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Case # CV 18-334-B

Case Information

Location

Freestone County - District Clerk

Date Filed

9/18/2018 7:52 AM

Case Number

CV 18-334-B

Case Description

Assigned to Judge

Attorney

Wm. Andrew Messer

Firm Name

Messer, Rockefeller & Fort, PLLC

Filed By

Sherry Brown

Filer Type

Not Applicable

Civil Information

Procedures / Remedies

Temporary Restraining Order/Injunction

Damages Sought

Over \$200,000 but not more than \$1,000,000

Fees

Service Fee

\$0.00

\$0.00

Documents

Lead Document

Original Petition.FINAL.pdf

eService Details

Name/Email	Firm	Service M
Sherry Brown sherry@txmunicipallaw.com	Messer, Rockefeller & Fort, PLLC	EServe
Andy Messer andy@txmunicipallaw.com	Messer, Rockefeller & Fort, PLLC	EServe
Brett Gardner brett@txmunicipallaw.com	Messer, Rockefeller & Fort, PLLC	EServe
Will Trevino will@txmunicipallaw.com	Messer, Rockefeller & Fort, PLLC	EServ
David James Tuckfield david@tuckfieldlaw.com		ESer
Linda L. Sjogren Linda@TexasMunicipalLawyers.com	Bojorquez Law Firm	ESe

CAUSE NO. CV 18-334-B

CITY OF TEAGUE,
Plaintiff,

v.

CITY OF FAIRFIELD,
Defendant.

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IN THE DISTRICT COURT

FREESTONE COUNTY, TEXAS

87TH JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION, VERIFIED REQUEST FOR TEMPORARY
RESTRAINING ORDER, REQUEST FOR TEMPORARY AND PERMANENT
INJUNCTION, AND REQUEST FOR DISCLOSURE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff City of Teague, Texas and files this Original Petition, Verified
Request for Temporary Restraining Order, Request for Temporary and Permanent Injunction, and

Service of process may be made upon defendant via its Mayor, Kenneth Hughes, 222 South Mount St., Fairfield, Texas 75840 or its City Secretary, 222 South Mount St., Fairfield, Texas 75840.

III. VENUE AND JURISDICTION

3.1. The damages sought are within the jurisdictional limits of this Court, as Teague seeks monetary relief over \$200,000 but not more than \$1,000,000 and non-monetary relief pursuant to Rule 47 of the Texas Rules of Civil Procedure.

3.2. There is a clear and unambiguous waiver of immunity, and the Court has jurisdiction, under:

- TEX. CIV. PRAC. & REM. CODE ch. 271 for contract and implied contractual claims;
- Fairfield is acting in a proprietary function for public utilities, *see City of Georgetown v. Lower Colorado River Teague*, 413 S.W.3d 803 (Tex. App.—Austin 2013, pet. dismiss'd), which renders Fairfield liable under the common law as a private person for all of Teague's claims;
- TEX. GOV'T CODE ch. 551 for open meetings violations, including injunctive relief provided for by TEX. GOV'T CODE § 551.142; and
- TEX. CIV. PRAC. & REM. CODE ch. 37 for declaratory judgment relief;

3.3. Venue is proper, and this Court has jurisdiction pursuant to Section 15.0151 of the Texas Civil Practice and Remedies Code in that an action against a political subdivision that is located in a county with a population of 100,000 or less shall be brought in the county in which the political subdivision is located, and Fairfield is located in Freestone County. Venue is also proper under Section 15.002 of the Texas Civil Practice and Remedies Code in that Freestone County is where all or a substantial part of the events or omissions giving rise to the claims occurred.

IV. FACTS

4.1. On or about June 25, 1990, Teague, Fairfield, Freestone County (the "County") and the Texas Department of Criminal Justice ("TDCJ") executed a facilities agreement, expiring

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December 30, 2020, regarding the construction of a minimum and medium security facility within the County for the detention, training, education, rehabilitation, and reformation of sentenced felons (the "Facilities Agreement"). The minimum and medium security facility, capable of housing a population of at least 1,000 persons (the "Boyd Unit"), was to be constructed with funds appropriated to TDCJ under line item 1.b., Additional Capacity of the Capital Outlay Section of Senate Bill No. 111 (Appropriations Act, 1990-1991 Biennium, page 1-84, 71st Legislature, Regular Session, 1989).

