




# 2012 Texas Open Meetings Act MADE EASY

Answers to the most frequently asked questions  
about the Texas 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"). For example, the handbook addresses when the Act applies, what constitutes reasonable notice and the application of the Act to informal gatherings. Additionally, the handbook covers permissible subjects for closed meetings/executive sessions, who may attend a closed meeting/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.

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 governmental bodies, it will be useful to other officials and Texas citizens as well. The local Government sections of the Office of the Attorney General are available to answer questions about this from public officials, who should nonetheless consult with their local legal counsel regarding the application of the law to the facts of each particular situation.

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# **I. Application of the Open Meetings Act**

## **1. When does the Open Meetings Act generally apply?**

The Open Meetings Act (hereinafter “the Act”) generally applies when:

1. a quorum<sup>1</sup> of a governmental body<sup>2</sup> is present and discusses public business,<sup>3</sup> or
2. a quorum of a governmental body is present and the governmental body is receiving information from or providing information to a third party.<sup>4</sup>

## **2. Does the Open Meetings Act always apply when a quorum of a governmental body is present?**

The Act does not always apply when a quorum of the governmental body is present. There are exceptions throughout the Act when it does not apply when a quorum of the governmental body is present. These situations are:

1. A social gathering that is unrelated to the body’s public business, 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;<sup>5</sup>
2. Attendance at a legislative committee or state agency meeting if the deliberations at the meeting by the members of the governing body consist only of:
  - a. Publicly testifying at the meeting,
  - b. Publicly commenting at the meeting, and
  - c. Publicly responding at the meeting to questions asked by a member of the legislative committee or agency;<sup>6</sup> or
3. When the staff or a member of the governing body of a city or county makes a report about items of community interest during a meeting of the governing body without giving notice of the subject of the report if no action is taken and possible action is not discussed regarding the information provided in the report. Items of community interest include:
  - a. Expressions of thanks, congratulations or condolence;
  - b. Information regarding holiday schedules;
  - c. An honorary or salutary recognition of a public official, public employee or other citizen, except that a discussion regarding a change in the status of a person’s public office or public employment is not an honorary or salutary recognition for purpose of this subdivision;
  - d. A reminder about an upcoming event organized or sponsored by the governing body;

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<sup>1</sup> See TEX. GOV’T CODE ANN. § 551.001(6) (West Supp. 2010) (definition of “quorum”).

<sup>2</sup> See *id.* § 551.001(3) (definition of “governmental body”).

<sup>3</sup> *Id.* §551.001(4)(A).

<sup>4</sup> *Id.* § 551.001(4)(B). See Tex. Att’y Gen. Op. No. GA-98 (2003).

<sup>5</sup> TEX. GOV’T CODE ANN. § 551.001(4) (West Supp. 2010). See Tex. Att’y Gen. Op. No. H-785 (1976) at 2 (breakfast meetings of governing body must be purely social without any discussion of public business).

<sup>6</sup> TEX. GOV’T CODE ANN. § 551.0035 (West 2004).



- e. Information regarding a social, ceremonial or community event organized or sponsored by an entity other than the governing body that was attended or is scheduled to be attended by a member of the governing body or an official or employee of the political subdivision; and
- f. Announcement involving an imminent threat to the public health and safety of people in the political subdivision that has arisen after the posing of the agenda.<sup>7</sup>

**3. *May a quorum of the members of the governing body receive a briefing from staff without being subject to the Open Meetings Act?***

A governing body is subject to the Act when it receives a briefing from staff.<sup>8</sup>

**4. *Are committees of a governing body subject to the Open Meetings Act?***

A committee created by a governmental body is not subject to the Act if it is purely advisory in nature.<sup>9</sup> However, if the committee has the power to make final decisions or the power to adopt rules regarding public business, then the committee is subject to the Act. Also, if the committee issues recommendations that are usually approved in full without discussion by the governing body or it routinely “rubber-stamps” the committee’s recommendations, then the committee is subject to the Act.<sup>10</sup>

The governing body will need to review the authority of the committee and how the committee’s actions are treated by it to determine whether the Act will apply to the committee. 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 the committee’s decision.<sup>11</sup> Also, the governmental body should review the committee’s bylaws, city charters, ordinances or orders to see if there is a special provision requiring the committee to follow the Act. If there is such a local requirement, it would apply even if the Act would not otherwise require compliance. However, the governing body cannot waive the requirements of the Act through an ordinance or an order.

