THE 2008 OPEN MEETINGS ACT MADE EASY

Answers to the most frequently asked questions about the Open Meetings Act

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The Texas Open Meetings Act Made Easy

After each legislative session, the Attorney General's Office has produced this publication that addresses certain key issues local officials face in their day-to-day operations. In a question-and-answer format, this handbook covers the most frequently asked questions about the Texas Open Meetings Act ("the Act").[1] For example, the handbook addresses when the Act applies, what constitutes reasonable notice, the application of the Act to informal gatherings, and the limited right of individual council members to place items on an agenda. Additionally, the handbook covers permissible subjects for executive sessions, who may attend an executive session, and the appropriate handling of a certified agenda. Finally, the handbook addresses the ability to "ratify" an action, civil enforcement of the Act, and criminal penalties for certain violations.

The stakes are high for local public officials. Texas courts have ruled that in certain cases, a local public official can be convicted of participating in an illegal closed meeting even though the official may have believed at the time that the closed meeting was authorized. Local public officials may also face criminal penalties if they knowingly attempt to avoid open meetings requirements by meeting in numbers less than a quorum for the purpose of secret deliberations about public business.

This "made easy" handbook provides answers in easy-to-understand language to the most frequently asked questions regarding the Act. The Act does apply to a variety of governmental entities, so although this information is geared towards the Act's application to local public bodies, it will be useful to other officials and Texas citizens as well.

[1] This handbook has been written and revised subsequently by several present and former assistant attorney generals, including Julian Grant, Scott Joslove, Jeff Moore, and Zindia Thomas. The original handbook was created with assistance from the Municipal Advisory Committee of this office.

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I. Application of the Open Meetings Act

When does the Open Meetings Act generally apply?

The Open Meetings Act (hereinafter "the Act") generally applies when a quorum of a governmental body is present and discusses public business.[2] The mere presence of a quorum may in some instances invoke the Act.[3] However, it does not apply to purely social gatherings of the governmental body that are unrelated to the body's public business, nor does it apply when public officials attend regional, state, or national conventions or workshops, ceremonial events, or press conferences, as long as no formal actions are taken and the discussion of public business is only incidental to the event.[4]

May members of the governing body receive a briefing from staff without posting notice of the briefing as an open meeting?

A governmental body must post notice of an open meeting when it receives a briefing from staff unless a specific statutory exception allows an executive session.[5]

Must appointed committees post notice of their meetings under the Act?

If a committee appointed by the governing body is truly advisory in nature, the Act generally does not require it to post public notice of its gatherings as open meetings. Accordingly, the local unit must first determine whether a committee is advisory or whether it has certain powers that would make it subject to the Act. To make this determination, the local unit needs to review the actual authority of the committee and how the committee's actions are treated by the governing body. For example, if the committee has the power to make final decisions or the power to adopt rules regarding public business, it would need to post its gatherings as open meetings. Additionally, if the committee issues recommendations that are usually approved in full by the governing body, such committee meetings should be posted as open meetings. In other words, a committee may not be considered "advisory" if the governing body generally "rubber-stamps" the committee's recommendations into final policy.[6] One factor may be the presence of members of the governing body on the committee, because even though they may constitute less than a quorum of the governing body, they may lack only the consent of one more member of the governing body to pass

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[2] TEX. GOV'T CODE ANN. § 551.001 (4)(A) (Vernon 2004).

[3] *See* Op. Tex. Att'y Gen. No. GA-98 (2003).

[4] TEX. GOV'T CODE ANN. § 551.001 (4)(B) (Vernon Supp. 2007) (as amended by Tex. S.B. 1306, 80th Leg., R.S. (2007)); Op. Tex. Att'y Gen. No. H-785 (1976) at 2 (breakfast meetings of governing body must be purely social without any discussion of public business).

[5] TEX. GOV'T CODE ANN. § 551.001 (4)(B) (Vernon 2004).

[6] *Willmann v. City of San Antonio*, 123 S.W.3d 469, 480 (Tex. App.–San Antonio 2003, pet. denied); Op. Tex. Att'y Gen. No. JC-60 (1999).

the committee's decision.[7] To insure compliance with the Act, the local unit may appoint only staff or no more than one member of the governing body to the committee.

It is important to note that the bylaws of an organization or the provisions within a city charter may specifically require a city committee to post its meetings pursuant to the Act. If there is such a local requirement, it would apply even if the Act would not otherwise require compliance. Conversely, cities cannot, through their city charters or local ordinances, waive the requirements of the Act.

Further, if members of a governmental body attend a committee meeting, then the committee would be subject to the Act when a quorum of the governmental body is present at the meeting and members of the governmental body "receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy" over which the governmental body has authority, regardless of whether the committee members or any members of the governmental body speak or otherwise engage in deliberations.[8] The presence of a quorum of the body and deliberation about the body's public business would also constitute a meeting of the body and necessitate compliance with the Act for the body, as well as the committee meeting.

Must private or non-profit entities that receive city funding post their meetings under the Act?

The Act does not apply to an entity merely because that entity receives public funds.[9] For instance, the Attorney General has concluded that a local chamber of commerce was not subject to the Act even though it received and administered local hotel occupancy tax funds.[10] Additionally, the Attorney General has concluded that an economic development corporation formed under the Texas Non-Profit Corporation Act and not the Development Corporation Act of 1979 (Article 5190.6 of the Revised Civil Statutes) was not subject to the Act.[11]

Of course, a non-governmental entity may be made subject to the Act by the entity's own bylaws, by special state legislation pertaining to that entity, or by a contractual commitment by that entity to comply with the Act. Therefore, local private or non-profit entities will want to consult their local legal counsel about whether their bylaws, state law, or a particular contractual commitment make them subject to the Act.

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[7] Op. Tex. Att'y Gen. No. JC-60 (1999); *cf.* Op. Tex. Att'y Gen. No. JC-160 (1999) (ad hoc tax foreclosure committee is not subject to Act).

[8] Op. Tex. Att'y Gen. No. JC-313 (2000).

[9] Tex. Att'y Gen. LO 98-40 (1998) at 2; *see* TEX. GOV'T CODE ANN. § 551.001 (3) (Vernon 2004) (definition of "governmental body"); & Op. Tex. Att'y Gen. No. JM-1072 (1989) (local-level entity must fall within definition of "governmental body" to be covered by Act).

[10] Tex. Att'y Gen. LO 93-55 (1993); LO 96-113 (1996); *see* Op. Tex. Att'y Gen. No. DM-7 (1991) (committee on aging that receives public funds is not subject to Act).

[11] Op. Tex. Att'y Gen. No. JC-327 (2001); *see also* Op. Tex. Att'y Gen. No. GA-206 (2004).

What is the relationship between the Open Meetings Act and the Public Information Act?

The Open Meetings Act and the Public Information Act are both intended to make government more accessible to the public. However, the two are completely separate statutes and operate independently of each other. The mere fact that a local unit may be able to withhold a document from the public under the Public Information Act does not mean that the governing body has authority to meet in executive session regarding the subject covered in that document.[12] Likewise, the fact that the Open Meetings Act allows a governing body to have an executive session about a particular topic does not mean that related documents reviewed in the executive session may be withheld from the public.[13]

II. Notice Provisions Under the Act

Where and for how long must an open meeting notice be posted?

The Act requires that the notice for each meeting subject to the Act be posted on a bulletin board at a place convenient to the public in the county courthouse, city hall, or other listed locations.[14] A Texas court has ruled that posting in a kiosk immediately outside city hall is also permissible.[15] This was necessary at the time because the agenda must be posted and readily accessible to the public at all times for at least 72 hours preceding the meeting; however, now the posting of notice on the Internet during this time period will satisfy the Act as long as physical notice is available to the public during normal business hours.[16] The same rules apply to posting notice for a meeting to deal with an emergency, except that the notice needs to be posted for only two hours and the notice must give a reason for calling the emergency meeting that meets the requirements of the Act, as discussed below.

Is a local entity required to publish notice on its Internet website?

The Act now requires that a city, county, school district, or sales tax economic development corporation publish notice of its meetings on its Internet website, if one exists.[17] If a city with a population of at least 48,000, a county with at least 65,000, or a sales tax economic development corporation affiliated with either has a website, it must also post the agenda on the website.[18] The

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[12] *E.g.*, Op. Tex. Att'y Gen. No. JM-595 (1986).

[13] *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351, 366-67 (Tex. 2000); Tex. Att'y Gen. ORD-605 (1992) (names of applicants discussed in executive session are not confidential under Public Information Act); ORD-485 (1987) (investigative report considered in executive session may not be withheld).

[14] TEX. GOV'T CODE ANN. §§ 551.049-.054 (Vernon 2004).

[15] *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 768 (Tex. 1991).

[16] TEX. GOV'T CODE ANN § 551.043 (Vernon Supp. 2007).

[17] *Id*. § 551.056(b).

[18] *Id*. § 551.056(c).

validity of an Internet posting made in good faith is not affected by failure to provide notice due to technical problems beyond the control of the local unit.[19]

Is a local entity required to publish notice of its open meetings in a newspaper?

Generally, the Act does not require a local entity to publish notice in a local newspaper. For some subjects, there may be a separate state statute that requires such notice. For example, Texas law requires that a city have two public hearings before annexing an area, and notice of each of those hearings must be published in a local newspaper.[20] Additionally, Statutes other than the Act require a city and county to publish in the newspaper certain notices regarding the adoption of their annual budget and tax rate. Finally, a home-rule city will want to review its city charter to see if the charter imposes stricter notice requirements on the city than does the Act.

How specific must the wording be for each agenda item posted for an open meeting?

The Act requires that the posted notice of an open meeting contain the date, hour, and place of the meeting and that the agenda describe each subject to be discussed at the meeting.[21] Texas courts have interpreted this to mean that the posting must be sufficient to alert the public, in general terms, of the subjects that will be considered in the meeting.[22] Descriptions such as "old business," "new business," "other business,"[23] "personnel," and "litigation matters"[24] are usually not sufficiently detailed to meet the requirements of the Act. The courts have also ruled that the more important a particular issue is to the community, the more specific the posted notice must be. Thus, the phrase "employment of personnel" was held to be a sufficient posting for hiring a school teacher.[25] However, the same court found that this phrase was not sufficient when the school was considering hiring a key supervisor such as a principal. Similarly, a Texas court ruled that a posting that said "personnel" was not specific enough to allow a city council to discuss the firing of a police chief.[26]

Finally, a local unit must be sure that its postings are consistent with prior practice. For example, a Texas court has ruled that a notice calling for "discussion" of a certain item was not sufficient to allow a board to take action on that item when the board's previous notices had always explicitly stated when an action might be taken.[27]

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[19] *Id.* § 551.056(d).