4.2. The Facilities Agreement required Teague, Fairfield and the County to convey to TDCJ several tracts of land consisting of approximately 733.65 acres of land located within County for the Boyd Unit and related facilities. The County was required to provide at no cost to TDCJ a paved two-lane road from Highway 84 to the Boyd Unit. Teague and Fairfield both agreed to lay, install, connect and maintain water and sewer lines to the Boyd Unit (the "Facilities"). In addition, at the end of the term of the Facilities Agreement, and after all of Teague and Fairfield's obligations and/or bonds had been repaid, TDCJ would have the option to accept title and possession of the Facilities. Chapter 791 of the Texas Government Code authorized Teague, Fairfield, the County, and TDCJ to enter into the Facility Agreement for the construction of the Boyd Unit and Facilities.

TEX. GOV'T CODE § 791.

4.3. In 1992, pursuant to Chapter 791 of the Texas Government Code, Teague and Fairfield signed an Interlocal Definitive Agreement (the "IDA") regarding the provision of water and wastewater utilities to the Boyd Unit. Under the terms of the IDA, Fairfield issued Combination Tax and Subordinate Lien Waterworks and Sewer System Revenue Certificates of Obligation, Series 1990 in the aggregate principal amount of \$1,780,000 and Teague issued Combination Tax and Subordinate Lien Waterworks and Sewer System Revenue Certificates of

Obligation, Series 1990 in the aggregate principal amount of \$1,500,000 to provide funds for the costs associated with the services and construction of the Facilities contemplated in the Facilities Agreement. This indebtedness for the Boyd Unit Facilities remains outstanding to date.

4.4. The IDA established the ownership of the Facilities by Fairfield and Teague as jointly owned, with Fairfield at fifty-five percent (55%) and Teague at forty-five percent (45%). The costs of building the Facilities was split in this same percentage with Fairfield at fifty-five percent (55%) and Teague at forty-five percent (45%). Fairfield and Teague agreed under the IDA that Fairfield would be responsible for operation and maintenance of the water and sewer plants. Additionally, it was agreed that Fairfield would prepare an operating plan and budget by October 31 of each year for review by the City Councils of both Fairfield and Teague. Fairfield has not provided the operating plan and budget for many, if not all years. Expenditures exceeding the revenues were to be split at the percentage levels of Fairfield at fifty-five percent (55%) and Teague at forty-five percent (45%). Revenues that exceed expenditures were to be split at the percentage levels of Fairfield at fifty-five percent (55%) and Teague at forty-five percent (45%). Fairfield has failed to pay Teague its owed revenues for many, if not all years.

4.5. Currently, Fairfield's approved 2017-2018 Budget's TDCJ Beginning Fund Balance was \$1,271,355.00. Fairfield's Financial Statement as of April 30, 2018 reflected the Y-T-D TDCJ Fund Balance of \$1,679,830.40.

4.6. Fairfield has grossly mismanaged the water and sewer services accounts for years. Fairfield recently hired W.D. Brown & Associates, PLLC to perform a forensic audit of Fairfield's financial statements, accounts and expenditures. This auditor, in response to a request for qualifications, reported that its team consisted of professionals with forensic accounting and investigative experience including former FBI agents, computer forensics specialists and CPAs.

The forensic auditor in its *Forensic Investigatory Services Report* revealed waste by Fairfield, transference of funds potentially against the advice of Fairfield's own bond counsel, that the overall operations of Fairfield appeared chaotic with no clear lines of authority, the filing and records of Fairfield were disorganized, improper allocation of payroll costs, an overstatement of \$281,790.76 in the Sept. 30, 2017 Beginning Fund Balance, and that critical documents were missing from Fairfield's records, including mandatory conflict of interest disclosures. In sum, Fairfield has failed to honor its obligations under the agreements.

4.7. On or about Friday, September 14, 2018, Fairfield caused to be posted at its city hall an agenda. The agenda is attached as Exhibit A and incorporated by reference. The agenda had blue ink corrections inserted attempting to correct the date of the Fairfield city council meeting. The date of the purported council meeting is either September 17, 18 or 19, depending on how the public reads the handwriting. In other words, the date of the council meeting is **unclear**, and is **ambiguous at best**. Further, the subject matter of the meeting is **generic**. It does not give the public adequate notice of the topics to be discussed. Thus, the agenda as physically posted is illegal.

