Texas Open Meetings Act

"UNCONSTITUTIONAL?"

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I. Introduction

Advising city officials about what behavior violates the Texas Open Meetings Act (Act) is almost comical. Let me clarify that statement. I have been a student of the Act for more than nine years. I have read every single court opinion interpreting the Act, I have read every attorney general opinion interpreting the Act, I have read dozens of papers and articles interpreting the Act, and I have analyzed and drafted legislation amending the Act.

So what's the problem? Well, with all that being said, I still can't answer in a satisfactory way the most common legal question I receive from elected officials:

"*Can I talk about public business with other members of my governmental body outside of a properly posted meeting?*"

The answer that I have to give, being a conservative lawyer who doesn't want elected officials sent to jail based on my advice:

"No."

Some lawyers disagree with that answer, but I give it knowing that, although it has been rare, elected officials have been indicted for doing so. I'm not talking about intentionally-planned, secret meetings to make decisions outside of the public view. What I'm talking about is elected officials communicating with one another to learn about an issue or to discuss whether an issue warrants consideration by the entire governmental body.

Of course, the answer to the question is more than just "no." It requires a long, drawn-out explanation. I don't think the answer that I provide to an elected official, who is trying his or her best to serve the community, should require a one-hour telephone conversation or a 3,000-word article that ultimately yields no useful guidance.

The following is an abbreviated look at the law on the issue, including a discussion of the recent lawsuit originally styled *Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas, Plaintiffs v. Frank D. Brown, 83rd Judicial District Attorney, Greg Abbott, Texas Attorney General, and the State of Texas, Defendants* (the "Alpine case"). The Alpine case sought to overturn the criminal closed meeting provision of the Act by showing that the provision unconstitutionally infringes upon elected officials' right to freedom of speech. The case was dismissed in September of 2009, but is likely to be re-filed by new plaintiffs later this year.

II. The State Law Problem

According to the Act and the Texas attorney general's office:

> *The Act generally applies when a quorum of a governmental body is present and discusses public business.*

In other words, any gathering of members of a governmental body (such as a city council) is subject to the requirements of the Act (including a 72-hour notice, an agenda, and minutes or a tape recording) if the following two elements are met: (1) a quorum is present; and (2) public business is discussed. The Act actually has two definitions of a meeting. Sections 551.001(4)(A) and (B) of the Texas Government Code are the statutory provisions that define whether a gathering of members of a governmental body constitutes a meeting. If the facts of a particular situation fall under *either* of the definitions, the requirements of the Act will apply.

A regular, special, or called meeting or hearing in which discussion or formal action will be taken will always be considered a "meeting." For other gatherings to be considered a meeting under Section 551.001(4)(A), the following elements must be satisfied:

1. a **quorum** of the governmental body must be present;
2. a **deliberation** (verbal exchange) must take place;
3. the deliberation must be between **members of the governing body** or a **member of the governing body and *any other person;*** and
4. the governmental body must have **supervision or control over the topic being deliberated.**

An additional definition of a meeting, Section 551.001(4)(B), was added in 1999 to eliminate the "staff-briefing exception," which allowed a governmental body to receive information (usually a staff report) from a third person without posting the meeting. The elements necessary to establish a gathering as a meeting under Section 551.001(4)(B) are:

1. a **quorum** of the governmental body must be present;
2. the governmental body **calls** the gathering;
3. the governmental body is **responsible for** or **conducts** the gathering;
4. members of the governmental body ***receive information from*, give information to, ask questions of, or receive questions from *any third person***; and
5. the information concerns **public business** or **policy** over which the governmental body has **supervision** or **control.**

A gathering that meets the above elements and is not posted and open to the public can be a crime under Government Code Section 551.144. Notwithstanding the above, the "two-element" test is the clearest way to explain when the Act applies. It seems simple enough, but even a simple test can be deceptive.

