

Office of the City Attorney

January 23, 2017

Mayor

Oscar Leeser

City Council

District 1

Peter Svarzbein

District 2

Larry Romero

District 3

Emma Acosta

District 4

Carl L. Robinson

District 5

Dr. Michiel R. Noe

District 6

Claudia Ordaz

District 7

Lily Limón

District 8

Cortney C. Niland

City Manager

Tommy Gonzalez

Mr. David Aviles
601 S. Mesa Hills, Apt. 1537
El Paso, Texas 79912

Via Certified Mail
Return Receipt Requested
7015 3430 0000 2100 0224

RE: Ethics Complaint Filed December 20, 2016 – Mayor Oscar Leeser, Representative Peter Svarzbein, Representative Jim Tolbert, Representative Niland and Representative Lily Limón

Dear Mr. Aviles:

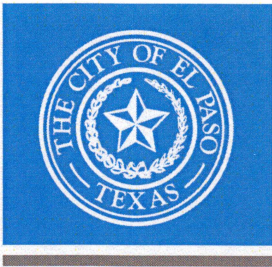
I am in receipt of the ethics complaint you filed on December 20, 2016. The City of El Paso Ethics Ordinance is very precise in the manner in which complaints are to be filed, and only those complaints which strictly comply with the Ethics Ordinance are forwarded to the Ethics Review Commission for consideration. Pursuant to Section 2.92.080(G) of the El Paso Municipal Code, the initial review of complaints is my responsibility. Within 20 business days of receipt of a complaint I am obligated to:

1. Refer the matter to the Ethics Review Commission if the complaint is filed in conformity with the requirements of Chapter 2.92 of the El Paso Municipal Code and the matter is within the purview of the ethics review commission;
2. In the event that deficiencies in the complaint are identified that prevent the City Attorney's Office from making a meaningful review of and determination regarding the appropriate disposition of the complaint, the city attorney's office may notify the complainant in writing of such deficiencies that could be capable of correction and request such correction within fifteen days of the date of the communication to the complainant. The time for action under this section shall be tolled while the city attorney's office awaits the complainant's response, up to a maximum of fifteen days;

Sylvia Borunda Firth – City Attorney

P.O. Box 1890/ El Paso, Texas 79950-1890 /915-212-0033 /Facsimile: 915-212-0034/ www.elpasotexas.gov
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3. Dismiss any complaint that does not relate to a person subject to the jurisdiction of the ethics review commission, or any complaint, that if true as alleged, would not as a matter of law constitute a violation of Chapter 2.92 of the El Paso Municipal Code; or
4. Refer complaints that cannot be readily assigned to the ethics review commission because of deficiencies, complaints that lack specificity in identifying the alleged violations of Chapter 2.92 of the El Paso Municipal Code, and complaints that appear to have been frivolously filed to a panel of the ethics review commission.

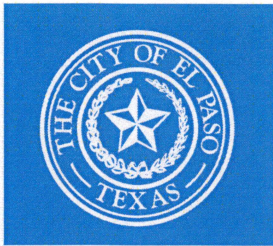
I have reviewed your complaint to determine which of the actions is appropriate. Section 2.92.080(C) requires the complaint to be in writing and under oath and must set forth in simple concise and direct statements:

<u>Requirement</u>	<u>Compliance</u>
1. The name of the complainant;	✓
2. The street or mailing address and the telephone number of the complainant;	✓
3. The name of each person complained about;	✓
4. The position or title of each person complained about;	✓
5. The nature of the alleged violation, including whenever possible, the specific provision of this chapter alleged to have been violated ;	No
6. A statement of the facts constituting the alleged violation and the dates on which or period of time in which the alleged violation occurred; and	✓
7. All documents or other material available to the complainant that are relevant to the allegation; a list of all documents or other material relevant to the allegation and available to the complainant but that are not in the possession of the complainant, including the location of the documents, if known; and a list of all documents or other material relevant to the allegation but unavailable to the complainant, including the location of the documents, if known.	✓

You have failed to identify a specific section of the ethics ordinance you believe has been violated. While that deficiency might be easily remedied, I note that your allegation is not grounded in the ethic ordinance but rather a violation of a Texas statute; the Texas Open Meetings Act.

