



Just How Much Information Should We Provide On An Agenda?

By Regina D. Adams

In April, Senator Jeff Wentworth (San Antonio) requested an opinion from the Attorney General of Texas (the "AG") regarding:

- (1) Whether placing "City Manager's Report", "Mayor's Update" and "Council and Other Reports" on a city council agenda provides adequate notice to the public under the Texas Open Meetings Act (the "Act") because for several years, the Corpus Christi City Council agendas traditionally included those items, and
- (2) Whether or not the Act requires that every topic addressed by the City Manager, Mayor or Council be specifically listed on the agenda.

Last month, the AG responded that the Act requires that meetings of a governmental body (*applies to all governmental*

bodies in the State of Texas) be preceded by a notice of the date, hour, place and subject of the meeting. The AG stated that, courts consider:

- (1) A comparison of the content of the notice to the action taken during the meeting;
- (2) Whether the notice departs from any customary practice where that custom establishes an expectation in the public about the subject of the meeting; or
- (3) Whether the subject is of special interest to the public.

Provisions of the Act are mandatory and are to be liberally construed in favor of open government. Texas courts have held and the AG has determined that **general terms do not provide full and adequate notice to the public.**

CONT'D ON PAGE 3

You Want Me To Drink What? Some basic facts about reuse and its future.

By Jonathan D. Polley

Many people active in their local water district may have heard a speaker at an Association of Water Board Directors function or elsewhere mention "reuse," but rarely does anyone explain exactly what they are talking about. In its most basic form, reuse is the beneficial use of treated water discharged from a wastewater treatment plant, generally referred to as effluent. However, before understanding why reuse is becoming such a hot topic in the water industry, one must understand the normal flow of effluent in the absence of reuse projects.

Ordinarily, effluent from wastewater treatment plants is discharged into a stream, or a ditch or gully that flows into a stream or other watercourse, where it mixes with other surface water and becomes a part of the surface water flows. Effluent that reaches other existing surface water is generally referred to as "return flows." In the Houston area, return flows travel through various creeks and bayous, such as Cypress Creek in north Houston and Buffalo Bayou in west Houston, and ultimately wind up in Lake Houston or Galveston Bay.

Reuse projects may seek to use effluent either before or after it mixes with other surface water. Diversion of effluent through pipelines or other infrastructure for use before it commingles with existing surface water is called "direct reuse." On the other hand,

CONT'D ON PAGE 3

INSIDE THIS ISSUE:

Just How Much Information Should We Provide On An Agenda?	1
You Want Me To Drink What?	1
FTC Identity Theft Red Flag Rules	2
JRPB Calendar of Events	2
So What Is... Post-Issuance Tax Compliance	2
Legislative Calendar of Events	4

FTC Identity Theft Red Flag Rules

By Joshua W. Golden

In early November of last year, the Federal Trade Commission (the "FTC") issued final rules and regulations, also known as the Red Flag Rules, to implement Sections 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003. The Rules require all financial institutions and creditors, including utility districts, that hold any consumer account, or other account for which there is a reasonably foreseeable risk of identity theft, to develop and implement an Identity Theft Prevention Program (the "Program") for combating identity theft in connection with new and existing accounts.

The Program must include reasonable policies and procedures for detecting, preventing and mitigating identity theft and enabling a financial institution or creditor to:

- Identify relevant patterns, practices and specific forms of activity that are red flags signaling possible identity theft and incorporate those red flags into the Program;
- Detect red flags that have been incorporated into the Program;
- Respond appropriately to any red flags that are detected to prevent and mitigate identity theft; and
- Ensure the Program is updated periodically to reflect changes in risks from identity theft.

The final regulations originally required that any institution or creditor subject to the rules must have developed and implemented an identity theft program in full compliance with the Rules by November 1, 2008. But not to worry... at the time the FTC issued the Rules, many entities throughout the nation, particularly governmental entities such as utility districts, either were not aware the Rules existed or did not think the Rules applied to them. Consequently, the FTC recognized the large burden that enforcement of the November compliance date would place on these entities and suspended enforcement of the Rules until May 1, 2009.

With the May 1, 2009 deadline on the horizon, Johnson Radcliffe Petrov & Bobbitt PLLC has started laying the groundwork to bring our clients into compliance with the Rules. Earlier this month, we developed a policy and solicited comments from all district staff and operators who will be required to implement the policy. We expect to receive comments from all operators and district staff (if any) by November 26, 2008. Provided we have received all comments in time, we will recommend that each Board adopt this policy at its December meeting with plenty of time to implement the Program before May 1, 2009.

Mr. Golden is a first year Associate at Johnson Radcliffe Petrov & Bobbitt PLLC, and specializes in public law, public finance and real estate development.

JRPB Calendar of Events

12/9/2008 Alan P. Petrov, Member of JRPB PLLC, will be making a presentation about the Open Meetings Act at the Continuing Legal Education seminar entitled "What You Need to Know About Public Records and Open Meetings in Texas" in Houston, Texas

1/24/2009 Ann M. Levy, Of Counsel to JRPB PLLC, will be presenting a seminar entitled "You Have to Sign a Tax Certificate—Do You Know What It Is?" at the Association of Water Board Directors - Texas Mid Winter Conference

SO WHAT IS...

Post-Issuance Tax Compliance

It relates to the monitoring of a Bond Issuer's ongoing compliance with the various tax-exempt bond requirements, so that the bonds that were issued are, and remain, tax exempt over the decades the bonds may be outstanding. Generally, to ensure continuing compliance with federal tax rules over the life of the bonds, a Bond Issuer must properly and timely spend the bond proceeds for qualifying capital expenditures; use the bond-financed facilities for permitted uses; and comply with arbitrage yield and rebate requirements. Bond Issuers must maintain sufficient records to establish compliance beginning on the date the bonds are issued and continuing until three years after the bonds are fully paid. Special rules apply in the case of refunded bonds. The IRS currently is encouraging, as opposed to requiring, Bond Issuers to adopt written post-issuance compliance procedures that can be easily understood and implemented by Bond Issuers to insure continuing compliance and continuity over the decades the bonds are likely to be outstanding.