[20] TEX. LOC. GOV'T CODE ANN § 43.0561 (Vernon Supp. 2007).

[21] TEX. GOV'T CODE ANN. § 551.041 (Vernon 2004).

[22] *City of San Antonio,* 820 S.W.2d at 766.

[23] Op. Tex. Att'y Gen. No. H-662 (1975).

[24] *Cox Enters., Inc. v. Bd. of Trustees*, 706 S.W.2d 956 (Tex. 1986).

[25] *Point Isabel Indep. Sch. Dist. v. Hinojosa,* 797 S.W.2d 176 (Tex. App. – Corpus Christi 1990, writ denied).

[26] *Mayes v. City of DeLeon,* 922 S.W.2d 200 (Tex .App. – Eastland 1996, writ denied).

[27] *River Rd. Neighborhood Ass'n v. S. Tex. Sports*, 720 S.W.2d 551 (Tex. App. – San Antonio 1986, writ dism'd w.o.j.).

Is a posting indicating "public comment" adequate notice of the subject to be discussed?

The Attorney General has concluded that "public comment" generally provides sufficient notice under the Act of the subject matter of sessions where members of the general public address a governing body about their concerns. This phrase might not be sufficient notice, however, when the governing body, prior to the meeting, is aware or should be aware of the specific topics that may be discussed at the meeting.[28]

Does a posting indicating "employee briefing session" or "staff briefing session" provide adequate notice of the subjects to be discussed?

An agenda posting simply indicating "employee briefing session" or "staff briefing session" does not provide the public with sufficient notice as to the subjects that will be discussed at a public meeting.[29] Unlike sessions involving "public comment"— language that is considered adequate notice for comments from the general public — a local entity is in a better position to ascertain from its employees or officers in advance what subjects will be addressed in a briefing session. Accordingly, postings simply indicating "employee briefing sessions" give inadequate notice.[30]

Must a posting indicate which subjects will be discussed in executive session?

The Act does **not** require the agenda to state which items will be discussed in closed session. Nonetheless, some local units indicate in their notices which items will be discussed in open session and which may be discussed in closed or executive session. Should a local unit consistently distinguish between subjects for public deliberation and subjects for executive session, an abrupt departure from this practice could deceive the public and thereby render the notice inadequate.[31]

What may members of a governing body do if an unposted issue is raised at an open meeting?

Members of the governmental body may not deliberate or make any decision about an unposted issue at a meeting of the governmental body. If an unposted item is raised by members or the general public, the governing body has four options. First, an official may respond with a statement of specific factual information or recite the governmental body's existing policy on that issue.[32] Second, an official may direct the person making the inquiry to visit with staff about the issue. Third, the governing body may offer to place the item on the agenda for discussion at a future

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[28] Op. Tex. Att'y Gen. No. JC-169 (2000).

[29] *Id.* at 6.

[30] *Id.*; *See Hays County Water Planning P'ship v. Hays County*, 41 S.W.3d 174, 181 (Tex. App. – Austin 2001, pet. denied) (agenda that provided "presentation by Commissioner" considered to be insufficient notice, as nothing in agenda posting indicated subject matter of presentation).

[31] Op. Tex. Att'y Gen. No. JC-57 (1999) at 5.

[32] TEX. GOV'T CODE ANN. § 551.042(a) (Vernon 2004).

meeting.[33] Finally, the governing body may offer to post the matter as an emergency item if it meets the criteria for an emergency posting.

May a governing body change the date of its meeting without posting a corrected notice for 72 hours before the meeting starts?

The Act requires literal compliance.[34] For this reason, a local entity generally does not have authority to change the date of its meeting without posting the new date for at least 72 hours in advance of the meeting.[35] Of course, if the entity is presented with an emergency, it could utilize its power to call an emergency meeting with two hours' notice. The sudden relocation of a large number of residents from the area of a declared disaster is considered reasonably unforeseeable for a reasonable period immediately following the relocation, in which case notice to the media must be given at least one hour in advance.[36] Additionally, if a catastrophe prevents the entity from convening an open meeting that was properly posted, the governing body may convene in a convenient location within 72 hours if this action is taken in good faith and not to circumvent the Act.[37] A catastrophe includes anything that interferes physically with the ability to conduct a meeting, including natural disasters, power failures, public riot, and similar occurrences.[38]

May a governing body change the time of its meeting without posting a corrected notice for 72 hours before the meeting starts?

The Act requires literal compliance.[39] For this reason, a local unit generally has no authority to change the time of its meeting without posting the new time for at least 72 hours in advance of the meeting.[40] Nonetheless, it is not necessarily a violation of the Act if a governing body or one of its committees starts its meeting a little later than the scheduled time. At what point the change in time would present a legal problem would be a fact issue. Local entities should consult their legal counsel if they decide to change a meeting time.

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[33] *Id.* § 551.042(b).

[34] *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299 (Tex. 1990).

[35] *See* TEX. GOV'T CODE ANN. §§ 551.041, 043 (Vernon 2004) (notice must be posted for 72 hours in advance of meeting and notice must include place of meeting).

[36] TEX. GOV'T CODE ANN. § 551.045(e) (Vernon Supp. 2007) (added by Tex. S.B. 11 and Tex. S.B. 1499, 80th Leg., R.S. (2007)).

[37] *Id.* § 551.0411(b) (Vernon Supp. 2007).

[38] *Id.* § 551.0411(c).

[39] *Acker*, 790 S.W.2d 299.

[40] *See* TEX. GOV'T CODE ANN. §§ 551.041, 043 (Vernon 2004) (notice must be posted for 72 hours in advance of meeting and must include place of meeting).

May a governing body change the location of its meeting without posting a corrected notice for 72 hours before the meeting starts?

The Act requires literal compliance.[41] For this reason, a local entity generally has no authority to change the location of its meeting without posting the new location for at least 72 hours in advance of the meeting.[42] On the day of the meeting, a local entity will sometimes change a meeting location to a bigger room within the same building to accommodate a large crowd. It is not clear whether such a change would constitute literal compliance with the Act. Local entities should consult their legal counsel if they decide to change a meeting location.

May a governing body continue a meeting the next day without reposting?

A governmental body that recesses an open meeting to the following regular business day need not post notice of the continued meeting if the action is taken in good faith and not to circumvent the Act. If a meeting continued to the following regular business day is then continued to another day, the governmental body must give notice of the meeting's continuance to the other day.[43] Additionally, the Attorney General has concluded that an executive session of a public meeting may be continued to the immediate next day if certain procedures are followed. [44]

What is required of a governing body to cancel a posted meeting?

The Act does not set forth any particular requirements for canceling a posted meeting. The Act requires meetings to be properly posted, but it does not require that a meeting actually be held once the meeting has been posted. As a result, a local unit may arguably cancel a posted meeting at any time unless doing so would violate some other provision of law (e.g., a city charter requirement). It is important to note that once the meeting is canceled or the posted agenda is taken down, a local unit must re-post and follow all the requirements of the Act for the rescheduled meeting.

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[41] *Acker*, 790 S.W.2d 299.

[42] *See* TEX. GOV'T CODE ANN. §§ 551.043 (Vernon 2004) (notice must be posted for 72 hours in advance of meeting and must include place of meeting).

[43] *Id.* § 551.0411(a) (Vernon Supp. 2007). Section 551.0411 codified the opinion set forth in Attorney General Opinion DM-482 and the decision in *Rivera v. City of Laredo. See Rivera v. City of Laredo*, 948 S.W.2d 787 (Tex.App. – San Antonio 1989, writ denied); Op. Tex. Att'y Gen. No. DM-482 (1998).

[44] Op. Tex. Att'y Gen. No. JC-285 (2000).

III. Effect of Quorum on Act Issues

General Quorum Provisions

What constitutes a quorum for purposes of the Act?

A quorum is considered by the Act to be a simple majority of the members of the governmental body.[45] However, certain issues might have specific quorum requirements. Local entities should check with their legal counsel.

May a governing body hold a meeting if, for any reason, there is not a quorum present?

A meeting subject to the Act may not be convened unless a quorum is present in the meeting room. In fact, the Texas Supreme Court has ruled that a school board of trustees may not convene its meeting until a quorum is physically present in the same room.[46] However, Texas case law and attorney general opinions have not addressed whether a properly convened meeting could continue if a quorum is lost due to the later departure or temporary absence of a member of the governing body. In any case, the body could not take any action during a meeting if a quorum were not present.

Application of the Act if Quorum of Governing Body is Present

Does the Act apply if a quorum of the governing body informally meets and no action or vote is taken on public business?

The Act applies to a gathering of a quorum of a governing body if it discusses public business, regardless of whether there is any action or vote taken. All requirements under the Act must be followed for such gatherings unless otherwise provided under state law. As noted earlier, state law provides a limited exception for gatherings at social events unrelated to the body's public business, as well as regional, state, or national conventions or workshops, ceremonial events, or press conferences if the discussion of public business is only incidental and no vote or action is taken.[47]

May a quorum of the governing body serve on an appointed board or commission?

Nothing in the Act would prohibit a quorum of the governing body from serving on a board or commission. However, the meetings of such a board or commission would have to meet all the requirements of the Act (and would probably constitute a meeting of the governing body as well, as discussed above). Additionally, under the common-law doctrine of incompatibility, a governing body is prohibited in most circumstances from appointing one of its own members to board

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[45] TEX. GOV'T CODE ANN. § 551.001(6) (Vernon 2004).

[46] *Cox Enters.*, 706 S.W.2d 956.

[47] *But see Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n*, 2 S.W.3d 459, 462 (Tex. App.—San Antonio 1999, pet. denied) (deliberations took place at informational gathering of water district board with landowners in board member's barn, where one board member asked question and another board member answered questions, even though board members did not discuss business among themselves).

positions. In certain situations, however, Texas statutes or a city charter specifically allow a governing body to appoint its own members to a board or commission. For example, the Development Corporation Act of 1979 indicates that a city council may appoint up to four city council members to serve as board members of a Section 4B development corporation board. A governing body will want to discuss the issue with local legal counsel before appointing one of its own members to a board or commission.

May a quorum of members of a governing body sign a group letter or other document without violating the Act?