Further, a committee meeting could be subject to the Act if a quorum of the appointing governmental body attends the meeting and deliberates with the committee about public business or public policy.<sup>12</sup> The presence of a quorum of the appointing governmental body and

<sup>7</sup> Act of June 17, 2011, 82nd Leg., R.S., H.B. 2313, § 1 & S.B. 1233, § 14 (to be codified as amendments of TEX. GOV’T CODE ANN. § 551.0415). *See also* Tex. Att’y Gen. Op. No. GA-668 (2008).

<sup>8</sup> TEX. GOV’T CODE ANN. § 551.001(4)(B) (West Supp. 2010).

<sup>9</sup> Tex. Att’y Gen. Op. Nos. H-994 (1977), H-772 (1976).

<sup>10</sup> *Willmann v. City of San Antonio*, 123 S.W.3d 469, 480 (Tex. App.–San Antonio 2003, pet. denied); Tex. Att’y Gen. Op. Nos. JC-60 at 3-5 (1999), H-438 (1974).

<sup>11</sup> Tex. Att’y Gen. Op. Nos. JC-60 (1999), Tex. Att’y Gen. Op. No. JC-160 (1999) (ad hoc tax foreclosure committee that does not include members of the governing bodies that the committee serves is not subject to Act), JM-1072 (1989).

<sup>12</sup> Tex. Att’y Gen. Op. No. JC-313 (2000). (A component committee of the Board of the Edwards Aquifer Authority is subject to the Open Meetings Act when a majority of the voting members of the Authority’s Board, including the committee members, is present at a meeting of the committee, and the Board members “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 Edwards Aquifer Authority has authority, regardless of whether the committee members or any Board members engage in a deliberation as defined by Government Code section 551.001(2).)

deliberation about the appointing governmental body's public business would also constitute a meeting of that body, and that body would be subject to the Act, as well as the committee meeting.

**5. *Are private or nonprofit entities that receive public funding subject to the Open Meetings Act?***

Private or nonprofit entities are not subject to the Act merely because that entity receives public funds.<sup>13</sup> 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.<sup>14</sup> 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 (Local Government Code Chapters 501-507) was not subject to the Act.<sup>15</sup>

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 nonprofit entities will want to consult their legal counsel about whether their bylaws, state law or a particular contractual commitment make them subject to the Act.

**6. *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 governing body may be able to withhold a document from the public under the Public Information Act does not mean that the governing body has the authority to meet in a closed meeting regarding the subject covered in that document.<sup>16</sup> Likewise, the fact that the Open Meetings Act allows a governing body to have a closed meeting about a particular topic does not mean that related documents reviewed in the closed meeting may be withheld from the public.<sup>17</sup>

## **II. Notice Provisions under the Act**

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

The Act requires that the notice for each open meeting be posted on a bulletin board at a place readily accessible to the public at all times in the county courthouse,<sup>18</sup> school district's central administrative office<sup>19</sup> or various locations for districts or political subdivisions that extend into a

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<sup>13</sup> Tex. Att'y Gen. LO-98-40 at 2, LO-93-55, LO-96-113. See Tex. Att'y Gen. Op. No. JM-1072 (1989) at 2 (local-level entity must fall within definition of "governmental body" to be covered by Act), See also TEX. GOV'T CODE ANN. § 551.001(3) (West Supp. 2010) (definition of "governmental body").

<sup>14</sup> Tex. Att'y Gen. LO-93-55, LO-96-113.

<sup>15</sup> Tex. Att'y Gen. Op. No. JC-327 (2001). See also Tex. Att'y Gen. Op. No. GA-206 (2004).

<sup>16</sup> Tex. Att'y Gen. Op. No. JM-595 (1986).

<sup>17</sup> *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).

<sup>18</sup> TEX. GOV'T CODE ANN. § 551.049 (West 2004).