4.8. Fairfield was required to simultaneously post its agenda on its internet website. It failed in this obligation too. As of approximately 8:45 a.m. Monday, September 17, 2018, Fairfield had not posted a copy of the agenda on its Internet website as required by Texas Open Meetings Act (Texas Government Code Chapter 551 *et seq.*). But shortly after 8:45 am, Fairfield posted the agenda to its Internet website. This is a clear violation of the Texas Open Meetings Act, which requires 72-hour notice prior to a posted meeting by a governmental body. TEX. GOV'T CODE § 551.043(a); (b). Exhibit "B" attached hereto and incorporated herein contains a copy of the agenda posted on Fairfield's Internet site as appeared after 9:00 a.m. The internet notice in Exhibit "E"

lacks the hand-drawn corrections as made on the notice posted on Fairfield's bulletin board for public notices. In other words, it is a different agenda. The internet agenda contains **two different dates** for the proposed council meeting – **September 18 (in the caption)** or **September 17 (in the body)**. It is anybody's guess when the Fairfield council plans to meet. The notices are clearly illegal, violating the Texas Open Meetings Act.

V. CAUSES OF ACTION

1. **Breach of Contract and Implied Bad Faith and Fair Dealing Contractual Duties**

5.1 Teague and Fairfield entered into a written contract for the provision of water and sewer service to the TDCJ.

5.2 The IDA stated the essential terms between the parties and was duly executed by the parties. In the IDA, the parties agreed that monthly payments from the TDCJ from water and wastewater sales that exceed the budgeted amount would be disbursed 55% to the City of Fairfield and 45% to the City of Teague. Moreover, the IDA provided that Teague would deposit revenues from the TDCJ into a TDCJ Revenue Account.

5.3 Fairfield breached the IDA by failing to pay any amount of the revenues owed to Teague and by, upon information and belief, failing to create a TDCJ Revenue Account.

5.4 As a result of Fairfield's conduct and breaches, Teague has suffered and continues to suffer damages.

5.5 All conditions precedent have been met or have been excused.

5.6 Pursuant to Section 271.152, Subchapter I, of the Texas Local Government Code, "[a] local government entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of

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this subchapter.” See *Tooke v. City of Mexia*, 197 S.W.3d 325, 344-45 (Tex. 2006) (finding section 271.152 is a waiver of immunity). Since the City of Fairfield is a local government entity, any assertions of immunity were waived by statute when it entered into a written contract for goods or services with Teague.

5.7 Fairfield also has an implied duty of good faith and fair dealing in the IDA. See *City of Mesquite v. PKG Contracting*, 263 S.W.3d 444, 447 (Tex. App.— Dallas 2008). The waiver of immunity under Ch. 271 applies to any claims for breach of contract falling within provisions of statute, including claims based on implied duties. *Id.* at 447. Fairfield breached these duties of good faith and fair dealing in misusing and misappropriating special revenue funds, in failing to pay Teague amounts clearly owed under the agreements, and in failing to establish a segregated, separate bank account for same.

5.8 Pursuant to Chapter 271 of the Texas Local Government Code, Teague seeks actual damages, and injunctive relief against Fairfield based on this breach of contract. TEX. LOC. GOV'T CODE § 271.153(c). Pursuant to Section 271.153(a)(3) of the Texas Local Government Code, Teague is entitled to recover reasonable and necessary attorney's fees.

2. Proprietary Function

5.9 A municipality has no governmental immunity from suit when it engages in the exercise of proprietary functions. *Temple v. City of Houston*, 189 S.W.3d, 816, 819 (Tex. App.— Houston [1st Dist.] 2006, no pet.). Fairfield's duties under, and actions involving, the agreements, including public utilities, constitute a proprietary function. See TEX. CIV. PRAC. & REM. CODE §101.0215(b)(1); see also *Gates v. City of Dallas*, 704 S.W.2d 737, 739 (Tex. 1986).

3. Breach of Fiduciary Duty

5.10 Fairfield agreed to provide the day to day administrative oversight in providing water and sewer service to the Boyd Unit. The IDA further states that Fairfield shall prepare a proposed budget annually on October 31 and shall prepare and submit reports of financial activity to each City Council in a timely manner. In other words, Fairfield is an agent of Teague. Fairfield's city administrator, secretary, and finance director are also agents of Teague.

5.11 Agents owe a fiduciary duty to their principals. Fairfield, its city administrator, secretary, and finance director are agents of Teague under the IDA and therefore owe a fiduciary duty to Teague.