Sylvia Borunda Firth – City Attorney

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You have alleged Mayor Oscar Leeser and Representatives Svarzbein, Tolbert, Limón and Niland have violated Chapter 551 of the Texas Government Code (the Open Meetings Act). The Ethics Review Commission does not have jurisdiction or authority to make a determination regarding violations of the Texas Open Meetings Act. District Courts have jurisdiction over criminal violations of the Texas Open Meetings Act as misdemeanors involving official misconduct and complaints should be presented to the County Attorney or the District Attorney.

With this letter I am sending you an excerpt from the Texas Attorney General Open Meetings Handbook in support of this position. If you would like to see the entire handbook, it is available at:

https://texasattorneygeneral.gov/files/og/OMA_handbook_2016.pdf.

If you believe a violation of the Texas Open Meetings Act has occurred, I recommend you file a complaint with the District Attorney or County Attorney.

The Ethics Review Commission's authority is limited to alleged violations of Chapter 2.92 of the El Paso Municipal Code. Your complaint fails to state a violation of Chapter 2.92 of the El Paso Municipal Code. Consequently, I am dismissing this complaint in accordance with Section 2.92.080(G)(3) of the El Paso City Code.

Sincerely,

A handwritten signature in black ink that reads "Sylvia Borunda Firth".

Sylvia Borunda Firth
City Attorney

Enclosure

cc: Mayor and City Council
El Paso Ethics Review Commission

Sylvia Borunda Firth – City Attorney

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XI. Penalties and Remedies

A. Introduction

The Act provides civil remedies and criminal penalties for violations of its provisions. District courts have original jurisdiction over criminal violations of the Act as misdemeanors involving official misconduct.³⁸⁶ The Act does not authorize the attorney general to enforce its provisions. However, a district attorney, criminal district attorney or county attorney may request the attorney general's assistance in prosecuting a criminal case, including one under the Act.³⁸⁷

B. Mandamus, Injunction or Declaratory Judgment

Section 551.142 of the Act provides as follows:

- (a) An 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.
- (b) The court may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or defendant who substantially prevails in an action under Subsection (a). In exercising its discretion, the court shall consider whether the action was brought in good faith and whether the conduct of the governmental body had a reasonable basis in law.³⁸⁸

Texas courts examining this provision have said that “[t]he Open Meetings Act expressly waives sovereign immunity for violations of the [A]ct.”³⁸⁹ The four-year limitations period in section 16.051 of the Civil Practices and Remedies Code applies to an action under this provision.³⁹⁰

Generally, a writ of mandamus would be issued by a court to require a public official or other person to perform duties imposed on him or her by law. A mandamus ordinarily commands a person or entity to act, while an injunction restrains action.³⁹¹ The Act does not automatically confer jurisdiction on the county court, but where the plaintiff's money demand brings the amount in controversy within the court's monetary limits, the county court has authority to issue injunctive and mandamus relief.³⁹² Absent such a pleading, jurisdiction in original mandamus and original injunction proceedings lies in the district court.³⁹³

³⁸⁶ See *State v. Williams*, 780 S.W.2d 891, 892–93 (Tex. App.—San Antonio 1989, no writ).

³⁸⁷ See TEX. GOV'T CODE ANN. § 402.028(a).

³⁸⁸ *Id.* § 551.142.

³⁸⁹ *Hays Cnty. v. Hays Cnty. Water Planning P'ship*, 69 S.W.3d 253, 257 (Tex. App.—Austin 2002, no pet.); see *Riley v. Comm'rs Court*, 413 S.W.3d 774, 776–77 (Tex. App.—Austin 2013, pet. denied).

³⁹⁰ *Rivera v. City of Laredo*, 948 S.W.2d 787, 793 (Tex. App.—San Antonio 1997, writ denied).

³⁹¹ *Boston v. Garrison*, 256 S.W.2d 67, 69 (Tex. 1953).

³⁹² *Martin v. Victoria Indep. Sch. Dist.*, 972 S.W.2d 815, 818 (Tex. App.—Corpus Christi 1998, pet. denied).

³⁹³ *Id.*