



SARAH DAVIS
Chair

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COMMITTEE ON GENERAL INVESTIGATING & ETHICS
TEXAS HOUSE OF REPRESENTATIVES

April 30, 2018

The Honorable Ken Paxton
Attorney General
Office of Attorney General
Attention: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Confirmation and Clarification of Attorney General Opinion GA-0386, Which Allowed, Under Article XVI, Section 40(d) of the Texas Constitution, An Individual Who Works As A Independent Contractor For A Municipal Management District To Simultaneously Serve As A Member of The Legislature

Dear Attorney General Paxton:

Recently, both the efficacy and application of Attorney General Opinion GA-0386 has been called into question. The following specific questions are submitted for your consideration:

- 1. Is Attorney General Opinion GA-0386 still the correct written interpretation of existing law on the issue of whether a legislator may simultaneously serve as president of a municipal management district operating under Chapter 375, Local Government Code?**

Background:

Attorney General Opinion GA-0386 was issued on December 27, 2005, over 13 years ago. During the intervening period, changes in constitutional or statutory interpretation may have changed the outcome of the opinion. For instance, in Opinion GA-0386, the Attorney General expressly overruled 15 year old letter opinion (Letter Opinion 90-55A).

Further, at least one municipal management district board has noted "[I]aw do change, and we're not saying that the laws that the [Abbott] opinion relies on have, but we are aware it can happen".

- 2. If Attorney General Opinion GA-0386 is the correct written interpretation of the existing law, then Article XVI, Section 40(d) of the Texas Constitution "does not prohibit an individual who works as an independent contractor for a municipal**

management district from simultaneously serving as a member of the legislature". Does any other statutory or constitutional provision, other than Article 16, Section 40(d) of the Texas Constitution, either prohibit the described employment or the receipt by the legislator of compensation for both positions?

Background:

The summary to GA-0386 only discusses the allowance of simultaneous employment and compensation under Article XVI, Section 40(d) of the Texas Constitution. Do any either statutory or constitutional provisions impact the dual employment and compensation of legislators?

- 3. What is the proper legal standard (as opposed to factual findings) to be used by a district in determining that a legislator that it intends to contract with is an "independent contractor" and may be both hired and compensated in their role as independent contractor?**

Background:

In GA-0386, the Attorney General cites 3 Texas Supreme Court cases and one Attorney General Opinion relating to when a person may be an independent contractor. In total, more than 13 factors are described. In addition we are aware that the Texas Workforce Commission notes that a number of additional tests for independent contractor status exist, including tests by the United State Supreme Court, various federal agencies, and the "Eleven Factor" test used by the IRS. See http://www.twc.state.tx.us/news/efte/independent_contractor_tests.html . State agencies and units of local government need clear guidance on the proper elements of a standard for determining who is an independent contractor that these agencies may uniformly apply.

- 4. May the test for "independent contractor" be satisfied by the mere affirmation of the status by the person claiming it or by the joint recital of the statement that a person is an independent contractor in a contract or other agreement? If not, what are the written or recorded obligations of the state agency or unit of local government in determining "independent contractor" status?**

Background:

A number of state agencies require detailed findings of whether a person is classified as an independent contractor versus an employee. For instance, the University of Texas requires all individuals paid for professional services to be classified as either an independent contractor or an employee using a 20 factor test identified by the IRS and requires that department personnel are accountable for completing the document which remains a government record. Further, the classification checklist may not be completed by the individual providing services who may (or

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may not) have an incentive to be viewed in a particular way. See <https://financials.utexas.edu/hbp/part-12/3-classification-of-independent-contractors-versus-employees>

Do other agencies or units of government have to take the same actions in properly documenting "independent contractor" status or may they rely on mere recitals?

Thank you for your consideration of this request. Please do not hesitate to contact me or my office by phone at 512-463-0389 or email if you have any additional questions.

Sincerely,

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

Chairman Sarah Davis