5.12 Additionally, the relationship between Fairfield and Teague created a special confidence between the two entities. The IDA states that "the utility services will require that the cities act in concert with each other." Because of the IDA, Teague allowed Fairfield to exercise control over its property, and the relationship involved a high degree of trust, influence or confidence.

5.13 Fairfield breached its fiduciary duty to Teague. Specifically, it breached the duty of loyalty and utmost good faith, the duty of candor, the duty to refrain from self-dealing, the duty to act with integrity, and the duty of full disclosure. As a result of this breach, Teague has been injured and/or Fairfield has benefitted from this breach.

4. Texas Open Meetings Act Violations

5.14 TOMA requires that "[e]very regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter." TEX. GOV'T CODE § 551.002. Section 551.041 of the Texas Government Code requires that a governmental body give written notice of the date, hour, place, and subject of each meeting held by the governmental body. Th

notice of a meeting of a governmental body must be posted in a place readily accessible to the general public at all times for at least 72-hours before the scheduled time of the meeting. TEX. GOV'T CODE § 551.043(a). Section 551.043(b) relates to posting notice on the Internet and requires a governmental body to post notice on the Internet if the governmental body maintains an Internet site. TEX. GOV'T CODE § 551.043(b). Furthermore, the notice must with specificity state what discussion or action the governmental body will undertake at the meeting. *River Rd. Neighborhood Ass'n v. S. Tex. Sports*, 720 S.W.2d 551, 557 (Tex. App.—San Antonio 1986, writ dismissed) (concluding that notice stating only “discussion” is insufficient to indicate board action is intended, given prior history of stating “discussion/action” in agenda when action is intended); *Mayes v. City of De Leon*, 922 S.W.2d 200, 203 (Tex. App.—Eastland 1996, writ denied) (determining that “personnel” was not sufficient notice of termination of police chief); *Stockdale*, 867 S.W.2d at 124–25 (holding that “discussion of personnel” and “proposed nonrenewal of teaching contract” provided sufficient notice of nonrenewal of band director’s contract); Tex. Att’y Gen. Op. No. H-1045 (1977) at 5 (holding “discussion of personnel changes” insufficient to describe selection of university system chancellor or university president).

5.15 An “action taken by a governmental body in violation of this chapter is voidable.” TEX. GOV'T CODE § 551.071. In *Esperanza Peace and Justice Center v. City of San Antonio*, the Court stated, “To hold otherwise would permit a governmental body convened in accordance with the Act to ‘rubber stamp’ deliberations and decisions already made in violation of the Act. It would also allow evisceration of the Act’s worthy goals of ensuring the public’s right to know what decisions government officials make and to have those officials articulate fully the basis on which they act.” 316 F.Supp. 2d 433, 478 (W.D. Tex. 2001).

5.16 Fairfield clearly intends to violate the Texas Open Meetings Act by holding a City Council retreat when Fairfield did not post the City Council meeting on Fairfield's Internet website at least 72-hours before the scheduled time of the meeting, the notice fails to give proper notice of the date of the meeting, and the notice fails to give proper notice of the subject matter of the September 18, 2018, sufficient to alert the general public of the topic(s) to be considered. These violations of the Texas Open Meetings Act constitute irreparable harm because there is no recourse to prevent the violations after they occur when the City Council meeting takes place on September 18, 2018, in accordance with the insufficient and improperly posted agenda notice.

5.17 Fairfield has a tendency to violate the Texas Open Meetings Act under § 551.041. On July 17, 2018, a quorum of Fairfield's City Council continued discussions at the conclusion of its workshop scheduled at 6:00 p.m. at Sam's Restaurant. Further, on August 14, 2018, Fairfield held a City Council Meeting at the City of Fairfield Municipal Building to discuss various personnel matters in executive session pursuant to Section 551.074 of the Texas Government Code. The Council Agenda specifically listed "Personnel Matters – Section 551.074 – Matters regarding the temporary promotion of Becky Boyd in absence of Albert Gallegos." Fairfield's City Council, after returning to Open Session, heard a motion made by Councilman Landis Bayless to take no action on the temporary promotion of Becky Boyd seconded by Councilman Keith Daniels. The motion carried 4-0. This motion was followed by another motion on an action item that was not listed on the agenda which was made by Councilman Keith Daniels to give Becky Boyd a pay rate increase. This motion was seconded by Councilman Landis Bayless. The motion carried 4-0. Finally, a third motion was made to make the pay rate increase effective on a certain date. The posted July 17, 2018 and August 14, 2018 agenda items did not properly authorize the City Council to act, and because fair notice was not given to the public, action taken by the Fairfield

City Council on July 17, 2018 and August 14, 2018 violate the Texas Open Meetings Act and are clear examples of Fairfield's disregard for transparency.

