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Austinites for Geographic Representation
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RE: Questions Regarding Meetings of the Independent Citizens Redistricting Commission (ICRC).

Dear AGR,

A couple of days ago, you requested my opinion regarding certain questions raised about how the ICRC may conduct its business. I have addressed the issues you submitted, and my opinion is offered to AGR to use as you see fit. In addition to analyzing the applicable provisions of law involved, I have reviewed a letter dated July 11, 2013 from Steve Bickerstaff to the ICRC members (“Bickerstaff Letter”), and a letter pre-dated July 17, 2013 to the ICRC from Assistant City Attorneys John Steiner and Sabine Romero (“City Attorney Letter”).

SPECIFIC QUESTIONS SUBMITTED

1. “Is a group of Commissioners (less than a quorum) allowed to meet with the City Auditor, City Manager, and Mayor to discuss the creation of a Commission bank account that is independent from the City’s?”
2. “Can a Hiring Subcommittee of Commissioners (as long as not a quorum) meet either online or in person to go over applications for Executive Director?”
3. “Does a quorum of Commissioners need to be present at the Commission’s public input meetings mentioned in the Charter? Can less than a quorum of Commissioners be present at those public input meetings on the [redistricting] maps?”
4. “Are maps allowed to be handed out ahead of time to the public?”
5. “Can non-Commission members from the public be on subcommittees with Commission members?”
6. “Is the December 1, 2013 ‘deadline’ for the Commission to adopt the redistricting plan a firm deadline, after which the City Attorney can bring suit for a court to draw the district lines?”

SUMMARY RESPONSE

While the ICRC is *not* a “governmental body” as defined by the Texas Open Meetings Act (TOMA), the ICRC, in conducting its business, is nonetheless required to comply with TOMA as well the City Charter ICRC provision ¹ and certain City ordinances.

The ICRC has authority to create and use “advisory” committees ² to support the Commission’s decision-making (such as Committee research, analysis, deliberation, receiving input, and preparing recommendations to be deliberated by the full Commission). However, such committees cannot be used in lieu of Commission meetings (with a quorum present) to hold the mandatory hearings on the redistricting plans themselves.

If these purely advisory committees are composed of Commissioners numbering well less than a quorum, the TOMA would not require the committee meetings to be publicly noticed or conducted in public, but, in my opinion, the Charter ICRC provision would require such open meetings of the committees. While I see no authority to recognize non-Commissioners as members of an ICRC committee, there is also no prohibition against the committees inviting certain persons to appear at their public meetings and converse with such individuals in public.

Ironically, unless changed, a City ordinance would prohibit the ICRC (or any other City board or commission) from using provisions of state law (including a new “message board” law authored by Senator Kirk Watson) that permit “meetings” to be held without the requirement that a quorum of the members be physically present in one place. Because of this antiquated Austin ordinance, technology is not available—in this City that advertises its hi-tech hipness—to the ICRC to efficiently conduct its business while maintaining openness to the public.

SPECIFIC RESPONSES TO QUESTIONS POSED

QUESTIONS 1, 2, & 5: SHORT ANSWERS

1. “Is a group of Commissioners (less than a quorum) allowed to meet with the City Auditor, City Manager, and Mayor to discuss the creation of a Commission bank account that is independent from the City’s?”

SHORT ANSWER: No, unless such discussion is part of a committee meeting that is also called with 72-hour public notice and open to attendance by the public.

¹ Unless expressly stated otherwise, the “Charter provision” refers to Austin City Charter, art. II, section 3.

² I will use the appropriate term “committee” instead of the less accurate term “subcommittee” used in some of the City’s correspondence and agendas. The Commission may have committees, and if the committees are further divided into smaller groups, those smaller groups would be “subcommittees.”

2. “Can a Hiring Subcommittee of Commissioners (as long as not a quorum) meet either online or in person to go over applications for Executive Director?”

SHORT ANSWER: The Commission cannot meet online. *See* Austin City Code § 2-1-43(B) (requiring members to be “physically present”); *contra* Tex. H.B. 2414, § 3, 83rd Leg. R.S. (2013) (amending TOMA to add Section 551.006, permitting an online message board communication between members of a governmental body). Subject to the caveats discussed below about committees, a *committee* can meet online, because it can also (but, in my opinion, should not) meet in secret. Certainly, a committee can meet, be physically present, to consider the applications for Executive Director, in a meeting that is called with 72-hour public notice and open to attendance by the public. The ICRC members may also communicate, in writing or orally, with each other on this topic, so long as the communication does not directly or indirectly include a quorum of the Commission. Those records of communication would likely be subject to disclosure under the TPIA and the Charter provision section 3(K)(2).