Why? One reason is that the Act has been interpreted to apply to situations in which members of a governmental body are not in each other's physical presence. For example, e-mail communications, telephone calls, and written correspondence that ultimately involve a quorum may constitute a meeting, even if the quorum is not physically present in the same location and the discussion does not take place at the same moment in time. Surely the Act is not intended to hamper the ability of individual elected officials to discuss and learn about issues? City councilmembers should be free to consult among themselves in a candid and unrestrained

manner to resolve issues. "Limiting board members' ability to discuss…issues with one another outside of formal meetings would seriously impede the board's ability to function." *Hispanic Educ. Comm. v. Houston Ind. Sch. Dist*., 886 F.Supp. 606, 610 (S.D. Tex. 1994). Casual discussions among city councilmembers do not normally amount to any systematic attempt to avoid the purposes of the Act. However, city attorneys remain cautious in their advice because prosecutors have substantial disagreement on interpretation.

A sampling of court cases and attorney general opinions shows the problem with advising anything other than "no conversations outside of formal meetings." *Harris County Emergency Service Dist. #1 v. Harris County Emergency Corps*, 999 S.W.2d 163 (Tex. App – Houston [14th Dist.] 1999, no writ) is a case that seems to indicate that the Act is not violated by using the telephone to discuss agendas for future meetings. The record in that case showed "that the board members discussed only what they needed to put on the agenda for future meetings" and that there was "no evidence that the district members were attempting to circumvent the [Act] by conducting telephone polls with each other." *Harris County*, 999 S.W.2d at 169.

Prior to the decision in *Harris County*, however, the attorney general's office had stated that "agenda preparation procedures may not involve deliberations among a quorum of members of a governmental body except in a public meeting for which notice has been posted." Op. Tex. Att'y Gen. No. DM-473 (1998) at 3. That opinion dealt with a City of Dallas policy that requires five of fifteen councilmembers to agree to place an item on an agenda. After the *Harris County* case, and in spite of DM-473, it was relatively safe to advise city officials that discussions about whether or not to place an item on a future agenda are clearly permissible. But a 2009 attorney general opinion cites DM-473 with approval. That opinion, which once again calls into question any discussions outside of meeting, states that: "As was the case with agenda preparation, the procedures for calling a special meeting under the charter provision may not involve deliberations among a quorum of the city council outside of a public meeting for which notice has been posted." Op. Tex. Att'y Gen. No. GA-717 (2009) at 3.

It appears that, according to the attorney general, brief discussions between councilmembers for the purposes of deciding what to put on an agenda or whether to have a meeting may violate the Act. *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. – San Antonio 1985, no writ) is a case that is often cited in attorney general opinions on the subject. The case held that school board trustees violated the Act by telephone conferencing. In *Mabry*, the trustees visited on the telephone and agreed to mail out a letter to all parents residing in the district advising recipients of their voting rights and stating that the message was a service of the board of trustees. The court upheld an injunction that prohibited the board from conducting informal meetings or telephone conferences to discuss or decide matters of public policy. That is an entirely different scenario than a casual conversation.

According to the attorney general's interpretation of *Mabry*, "[it] appears that the physical presence of a quorum in a single place at the same time is not always necessary for a violation…to occur. Avoiding the technical definition of 'meeting' or 'deliberation' is not, therefore, a foolproof insulator from the effect of the act." Op. Tex. Att'y Gen. No. DM-95 at 2 (1992). According to the attorney general, "[i]f a quorum of a governmental body agrees on a joint statement on a matter of such business or policy, the deliberation by which that agreement

is reached is subject to the requirements of the act, and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time." Therein lies the danger in advising elected officials. If they speak to one another outside of a meeting, whether to simply share information or to decide whether to place an item on a future agenda, and then take action in the future on the topic they discussed, a prosecutor might infer that a meeting of the minds occurred prior to the meeting. That prosecutor may decide to prosecute, and councilmembers could face criminal penalties, including jail time. While an official may not have actually violated the Act, he or she must still bear the publicity and hire an attorney, resulting in considerable inconvenience to say the least.