If members meet in a quorum without following open meetings procedures to discuss and then create or sign the document, they would violate the Act. Similarly, if the members meet in numbers less than a quorum regarding the document, or if they communicate by phone, memo, or e-mail with the specific intent of circumventing the purposes of the Act, a violation of the Act would also have occurred. Knowing circulation of a claim, bill, or invoice among members for approval of payment in writing without discussion at a meeting would also violate the Act.[48] Such communications are best considered at posted open meetings, and any signatures should be executed in response to a vote at the meeting on the issue.

May a quorum of members of the governing body attend a committee meeting of the governmental body?

A quorum of members of the governing body may attend a committee hearing. However, the attendance of a quorum would constitute a meeting of the governing body that would require compliance with the Act in certain circumstances. In Attorney General Opinion JC-313, the Attorney General concluded that if enough members of a governmental body attended the meeting of a component committee on which some members of the governmental body sit, so that a quorum of the governmental body is present, then the committee would be subject to the Act, regardless of whether the committee members or any members of the governmental body spoke or otherwise engaged in deliberations.[49] As discussed above, the presence of a quorum will probably constitute a meeting of the governing body, as well.

May a quorum of the members of the governing body attend a state legislative committee meeting without violating the Act?

The attendance of a quorum of a governmental body at a meeting of a state legislative committee or agency does not constitute a meeting of that body, provided deliberations at the meeting by the members of that body consist only of publicly testifying at the meeting, publicly commenting at the meeting, or publicly responding at the meeting to questions asked by a member of the state legislative committee or agency.[50]

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[48] Op. Tex. Att'y Gen. Nos. DM-95 (1992); JC-307 (2000).

[49] Op. Tex. Att'y Gen. No. JC-313 (2000).

[50] TEX. GOV'T CODE ANN. § 551.0035 (Vernon 2004).

Could a gathering of less than a quorum of a current board with officials elected but not sworn in to that board constitute a quorum?

No, the officials must sign the appropriate constitutional statement and take the oath of office before they would be considered officials of the board under the Act.[51]

Application of the Act to Gatherings of Less Than a Quorum

Is a gathering of less than a quorum of a governing body subject to the Act?

A gathering of less than a quorum of the governing body is not generally subject to the Act. However, if a standing committee or subgroup of the governmental body meets and a discussion of public business occurs, it is advisable that such gatherings should also be posted and conducted as open meetings. Moreover, if the city council routinely approves decisions of a subcommittee consisting of less than a quorum of the city council, the subcommittee must comply with the Act.[52]

State law also provides that if less than a quorum of the governing body gathers to intentionally or knowingly circumvent the Act, criminal penalties can be imposed against the participating officials. In other words, if members are holding their discussion of public business in numbers less than a quorum in order to avoid having to meet the requirements of the Act, criminal prosecution can be pursued. This warning should apply to discussions about which items to place on the agenda as well as the merits of issues.

May less than a quorum of members of the governing body meet with public or private groups without posting the gathering as an open meeting?

It is not uncommon for several members to be present at a private or public gathering that is put on by another entity. The Act does not require that the gathering be treated as an open meeting if less than a quorum of members is present. However, as noted above, an official faces potential criminal penalties if such gatherings are used with the intent of circumventing a discussion of public business at an open meeting.

May less than a quorum of members of the governing body visit over the phone without violating the Act?

The mere fact that two members visit over the phone does not in itself constitute a violation of state law unless there are three members on the governmental body. However, if members are using individual telephone conversations to poll all the members on an issue or are making such telephone calls to conduct their deliberations about public business, there may be a potential criminal violation. Physical presence in one place is not necessary to violate the Act.[53] It would remain a fact issue whether certain phone conversations between less than a quorum of members would be a violation

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[51] Op. Tex. Att'y Gen. No. GA-355 (2005).

[52] *Willmann*, 123 S.W.3d at 480.

[53] Op. Tex. Att'y Gen. No. DM-95 (1992).

of the Act.[54] Such interactions could amount to meeting in numbers less than a quorum to circumvent the Act.

May less than a quorum of members of the governing body sign a group letter or other document without violating the Act?

It is a fact issue whether the presence of less than a quorum of a local entity's members' signatures on a group letter or other document constitutes a violation of the open meetings laws. For example, if the members at some time knowingly met in numbers less than a quorum to discuss signing the document or otherwise communicate by phone, memo, or e-mail in order to circumvent the Act, a violation of the Act would have occurred. [55]

IV. Regular Open Meetings

Adoption of Procedural Guidelines to Administer the Act

Does state law set out procedural rules that apply to open meetings?

Relatively few procedural rules are contained in the Act for meetings of a governmental body. All meetings must, of course, be properly posted, and a governmental body is limited in how it can respond to inquiries about issues that are not listed on the posting. Additionally, during all meetings, minutes of the meeting must be kept, and certain rules must be followed when holding an executive session.

However, state law does not impose general rules of parliamentary procedure for open meetings. For example, the Act does not specify rules on how many readings of an ordinance are required, who may make a motion, or whether a motion must be seconded. In order to answer these questions, a local governmental body must consult any local rules of procedure that it has adopted. If a governing body has not adopted any such rules, a majority of the body would determine how items are to be considered procedurally.[56]

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[54] *See Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. – San Antonio 1985, no writ) (school trustees violated Act by telephone conferencing). *But see Harris County Emergency Serv, Dist. #1 v. Harris County Emergency Corps*, 999 S.W.2d 163 (Tex. App. – Houston [14th Dist.] 1999, no writ) (evidence that one board member of a five-member county emergency service district occasionally used telephone to discuss agenda for future meetings with one other board member did not amount to Act violation).

[55] Op. Tex. Att'y Gen. Nos. JC-307 (2000); DM-95 (1992); *Willmann*, 123 S.W.3d at 480. See especially *Esperanza Peace and Justice Center v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001) for a discussion of an illegal "walking quorum" facilitated by mayor and city manager.

[56] Op. Tex. Att'y Gen. No. GA-412 (2006) (stating that a governmental body may adopt Robert's Rules of Order if the adopted provisions are consistent with the Act and other applicable statues); TEX. LOC. GOV'T CODE ANN. § 22.038(c) (Vernon 1999) (the governing body of a Type A general law may determine the rules of its proceedings); *See* Op. Tex. Att'y Gen. No. DM-473 (1998) (home rule city)

Does the Act give individual members of the governing body a right to place items on a meeting agenda?

The Act does not specifically address the power of individual officials to place items on the agenda for a meeting. However, the Attorney General has ruled that a home rule city may adopt a local provision that requires the consensus of several council members to place an item on the agenda.[57] For example, the City of Dallas requires the consensus of five council members to place an item on the agenda. However, in a home rule city that has not adopted such a requirement, or in a general law city, an argument could be made that individual council members could each place items on the agenda. This argument is supported by the reasoning in Attorney General Opinion DM-228,[58] which concluded that individual county commissioners have a right to place items on the agenda for a county commissioners court meeting. A city should consult its local legal counsel regarding this issue.

What is the role or power of the mayor or county judge during an open meeting?

The mayor or county judge serves as the presiding officer for purposes of running an open meeting. However, the Act itself does not define any specific powers of the mayor or county judge regarding the open portion of a meeting.

May a mayor or county judge vote on items or second motions that are made at an open meeting?

The Act does not address when a mayor or a county judge may vote on an item during an open meeting.

In a home rule city, the power of the mayor to cast a vote is generally addressed in the city charter. For Type A general law cities, state law specifies that the mayor may vote only in the case of a tie.[59] State statutes do not specifically address whether a mayor in a Type B or a Type C general law city may vote on items. Some legal analysts have concluded that the mayor of a Type B city and the mayor of a Type C city may vote on all items, even when there is not a tie.[60]

In the county, the county judge is a full voting member of the commissioners court.[61]

As to who may second motions, the answer would depend on what local rules of parliamentary procedure have been adopted by the city council. Under most rules of parliamentary procedure, only a voting member of the city council could second a motion. Under such a rule, whether or not the mayor could second a motion would depend on whether or not the mayor had the power to vote on the matter that was before the city council. On the other hand, a county judge would be able to second motions.

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[57] Op. Tex. Att'y Gen. No. DM-473 (1998).

[58] Op. Tex. Att'y Gen. No. DM-228 (1993).

[59] TEX. LOC. GOV'T CODE ANN.§ 22.037(a) (Vernon 1999).

[60] Bojorquez, Alan J., *Texas Municipal Law and Procedure Manual*.

[61] Op. Tex. Att'y Gen. Nos. O-2145 (1940); O-1716 (1939).

May members of the governing body enter their votes on an item without attending the meeting (e.g., vote by proxy)?

A member must be present at a meeting in order to deliberate and to vote;[62] the member may not vote by proxy.[63]

May a governing body hold an open meeting by teleconference?

A meeting of a governing body may be held by teleconference call only if:

1. An emergency or public necessity exists; and
2. It is difficult or impossible to convene a quorum at one location.[64]

When holding such a meeting, there are several procedural requirements that must be met. First, the meeting must be posted and open to the public in the same manner as a regular meeting. Second, the meeting must be held in the same place where meetings of the governing body are usually held. Third, the identity of each speaker must be clearly stated prior to that person speaking. Fourth, the meeting must be set up so as to provide two-way communications throughout the entire meeting. Fifth, all portions of the meeting (other than executive sessions) must be audible to the public, including the entire conference call. Finally, the meeting must be recorded and a copy of the recording must be made available to the public.

In Attorney General Opinion JC-352, the Attorney General concluded that a governmental body was not required to state in the agenda that the meeting would be held by telephone conference call pursuant to the Act.[65] Further, section 551.125, which permits a meeting by telephone conference call only in case of an emergency or public necessity and only if it is "difficult or impossible" to convene a quorum in one location, contemplates meetings by telephone conference call in extraordinary circumstances and not merely when attending a meeting at short notice would inconvenience members of the governmental body. Should a quorum of the governmental body convene at the meeting location, section 551.125 does not permit absent members to participate from other locations by telephone conference call.[66] Further, it would be questionable to allow participation of a third party by teleconference in a meeting due to the strict requirements in this section. Legal counsel should be consulted if such a situation arises.

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[62] Op. Tex. Att'y Gen. Nos. DM-207 (1993); JM-584 (1986).

[63] Tex. Att'y Gen. LO 94-028 (1994); Op. Tex. Att'y Gen. No. JM-903 (1988).

[64] TEX. GOV'T CODE ANN. § 551.125 (Vernon 2004).