5. “Can non-Commission members from the public be on subcommittees with Commission members?”

SHORT ANSWER: Probably not. Charter provision section 3(K)(3) prohibits Commission *members* or staff, not just the Commission as a body, from communicating with “anyone” about “redistricting matters” outside a public hearing.³ A court may interpret the phrase “redistricting matters” broadly to include any work of the Commission, or more narrowly to include only district boundary issues. I offer no opinion on that at this time. A committee of Commission members should only communicate with non-Commission persons in a public setting. Members of the public who might otherwise have been invited to sit as *ex officio* members of ICRC committees, can instead be invited to testify/deliberate during open meetings of the committees.

QUESTIONS 1, 2, & 5: DETAILED ANALYSIS AND AUTHORITIES

There are additional issues involved in these three questions that require more detailed attention.

The Charter Provision & City Code Require ICRC Compliance with TOMA and Openness

First of all, TOMA does not directly apply to the ICRC. The ICRC is *not* a

³ That section makes an exception for communication between commission members, commission staff, legal counsel, and consultants if permitted by state or city open meeting requirements.

“governmental body” under TOMA section 551.001(3)(C) or (D), because the ICRC is neither “a municipal governing body in the state” nor “a deliberative body that has *rulemaking or quasi-judicial power* and that is classified as a department, agency, or political subdivision of a county or municipality.” Tex. Gov’t Code § 551.001(3)(C), (D) (emphasis added). The ICRC has *legislative power*—not rulemaking or quasi-judicial power—to draw election districts. See *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001) (addressing separation of powers issue, noting that apportioning election districts is a legislative function). In essence, by the November 2012 Charter amendment, this legislative function was transferred from the City’s “legislature,” the City Council to the ICRC. But TOMA has no definition of a governmental body that describes the ICRC and incorporates the ICRC within the scope of the TOMA.

However, the Charter provision, section 3(K)(1) says, “the commission shall comply with all state and city requirements for open meetings.” TOMA is the “state” requirement for open meetings and is, by the Charter, made applicable to the ICRC even if TOMA, by its own terms, does not apply to the ICRC. Austin City Code section 2-1-43(B) is a “city” requirement: “Each board ⁴ shall comply with Government Code Chapter 551 (*Open Meetings Act*). All members necessary to provide a quorum must be physically present at a meeting to conduct business.” Austin City Code, then, also, makes TOMA applicable to the ICRC.

Additional “city” requirements for open meetings are found in the Charter provision. While there is no obvious enforcement for such a general requirement, Charter provision 3(C)(1) says “The commission shall: (1) conduct an open and transparent process enabling full public consideration of and comment on *the drawing of district lines....*” In addition, as noted above, the Charter provision, section 3(K)(3) includes a prohibition against individual commission members (or staff) from communicating about “redistricting matters” with “anyone” outside a public hearing.

The bottom line is that the ICRC must not violate TOMA, and, even where TOMA would permit written or oral communication between members of the public and individual ICRC commissioners (in numbers avoiding a quorum directly or indirectly) about “redistricting matters,” the Charter provision prohibits such external communication except in a public meeting (of either the Commission or its committee(s)).

ICRC Has Authority to Appoint Advisory Committees

I have found no state or city law saying, directly, that the ICRC can or cannot use advisory committees to prepare issues for consideration by the full Commission. However, Austin City Code § 2-1-44(A) says, “Board meetings are governed by Robert’s Rules of Order and the board’s bylaws.” ⁵ Robert’s Rules permits the ICRC to appoint such advisory

⁴ Austin City Code section 2-1-2(A) defines “board” as “BOARD means a permanent advisory or decision-making body described in Article 2 (*Boards*) and includes a commission, committee, council, or agency.” ICRC is a “board” under the Austin City Code.

⁵ I am not aware of any “bylaws” being adopted by the ICRC.

committees. Robert's Rules of Order describes "Committees of a Board." RONR (10th Ed.), p. 468-69:

Where an organization is local [] the executive board usually divides itself into committees having charge of different branches of the work during the interval between the monthly [] meetings of the board. At the board meetings these committees report on the fulfillment of their assigned responsibilities. In such cases the committees are genuinely subordinate to the board and must ordinarily report back to it for authority to act (in contrast to an executive committee, which usually has power to act as the board []). **Any board can appoint committees of the kind just described without authorization in the bylaws.**"

RONR (10th Ed.), p. 468, L. 29-35; p. 469, L. 1-8 (emphasis added).