An additional problem arises under Opinion No. GA-326 (2005). That opinion coined the term "walking quorum." The term seems to indicate, assuming that a city council's quorum is three, that: If councilmember A deliberates with councilmember B, then councilmember B deliberates with councilmember C, and finally councilmember C deliberates with councilmember A, a quorum was formed. GA-326 actually dealt with the criminal conspiracy provision of the Act (Government Code Section 551.143), under which discussions among less that a quorum can be a crime. Even so, the reference to the term "walking quorum" blurs the line between discussions that clearly involve a quorum, and those that involve less than a quorum.

That's why most city attorneys reluctantly stick to the "no discussions with other members outside of a meeting" answer. And that leads councilmembers to "self-censor" their speech, which is contrary to their First Amendment right. No one would argue that councilmembers should be allowed to come to a "meeting of the minds" on the issues outside of a properly posted meeting, but it should be acceptable for them to have a conversation without the threat of jail time.

III. The Alpine Case

A. The Facts

The facts in the Alpine case are simple. A city councilmember in a West Texas town sent an e-mail to four other councilmembers asking if they felt that a particular item should be placed on a future agenda.[1] The following day, one of the four councilmembers responded to the first e-mail, stating that she agreed that the item was relevant and should be discussed.[2] According to the

[1] *Avinash, Manuel ... Anna just called and we are both in agreement we need a special meeting at 6:00 pm Monday ... so you or I need to call the mayor to schedule it (mainly you, she does'nt* [sic] *like me right now I'm Keri's MOM).. we both feel Mr. Tom Brown was the most impressive..no need for interviewing another engineer at this time ... have him prepare the postphonment* [sic] *of the 4.8 million, get us his firms* [sic] *review and implementations for the CURE for South Alpine....borrow the money locally and get it fixed NOW....then if they show good faith and do the job allow them to sell us their bill of goods for water corrections for the entire city.....at a later date..and use the 0% amounts to repay the locally borrowed money and fix the parts that don't meet TECQ* [sic] *standards....We don't have to marry them ... with a life long contract, lets* [sic] *just get engaged! Let us hear from you both. KT*

[2] *Hello Katie....I just talked with John Voller of Hibb and Todds of Abilene ... and invited him to come to the Monday meeting.... I asked him to bring his money man also.... these guys work for Sul Ross ... He said ... he will be at meeting Monday....I'll talk with Tom Brown also after my 8:00 class ... Thanks for the advice..... and I'll talk with*

Brewster County district attorney, that exchange violated the Act. As a result, two of the councilmembers involved in the exchange were criminally indicted by a grand jury. The indictments were ultimately dismissed "without prejudice," but the prosecution led to a federal lawsuit challenging the constitutionality of the Act.

The councilmembers did not discuss the merits of the issue outside of a properly posted meeting. According to the appellate court decisions mentioned above, an exchange between councilmembers for the purpose of deciding if an item should be placed on a future agenda is not a violation of the Act. But the councilmembers were indicted by their district attorney anyway. The charges were ultimately dismissed without prejudice, but the two councilmembers sued the district attorney and the State of Texas. *Rangra v. Brown*, 2006 WL 3327634 (W.D. Tex., November 07, 2006). The suit was based on the fact that some discussions clearly violate the Act, whereas others do not. There is a gray area in the middle of that continuum that has a chilling effect on a councilmember's freedom of speech. Because councilmembers do not know specifically what they can and can't talk about, they are afraid to talk about anything. And that scenario is exactly what the First Amendment to the United States Constitution was meant to protect.

B. The District Court Ruling

> *Congress shall make no law…abridging the freedom of speech…*
>
> -First Amendment, U.S. Constitution
>
> *Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.*
>
> -Article I, Section 8, Texas Constitution

On November 7, 2006, the judge in the case issued his ruling. The following quote sums up the holding of the case:

> *"Because the speech at issue is uttered entirely in the speaker's capacity as a member of a collective decision-making body, and thus is the kind of communication in which he or she is required to engage as part of his or her official duties, it is not protected by the First Amendment from the restrictions imposed by the Texas Open Meetings Act."*

In other words, the district court concluded that when a person is elected to public office, his constitutional rights vanish. *See also, Hays County Water Planning P'ship v. Hays County, Texas*, 41 S.W.3d 171, 181-82 (Tex. App. – Austin 2001, no pet.) (holding that the requirement

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Mickey as per your, Anna, and Manuel directions ... and arrange the meeting on Monday....We must reach some sort of decision SOOOOOOOOOOOOON. Avinash

that an elected official comply with the Open Meetings Act does not abridge his right to freedom of speech).

