

# ***DOES TOMA ALLOW A “TOWN HALL” MEETING?***



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## **Table of Contents**

What is a “Town Hall” Meeting in Texas?.....	2
How Does TOMA Define a Meeting? .....	2
Specificity of Agenda Notices? .....	4
Is it Possible to Provide Proper Notice of a Town Hall Meeting?.....	6
Surely There’s a Better Way? .....	7
What’s the Harm?.....	9

## **What is a “Town Hall” Meeting in Texas?**

The term “town hall meeting” technically refers to a governance practice in New England. According to the author of a book on the subject in response to the question of “what a town meeting is like and how it functions:”

A town meeting is a legislature of citizens, for citizens, and by citizens. The fact that each citizen of the town is also a legislator separates the New England town meeting from all other forms of democracy. This difference is huge. Town meeting democracy is not representative democracy. Representation was conceived as a natural substitute for real democracy—an effective way to insure some popular control over distant governments in large nations. Town meeting democracy is like the democracy of ancient Athens. In town meetings like the ones I study in Vermont, citizens come together and make laws face-to-face. Budgets are adjusted, passed, or defeated. Officers are elected. Town property is bought or sold. Taxes are levied. This is done legislatively under rules of procedure designed to protect minorities and to insure that the process is orderly and predictable. *In recent years the national media has cast the town meeting as simply a public meeting or a candidate’s forum attended by citizens.* Nothing could be further from the truth.

*An interview with Frank M. Bryan, author of Real Democracy: The New England Town Meeting and How It Works (<http://www.press.uchicago.edu/Misc/Chicago/077977in.html>)* (emphasis added). Of course, for purposes of a Texas-centric discussion, the italicized portion best describes a town hall meeting here. According to Wikipedia:

A town hall meeting is an American term given to an informal public meeting, function, or event derived from the traditional town meetings of New England. Typically open to everybody in a town community and held at the local municipal building, attendees generally may voice their opinions and ask questions of the public figures, elected officials, or political candidates at the town hall. Attendees rarely vote on an issue or propose an alternative to a situation.

([http://en.wikipedia.org/wiki/Town\\_hall\\_meeting](http://en.wikipedia.org/wiki/Town_hall_meeting)). For purposes of this paper’s discussion, the term means a gathering of a quorum of a city council where citizens are invited to a city or other facility to share their concerns with, and ask questions of, the city council and city staff. That definition leads to a number of questions about compliance with the Texas Open Meetings Act, most notably how the notice on the agenda reads.

## **How Does TOMA Define a Meeting?**

For purposes of Texas law, Sections 551.001(4)(A) and (B) of the Texas Government Code are the statutory provisions of the Open Meetings Act that define whether a gathering of members of a governmental body constitutes a “meeting” for legal purposes. If the facts of a particular situation fall under *either* of the definitions, the requirements of the Act will apply, including seventy-two hours notice, a posted agenda with sufficient notice, and meeting minutes.

For a town hall meeting 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*.

Under the definition above, a city council could conduct a town meeting to only listen to citizens that would not be a “meeting” under the Open Meetings Act and would thus not have to be posted as such. That’s because, if neither the mayor nor any councilmember speaks, element three is not satisfied.

The same is not true under the additional definition of a meeting, Section 551.001(4)(B), which was added in 1999 to eliminate the “staff-briefing exception.” The staff briefing exception included a quirk in the first definition that allowed a governmental body to receive information (usually a staff report) from a third person without posting the meeting. Again, that was possible because, if neither the mayor nor any councilmember speaks, element three is not satisfied.

The elements necessary to establish a gathering as a meeting under the additional definition in 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*.

Under the additional definition, it makes no difference whether the mayor or council speaks. If a quorum is present at a town hall meeting, and the citizens are speaking on matters of city business, that alone is enough to make the gathering a “meeting” under the Open Meetings Act.