[65] Op. Tex. Att'y Gen. No. JC-352 (2001).

[66] *Id.* at 4.

May a governing body hold an open meeting by video conference?

A governing body may hold an open meeting by video conference if a quorum of the body is physically present at one location for the meeting.[67] There is no requirement that an emergency exist in order to meet by video conference. As with a teleconference meeting, there are several specific procedural requirements that apply to such a meeting. For example, the notice of a video conference meeting must specify the location where a quorum of the body will be physically present. Additionally, the notice must specify the physical location of each member who will be participating in the meeting from another location. All of the locations identified in the notice must be open to the public, and the entire video conference meeting (other than an executive session) must be visible and audible to the public at each of those locations. Each location identified in the notice must also have two-way communication with all the other locations during the entire meeting. The Act further requires that each participant be clearly audible and visible to all of the other participants and to the public (except during an executive session). Additionally, the quality of the audio and video signals at a video conference meeting must meet the requirements set forth by the Texas Department of Information Resources and by section 551.127 of the Texas Government Code. Finally, the entire meeting must be recorded, and the tape must be made available to the public.

May a governing body broadcast its meetings over the Internet?

The governing body may broadcast its open meetings over the Internet.[68] If it chooses to broadcast its meetings in this fashion, the entity must establish an Internet site and provide access to the broadcast from that site. In addition, the Internet site must provide the same 72-hour notice of any meeting as must be provided at city hall.

What accommodations must a local entity provide at its open meetings for an attendee who has a disability?

Generally, a local unit must make its meetings accessible to persons with disabilities. Title II of the Americans with Disabilities Act (ADA) provides that activities of state and local governing bodies, including meetings, are subject to the ADA.[69] In most cases, such a requirement means that the facility holding the meeting must be physically accessible to individuals with disabilities. Entities may ask that individuals with disabilities provide the entity with reasonable notice on any accommodations they may need to attend the meeting. Entities must also be ready to provide an accessible meeting site and provide alternative forms of communications that address the needs of individuals with disabilities. This may involve providing sign language interpreters, readers, or large print or Braille documents upon request.

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[67] TEX. GOV'T CODE ANN .§ 551.127 (Vernon 2004).

[68] *Id.* § 551.128.

[69] 42 U.S.C.A. § of 42.12131 – .12165 (1990)

Managing Discussions at an Open Meeting

What right does the public have to speak on a particular agenda item?

The Act allows the public to observe the open portion of a meeting. However, the Attorney General has concluded that the Act does not give members of the public a right to speak on items considered at an open meeting.[70] Such a right exists only if a specific state law requires a public hearing on an item or if state law requires that public comment be allowed on an issue. If a local entity allows members of the public to speak on an item at a meeting, the governing body may adopt reasonable rules regulating the number of speakers on a particular subject and the length of time allowed for each presentation. However, the body must apply its rules equally to all members of the public.[71]

What is the general distinction between a public hearing and an open meeting?

A governing body is not required by the Act to allow members of the public to speak on regular agenda items at an open meeting.[72] However, during a public hearing, members of the public must be given a reasonable opportunity to speak.

Another difference between public hearings and general open meetings is the type of notice that must be provided. Many statutes that require a public hearing also require that special notice of the hearing be given. For instance, when a city council is going to have an annexation hearing, it must publish notice of the hearing in a newspaper at some time between 10 and 20 days before the hearing. On the other hand, the only notice generally required for a regular open meeting is the 72-hour posted notice.

May a governing body require that a group select one of its members as a spokesperson?

A governing body may make reasonable rules regulating the number of speakers on a particular subject and the length of each presentation.[73] Arguably, such rules could include a requirement that a group select one of its members as a spokesperson. However, the body should not discriminate between one group and another on a particular issue. Further, in no case may the body adopt procedural rules that are inconsistent with the state or federal constitution, state or federal statutes, or city charter provisions (in a home rule city).[74] Restrictions on the subject matter that citizens may discuss or the manner in which they may discuss them may in some instances violate the United States Constitution's First Amendment, which prohibits governmental bodies from imposing laws or regulations that abridge free speech. A local entity should consult its legal counsel if it decides to impose such procedural rules.

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[70] Op. Tex. Att'y Gen. Nos. JC-169 (2000); H-188 (1973).

[71] Op. Tex. Att'y Gen. No. JC-169 (2000); Tex. Att'y Gen. LO 96-111 (1996).

[72] Op. Tex. Att'y Gen. Nos. JC-169 (2000); H-188 (1973).

[73] Op. Tex. Att'y Gen. No. JC-169 (2000); Tex. Att'y Gen. LO 96-111 (1996).

[74] Op. Tex. Att'y Gen. Nos. DM-473 (1998); H-188 (1973).

May members of the public be removed from an open meeting for causing a disturbance?

The presiding officer or the governing body as a whole may ask that individual members of the public be removed if they are causing a disturbance at a public meeting. What constitutes conduct that rises to the level of disorderly conduct is a fact issue for the body to consider. A local entity may want to consult its attorney for guidance on what actions may constitute "disorderly conduct" and adopt policies to put the public on notice.

May a governing body limit its members to a set amount of time for their testimony or remarks at an open meeting?

The Act does not address whether a governing body may set time limits on the remarks of its members at an open meeting. However, the governing body may adopt procedural rules for its meetings that are not inconsistent with the state or federal constitution, state or federal statutes, or with local city charter provisions.[75] Within these parameters, a governing body may arguably set reasonable time limits for its members' remarks in an open meeting.[76]

May members of the governing body be removed from an open meeting for causing a disturbance?

The Act does not specifically address removal of a member of a governing body from an open meeting for causing a disturbance. Nonetheless, local entities have the power to take actions to promote an orderly meeting. Accordingly, if a council member's or other official's conduct rose to the level of disorderly conduct, the member could be warned and then, if necessary, the presiding officer or the governing body as a whole could require that the member be removed. Adopting rules to put the members of the governing body on notice might be beneficial after consulting with local counsel.

Keeping a Record of Open Meetings

What duty does a local entity have to keep minutes of open meetings?

A governing body must either keep minutes or make a tape recording of every open meeting.[77] If the body chooses to keep minutes rather than make a tape, the Act requires that the minutes indicate the subject of each deliberation and indicate every action that is taken.[78]

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[75] Op. Tex. Att'y Gen. Nos. DM-473 (1998); H-188 (1973).

[76] Tex. Att'y Gen. LO 96-111 (1996); Op. Tex. Att'y Gen. No. H-188 (1973).

[77] TEX. GOV'T CODE ANN. § 551.021(a) (Vernon 2004).

[78] *Id.* § 551.021(b).

What access does the public have to the minutes of an open meeting?

The minutes or tape recording of an open meeting are open to the public and must be available for inspection or copying.[79] It should be noted that exceptions to required public disclosure in the Public Information Act do not apply to the minutes or recording of an open meeting. The local unit must permanently retain copies of its minutes of its meetings. However, the unit is not required by state law to publicly post the minutes of an open meeting.

What right does the public have to record open meetings?

The Act gives any member of the public a legal right to make a video or audio recording of an open meeting.[80] However, the Act also gives a governmental body a right to adopt reasonable rules that are necessary to maintain order at a meeting. Thus, a governing body may regulate the location of recording equipment and the manner in which the recording is conducted. However, the body may not adopt any rule that would unreasonably impair a person's right to record an open meeting.

V. Executive Sessions

What are the general subjects for which a municipality or county may hold an executive session?

Under the Act, a municipality or county may generally hold an executive session for one or more of the following nine reasons: 1) consideration of specific personnel matters; 2) certain consultations with its attorney; 3) discussions about the value or transfer of real property; 4) discussions about security personnel, security devices, or a security audit; 5) discussions about a prospective gift or donation to the city; 6) discussions by a governing body of potential items on tests that the governing body conducts for purposes of licensing individuals to engage in an activity; 7) discussions of certain economic development matters; 8) discussions of certain competitive matters relating to a city-owned electric or gas utility for which the city council is the governing body;[81] and 9) certain information relating to the subject of emergencies and disasters.[82]

Executive Sessions to Discuss Personnel Issues

When may a governing body meet in executive session to discuss personnel issues?

The Act allows a governmental body to hold an executive session to discuss the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or

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[79] *Id.* § 551.022 ; *see also* Att'y Gen. ORD-225 (tapes of meetings used to assist in writing minutes are open records).

[80] TEX. GOV'T CODE ANN. § 551.023 (Vernon 2004).

[81] *See generally* Subchapter D of the Act; *see also* notes below for particular statutory references.

[82] TEX. GOV'T CODE ANN. § 418.183(f) (Vernon 2005). There may be rare instances where another exception in Subchapter D of the Act would apply to a local entity.

employee.[83] A governmental body may also hear a complaint or charge against such officer or employee in an executive session. However, the governmental body is not allowed to meet in executive session about an employee or official if the subject of the deliberation requests that the item be heard in an open session or in a public hearing. Also, any final action by the governing body on a personnel matter must be taken in open session.[84]

It is important to note that a governing body may meet in executive session under the personnel exception only if the person being discussed is an officer or employee of the local entity. Neither the appointment of advisory committee members[85] nor the hiring of independent contractors[86] are proper subjects for executive sessions under the personnel exception. In addition, the personnel exception allows only the discussion of a particular person or persons in executive session. A governmental body may not discuss general policies regarding an entire class of employees in an executive session held under the personnel exception.[87] Such general policies must be addressed during the open portion of a meeting.

Does the entity have to post the name of the individual employees who are to be discussed in executive session?

A local entity is not required to post the name of the specific individual to be discussed in an executive session.[88] However, the more important the position being discussed, the more specific the posting will need to be in describing that position.[89] Thus, the phrase "possible dismissal of a police officer" would normally be a sufficient posting for a city to consider firing a police officer of low rank, unless unusual circumstances made the item particularly newsworthy. On the other hand, if a city is considering the dismissal of the police chief, the posting arguably should indicate "possible personnel action regarding police chief" so that the public is clearly informed as to which high-level position is under discussion.[90]

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[83] *Id.* § 551.074 (Vernon 2004).

[84] *Id.* § 551.102.

[85] Op. Tex. Att'y Gen. No. DM-149 (1992).

[86] *Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 699 (Tex. App. – San Antonio, pet. denied); Op. Tex. Att'y Gen. No. MW-129 (1980).

[87] *Gardner v. Herring*, 21 S.W.3d 767, 777 (Tex. App. – Amarillo 2000, no pet.); Op. Tex. Att'y Gen. No. H-496 (1975).