5. Request for Declaratory Relief

5.18 Pursuant to Section 37.004 of the Texas Civil Practice and Remedies Code, Teague requests declaratory relief. Teague is a political subdivision of the State that has an interest under a written contract and whose rights, status or other legal relations are affected by a statute, municipal ordinance, and contract and requires a determination of construction or validity arising under the agreements.

5.19 Teague seeks for the Court to declare Fairfield responsible for funds owed to Teague as per the agreements and to declare that Fairfield's September 18, 2018, agenda posting violates the Texas Open Meetings Act.

5.20 Pursuant to Section 37.009 of the Texas Civil Practice and Remedies Code, Teague requests reasonable and necessary attorney's fees.

6. Request for Injunctive Relief

5.21 Section 551.142 of the Texas Government Code provides that "[a]n interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body." Injunctive relief should be granted to prevent Fairfield from continuing to violate the Texas Open Meetings Act.

5.22 A violation of Texas Open Meetings Act constitutes irreparable injury for the purposes of injunctive relief and Teague seeks relief on this basis. *Matagorda County Hosp. Dist. v. City of Palacios*, 47 S.W.3d 96, 102 (Tex. App.—Corpus Christi 2001, no pet.). The Texas Open Meetings Act also expressly waives sovereign immunity for suit to be brought against a

governmental body to reverse a prior violation of the Act. *City of Austin v. Savetownlake.org*, No. 03-07-00410-CV, 2008 WL 3877683, *17 (Tex. App.—Austin 2008, no pet.) (mem. op.); *Gillum v. Santa Fe Indep. Sch. Dist.*, No. 01-10-00351-CV, 2011 WL 1938476, *19 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (concluding that trial court erred by dismissing open meetings case filed against school district because petition alleged open-meetings violation).

5.23 Pursuant to Texas Open Meetings Act § 151.142(a), Teague, as an interested party, requests an injunction to stop and prevent Fairfield from holding its City Council retreat. *City of Port Isabel v. Pinnell*, 161 S.W.3d 233, 238 (Tex. App.—Corpus Christi 2005, no pet.) (Town was an “interested party” under the Texas Open Meetings Act and thus had standing to sue City of Port Isabel pursuant to the Act when seeking declaration that city’s annexation of land within town’s extraterritorial jurisdiction was invalid).

5.24 Teague requests that the Court issue a temporary restraining order enjoining the City of Fairfield from convening its scheduled City Council meeting on September 18, 2018, and from deliberating, considering, or taking any action in conformity with its posted City Council agenda for September 18, 2018.

5.25 Teague has plead viable causes of action, has a probable right to relief, lacks an adequate remedy at law to prevent the improperly noticed Fairfield City Council meeting from occurring, and desires to maintain the status quo pending the outcome of this case. Fairfield will suffer no harm as a result of injunctive relief but will instead be simply forced to comply with the rule of law. Teague further requests, upon notice and hearing, the issuance of a temporary injunction and a permanent injunction preventing Fairfield from continuing to violate the Texas Open Meetings Act.

5.26 Furthermore, pursuant to § 151.142(b) of the Texas Government Code, Teague requests costs of litigation and reasonable attorney's fees.

5.27 Teague is a municipality and is not required to post a bond to obtain injunctive relief.

VI. PRAYER

WHEREFORE, plaintiff City of Teague prays for the following relief against the defendant City of Fairfield:

1. Plaintiff be granted a temporary restraining order that defendant City of Fairfield, Texas, be enjoined from convening its scheduled City Council meeting on September 18, 2018, and from deliberating, considering, or taking any action in conformity with its posted City Council agenda for September 18, 2018.
2. Plaintiff be granted temporary and permanent injunctive relief as requested herein;
3. Plaintiff be granted judgment for actual and consequential damages;
4. Plaintiff be granted declaratory relief as requested herein;
5. Plaintiff be awarded its reasonable and necessary attorney's fees;
6. Plaintiff be granted a judgment for prejudgment interest as provided by law;
7. Plaintiff be granted a judgment for post judgment interest as provided by law;
8. Plaintiff be granted a judgment for all costs of suit; and
9. Plaintiff be granted such other and further relief, both general and special, at law or in equity, to which it may show itself to be justly entitled.