Thus, whether members of the city council simply listen or answer questions, a town hall meeting will always be a “meeting” under the Open Meetings Act. A meeting has to have a properly-posted agenda that includes a sufficient description of the topics to be discussed. That leads to the core issue in this paper: Are there ways to post a town hall meeting agenda, with sufficient notice to allow discussion of issues that arise, that complies with the Open Meetings Act?

## Specificity of Agenda Notices?

The Open Meetings Act does not expressly state how specific the notice on an agenda must be. It merely states in Section 551.041 that a “governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body.” However, court cases and attorney general opinions issued over the years have provided guidance as to the required degree of specificity under the Act.

In opinion GA-0668 (2008), the attorney general concluded that agenda postings such as “City Manager’s Report,” “Mayor’s Update,” or “Council and Other Reports” provide insufficient notice to the public. The conclusion in GA-0668 was not new. It is based on court cases from as far back as 1975. In fact, the Texas Supreme Court expressly concluded more than 20 years ago that one-word or two-word agenda postings are insufficient. GA-0668 is actually a well-drafted restatement of previous court decisions. The following is a brief summary of two of those cases:

- *Cox Enter., Inc. v. Bd. of Trs. of Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 958-59 (Tex. 1986). In this case, the *Austin American-Statesman* sued the Austin Independent School District. The paper claimed that the district – by posting an agenda listing only general terms such as “personnel,” “litigation,” and “real estate matters” – failed to give adequate notice of its executive sessions.

The court concluded that the district did not provide adequate notice, particularly where the subject slated for discussion was one of special interest to the public. For example, selection of a new school superintendent is not in the same category as ordinary personnel matters, and a label like “personnel” fails as a description of that subject. Similarly, a major desegregation lawsuit that occupied the district’s time for a number of years is not in the same category as the more common “litigation” that a district may expect to face. Certainly, a school board is not expected to disclose its litigation strategy, but it cannot totally conceal that a pending desegregation lawsuit will be discussed.

This case was decided more than 20 years ago, and the court ultimately declared that the district violated the Act by providing inadequate notice.

- *Hays County Water Planning Partnership v. Hays County, Texas*, 41 S.W.3d 174 (Tex. App.—Austin 2001, pet. Denied). In the *Hays County* case, a county commissioner addressed the commissioners court from the citizens’ comment microphone pursuant to an agenda posting that read: “Presentation by Commissioner Molenaar.” Molenaar notified that county’s legal counsel, who worded the agenda posting. The court held that, because there was nothing in the posting that would give a resident of Hays County any inkling of the *substance* of Molenaar’s proposed presentation, the notice was inadequate.

Of particular interest, the court addressed the issue of the requirements of the Act as they relate to an elected official’s freedom of speech. Specifically, the court concluded that requiring advance notice in compliance with the Act does not restrict the constitutional right of free speech when the official seeks to exercise that right at a meeting of the public body of which he is a member. “In the context in which they were made, Molenaar’s remarks were not those of a private citizen but of an elected official. In these

circumstances, requiring compliance with the Open Meetings Act does not violate the First Amendment.”

GA-0668 is probably beneficial in that it gives some guidance as to how to “shore up” an agenda item for the city manager or other city officials to report on various items. For example, instead of merely posting “City Manager’s Report,” a city could include various subheadings, such as: (1) announcement of upcoming agenda items; (2) dates and times of local meetings; (3) status of various (specifically listed) city projects; (4) receipt of city awards; (5) recognition of citizen achievements; and (6) arrival of new department directors. That type of additional notice should cover most items related to those topics.

In the *Hays County* case, a county commissioner made substantive statements about water planning issues that had been contentious for some time. And, he did so pursuant to inadequate notice. The case appears to be drastically different than a mayor or city councilmember recognizing a constituent who won an award or some other similar statement.

In response to GA-0668, the legislature enacted Section 551.0415. The section allows a mayor and city councilmembers to make a report about items of community interest without having to give notice, and defines such items to include – among other things - expressions of thanks, congratulations, or condolence; an honorary or salutary recognition of a public official, public employee, or other citizen; and a reminder about an upcoming event organized or sponsored by the city.