[88] *See City of San Antonio*, 820 S.W.2d 762 (the Act does not raise due process implications; individual notice is not required).

[89] *See, e.g., Point Isabel*, 797 S.W.2d 176.

[90] *See Mayes*, 922 S.W.2d 200.

Does the governing body have to give individual notice to the employee that he/she will be discussed in an executive session?

The Act does not require that an employee or officer be given individual notice of an executive session in which that person will be discussed.[91] However, it is possible that other sources, such as constitutional due process, state statutes, a contractual agreement, a city charter, or a local city ordinance may require that certain staff positions be given individual notice and a hearing before any disciplinary action is taken.[92] Local units should consult their legal counsel regarding the applicable laws in such a situation.

Does an employee have a right to attend the executive session if he/she is being discussed?

When a governing body discusses an employee or officer in executive session under the personnel exception, the person being discussed does not have an inherent right to attend the executive session. The governing body decides who are the necessary parties for attendance at the executive session. The governing body chooses whether to allow the attendance of the employee at the executive session.[93]

Does an employee have a right to force the governing body to hear a personnel item regarding that employee in an open meeting instead of in executive session?

The person that is to be discussed under the personnel exception has a right to insist that the item be discussed in a public hearing instead of during an executive session.[94] However, the Act does not give an employee or officer the right to insist that a personnel item regarding that individual be discussed only within an executive session.[95]

Is a governing body permitted to conduct personnel interviews for new hires or potential officers in an executive session?

There do not appear to be any court cases or attorney general opinions that directly address the authority of a governing body to interview prospective personnel or officer appointees in an executive session. Given the language of the exception, it is an open question whether a governing body could interview job applicants or potential officers in closed session, and local counsel should be consulted before doing so.

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[91] *City of San Antonio*, 820 S.W.2d 762 (Act does not raise due process implications; individual notice is not required); *Rettberg v. Tex. Dep't of Health*, 873 S.W.2d 408 (Tex. App. – Austin 1994, no writ) (state agency executive secretary not entitled to individual notice); *Stockdale v. Meno*, 867 S.W.2d 123 (Tex. App. – Austin 1993, writ denied) (teacher not entitled to individual notice).

[92] *E.g.*, TEX. LOC. GOV'T CODE ANN § 22.077 (Vernon 1999) (hearing for removal of certain municipal officers in type A city).

[93] Op. Tex. Att'y Gen. No. JM-6 (1983).

[94] TEX. GOV'T CODE ANN. § 551.074 (Vernon 2004).

[95] Op. Tex. Att'y Gen. No. JM-1191 (1990).

May a governing body admit members of the public selectively to an executive session to give feedback on an employee or official being evaluated in the session?

No, the executive session is for the benefit of the governing body to meet away from public scrutiny under limited exceptions; this purpose is defeated by selectively admitting the public and the Act does not condone this type of procedure.[96]

Executive Sessions for Consultations with an Attorney

When may a governing body have an executive session using the exception for consultations with an attorney?

The Act allows a governmental body to meet with its attorney to receive legal advice about pending or contemplated litigation or about settlement offers. The Attorney General has also concluded that a governmental body may meet with its attorney to receive legal advice on any matter.[97] However, the Attorney General has warned that discussions in an executive session under the attorney-consultation exception must relate solely to legal matters. The governing body may not discuss general policy matters that are unrelated to receiving legal advice from the attorney while in executive session under this exception.[98]

May a governing body meet in executive session for consultations with an attorney if the attorney is not physically present?

An entity may use a telephone conference call, video conference call, or Internet communications to consult with certain attorneys in an open meeting or in an executive session. Each part of the public consultation with the attorney in open session must be audible to the public at the location specified in the agenda. Further, only certain attorneys may consult with the governing body via these means. If the attorney is an employee of the local unit, such consultations via the Internet, telephone, or video conference are not permitted. An attorney who receives compensation for legal services from which employment taxes are deducted by the unit is considered to be an employee of the unit.[99]

May a governing body meet in executive session with its attorney to discuss a proposed contract?

A governing body may consult with its attorney in executive session to receive advice on legal issues raised by a proposed contract. However, the body may not discuss the merits of a proposed contract, financial considerations, or other nonlegal matters related to the contract simply because

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[96] Op. Tex. Att'y Gen. GA-511 (2007) at 4.

[97] Op. Tex. Att'y Gen. No. JM-100 (1983); *see* Op. Tex. Att'y Gen. No. JM-238 (1984) (governing body may admit to executive session persons aligned with governing body and necessary to governing body's full communication with its attorney) (modified by Op. Tex. Att'y Gen. No. JC-506 (2002) to require in addition that presence of person must not waive attorney-client privilege if person is admitted under attorney consultation exception).

[98] Op. Tex. Att'y Gen. No. JM-100 (1983) at 2.

[99] TEX. GOV'T CODE ANN. § 551.129 (Vernon 2004).

its attorney is present.[100] General discussion of policy unrelated to legal matters is not permitted in executive session under the Act merely because an attorney is present.

Other Types of Executive Sessions

May a governing body discuss the acquisition of real estate in an executive session?

The Act allows a governmental body to hold an executive session to discuss the purchase, exchange, lease, or value of real estate.[101] However, such an executive session is allowed only if discussion of the real estate in an open meeting would have a detrimental effect on the ability of the governmental body to negotiate with a third party.[102] For example, an executive session may in certain cases be permitted to discuss what the local unit is willing to pay for real property that it plans to acquire. The unit should not use this exception when the other party in the transaction is present. There is no comparable authority for a governing body to go into an executive session to discuss the acquisition of items of personal property, such as the purchase of a new computer system.

May a governing body discuss security personnel, security devices, or a security audit in an executive session?

The Act has permitted a governing body to discuss security personnel or security devices in an executive session; it now also allows discussion of security audits.[103]

May a governing body discuss a contract involving a prospective gift or donation in an executive session?

A governing body may meet in executive session to discuss the negotiations for a contract for a prospective gift or donation.[104] Such a contract must relate to a gift to be given to the State or to the governmental body. However, similar to the real estate exception, the body may only meet in an executive session if its negotiating position with a third person would be negatively affected by the body's discussion of the contract in open session.

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[100] *Olympic Waste Servs. v. City of Grand-Saline*, 204 S.W.3d 496, 503-04 (Tex. App. – Tyler 2006, no pet.); Op. Tex. Att'y Gen. No. JC-233 (2000) at 3; *see also Finlan v. City of Dallas*, 888 F. Supp. 779, 782 n.9 (N.D. Tex. 1995).

[101] TEX. GOV'T CODE ANN. § 551.072 (Vernon 2004).

[102] *City of Laredo v. Escamilla*, 219 S.W.2d 14, 19 (Tex. App. – San Antonio 2006, pet. denied); Op. Tex. Att'y Gen. No. MW-417 (1981).

[103] TEX. GOV'T CODE ANN. § 551.076 (Vernon Supp. 2007) (as amended by Tex. S.B. 11, 80th Leg., R.S. (2007)).

[104] *Id*. § 551.073.

May a governing body discuss a test item in executive session?

A governing body may discuss a test item or information related to a test item in executive session if the item may be included in a test that the governing body administers to individuals who seek to obtain or renew a license or certificate that is necessary to engage in an activity.[105]

May the governing body of a public utility discuss utility matters in executive session if the disclosure of the information would give an advantage to competitors?

The governing body of a public electric or gas utility is allowed to discuss information in a closed session if that information would give advantage to a competitor or potential competitor.[106] Unlike other provisions authorizing executive sessions, this provision appears to authorize a governing body to take a final vote on a matter in a properly held executive session of this type.

In order to use this provision, the governing body is required to take a vote at the beginning of such a closed session. For the closed session to continue, a majority of the governing body must determine that the matter to be discussed is related to the utility's competitive activity and would, if disclosed, give advantage to a competitor or potential competitor. The vote must be recorded in the tape or certified agenda of the closed session.

This new provision also lists several types of information that may not be discussed in this type of executive session. Thus, before using this authority, the governing body of a public utility should review Texas Government Code section 551.086 and discuss the matter with its legal counsel.

May a governing body discuss potential business incentives and other economic development negotiations in an executive session?

A governing body may meet in an executive session to discuss certain matters related to economic development.[107] It may discuss commercial or financial information that the governing body has received from certain business prospects. The business prospect must be one that the governing body is negotiating with for economic development purposes to locate, stay, or expand in or near the city. Under this exception, a governing body may also hold an executive session to discuss a potential offer of financial or other incentives to the business prospect. The unit should not use this exception when representatives for the business prospect are present.

Need for Statutory Authority to Hold Executive Sessions

May a governing body hold workshops or retreats in an executive session?

It is irrelevant whether a governing body refers to a gathering as a workshop or as a retreat; the provisions of the Act would apply to such meetings if a quorum of the body is present and the

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[105] *Id.* § 551.088.

[106] *Id.* § 551.086.

[107] *Id.*§ 551.087.

quorum/governmental body deliberates about public business.[108] To go into an executive session, the local entity must show that the issue to be discussed fits within one of the specific statutory categories that is permitted for executive sessions.

Does the Public Information Act provide a basis for meeting in executive session?

The governing body may not discuss documents that may be confidential under the Public Information Act, Chapter 552 of the Government Code, in executive session unless one of the particular exceptions to the Open Meetings Act applies. The two main open government Texas statutes are entirely independent in their operation.[109]

Procedural Requirements for Meeting in Executive Sessions

Is there a difference between the terms "executive session," "closed meeting," and "closed session"?

No. All of these terms are used interchangeably. The important point to remember is that a governmental body may not exclude the public from a meeting unless the Act specifically authorizes such a closed meeting.[110]

May a city council meet in executive session if a local city charter provision requires that all city council meetings be conducted as open meetings?

A city council may not hold an executive session if the city charter specifically requires that all meetings or the type of meeting in question be held as open meetings.[111]

What notice must be posted to consider an item in executive session?

The rules for posting executive session items are the same as the general rules for posting issues that will be considered in open session.[112] Most local units indicate on the posting that the governmental body may be going into executive session on a particular topic and the statutory section that allows such an item to be considered in a closed meeting. However, the Act does not require the agenda to state which items will be discussed in closed session. Should a governing body consistently distinguish between subjects for public deliberation and subjects for executive session, an abrupt departure from this practice could deceive the public and thereby render the notice inadequate.[113]

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[108] *See Bexar Medina Atascosa Water Dist.*, 2 S.W.3d at 462.

