



**DISTRICT ATTORNEY'S OFFICE**  
**33<sup>RD</sup> & 424<sup>TH</sup> Judicial Districts**

**COUNTIES OF**  
**BLANCO • BURNET • LLANO • SAN SABA**

**Wiley B. McAfee**

District Attorney

April 10, 2014

Mr. Marc Sewell  
108 Summit  
Llano, TX 78643

REPRINT AT REQUEST OF ADDRESSEE

Re: Complaint regarding violation(s) of Open Meetings Act, Open Records Act,  
and Local Government Code Chapters 252 and 271

Dear Mr. Sewell:

I have reviewed the materials which you sent to our office and I have met with the City Secretary, Toni Milam, the City Manager, Brenton Lewis, and we spoke by conference call with City Attorney Carey Bovey. I have concluded that there is insufficient evidence to justify prosecution of these complaints.

Your main complaint primarily revolves around your belief that the city council has (a) conducted closed/executive meetings of which notice was not posted in advance, (b) that recordings of the activities of those meetings were not made or if made, were destroyed, and (c) that the city has failed and refused to provide you the records of those meetings which you requested. Your other complaints focus on the allegation that the city intentionally and deliberately manipulated a contract for the single purpose of avoiding the requirement of competitive bidding.

Facts from which the complaints developed:

1. At a regularly scheduled public meeting of city council, Mayor Virdell begins to announce that "the other day" the council "in a closed meeting" decided to spend \$50k. At this point the city manager broke in telling Mayor Virdell he can not talk about what was discussed in a/the closed meeting. Mayor Virdell asked if he can talk about the expense plan. Then he announced that "it was decided" to spend \$50k for dredging of the Llano River. The city manager took over and explained the plan in more detail. Questions were taken from the audience. Then a motion was made to approve the plan and the plan was approved by the council members present. By phrasing the opening the way he did, Mayor Virdell gives the impression that the council had formally approved the contract prior to that meeting and he was just telling folks what the council had already done, however, following this discussion a formal motion was made, a second, and vote was taken which approved the contract.

2. Based on the comment of the mayor, you made a PIA request, quoting the mayor having said that a decision was made by council in a closed meeting to spend \$50k, and you asked for:
  - a. the date and time of the closed meeting
  - b. the agenda of the open meeting that contained the closed meeting
  - c. the agenda of the closed meeting
  - d. the meeting minutes of both the open and closed meetings
  - e. any and all announcements of the meetings, paper and web
  - f. the attendees of the meeting.
  
3. The city secretary responded to each part of the request providing a copy of the posted agenda for the called council meeting to be held on 10/07/2013, in which was a notice that the council would be going into executive session to consult with the City Attorney regarding contemplated litigation on water matters. The notice included the intent that once the executive session was concluded, council would return to open session and discuss and take action regarding contemplated litigation on water matters. The minutes show that no formal action was taken on the contemplated litigation on water matters.

Complaints - first series - From reading the emails between yourself and the city secretary as well as the contents of the complaints, it is clear that you observed that the agenda and minutes of the 10/07/2013 meeting had nothing on them regarding a decision to spend \$50k for dredging. From here you are concluding that the mayor's comment in the 10/21 meeting is proof that an unannounced secret meeting was held in which the council took formal action in approving a contract for \$50k. You are further concluding that because the city secretary has not provided you with documents that actually includes discussion or action on a contract for dredging for a meeting prior to 10/21 then the city is illegally withholding public records and/or has altered or destroyed public records.

Conclusions on complaints - first series:

1. I believe that no secret, illegal meeting has taken place. I believe that on 10/21/2013 Mayor Virdell used a poor choice of words when he opened the discussion for the posted agenda item of "Discuss and consider action entering into an agreement between the City of Llano and Chanas Aggregates for the purpose of testing for best dredging procedures". First - when Mayor Virdell first said that the council had decided in executive session a few days ago to spend \$50k the city manager reminded him that he can not mention what took place in executive session, yet Mayor Virdell rephrased and said it was decided to spend \$50k for dredging. I conclude that this comment was his way of

opening up Agenda Item 2 for discussion as was posted in the agenda notice. I am familiar with the fact that Mayor Virdell likes to try to use more common phraseology as opposed to official terminology. The city manager confirmed to me that when he stopped the mayor from talking about the executive session, it was simply because what occurred in that executive session was confidential by law. The mayor's act of rephrasing and continuing to talk would have forced the city manager to shut the mayor down again if that topic was actually part of the executive session on 10/07/2013. Second - there was no contemplated litigation involved in the investigation of the need for dredging or contract negotiations and for this reason the council was not permitted to discuss this topic when they met in executive session on 10/07/2013. I conclude that the mayor simply misspoke. I believe that the meeting the mayor was probably referring to was a meeting between the mayor and the city manager about the recommendation that would be made at the upcoming council meeting. Third - the city manager prepared and distributed the City Council Agenda Item Report dated 10/21/2013 in which the city manager described that several people associated with the city had been exploring the problem and possible solutions for several months, the options that were explored, the financial impact, and concluded that the Staff recommends that the Council authorize the City Manager to enter into this contract. Fourth - following the mayor's opening and the city manager's description of the proposed project, the floor was opened for questions from the public. Finally - at the end of the discussion and question period a formal motion and second were made and a vote was taken which approved the recommendation and concluded agenda item no. 2.