Many cases have concluded that notice was adequate in different scenarios (more detail about these cases is available in the attorney general’s 2014 Open Meetings Act Handbook, available at [https://www.texasattorneygeneral.gov/AG\\_Publications/pdfs/openmeeting\\_hb.pdf](https://www.texasattorneygeneral.gov/AG_Publications/pdfs/openmeeting_hb.pdf) on pp. 24-27):

- *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762 (Tex. 1991): the Texas Supreme Court considered whether the following item in the notice posted for a city council meeting gave sufficient notice of the subject to be discussed:

“An Ordinance determining the necessity for and authorizing the condemnation of certain property in County Blocks 4180, 4181, 4188, and 4297 in Southwest Bexar County for the construction of the Applewhite Water Supply Project.”

A property owner argued that this notice item violated the subject requirement of the statutory predecessor to Section 551.041 because it did “not describe the condemnation ordinance, and in particular the land to be condemned by that ordinance, in sufficient detail” to notify an owner reading the description that the city was considering condemning the owner’s land. The Texas Supreme Court held that the condemnation notice complied with the Act, because the notice apprised the public at large in general terms that the city would consider the condemnation of certain property in a specific area for purposes of the project.

- *Tex. Turnpike Auth. v. City of Fort Worth*, 554 S.W.2d 675 (Tex. 1977): In this case, the court addressed the sufficiency of the following notice for a meeting at which the turnpike authority board adopted a resolution approving the expansion of a turnpike:

“Consider request . . . to determine feasibility of a bond issue to expand and enlarge [the turnpike].”

Prior resolutions of the board had reflected the board’s intent to make the turnpike a free road once existing bonds were paid. The court found the notice sufficient, refuting the arguments that the notice should have included a copy of the proposed resolution, that the notice should have indicated the board’s proposed action was at variance with its prior intent, or that the notice should have stated all the consequences that might result from the proposed action.

- *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975): In this case, the Texas Supreme Court found sufficient a Lower Colorado River Authority Board notice providing:

“Ratification of the prior action of the Board taken on October 19, 1972, in response to changes in electric power rates for electric power sold within the boundaries of the City of San Marcos, Texas.”

“Although conceding that the notice was ‘not as clear as it might be,’” the Court held that it complied with the Act “because ‘it would alert a reader to the fact that some action would be considered with respect to charges for electric power sold in San Marcos.’”

The cases above generally mean that an agenda has to state with reasonable specificity what the city council will be discussing. But how would a city post notice of a “town hall meeting” (as defined earlier in this paper) that complies with that standard?

### **Is it Possible to Provide Proper Notice of a Town Hall Meeting?**

Discussion several years ago with a city attorney on a related matter yielded a consensus that the only correct way to comply with the specificity requirement was to list every possible topic that could be discussed at a town hall meeting. That conclusion led to an agenda posting that would look something like this:

**NOTICE**  
**CITY COUNCIL MEETING**  
**FRIDAY, JUNE 20, 2014**  
**CITY HALL**  
**123 NONSENSE ROAD, CITY, TX 12345**  
**3:45 P.M.**

**COME VISIT WITH YOUR MAYOR AND CITY COUNCIL ON ITEMS OF IMPORTANCE TO  
YOU AND HEAR THEIR THOUGHTS AND IDEAS ON MAKING IMPROVEMENTS BASED  
ON YOUR INPUT!**

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1. **Call to order.**

2. “Town Hall Meeting” moderated by the mayor to include discussion on any and all types of city business, including:

Animal Control	Drug Enforcement	Municipal Court
Beautification of City	Economic Development	Nuisances
County Flood Control	Elections	Overlay Zones
Watershed Projects	Federal Stimulus Plan	Parks and Recreation
Building-related Permits	Finance Department	Personnel Issues
Business Development	Fire Department	Police Department
Churches	Future Development	Property Taxes
City Agendas and Minutes	Flooding & Drainage Issues	Public Works Projects and Operations
City Beautification	Garbage and Recycling	Recreation Facilities
City Budget	Grants	Sales Taxes
City Code of Ordinances	Graffiti Ordinance	Signage/Signs
City Committees	Growth, taxes, vision	Staffing
City Communications	Home Rule Charter	Strategic Planning
City Contracts	Human Resources	Street Maintenance Sales tax
City Engineer	Interlocal Agreements	Streets and Roads
City Events	Intergovernmental Relations	Stormwater Management
City Facilities	Interrelationship w/County	Sustainability Overlay
City Finances	Government	Swimming Pools
City Library	Interrelationship w/University	Taxes
City Manager	Interrelationship between City Govt & Fed Govt	Texas Municipal League
City Meetings	Junked Vehicle Ordinance	Trade and Market Days
City Water System	Law Enforcement Programs	Traffic & Traffic Control
City Website	EDC	Trails
Code Enforcement	Lighting	Trees and Tree Challenge
Community and Conference Centers	Litigation	Vector Control
Community Development	Master Plan	Waste Management
Curfew Ordinance	Master Redevelopment Plan	
Zoning		

**There will be no votes or any formal actions taken on subjects discussed during this meeting as this town hall meeting will only present an exchange of ideas and information among city officials and members of the public.**

**3. Adjourn.**

While the above seemed somewhat ludicrous because probably only 10 of the dozens of listed topics would be discussed, it was the best legal advice in light of the common law interpretation of required specificity. Over the years, further discussion and reflection has yielded that a more practical approach may still meet the requirements of the Open Meetings Act.

**Surely There's a Better Way?**

Most cities provide for public comment in some format on most meeting agendas. The attorney general issued a controversial opinion on the subject in 2000. Attorney general opinion JC-0169 concluded that the term “public comment” or similar provides sufficient notice of a “public comment” session, where the general public addresses the governmental body about its concerns and the governmental body does not comment or deliberate, except as authorized by section 551.042 of the Government Code. Section 551.042 provides that:

Sec. 551.042. INQUIRY MADE AT MEETING. (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 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.

Based on the section above, would a meeting notice stating simply “town hall meeting” be sufficient? It seems like it should be, and would look something like this:

**NOTICE  
CITY COUNCIL MEETING  
FRIDAY, JUNE 20, 2014  
CITY HALL  
123 MAKESMORESENSE ROAD, CITY, TX 12345  
3:45 P.M.**

**JOIN THE MAYOR AND CITY COUNCIL FOR A TOWN HALL MEETING WITH PUBLIC  
COMMENT ENCOURAGED**

**COME VISIT WITH YOUR MAYOR AND CITY COUNCIL ON ITEMS OF IMPORTANCE TO  
YOU AND HEAR FROM THEM BASED ON YOUR INPUT!**

\*There will be no votes or any formal actions taken on subjects discussed during this meeting as this town hall meeting will only members of the public to present ideas and information to city officials and staff.

A quick Internet search revealed that the Cities of Arlington and Cleveland conduct town hall meetings with posting similar to the above:

- [http://www.arlingtontx.gov/citycouncil/agendas/townhallmeeting\\_061614.pdf](http://www.arlingtontx.gov/citycouncil/agendas/townhallmeeting_061614.pdf)
- <http://www.clevelandtexas.com/AgendaCenter/ViewFile/Agenda/04082014-382>

In the scenario in which all that is posted is the above “town hall meeting” notice, a mayor or councilmember could respond to a citizen inquiry about any item of city business by stating facts or existing policy.