<sup>19</sup> *Id.* § 551.051.

certain number of counties.<sup>20</sup> A city can post its notice on a physical or electronic bulletin board at a place readily accessible to the public at all times in the city hall.<sup>21</sup> The notice must be posted for at least 72 hours before the scheduled meeting.<sup>22</sup>

Certain governing bodies that maintain an Internet website are required to concurrently post a notice or an agenda on the Internet.<sup>23</sup> Once those governing bodies make a good-faith attempt to post their notice on the Internet for the required time, the governing bodies satisfy the requirement of having the physical posting accessible to the public at all times, and the physical posting only has to be readily accessible to the public during the governing bodies' normal business hours.<sup>24</sup>

Notice for an emergency meeting must follow the same procedure. However, the notice is only required to be posted two hours before the scheduled meeting, and it must state the reason for the emergency meeting.<sup>25</sup>

**8. *Is a governing body or an economic development corporation required to publish notice on its Internet website?***

The Act requires cities, counties, school districts, junior colleges, junior college districts, economic development corporations and regional mobility authorities to publish *notice* of its open meetings on its Internet website, if it maintains an Internet website.<sup>26</sup> Additionally, the following governing bodies or economic development corporations are required to post their *agenda*, on their Internet websites:<sup>27</sup>

1. A city with a population of 48,000 or more;
2. A county with a population of 65,000 or more;
3. A school district or a junior college district that contains all or part of the area within a city with a population of 48,000 or more;
4. An economic development corporation that was created by or for:
  - a. A city with a population of 48,000 or more, or
  - b. A county or district that contains all or part of the area within a city with a population of 48,000 or more; or
5. A regional mobility authority.

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<sup>20</sup> *Id.* §§ 551.053 (districts or political subdivision extending in to four or more counties); 551.054 (district or political subdivisions extending into fewer than four counties).

<sup>21</sup> Act of June 17, 2011, 82<sup>nd</sup> Leg., R.S., H.B. 2313, § 2 (to be codified as an amendment of TEX. GOV'T CODE ANN. § 551.050). See *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 768 (Tex. 1991) (posting in a kiosk immediately outside city hall is also permissible).

<sup>22</sup> TEX. GOV'T CODE ANN. § 551.043(a) (West Supp. 2010).

<sup>23</sup> *Id.* §§ 551.056, .043(b).

<sup>24</sup> *Id.* § 551.043(b)(1)-(3).

<sup>25</sup> *Id.* § 551.045.

<sup>26</sup> *Id.* § 551.056(a)-(b).

<sup>27</sup> *Id.* § 551.056(c). (Note: "Agenda" is not defined by the Act, but Black's Law Dictionary defines "agenda" as "a list of things to be done, as items to be considered at a meeting." "Agenda" and "notice" are often used interchangeably in discussing the Act because of the practice of posting agenda as the notice of a meeting or as an appendix to the notice.)

The validity of an Internet posting of the notice or agenda made in good faith by the governmental body or the economic development corporation is not affected by the failure to comply with this requirement due to technical problems beyond the control of the governmental body or economic development corporation.<sup>28</sup>

**9. *Is a governmental body required to publish notice of its open meetings in the newspaper?***

The Act does not require a governmental body to publish notice in the newspaper.

**10. *What information is required to be in the posted notice under the Open Meetings Act?***

The Act requires that the posted notice of an open meeting contain the date, hour, place and subject of each meeting.<sup>29</sup>

**11. *How specific does the subject of the posted notice need to be?***

The subject of the posted notice has to be sufficient to alert the public, in general terms, of the subjects that will be considered at the meeting.<sup>30</sup> However, descriptions such as “old business,” “new business,” “other business,”<sup>31</sup> “personnel”<sup>32</sup> and “litigation matters”<sup>33</sup> are usually not sufficiently detailed to meet the requirements of the Act.<sup>34</sup> Also, the more important the particular subject 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.<sup>35</sup> However, the same court found that this phrase was not sufficient when the school was considering hiring a key supervisor such as a principal.<sup>36</sup>

Finally, a governmental body 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.<sup>37</sup>

**12. *Is a posting indicating “public comment” sufficient 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. However, this phrase might not be sufficient notice when

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<sup>28</sup> *Id.* § 551.056(d).

<sup>29</sup> TEX. GOV’T CODE ANN. § 551.041 (West 2004).

<sup>30</sup> Tex. Att’y Gen. Op. No. H-662 (1975).

<sup>31</sup> *Id.*

<sup>32</sup> *Cox Enters., Inc. v. Bd. of Trustees*, 706 S.W.2d 956 (Tex. 1986). *See also* *Mayes v. City of DeLeon*, 922 S.W.2d 200 (Tex. App. – Eastland 1996, writ denied); *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176 (Tex. App. – Corpus Christi 1990, writ denied).