[109] Op. Tex. Att'y Gen. No. GA-16 (2003) at 6.

[110] TEX. GOV'T CODE ANN. § 551.002 (Vernon 2004).

[111] TEX. GOV'T CODE ANN. § 551.004 (Vernon 2004); *Shackelford v. City of Abilene*, 585 S.W.2d 665 (Tex. 1979)

[112] *See generally* TEX. GOV'T CODE ANN. §§ 551.041, .043, .050 (Vernon 2004). The notice does not have to cite the section or subsection numbers of the provision authorizing the closed session. Op. Tex. Att'y Gen. No. GA-511 (2007) at 6.

[113] Op. Tex. Att'y Gen. No. JC-57 (1999) at 5.

May an item be considered in executive session if the posted agenda does not indicate it will be discussed in executive session?

In certain cases, a properly posted agenda item may be considered in executive session even though the posted agenda did not indicate that the item would be discussed in executive session.[114] As mentioned above, the rules for posting executive session items are the same as the rules for posting items that will be considered in open session.[115] The Open Meetings Act requires only that the posted notice give reasonable notice of the subjects that will be discussed. There is no requirement that the local entity indicate whether an item will be handled in open or closed session. However, if the notices posted for a governmental body's meetings consistently distinguish between subjects for public deliberation and subjects for closed session deliberation, an abrupt departure from this practice may raise a question as to the adequacy of a notice to inform the public.[116]

What procedure should a governing body follow to go into executive session?

If a governing body chooses to discuss an item in executive session, it must follow the statutory procedures required for such sessions. The body must first convene in a properly posted open session. During that open session, the presiding officer must announce that a closed meeting will be held and identify the section(s) of the Act authorizing such a closed meeting.[117] A local unit may wish to have a prior written opinion from its attorney setting forth a reasonable basis for holding the executive session for the involved item whenever the matter is in dispute. Once an executive session has begun, the presiding officer must announce the date and time the session started. At the end of that executive session, the presiding officer must again announce the date and time.[118] A tape recording or certified agenda must be made. Also, any action or vote on an agenda item may be taken only during an open session.[119]

May a governing body continue an executive session to the immediate next day?

An executive session of a public meeting may be continued to the immediate next day, so long as, before convening the second-day executive session, a quorum of the governing body first convenes in an open meeting. The presiding officer must publicly announce that a closed meeting will be held and identify the section or sections of the Act under which the executive session is authorized.[120]

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[114] Op. Tex. Att'y Gen. No. JC-57 (1999).

[115] *See generally* TEX. GOV'T CODE ANN. §§ 551.041, .043, .050 (Vernon 2004).

[116] Op. Tex. Att'y Gen. No. JC-57 (1999) at 5.

[117] TEX. GOV'T CODE ANN. § 551.101 (Vernon 2004); *see Lone Star Greyhound Park v. Tex. Racing Comm'n*, 863 S.W.2d 742, 747-48 (Tex. App. – Austin 1993, writ denied) (presiding officer's announcement of content of applicable section, but not section number, gives sufficient notice).

[118] TEX. GOV'T CODE ANN. § 551.103 (Vernon 2004).

[119] *Id*. § 551.102.

[120] TEX. GOV'T CODE ANN. § 551.101 (Vernon 2004); *see also id.* § 551.0411(a) (Vernon Supp 2007); Op. Tex. Att'y Gen. No. JC-285 (2000).

If a member of a governing body is not certain that an executive session is permitted, what actions should the official take if such a session is called?

If a member is not certain that an executive session is permitted on an issue, the member may want to obtain in advance of that executive session a formal written interpretation from the local entity's attorney as to the legality of the meeting. The Act provides that an official who reasonably relies on such a written opinion has an affirmative defense to any criminal prosecution for violation of the Act. Unless the member has such a written interpretation from his attorney, the Attorney General, or a court,[121] the member should refuse to attend any executive session that he or she feels may be illegal. Simply objecting or not speaking during an illegal executive session would not relieve the member of potential criminal liability for participating in the meeting.

Who is permitted to attend an executive session?

The Act does not specify who may or may not attend an executive session.[122] Generally, a governmental body has discretion to determine who may attend executive sessions. Members of the public may not be selectively admitted to an executive session.[123] When a governmental body holds an executive session under section 551.071, the attorney-consultation exception, to discuss a lawsuit, the body's attorney must be present, but an opposing party may not be present.[124] In considering whether to admit any other nonmember to an executive session held under this section, a governmental body should consider 1) whether the person's interests are adverse to the governmental body's; 2) whether the person's presence is necessary to the issues to be discussed; and 3) whether the governmental body may waive the attorney-client privilege by including the nonmember.[125] With respect to executive sessions held under other exceptions in the Act, a governmental body has the right to determine which nonmembers may attend and may include a nonmember if the person's interests are not adverse to the governmental body's and the person's participation is necessary to the anticipated deliberation.[126] In addition, a governmental body should be careful not to admit a party whose presence would circumvent the purpose for which the executive session is authorized. For example, the purpose of the exception that allows closed sessions to discuss the purchase or sale of real property is to hold such talks without putting the governmental body at a disadvantage in bargaining.[127] A governmental body, therefore, should not allow someone to attend an executive session regarding a proposed real estate transaction if this person is bargaining with the local unit for the purchase or sale of the real property.[128]

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[121] TEX. GOV'T CODE ANN. § 551.144 (Vernon 2004).

[122] Op. Tex. Att'y Gen. No. JC-375 (2001).

[123] Op. Tex. Att'y Gen. No. GA-511 (2007).

[124] *See* Op. Tex. Att'y Gen. Nos. JC-506 (2002); JC-375 (2001); JM-238 (1984).

[125] Op. Tex. Att'y Gen. No. JC-506 (2002).

[126] *Id.*

[127] Op. Tex. Att'y Gen. No. MW-417 (1981).

[128] *See Finlan*, 888 F. Supp. at 787.

May a governing body prevent a member from attending an executive session?

The Attorney General has addressed the ability of a governmental body to exclude one of its members from an executive session concerning a lawsuit by a board member against the governmental body.[129] In that situation, a school board had been sued by one of its own members and wanted to discuss the lawsuit with its attorney in an executive session. The Attorney General concluded that the school board could exclude the member who had sued the district. The purpose of the exception for consultations with an attorney is, in part, to allow a governmental body to receive legal advice from its attorney without revealing attorney-client confidences to the opposing side. Admitting a member of a governing body who is on the opposing side of litigation to such an executive session would defeat the purpose of holding it.

May a governing body prevent its staff from attending an executive session?

The Attorney General has indicated that a governing body may exclude all nonmembers from attending a closed meeting.[130] Thus, a governing body may exclude its staff from attending an executive session. However, some city charters and certain statutory provisions provide that the city secretary shall attend all city meetings.[131] It is not clear whether such a provision would require the attendance of the city secretary at an executive session. One attorney general opinion concluded that the county commissioners court could exclude the county clerk from an executive session of the commissioners court where no statute required the presence of the county clerk.[132] This was recently reiterated in an opinion that also suggested the court could authorize the county clerk to attend an executive session.[133] Another opinion concluded that a contractual provision requiring a superintendent of schools to attend all executive sessions of her school board of trustees was valid under the Act but would not preclude her exclusion by the board.[134]

May a governing body approve items or take a straw poll in an executive session?

A court has held that a member of a governing body may indicate during an executive session how he or she plans to vote on an item.[135] However, the governing body may not conduct a straw vote

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[129] Op. Tex. Att'y Gen. No. JM-1004 (1989).

[130] *See* Op. Tex. Att'y Gen. No. JM-6 (1983); Tex. Att'y Gen. LO 97-017 (1997). *But see* Op. Tex. Att'y Gen. No. JC-506 (2002) (test for admitting persons when invoking attorney consultation exception).

[131] *See* TEX. LOC. GOV'T CODE ANN. § 22.073 (Vernon 1999) (requires a city secretary in Type A city to attend all meetings and keep required minutes).

[132] Op. Tex. Att'y Gen. No. JM-6 (1983).

[133] Op. Tex. Att'y Gen. No. GA-277 (2004).

[134] Op. Tex. Att'y Gen. No. JC-375 (2001).

[135] *Bd. of Trustees v. Cox Enters., Inc.*, 679 S.W.2d 86, 89 (Tex. App. – Texarkana 1984), *aff'd in part, rev'd in part on other grounds*, 706 S.W.2d 956 (Tex. 1986); *Nash v. Civil Serv. Comm'n*, 864 S.W.2d 163, 166 (Tex. App. – Tyler 1993, no writ).

or a formal vote during such a session.[136] The Act requires that any final action, decision, or vote be taken in open session.[137]

Production and Handling of Certified Agenda or Tape for Executive Sessions

Is a governmental body required to create a certified agenda or to record a tape of discussions held in executive session?

A governmental body must create a certified agenda or make a tape recording of every executive session unless the closed session is being held under the exception for consultation with an attorney.[138] The body may turn off the tape or stop taking notes during the portion of a closed meeting that involves consultations with an attorney. If the body chooses to keep a certified agenda rather than make a tape of an executive session, the certified agenda must state the subject matter of each deliberation.[139] A certified agenda does not have to be a verbatim transcript of what happened in executive session, but it must summarize what was discussed on each topic.[140] In addition, the certified agenda or tape must include an announcement by the presiding officer of the date and time that the executive session began and ended.[141]

Who is responsible for creating the certified agenda or recording the tape of an executive session?

The Act does not specify a particular individual or officer responsible for producing the certified agenda or making the tape of an executive session. However, the presiding officer at the executive session is responsible for certifying that the certified agenda or tape is a true and correct record of the proceedings.[142] It is important to note that a member of a governing body commits a Class C misdemeanor if he/she participates in a closed meeting knowing that a certified agenda or tape is not being made.[143]

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[136] *Cox Enters Inc.*, 679 S.W. 2d 86

[137] TEX. GOV'T CODE ANN. § 551.102 (Vernon 2004); *Nash*, 864 S.W.2d at 166.

[138] TEX. GOV'T CODE ANN. § 551.103(a) (Vernon 2004).

[139] *Id.* § 551.103(c)(1).

[140] Op. Tex. Att'y Gen. No. JM-840 (1988) at 4-7.

[141] TEX. GOV'T CODE ANN. § 551.103(c)(2) (Vernon 2004).

[142] *Id.* § 551.103(b).

[143] *Id.* § 551.145.