The purpose of a town hall meeting is to get citizen input, and there would not usually be in-depth discussion (i.e., “deliberation”) involved when trying to solve an issue raised by an inquiry. If the council decides that deliberation on the item is necessary, a proposal to place it on a future agenda for discussion can be made. Only one substantive judicial opinion has interpreted Section 551.042. In *Gardner v. Herring*, 21 S.W.3d 767, 774 (Tex. App. – Amarillo 2000, no pet.), the court reviewed a school board’s discussion of the un-posted topic of teen pregnancy. The court stated that:

Furthermore, summary judgment evidence illustrates that when the subject of teen pregnancies was broached by a Board member, responses were made. Those responses consisted of “giving information about the District’s curriculum”, “general comments about the pregnancy rate”, and asking whether the Board member would care to have the matter placed on the agenda for the next Board meeting. And, while the minutes of the April 14th meeting stated that the issue was “discussed” nothing of record suggests that the discussion consisted of more than what we have mentioned. These circumstances illustrate nothing more than the type of exchange contemplated by section 551.042(a). There was a spontaneous inquiry coupled with recitation of factual information and district policy (*i.e.*, explanation of the district’s curriculum).

That sounds simple enough in theory, but – out of caution – many city attorneys still advise their city council to say nothing in response to un-posted citizen inquiries.

There’s also another wrinkle. The attorney general, in JC-0169, also threw in the idea that a posting of “public comment” will “not provide adequate notice if the governmental body is, prior to the meeting, aware, or reasonably should have been aware, of specific topics to be raised.” Tex. Att’y Gen. Op. No. JC-0169 (2000) at 4. The opinion cites to “*See Cox Enterprises*, 706 S.W.2d 956” for that proposition. Nothing in the *Cox Enterprises* opinion seems to stand for the proposition cited. In fact, it seems strange that a city council would – under JC-0169 – presumably have to take affirmative steps to seek out what the public may or may not say. The reasoning leads to a circular argument. It is there nonetheless; it’s not binding, of course, but it is persuasive.

Moreover, the *Hays County* court concluded that, when a governmental body is responsible for a presentation, it can easily give notice of its subject matter, but it usually cannot predict the subject matter of public comment sessions. A meeting notice stating “Presentation by [County] Commissioner” did not provide adequate notice of the presentation, which covered the commissioner’s views on development and substantive policy issues of importance to the county. 41 S.W.3d 174, 180 (Tex. App. – Austin 2001, pet denied). The court concluded that the term “presentation” was too vague in that instance. *Id.* (citing Tex. Att’y Gen. Op. No. JC-0169 (2000)). The *Hays County* opinion, however, isn’t exactly on point because it deals with the city council knowing what a *councilmember* is going to say. That’s again not the same thing as knowing what a *citizen* at a town hall meeting may or may not say.

## **What’s the Harm?**

Criminal Penalties under the Open Meetings Act can include fines and/or jail time. The Act provides that a closed meeting involving a quorum of members is a misdemeanor offense:

Sec. 551.144. CLOSED MEETING; OFFENSE; PENALTY. (a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:

- (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
- (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
- (3) participates in the closed meeting, whether it is a regular, special, or called meeting.

- (b) An offense under Subsection (a) is a misdemeanor punishable by:
- (1) a fine of not less than \$100 or more than \$500;
  - (2) confinement in the county jail for not less than one month or more than six months; or
  - (3) both the fine and confinement.

(c) It is an affirmative defense to prosecution under Subsection (a) that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body.

Conducting a town hall meeting after simply posting “town hall meeting” on an agenda probably wouldn’t rise to the criminal level under the provision above.

The likely remedy would be a civil lawsuit filed by a disgruntled citizen or group seeking mandamus (that is, an order) or an injunction to stop, prevent, or reverse a violation of the Act under Sections 551.141 or 551.142.

Each city attorney will have to decide his or her opinion, and can always write that opinion down to provide a future affirmative defense to criminal prosecution for the city councilmembers.

Just before posting this article, the Austin-American Statesman issued a story about the City of Austin having a town hall meeting. How did Austin handle the agenda posting? That city required speakers to sign up in advance with their topic listed, and specifically posted them on the agenda. Brilliant:

<http://austin.siretechnologies.com/sirepub/mtgviewer.aspx?meetid=558&doctype=agenda>

This whole paper is yet another example of the Open Meetings Act possibly limiting, rather than expanding, access to government. 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. A town hall meeting is the antithesis of that behavior, and it’s strange that the Act’s notice requirements may serve to limit citizen discourse with their elected officials at an open meeting.