01. "Its decisions affect highway planning in Travis, Hays, Caldwell, Bastrop, and Williamson counties." Id. at 300. The court thus emphasized the decision-making function of the ATSPAC.

The court also pointed out that committees like the ATSPAC did not exist when the Open Meetings Act was adopted in 1967, but that when its functions are compared to those of the governmental bodies defined in the act, "it is clear that the committee is just the sort of body the Open Meetings Act was designed to govern." Id. at 301. It quoted the following dictionary definition of "special district":

A limited governmental structure created to bypass normal borrowing limitations, to insulate certain activities from traditional political influence, to allocate functions to entities reflecting particular expertise, to provide services in otherwise unincorporated areas, or to accomplish a primarily local benefit or improvement, e.g., parks and planning, mosquito control, sewage removal.

1. Attorney General Opinion JM-183 (1984) held that a library council consisting of representatives chosen by governing bodies of political subdivisions was a "hybrid" body that did not fit any definition of "governmental body" in the Open Meetings Act.

Black's Law Dictionary (5th ed. 1986) (emphasis added).

Relying particularly on the underlined language, the court found that the ATSPAC was a special district, in that it was designed to accomplish the primarily local benefit or improvement of bringing federal highway funds into the Austin urban area for highway planning and construction. 746 S.W.2d at 301.

In deciding that the ATSPAC was a governmental body subject to the Open Meetings Act, the court first considered the powers it exercised and applied a test similar to that applied by the courts and by prior opinions of this office to decide whether an entity in the executive branch must comply with the act. Among other prerequisites for establishing that a committee, board, or other entity in the executive branch of government is subject to the Open Meetings Act, it must deliberate or act on a matter of public business or policy over which it has supervision or control. See, e.g., Gulf Regional Educ. Television Affiliates v. University of Houston, 746 S.W.2d 803 (Tex. App. - Houston [14th Dist.] 1988, writ denied); Attorney General Opinions H-772 (1976); H-438 (1974). An advisory body, with no power to supervise or control public business, is not subject to the Open Meetings Act. Attorney General Opinion JM-331 (1985) (citizens advisory panel of Office of Public Utility Counsel); H-994 (1977) (advisory committee studying selection process for university president).

A department or agency of a city or county is a governmental body within the act if it has rule-making or quasi-judicial powers. V.T.C.S. art. 6252-17, § 1(c). In determining whether an entity is a governmental body within this provision, this office also considers whether it has authority to exercise governmental power, or whether it has only an advisory role. Attorney General Opinion MW-506 (1982) determined that the board of trustees of a city firemen's retirement fund was an agency of the city subject to the Open Meetings Act. The board had power to receive, manage, and disburse the retirement fund; moreover, it exercised quasi-judicial powers in hearing and determining applications for benefits. Attorney General Opinion H-467 (1974), in contrast, dealt with a city library board that was authorized to act in an advisory capacity only and held that insofar as it truly acted only in an advisory capacity, it was not required to comply with the Open Meetings Act.

The responsibilities of the criminal justice council, and its place in the criminal justice hierarchy, persuade us that it is properly characterized as an advisory body, and not a governmental body within the Open Meetings Act. As we

have already said, its most important function is to prepare the community justice plan that a community supervision and corrections department must submit to the community justice assistance division before the city, county, or the department may establish certain correctional facilities. Code Crim. Proc. arts. 42.13, § 3; 42.131, § 3. As of September 1, 1990, a department must submit a plan to the division as a condition of receiving state aid. Id. art. 42.131, §§ 6, 11.

The division determines the format for community justice plans. Id. § 2(a)(3). Section 6 of article 42.13 sets out the information that must be included in a plan. It must give a detailed description of the services provided by the department and new facilities or programs proposed for the department, such as electronic monitoring programs and community corrections facilities. It also must include a description of services needed within the area, information about contracts necessary to achieve programs and facilities, and "a statement of commitment by the community justice council and the department to achieve a targeted level of alternative sanctions." Id. § 6(b)(5). The plan may include other information, such as information about personnel training or program evaluation, as well as "other details or options that the community justice council wishes to include."

The plan is thus primarily descriptive of corrections facilities that are established or may be established by a community supervision and corrections department, a county, a municipality, or a combination of these. See Code Crim. Proc. art. 42.131, § 3. It appears that the council's responsibility is to gather and report information about the facilities operated by these entities but not to decide how the facilities are to be operated or which facilities are to be proposed. Decisions on these matters are made by the division, the district judges, the department, and the political subdivisions operating correctional facilities. Moreover, a community justice council may not submit a plan to the division as a condition of payment of state aid to a department unless the plan is first approved by the district judges who manage the department served by the council. Id. art. 42.13, § 6.

The council also has the following responsibility over expenditures:

The district judge or judges may authorize expenditures of funds provided by the division to the department for the purposes of

providing facilities, equipment, and utilities for community corrections facilities if:

(1) the community justice council recommends the expenditures; and

(2) the division provides funds for the purpose of assisting in the establishment or improvement of the facilities.

Code Crim. Proc. art. 42.131, § 10 (emphasis added).

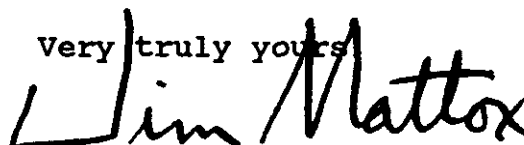
In this case, the council makes recommendations, but the judge or judges make the decisions about expenditures. In Gulf Regional Educ. Television Affiliates v. University of Houston, supra, at 809, the court found that an auxiliary enterprise of a state university was subject to the Open Meetings Act because it spent public funds and operated with little control or supervision by the university board of regents. In contrast, the community justice council recommends expenditures, but does not expend public funds on its own authority. In Attorney General Opinion H-467 (1974), this office decided that a city library board was not subject to the Open Meetings Act because it was empowered to act in an advisory capacity only. The library board was authorized to recommend the adoption of rules to administer the library, to make recommendations for library facilities, and to submit its proposed expenditures for the approval of the city council.

In our opinion, a criminal justice council acts in an advisory capacity only, like the library board at issue in Attorney General Opinion H-467. It does not have the power to make decisions that the courts found the ATSPAC to have in Sierra Club and the auxiliary enterprise in Gulf Regional Educ. Television Affiliates. It is not "the sort of body the Open Meetings Act was designed to govern." Sierra Club, supra, at 301. Although it assists the department's efforts to secure state funding for community corrections facilities, the council does not "accomplish a primarily local benefit or improvement." Id. (emphasis added). Thus, it is not a "special district" within the Sierra Club case. Accordingly, a criminal justice council is not subject to the Open Meetings Act.

S U M M A R Y

A criminal justice council established by the district judge or judges under section 3 of article 42.131 of the Code of Criminal Procedure is not subject to the Open Meetings Act.

Very truly yours

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, slightly slanted style.

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