May a member of a governing body or staff release a copy of a certified agenda or tape to the public?

A certified agenda or tape kept during an executive session may be disclosed to a member of the public only under a court order.[144] There are criminal penalties for releasing a copy of the certified agenda to the public without a court order.[145]

May a member of a governing body tape an executive session for the member's own use?

A Texas court has ruled that a member of a governmental body has no right to tape an executive session over the objection of a majority of the governmental body's members.[146] A reasonable argument can be made that a governmental body may give permission to one of its members to tape an executive session. However, it does not appear that either the courts or the attorney general have directly addressed this issue.

May a local entity release a copy of a certified agenda or recording to its member?

The Attorney General has indicated that a member of a governing body who attended an executive session may later review the certified agenda or tape of that executive session.[147] However, members do not have a right to make a copy of the certified agenda or tape of the executive session.[148] Further, the Attorney General has indicated that an absent member may review the tape recording of a closed meeting that the member did not attend. Presumably, this would include tapes made of closed sessions conducted prior to the start of the member's term of office. The governing body should adopt procedures for reviewing a recording to preserve the recording's evidentiary integrity, but the governing body could not absolutely prohibit the review by a member. Additionally, the governmental body may not provide the absent member with a copy of the tape recording of the executive session. Nor may the governing body allow a member to review the tape of an executive session once the member has left office.[149]

How should an entity's staff handle the certified agenda or tape once it is prepared?

The Act contains two requirements on how certified agendas or tapes of executive sessions are to be handled once they have been created.[150] First, the certified agenda or tape may not be disclosed to the public without a court order. Second, the agenda or tape must be preserved for a period of at least two years after the date of the executive session. If any legal action involving the executive

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[144] *Id*. §§ 551.104, 551.146.

[145] *Id.*

[146] *Zamora v. Edgewood Indep. Sch. Dist.*, 592 S.W.2d 649 (Tex. Civ. App. – Beaumont 1979, writ ref'd n.r.e.); Op. Tex. Att'y Gen. No. JM-351 (1985) at 2.

[147] *See* Op. Tex. Att'y Gen. No. DM-227 (1993); Tex. Att'y Gen. LO 98-033 (1998).

[148] Tex. Att'y Gen. LO 98-033 (1998).

[149] Op. Tex. Att'y Gen. No. JC-120 (1999).

[150] TEX. GOV'T CODE ANN. § 551.104 (Vernon 2004).

session is brought within this time period, the agenda or tape must be further preserved until the action is finished. Ultimately, the governing body is the proper custodian for the certified agenda or tape, not the city secretary or county clerk, but the body may delegate its duty to these individuals.[151]

May members of the governing body publicly discuss what was considered in an executive session?

The Act does not prohibit a member from discussing or making statements about what occurred in an executive session.[152] However, as noted above, the Act does prohibit a person from disclosing to the public a copy of the actual certified agenda or tape of an executive session.[153] Of course, the fact that a person may legally discuss what occurred in an executive session does not mean that it is advisable to do so. For instance, it is possible that such a discussion could waive the governing body's claim of attorney-client privilege if a member revealed attorney-client communications that occurred during an executive session. Other statutes and professional obligations, as well as possible civil rights violations, individual privacy concerns, and the best interest of the governing body and the citizens the member represents, might drastically affect the wisdom of such a course of action.

It is not clear whether a governing body may affirmatively prohibit its members from publicly discussing what takes place in executive session. Attorney General Opinion No. JM-1071 implies that such a restriction may violate the First Amendment of the United States Constitution.[154] A governing body will want to carefully review this issue with its legal counsel before attempting to enact any such policy.

Are notes made by an official in an executive session considered confidential under the Public Information Act?

The certified agenda and tape of an executive session are considered confidential under Texas law. However, a record other than the certified agenda or tape is not automatically considered confidential simply because it relates to an executive session.[155] Therefore, whether the notes made by an official in an executive session are confidential would depend on whether an exception under the Public Information Act applies to the information.

For example, a few early attorney general decisions found that notes made by an official are not subject to the Public Information Act if those notes are solely for the official's personal use and are

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[151] Op. Tex. Att'y Gen. No. GA-277 (2004).

[152] Op. Tex. Att'y Gen. No. JM-1071 (1989).

[153] TEX. GOV'T CODE ANN. §§ 551.104, 551.146 (Vernon 2004).

[154] Op. Tex. Att'y Gen. No. JM-1071 (1989); *See also* Op. Tex. Att'y Gen. No. MW-563 (1980) at 5 (city ordinance attempting to prohibit public discussion of the contents of an executive session may raise First Amendment concerns but does not violate the Public Information Act).

[155] *See* Tex. Att'y Gen. ORD-605 (1992), ORD-491 (1988); ORD-485 (1987).

not produced with public property or by governmental staff.[156] However, these early decisions did not concern notes taken by an official during an executive session. Moreover, more recent decisions have found that personal notes are not necessarily excluded from the definition of "public information" in the Public Information Act.[157] For example, if an official uses his or her notes for public purposes or if the notes are taken as part of the official's duties, the notes are likely to be considered an open record.[158] If there is an open record request for any such notes, the local unit will want to confer with its local legal counsel. Whether the Public Information Act would protect the notes would depend in part on their content and the facts surrounding their creation.[159] For example, the unit should consider who prepared the notes, who possesses and controls the notes, who has access to the notes, whether the notes were used in conducting public business, and whether public funds were expended in creating or maintaining the notes.

VI. Emergency Meetings

What is sufficient cause for posting a two-hour emergency meeting?

Under the Act, an emergency "exists only if immediate action is required of a governmental body because of an imminent threat to public health and safety" or "because of a reasonably unforeseeable situation."[160] The courts and the Attorney General have traditionally construed the emergency posting exception strictly. Accordingly, a situation in which a quick decision was needed to purchase a piece of land was not considered an emergency.[161] The Attorney General has also concluded that the need to discuss indemnifying the governing body and hiring a lawyer for a lawsuit did not constitute an emergency.[162]

As a general rule, the members of a governmental body should ask themselves two questions when considering whether an emergency exists. First, what would happen if the meeting on the "emergency" issue were postponed for 72 hours? If the governing body could not point to an imminent risk to public welfare or safety that would occur if action were not taken within 72 hours, then it would be difficult to argue that an emergency existed. Second, how long has the governing body known about the "emergency" issue? If the governing body has known about the matter for more than 72 hours, it would work against the entity's argument that an emergency existed. It should also be noted that a situation is not "unforeseeable" merely because a deadline is less than

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[156] *See* Tex. Att'y Gen. ORD-145 (1976); ORD-116 (1975); ORD-77 (1975).

[157] *See, e.g.*, Tex. Att'y Gen. ORD-635 (1995).

[158] *See, e.g.*, Op. Tex. Att'y Gen. No. JM-1143 (1990); Tex. Att'y Gen. ORD-225 (1979).

[159] *See, e.g.*, ORD-635 (1995); ORD-574 (1990) (inter-agency and intra-agency written memoranda containing advice, recommendations and opinion can be withheld); Tex. Att'y Gen. ORD-462 (1987).

[160] TEX. GOV'T CODE ANN. § 551.045 (Vernon 2004).

[161] Op. Tex. Att'y Gen. No. JM-985 (1988).

[162] Op. Tex. Att'y Gen No. JM-1037 (1989) at 2-5; JC-57 (1999) at 4; *Markowski v. City of Martin*, 940 S.W.2d 720, 725 (Tex. App.—Waco 1997, writ denied).

72 hours away. If the governing body knew about or should have known about the deadline in advance, then it may be difficult to argue that the situation was "reasonably unforeseeable."[163]

What must be indicated in a notice for an emergency item?

In order to be eligible for a two-hour emergency meeting, the notice of an emergency item must "clearly identify the emergency."[164] The emergency is "clearly identified" when the governing body states the reason for the emergency in the posted notice.[165]

May a local entity add nonemergency items onto an agenda that was otherwise validly posted for two hours as an emergency?

The Act does not allow a governmental body to add nonemergency items to the agenda for an emergency meeting unless the nonemergency items have been posted for sufficient time. The body must post the nonemergency items for at least 72 hours for them to be considered.

Does the media have a right to specific notice of any items that are considered at a governmental meeting on an emergency basis?

To be entitled to specific notice of items that are to be considered on an emergency basis, members of the media must do two things.[166] First, they must file a request to be notified of such items. This request must be filed at the headquarters of the governmental body. The request must also include information on how to contact the media member by telephone, facsimile transmission, or electronic mail. Second, the media member must agree to reimburse the local entity for the cost of providing the special notice. Members of the media are not entitled to special notice of an emergency item unless they meet these criteria.[167]

VII. Enforcement of the Act's Requirements

Civil Enforcement of the Act

What civil remedies does an individual have if the Act is violated?

An individual may sue to prevent, stop, or reverse a violation of the Act.[168] Standing for bringing such an action has been very liberally construed, even in areas like annexation challenges that

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[163] *See River Rd. Neighborhood Ass'n*, 720 S.W.2d at 557-58.

[164] TEX. GOV'T CODE ANN. § 551.045 (Vernon 2004).

[165] *Piazza v. City of Granger*, 909 S.W.2d 529 (Tex. App. — Austin 1995, no writ).

[166] TEX. GOV'T CODE ANN. § 551.047 (Vernon Supp. 2007) (as amended by Tex. S.B. 592, 80th Leg., R.S. (2007)).

[167] *McConnell v. Alamo Heights Indep. Sch. Dist.*, 576 S.W.2d 470 (Tex. Civ. App. — San Antonio 1978, writ ref'd n.r.e.) (media is not entitled to notice unless they request it).

[168] TEX. GOV'T CODE ANN. § 551.142(a) (Vernon 2004).

normally require an action to be brought by the State's attorney.[169] If a court finds that there will be or has been a violation of the Act, the court has at least four options. First, the court may order a governmental body or an official to stop violations of the Act, to avoid future violations of the Act, or to perform a duty required by the Act.[170] Second, a court may invalidate any action that a governmental body has taken in violation of the Act.[171] Third, in cases where the Act was violated in the course of firing an employee, the courts may order the governmental body to provide back pay to the employee.[172] Finally, at its own discretion, a court may make the losing side in such a case pay costs of litigation and reasonable attorney fees.[173]

The Act also provides that an individual, corporation, or partnership that releases a certified agenda or tape of an executive session to the public may be held liable in a civil lawsuit.[174] In such a suit, the person or entity that is harmed may get damages, attorney fees, and court costs.