If there is any thought by the ICRC to permit any of its committees to meet without TOMA meeting notices and public deliberation, I would caution that committees should not be so large that only a few more votes are required in order to obtain Commission approval of the committee's actions. In such a circumstance—or in circumstances where the Commission just "rubber-stamps" the committee recommendation without its own meaningful deliberation—the committee can be considered to be a "governmental body" subject to TOMA. *See Finlan v. City of Dallas*, 888 F. Supp. 779, 785-86 (N.D. Tex. 1995) (finding a Dallas subcommittee of 5 out of the 15 Council members (to recommend a location for a sports arena) was required to comply with open meeting requirements).

In *Finlan*, the Court said, "With the five members of the Committee in favor of a new arena, as well as the Mayor who appointed them, only two more votes are needed for the remaining nine City Council members to go along with whatever deal the Committee cuts." The court also found circumstantial evidence that the Committee was designed to circumvent TOMA); Tex. Atty. Gen. Op. JC-0060 (1999) (Commissioners Court committee to recommend selection of architect required to comply with TOMA); Tex. Atty. Gen. Op. JC-0053 (1999) (pricing committee of 2 members of the Texas Public Finance Authority Board required to comply with TOMA); Tex. Atty. Gen. Op. JM-1072 (1989) (finding that any subcommittee of a school board, no matter how small, must comply with TOMA).

The best practice is to appoint small committees merely to help gather information and frame the issues for deliberation by the entire ICRC, and for those committees to comply with TOMA requirements for meeting notices and public discussion.

QUESTION 3: SHORT ANSWER

3. "Does a quorum of Commissioners need to be present at the Commission's public input meetings mentioned in the Charter? Can less than a quorum of Commissioners be present at those public input meetings on the [redistricting] maps?"

Yes to the first question; No to the second question.

For reasons that differ slightly with both the Bickerstaff Letter and the City Attorney Letter, I agree with their conclusion that the Commission is required by the Charter provision to hold the mandatory hearings *en masse* with a quorum of the Commission present. I believe that conclusion is the result of applying Charter provision section 3(K)(3) that prohibits even commission “members” from communicating with “anyone” about “redistricting matters” outside a public hearing. (Section 3(K)(3) “commission members and commission staff may not communicate with or receive communications about redistricting matters from anyone outside a public hearing...”). While certain administrative issues, *e.g.*, setting up an ICRC bank account, reviewing applications for executive director, consultants, or attorneys, might not be considered “redistricting matters,” certainly the issue of the district maps is included in that prohibition.

The communication with *anyone*, outside the commission (or with its staff, attorneys, or consultants), about the maps, therefore, can only occur in public hearings. Charter provision section 3(I)(10) specifically requires those hearings to be conducted by “the commission” (which requires a quorum to conduct any business). (Charter provision section 3(I)(10) “...the *commission* shall conduct hearings and adopt a plan for the boundaries...”).

QUESTION 4: SHORT ANSWER

4. “Are maps allowed to be handed out ahead of time to the public?”

Yes, if provided uniformly to the public at large.

Since the maps are “redistricting matters,” the wording of Charter provision section 3(K)(3) could be read to prohibit the commission members or staff from communicating the draft maps to “anyone” except *during* a public hearing. I do believe this provision would bar any one-on-one communication of the maps to any individual members of the public ahead of public hearings. Such one-on-one communication to “anyone” might be considered less than impartial, as well as a violation of section 3(K)(3). *See* Charter provision 3(D)(4) “Each commission member shall apply this section [meaning the entire Section 3] in a manner that is impartial and that reinforces public confidence in the integrity of the redistricting process.” Thus, no one (not “anyone”) should get a head start in reviewing the maps prior the public hearings.

Here is the solution: There is no prohibition in the Commission ordering its staff to post the maps in advance of public hearings on an ICRC website. Such an action would be consistent with the Charter provision section 3(D)(4) (quoted above) and section 3(C)(1) that the commission shall “conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines.” The communication would be to everyone, not anyone.

QUESTION 6: SHORT ANSWER

6. “Is the December 1, 2013 ‘deadline’ for the Commission to adopt the redistricting plan a firm deadline, after which the City Attorney can bring suit for a court to draw the district lines?”

I agree with the Bickerstaff Letter and City Attorney Letter that December 1st is no longer a legally mandatory deadline, in light of the other Charter change moving the Council elections from May to November 2014. In light of the added sentence in Section 3(B) (adjusting the Commission deadlines if the election was moved), I doubt that a Court would entertain a suit on December 1st by the City Attorney pursuant to Section 3(G)(2). Still, having at least a preliminary plan adopted by December 1, 2013 is the best way to avoid the risk that opponents of the 10-1 plan who still sit on the Council (and particularly those opponents of *independent* redistricting) would try to take advantage and get a court to draw the districts the way such opponents want them drawn.

I hope this analysis is helpful to AGR.

Respectfully submitted,



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