It should be noted that neither the Texas Municipal League (TML) nor its member city officials believes that elected officials should be able to make substantive decisions in private. However, alleging that the e-mails sent between the Alpine city councilmembers substantively did so is a stretch. They simply discussed *whether or not an item should be placed on an agenda*. That discussion shouldn't violate the Act under *Harris County* and other judicial precedent. As a practical matter, most would agree that such a discussion shouldn't subject an elected official to jail time.

The judge's decision cites a Kansas Supreme Court opinion upholding the constitutionality of that state's open meetings laws. In the Kansas case, actual secret meetings were prearranged, planned, and carried out for the purpose of deliberations and decisions that were not open to the public. Those are not the same facts as those in the Alpine case. The Texas attorney general issued a press release following the decision that states the following:

> *"Public officials who seek ways to skirt the law governing public meetings, while asserting their right to 'free speech,' are not acting in the spirit of democracy and we must never tolerate these acts in a free country."*

A November 13, 2006, editorial in the *Austin American-Statesman* opined that:

> *"[The court's decision] might discourage other elected officials who chafe at doing the people's business in the sunshine from filing frivolous lawsuits."*

Neither statement has anything to do with what the Alpine councilmembers did. To read the press release and editorial, you'd suspect that the councilmembers were "chafing" evildoers who were sneaking around to make decisions outside of the public view. That's simply not the case. One simply asked the others if they would like to discuss the hiring of an engineer in a public meeting. The Kansas Open Meetings Act does not contain criminal penalties, only the possibility of a civil fine of no more than $500. In fact, most state's open meetings laws do not provide for criminal penalties. In Texas, however, a councilmember who asks other councilmembers whether an item should be placed on a future agenda could be sent to jail for up to six months.

Thus, most city attorneys advise city councilmembers not to talk about items of public business with each other outside of a properly posted meeting, period. Many city officials believe that it is essentially impossible to run a city that way. Beyond that advice, there is a continuum of behavior to consider, with criminal prosecution for innocent (and arguably lawful) discussions being a real possibility. The cases and attorney general opinions that interpret the Act suggest several logistical problems about which city attorneys must caution elected officials:

1. A member of a governmental body should not for any reason or in any context discuss with another member matters over which the body has supervision or control outside of a properly posted open meeting.

2. While modern conveniences such as the telephone and e-mail should be used to facilitate the exchange of information, these tools should be used cautiously when dealing with public business.
3. A member of a governmental body should avoid discussing public business with less than a quorum of the body outside of a properly posted meeting.
4. Elected officials should inquire of their local prosecutor as to his or her interpretation of the Act. The local district or county attorney's interpretation of the Act may be the key factor.

The district court relied on the recent U.S. Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) for the proposition that government can restrict elected officials' speech in the same way as it can restrict public employees' speech. *Garcetti* dealt with a public employee – an assistant district attorney – who alleged that his firing for writing a controversial memo violated the First Amendment. The Court disagreed, and held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. In *Garcetti*, the district attorney did not speak as a citizen when he wrote his memo. Thus, his speech was not protected by the First Amendment.

The holding in *Garcetti* was based on the "*Pickering/Connick*" precedent. According to that precedent, two inquiries guide interpretation of the constitutional protections accorded to public employee speech. The first is whether the employee spoke as a citizen on a matter of public concern. *See Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). If the answer is no, the employee has no First Amendment protection. *See Connick v. Myers*, 461 U.S. 138, 147 (1983).