2. I noted from the Public Meetings Handbook published by the Office of the Attorney General that elected officials and staff can work to investigate problems and solutions either independently or in a small group of less than a quorum or in an advisory capacity as long as the elected officials are not conducting a "walking quorum" and have no intent to violate the Open Meetings Act. See *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001); Office of Attorney General Open Meetings Handbook (2014) pages 14- 15, 17 - 20. I believe that this was the type of activity that is described by the city manager in the background/history of his report.
3. I believe that the city secretary properly complied with all of the public information act requests made by yourself. I noted that the complaints specifically revolve around the failure to provide accurate records/information about the closed meeting mentioned by Mayor Virdell. I have found no evidence of any called, secret, closed meeting which was not conducted as part of a regularly called open meeting. The city secretary did provide to you all responsive records of the meeting conducted on 10/07/2013 with the proper

reference to the executive session on that date. All of the documentation related to the meetings on 10/07/2013 and on 10/21/2013 are in proper form and timely prepared with notices timely posted. In as much as the executive session was conducted pursuant to Texas Government Code Sec. 551.071, I could not review any record of that portion of the proceedings. However, I am told a record of that meeting exists and can be made available if a court orders them to do so. As stated earlier, I am convinced that this issue is based on a poor choice of words which did not accurately describe what had taken place to that point.

4. I found no evidence, beyond the comment made by the mayor, that any executive session was conducted to discuss and decide a construction contract with Chanas Aggregates. It is true that there is no statutory authority for a city government to conduct general discussions regarding a construction contract in a closed session although it is ok to discuss legal issues related to a contract with the city attorney in executive session. Even then the discussions may not go beyond the legal issues. See *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 486 (Tex. App.—Austin 2004, pet. denied) (concluding that city council did not violate Act when it went into executive session to seek attorney's advice about land use provision); Tex. Att'y Gen. Op. Nos. JC-0233 (2000) at 3, JM-100 at 2 (1983); Office of Attorney General Open Meetings Handbook pages 42 - 43. However, I am told that neither the Chanas Aggregates contract nor the contemplated project were topics of discussion in the 10/07/2013 executive session and I have found no reason to doubt this statement.

Conclusions on complaints - violation of competitive bidding requirements:

5. The body of the complaints refer to chapter 271 of the Local Government Code while the cover letter also mentions chapter 252. However, I do not believe that this reference to chapter 271 would apply as chapter 271 applies to construction, repair, or renovation of public works such as a structure, road, highway or other addition or improvement to real property. From what I see the purpose of this project is to preserve public health or safety by securing adequate availability of water for public consumption. This would be covered by chapter 252. Either way the stated purpose that is recorded on the video submitted is to test a type of dredging process to determine if that process would meet the needs of the project. If the testing is successful then a new contract for a larger scale of like dredging process will be put out for competitive bidding. It would be reasonable and prudent, considering the amount of public funds that will be involved, for a city government to make sure that the process

under consideration will give the city the biggest bang for its buck before a full contract for the entire project is put into place. It may well be noted that one provision of chapter 252 requires that for expenditures between \$3k and \$50k the city must contact two historically underutilized businesses in the county before going outside of the county, yet if there is no such business within the county the subsection does not apply. I did not ask about this but I noted through an internet search that there are only two dredging company with a telephone listing in Llano County of which Chanas Aggregates is one. I also noted from your telephone call that you do not feel that Chanas Aggregates is a true dredging company and that they are not qualified to do this work. That issue would be considered a business decision and would only apply to civil issues and is not criminal in nature.

Conclusions - remaining on complaints - Tampering with Government Record; Abuse of Official Capacity; Misuse of Government Property; and Misuse of Public Information

6. All of these are simply spinoff complaints that might apply if there were actual violations of any of the other statutes. I see no evidence of application to any of these offenses under the facts and circumstances I have reviewed.

Closing Note - I did confirm that all participants named in this complaint have completed training on the Open Meetings Act and the Public Information Act.

In as much as this office will not be proceeding with criminal prosecutions on any of these complaints that have been submitted you are welcome to take your issues, along with this letter, to the Office of the Attorney General for their consideration.

Sincerely,

Gary W. Bunyard  
Assistant District Attorney