Is an action automatically void if it was accomplished without compliance with the Act?

Actions that violate the Act may be invalidated by a court.[175] However, such actions are not automatically void. Whether to invalidate a particular action is for the discretion of the court. In fact, it is possible that a court may not invalidate an action even if the court finds that the action was taken in violation of the Act.[176] Nonetheless, it is always the safer course to attempt to achieve full compliance with the Act to avoid the likelihood of later court challenges.

May a governing body later "ratify" an action that was handled in a meeting that did not comply with Act requirements?

If a governing body has taken an action at a meeting that may not have fully complied with the requirements of the Act, the body may at a later time meet again to re-authorize the same action. If the second meeting is held in accordance with all the requirements of law, including the Act, then the action under certain circumstances may be considered valid from the date of the second meeting.[177] For example, if a body fires an employee at a meeting that does not meet the requirements of the Act, it may then fire the same employee at a later open meeting that meets the

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[169] *See City of Port Isabel v. Pinnell*, 161 S.W.3d 233, 241 (Tex. App.—Corpus Christi 2005, no pet.).

[170] *See, e.g., Forney Messenger, Inc. v. Tennon*, 959 F. Supp. 389 (N.D. Texas 1997) (injunctive relief available for violations of Act); *Cox Enters. Inc.* 679 W.W.2d 86 (declaratory judgment available for violations of Act).

[171] TEX. GOV'T CODE ANN. § 551.141 (Vernon 2004).

[172] Ferris v. Bd. of Chiropractic Exam'rs, 808 S.W.2d 514 (Tex. App. — Austin 1991, writ denied).

[173] TEX. GOV'T CODE ANN. § 551.142(b) (Vernon 2004).

[174] *Id*. § 551.146.

[175] *Id*. § 551.141; *see City of Point Isabel*, 161 S.W.3d 233 (actions violating notice provisions voidable).

[176] *Collin County v. Homeowners Ass'n*, 716 F. Supp. 953, 960 n.12 (N.D. Tex. 1989).

[177] *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975) (increase in electric rates effective only from date re-authorized at lawful meeting).

requirements of the Act. However, the local entity may owe back pay to the employee for the time period between the first meeting and second meeting if a court finds that the action taken at the first meeting was invalid.[178]

Criminal Enforcement for Violations of the Act

What are the criminal penalties for noncompliance with the Act?

There are four provisions of the Act that provide criminal penalties for violation of the Act:

1) **Unauthorized Executive Sessions.** If a closed meeting is not authorized by law, a member of a governing body commits a crime if he or she calls or aids in calling such a meeting, closes or aids in closing such a meeting, or participates in such a meeting.[179] A violation of this sort is a misdemeanor punishable by a fine of between $100 and $500, one to six months in jail, or both. A Texas court has ruled that a public official could be convicted of participating in an illegal closed meeting even if the official attended the session pursuant to advice of legal counsel that the session was legal.[180] The court reasoned that people, including public officials, are generally presumed to know the law. However, the Act now allows a member of a governing body to rely on official written advice from a court, the Attorney General, or the entity's attorney regarding the legality of a closed meeting.[181] Specifically, the Act provides that if a member of the governing body has a formal written interpretation from one of these sources indicating that a particular closed meeting is legal, the member may use that written interpretation as a defense if he or she acted in reasonable reliance on the written interpretation and is later prosecuted for participating in an illegal closed session. A governing body may want to consider asking its local legal counsel to provide in advance a written opinion noting the legal authority for an executive session prior to holding the closed meeting, when doubt exists about the authority for the executive session.

2) **Meeting in Numbers Less than a Quorum With Intent to Circumvent the Act.** A member of a governing body commits a crime if that official intentionally or knowingly conspires to circumvent the Act by meeting in numbers of less than a quorum for the purpose of secret deliberations in violation of the Act.[182] A violation of this sort is a misdemeanor punishable by a fine of between $100 and $500, one to six months in jail, or both. Attorney General Opinion GA-0326 (2005) held that this section was not unconstitutional for being too vague.[183]

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[178] *Ferris*, 808 S.W.2d 514.

[179] TEX. GOV'T CODE ANN. § 551.144 (Vernon 2004).

[180] *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

[181] TEX. GOV'T CODE ANN. § 551.144 (c) (Vernon 2004).

[182] *Id.* § 551.143.

[183] Op. Tex. Att'y Gen. No. GA-0326 (2005).

3) **Failure to Keep a Certified Agenda.** A member of a governing body commits a crime if he or she participates in a closed meeting knowing that a certified agenda or tape recording of the closed meeting is not being made.[184] A violation of this sort is a Class C misdemeanor and is punishable by a fine of up to $500.[185]

4) **Disclosure of Copy of Certified Agenda.** An individual, corporation, or partnership commits a crime if it releases to the public a copy of the tape or certified agenda of a lawfully closed meeting.[186] A violation of this sort is a Class B misdemeanor and is punishable by a fine of up to $2,000, a jail term of up to 180 days, or both.[187]

May a member of a governing body be criminally prosecuted if he or she did not intentionally or knowingly violate the open meetings laws?

Although some other provisions of the Act do require criminal intent or knowledge, a Texas court has ruled that an individual would not have to know that a closed meeting was illegal in order to be convicted of participating in an illegal closed meeting.[188] Instead, the individual would have to know only that he or she was participating in a closed meeting. Under this court ruling, if it later turned out that there was no legal authority to hold that closed meeting, the person could be convicted of a crime even if he or she thought at the time that it was legal to hold the closed meeting. However, the Act now allows a member of a governing body to rely on official written advice from a court, the Attorney General, or the entity's attorney.[189] If a member has a formal written interpretation from one of these sources indicating that a particular closed meeting is legal, and the member acts in reasonable reliance on that interpretation, the member may use the written interpretation as a defense if he or she is later prosecuted for participating in an illegal closed session. Prosecution of such a crime is at the discretion of the local prosecuting attorney.

May a private citizen who is not a member of a governing body violate the Act by urging members to place an item on the agenda or by informing some members how other members intend to vote on a particular item?

The Attorney General has concluded that a private citizen who acts independently to urge individual members to place an item on the agenda or to vote a certain way on an agenda item does not commit an Act violation even if he or she informs members of other members' views on the matter. Nonetheless, a person who is not a member of the governmental body could be charged with a Act

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[184] *Id*. § 551.145.

[185] TEX. PEN. CODE ANN. § 12.23 (Vernon 2003).

[186] TEX. GOV'T CODE ANN. § 551.146 (Vernon 2004).

[187] TEX. PEN. CODE ANN. § 12.22 (Vernon 2003).

[188] *Tovar.*, 978 S.W.2d 584.

[189] TEX. GOV'T CODE ANN. § 551.144 (c) (Vernon 2004).

violation if the person acts with intent and knowingly aids or assists a member or members to violate the Act. A private citizen who does not act in concert with members does not violate the Act.[190]

What is the role of the local district attorney or prosecuting county attorney regarding Act violations?

The local district attorney or prosecuting criminal county attorney (depending on the county) has the authority to prosecute criminal violations of the Act. As with other alleged crimes, the local prosecutor retains the discretion to determine which alleged violations he or she will prosecute.

What is the role of the Attorney General regarding Act issues?

The Attorney General may issue an official opinion answering questions about the legal meaning of the Act if the opinion is requested by an authorized official such as the Governor, the chair of a state legislative committee, or a district or county attorney.[191] City officials generally work through their district or county attorney or a state legislator to request an attorney general opinion. The Attorney General can make conclusions only about the legal meaning of a law. The Office of the Attorney General does not rule on the facts of a specific case.[192] Thus, in most cases the Attorney General cannot rule as to whether a specific person violated the Act on a specific occasion if the ruling would require a determination of the applicable facts.[193]

It should be noted that the Attorney General does not have enforcement authority with regard to the Act. The prosecution of criminal violations of the Act remains within the discretion and authority of the local district attorney or prosecuting criminal county attorney. A local prosecutor, however, may request assistance from the Office of the Attorney General in prosecuting an Act violation. It is within the discretion of that local prosecutor to determine whether to request such help from the Office of the Attorney General, and it is within the discretion of the Attorney General whether the resources of the agency and the interest of the State of Texas make such help proper at the time of the request.

Could a governing body pay attorney fees incurred to defend its members charged with violating the Act?

The Attorney General has concluded that although it is not required to do so, a governing body may spend public funds to reimburse a member for the legal expenses of defending against an unjustified prosecution for Act violations. However, the governing body may not decide to pay for such legal expenses until it knows the outcome of the criminal prosecution. The entity may not pay the expenses of a member who is found guilty of such violations. Additionally, a member is disqualified

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[190] Op. Tex. Att'y Gen. No. JC-0307 (2000).

[191] TEX. GOV'T CODE ANN. §§ 402.041-.045 (Vernon 2005).

[192] Op. Tex. Att'y Gen. No. DM-95 (1992).

[193] Op. Tex. Att'y Gen. Nos. JM-840 (1988); H-772 (1976).

from voting on a resolution to pay his or her own legal fees or the legal fees of another member indicted on the same facts for the same offense.[194]

VIII. Additional Information on the Act

Are all elected or appointed governmental officials required to take training about the Act?

Elected or appointed governmental officials must have a minimum of one hour of training that has been prepared or approved by the Office of the Attorney General. Officials have 90 days after their election or appointment to complete the required training.[195] The official should receive a certificate of course completion. The governmental body shall maintain the official's certificate and make it available for public inspection. A training video is available online at www.texasattorneygeneral.gov.

Where may a local entity get more information about the Act?

For further discussion of the issues raised in this article, local officials or employees may contact the Municipal Affairs Section of the Office of the Attorney General at (512) 475-4683 or the County Affairs Section of the Office of the Attorney General at (512) 463-2060. Additionally, the Office of the Attorney General produces the *Open Meetings Handbook*, an in-depth publication about the Act and its interpretation in attorney general opinions and court cases. That publication may be ordered by calling (512) 936-1730. It is also available in a downloadable PDF format on the Attorney General's Web site at *www.texasattorneygeneral.gov*. And finally, the Office of the Attorney General sponsors an open government hotline where public officials and concerned citizens can get answers to basic questions about the Act. The open government hotline number is (877) 673-6839 (OPEN-TEX).

[194] Op. Tex. Att'y Gen. No. JC-294 (2000).

[195] TEX. GOV'T CODE ANN. § 551.005 (Vernon Supp. 2007).