If the answer is yes, the possibility of a First Amendment claim arises. The question then becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public. *See Pickering*, 391 U.S. at 568. This consideration reflects the importance of the relationship between the speaker's expressions and employment. Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. Thus, a governmental entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations. On the other hand, a citizen who works for the government is still a citizen. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. *See, e.g., Connick* , 461 U.S. at 147.

The district court ruling in the Alpine case was appealed to the U.S. Court of Appeals for the Fifth Circuit, and that appeal is discussed below. Essentially, a panel of the Fifth Circuit concluded that the cases relating to restrictions on employee speech don't apply to the speech of elected officials.

C. The Fifth Circuit Panel Decision

> *Indeed, the Supreme Court's decisions demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general. Further, the [U.S. Supreme] Court reaffirmed that "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance."*

On April 24, 2009, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit released its long-awaited opinion in the lawsuit. *Rangra v. Brown*, 566 F.3d 515, C.A.5 (Tex.), April 24, 2009. The panel held that district court incorrectly applied the "*Pickering/Connick*" employee speech precedent to the case.

The district court concluded that, under *Garcetti*, the First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee's official duties. *See Garcetti*, 547 U.S. at 421. The district court also assumed that there is no meaningful distinction between the speech of elected officials and that of public employees and held that, under *Garcetti*, the plaintiffs' speech pursuant to their official duties was not protected by the First Amendment.

The panel disagreed, and opined that "[w]e agree with the plaintiffs that the criminal provisions of [the Texas Open Meetings Act] TOMA are content-based regulations of speech that require the state to satisfy the strict scrutiny test in order to uphold them." *Id*. at 521. Section 551.144 of the Act, which criminalizes the discussion of public matters by a quorum of public officials when outside of an open meeting, is "content-based" because whether a quorum of public officials may communicate with each other outside of an open meeting depends on whether the content of their speech refers to "public business or public policy over which the governmental body has supervision or control." *Id*. at 522.

When a state seeks to restrict the speech of an elected official on the basis of its content, a court must apply "strict scrutiny" review, which: (1) shifts the burden of proof to the government; (2) requires the government to prove that its action or regulation pursues a compelling state interest; and (3) demands that the government prove that its action or regulation is "narrowly tailored" to further that compelling interest. *Id*. at 520-521. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *See, e.g., Pickering,* 391 U.S. at 568. When the state acts as a sovereign, rather than as an employer, its power to limit First Amendment freedoms is much more limited. That is because a state's interest in regulating speech as sovereign is "relatively subordinate ... [as] [t]he government cannot restrict the speech of the public at large just in the name of efficiency." *Rangra,* 566 F.3d 523. None of the Supreme Court's public employee speech decisions qualifies or limits the First Amendment's protection of elected government officials' speech. *Id*.

For example, the Fifth Circuit, in *Jenevein v. Willing,* 493 F.3d 551 (5th Cir. 2007), applied the strict scrutiny test to determine whether a state judiciary commission's order censuring an elected judge's speech on the basis of its content violated his First Amendment speech rights. *See Jenevein,* 493 F.3d at 557-58 (Citing *Republican Party of Minnesota v. White,* 536 U.S. 765,

774-75 (2002)). The censure order, which disciplined the judge for holding a press conference in which he addressed alleged abuses of the judicial process by lawyers in a pending case, shut down all communication between the elected judge and his constituents. *See id.* at 556-58. Applying the strict scrutiny test, the court held that the censure order, in substantial part, was an unconstitutional, content-based restriction of the elected official's speech because the state had failed to prove that it was narrowly tailored to further a compelling state interest. *See Jenevein*, 493 F.3d at 559-60. The Supreme Court has applied the content-based strict scrutiny test in service of the "practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). The application of strict scrutiny in *Jenevein* and the Alpine case fits squarely within the long-held principles of First Amendment jurisprudence.

The panel ultimately reversed the district court's judgment and remanded the case for the application of the strict scrutiny formula. That action is significant because strict scrutiny presents a very high hurdle for the government to overcome. Essentially, the state would now have to prove that the criminal provision of the Act is *not* unconstitutional.