Agenda?

CONT'D FROM PAGE 1

The AG also determined that, on the agenda in question, "City Manager's Report", "Mayor's Update" and "Council and Other Reports", were inadequate to provide notice to the public.

The AG stated that "the general and generic nature of the notice does not sufficiently notify a reader, as a member of the interested public, of the subjects of the update and reports to be discussed at any particular meeting" and "the subjects to be addressed can presumably be ascertained by the governmental body in advance."

In answering Senator Wentworth's second question, the AG stated that section 551.042¹ of the Act authorizes a limited response to inquiries of a member of the public or of the governmental body about a subject not included on the posted notice (i.e., "Public Comment"). To the extent that a subject is addressed by a manager or a member of the governing body in the manner and under the circumstances authorized under section 551.042 of the Act, it does not have to be included in a posted meeting notice.

For example, if a utility district posts a notice of meeting that simply states "Engineer's Report" or "Bookkeeper's Report" or "Director Update", that language is not sufficient information to provide notice to the public of what subjects are to be included in the update and/or reports to be discussed at the

meeting. Conversely, an agenda line item titled "Public Comment" is sufficient for the board or general manager to answer the public's questions. Or if a board member asks a consultant a question, the response can be factual and/or a statement of policy. The board may also discuss including items on a subsequent meeting's agenda.

Ms. Adams is a fifth year Associate at Johnson Radcliffe Petrov & Bobbitt PLLC, and specializes in public law, public finance, real estate development, election law and employment law.

¹Section 551.042 of the Act states:

- (a) If, at a meeting of a governmental body, a member of the public or of the governmental body inquires about a subject for which notice has not been given as required by this subchapter, the notice provisions of this subchapter do not apply to:
 - (1) a statement of a specific factual information given in response to the inquiry; or
 - (2) a recitation of existing policy in response to the inquiry.
- (b) Any deliberation of or decision about the subject of the inquiry shall be limited to a proposal to place the subject on the agenda for a subsequent meeting.

You want me to drink what?

CONT'D FROM PAGE 1

sometimes effluent is discharged into a watercourse, where the watercourse is essentially used as the transmission pipeline, and then diverted for use downstream. This process is often referred to as "indirect reuse."

There is no question that both direct and indirect reuse will be a source of water in the future – it is just a question of when. However, reuse has become a hot topic of late because several regulatory questions must be answered before many water providers will undertake reuse projects because they want to know the rules governing their project will not change in the near future. For example, when the Texas Commission on Environmental Quality ("TCEQ") issues surface water permits, it must evaluate the volume of water that may be consumed without having a detrimental effect on downstream users relying on that water. In this process, the TCEQ considers return flows as part of the existing surface water. As a result, many people in the water industry are wondering whether indirect reusers are simply reusing their own effluent or diverting surface water the TCEQ has already allocated to a prior permittee. Similarly, because direct reuse projects prevent the creation of return flows or send the return flows elsewhere by diverting the effluent before it enters a watercourse, the TCEQ may have issued downstream surface water permits based on a projected volume of surface water that may significantly decrease.

Currently, reuse projects in Texas have typically only been done to fill amenity ponds or for large-scale irrigation, such as golf courses. However, the Texas Legislature and TCEQ will no doubt be wrestling with these and other reuse related dilemmas in the future. As these issues get resolved, Texas will likely begin to see an increase in the number of reuse projects water providers initiate. However, because of substantial public concern related to implementing reuse for household purposes, the cost of water from other sources will likely greatly increase long before either direct reuse projects are implemented to supply water for human consumption.

Mr. Polley is a third year Associate at Johnson Radcliffe Petrov & Bobbitt PLLC, and specializes in public law, public finance and real estate development.



JOHNSON RADCLIFFE PETROV & BOBBITT PLLC
1001 MCKINNEY STREET, STE. 1000
HOUSTON, TX 77002-6424

PLEASE CALL 713.237.1221 OR E-MAIL JRPB@PUBLICLAW.COM WITH REQUESTS FOR MORE INFORMATION, COMMENTS, ADDRESS UPDATES OR CORRECTIONS.

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Calendar of Events

81st Legislative Session Texas Legislature

Monday, November 10, 2008

Prefiling of legislation for the 81st Legislature begins

Tuesday, January 13, 2009

81st Legislature convenes at noon

Friday, March 13, 2009

Deadline for filing bills and joint resolutions other than local bills, emergency appropriations, and bills that have been declared an emergency by the governor

Monday, June 1, 2009

Last day of 81st Regular Session; corrections only in house and senate

Sunday, June 21, 2009

Last day governor can sign or veto bills passed during the regular legislative session

Monday, August 31, 2009

Date that bills without specific effective dates (that could not be effective immediately) become law

JRPB Employee Profile

Meet Josh Golden



Josh Golden is JRPB's newest associate attorney. He joined JRPB in August 2008 and is assisting in the Firm's public law, public finance and real estate development practices.

Josh obtained his undergraduate degree from Tarleton State University in Stephenville, Texas. After six years of service in technology and business, Josh returned to law school and earned his JD from The University of Texas School of Law in 2007.

Prior to joining JRPB, Josh served as a commercial real estate attorney in the legal department of Weingarten Realty Investors.

When not practicing law, Josh enjoys following Texas Longhorns athletics, relaxing with friends and family and playing golf whenever he has the chance.