D. The *En Banc* Dismissal

Shortly after the opinion was issued, both parties filed for a rehearing by the court *en banc*. An *en banc* rehearing is one that is conducted by all of the Fifth Circuit's seventeen judges. The State of Texas argued that the panel's decision should be overturned. The plaintiffs argued that no additional trial proceedings are necessary, and that the court should simply declare the criminal provision of the Act unconstitutional. TML, along with the Texas City Attorneys Association, the Illinois Municipal League, the South Dakota Municipal League, the National League of Cities, and the International Municipal Lawyers Association, filed an amicus brief in the case in support of the plaintiff's position.

The court granted the motions, and was set to hear oral arguments this month. But in a surprise move, the court dismissed the case on September 10 by a 16-1 decision without the benefit of hearing oral arguments.

The case was dismissed due to a lack of "standing." The plaintiff is no longer a city official (he was term-limited as a councilmember), and the court in a one-sentence order deemed the case moot. *Rangra v. Brown*, 2009 WL 3030770 (C.A.5 Tex., September 10, 2009). Standing is a prerequisite to bringing suit, and the doctrine generally requires a "live controversy." However, in the case of a statute like the Act, the law allows a case to proceed if there is a "credible threat of present of future prosecution" or if the case is "capable of repetition but evading review." Because the criminal statute of limitations under the Act is two years, the plaintiff could still be prosecuted even though no longer in office. In addition, thousands of elected and appointed officials are still subject to criminal prosecution under the Act.

The lone dissenting justice wrote a scathing rebuke in which he lambasted the other members of the court for essentially taking the easy way out. According to him:

> *Because the plaintiff has once been indicted and prosecuted for an alleged violation of the Texas Open Meetings Act and could be so prosecuted again, the plaintiff has standing to challenge the statute and the case is not moot. Alternatively, although it is not necessary to consider any exception to the mootness doctrine, because this case presents a live, extant controversy, this case also fits within several of the exceptions. For instance, this controversy is excepted from the mootness doctrine as presenting a 'wrong capable of repetition yet evading review.' To come within this exception, Rangra is only required to show that '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.' As the Supreme Court put it, Rangra did not have to "bet the farm," on his right to use his email to communicate with other members of the city council for the purpose of scheduling a routine business meeting; instead, he took the action that the Supreme Court has approved and encouraged citizens to take when they are threatened by criminal prosecutions they believe to be unlawful. He filed a declaratory judgment action challenging the constitutionality of the criminal statute as an infringement on the First Amendment.*

Id. at 2-4.

IV. Conclusion

The decisive dismissal vote, along with other indications from the court, seems to indicate that further appeals of the original case may be futile. Because of that, several city officials may file an entirely new lawsuit based on the same legal principles as the Alpine case at the federal district court level. If you are an official who is subject to the Act, and are interested in being a plaintiff in that case, please contact Rod Ponton, Alpine's city attorney, at rod_ponton@yahoo.com.

Neither the Texas Municipal League nor its member city officials are opposed to open government, nor do they favor "backdoor deals in smoke-filled rooms." To say so would be patently absurd. What city officials would like is the opportunity to serve their cities without the constant threat of jail time for doing so. They need a less restrictive method by which open government is made possible.

In the past, Texas lawmakers have considered legislation that attempted to give elected officials the flexibility to learn about issues and decide whether or not issues merit discussion at a meeting. For example, H.B. 305 (2005) would have clarified that members of a governmental body do not commit a crime if they meet in numbers less that a quorum, so long as the discussion is limited to: (1) the exchanging of information about public business among the members present; (2) the receiving of information by the members present from an officer or employee of the governmental body about public business; or (3) the giving of information by the members present to an officer or employee of the governmental body about public business. The bill would also have required that the members present: (1) take no action; and (2) do not privately

discuss the information with any other member of the governmental body before the information is discussed with a quorum of the governmental body in an open meeting. H.B. 305 never made it out of committee, and similar legislation would probably meet the same fate unless the courts force the issue.