<sup>33</sup> *Cox Enters., Inc. v. Bd. of Trustees*, 706 S.W.2d 956 (Tex. 1986).

<sup>34</sup> *See* Tex. Att’y Gen. Op. No. GA-668 (2008). (The city of Corpus Christi’s notice “does not sufficiently notify a reader, as a member of the interested public, of the subjects to be addressed at a meeting subject to the Open Meetings Act”.)

<sup>35</sup> *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176 (Tex. App. – Corpus Christi 1990, writ denied).

<sup>36</sup> *Id.*

<sup>37</sup> *River Rd. Neighborhood Ass’n v. S. Tex. Sports*, 720 S.W.2d 555, 571 (Tex. App. – San Antonio 1986, writ dismissed w.o.j.).

the governing body, prior to the meeting, is aware or should be aware of the specific topics that may be discussed at the meeting.<sup>38</sup>

**13. Does a posting indicating “employee briefing session” or “staff briefing session” provide sufficient notice of the subjects to be discussed?**

A 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.<sup>39</sup> Unlike sessions involving “public comment,” which was discussed above, a governmental body is in a better position to ascertain from its employees or officers in advance what subjects will be addressed in a briefing session.

**14. Must a posting indicate which subjects will be discussed in a closed meeting?**

The Act does **not** require the posting to state which items will be discussed in a closed meeting.<sup>40</sup> Nonetheless, some entities 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 entity consistently distinguish between subjects for public deliberation and subjects for a closed meeting, an abrupt departure from this practice could deceive the public and thereby render the notice inadequate.<sup>41</sup>

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

Members of the governing body may not deliberate or make any decision about an unposted issue at a meeting of the governing 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.<sup>42</sup> 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 meeting.<sup>43</sup> Finally, the governing body may offer to post the matter as an emergency item if it meets the criteria for an emergency posting. (See Section VI for a discussion on emergency meetings.)

**16. 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.<sup>44</sup> For this reason, a governing body does not have authority to change the date of its meeting without posting the new date for at least 72 hours before the meeting.<sup>45</sup> If the governmental body is presented with an emergency, it could utilize its power to

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<sup>38</sup> Tex. Att’y Gen. Op. No. JC-169 (2000).

<sup>39</sup> *Id.* at 6. 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); Op. Tex. Att’y Gen. No. GA-668 (2008).

<sup>40</sup> Op. Tex. Att’y Gen. No. JC-57 (1999) at 5. See also Tex. Att’y Gen. LO-90-27.

<sup>41</sup> Op. Tex. Att’y Gen. No. JC-57 (1999) at 5.

<sup>42</sup> TEX. GOV’T CODE ANN. § 551.042(a)(1)-(2) (West 2004).

<sup>43</sup> *Id.* § 551.042(b).

<sup>44</sup> *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299 (Tex. 1990).

<sup>45</sup> See TEX. GOV’T CODE ANN. §§ 551.041 (West 2004), .043 (West Supp. 2010) (notice must be posted for 72 hours in advance of meeting and notice must include place of meeting).

call an emergency meeting which only requires two hours notice. (See Section VI for a discussion on emergency meetings.)

**17. *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.<sup>46</sup> For this reason, a governing body has no authority to change the time of its meeting without posting the new time for at least 72 hours before the meeting.<sup>47</sup> 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.

**18. *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.<sup>48</sup> For this reason, a governing body has no authority to change the location of its meeting without posting the new location for at least 72 hours before the meeting.<sup>49</sup> However, on the day of the meeting, a governing body may change a meeting location to a bigger room within the same building to accommodate a large crowd. Governing bodies should consult their legal counsel if they decide to change a meeting location.

**19. *May a governing body continue a meeting to the next day without reposting?***

A governing body may continue an open meeting to the next regular business day without reposting notice if the action is taken in good faith and not to circumvent the Act. If a meeting must be continued again, the governing body must give at least 72 hours notice.<sup>50</sup> 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.<sup>51</sup>

**20. *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, the Act does not expressly prohibit a governmental body from canceling 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 notice is taken down, a governmental body must repost and follow all the requirements of the Act for the rescheduled meeting.

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<sup>46</sup> *Acker*, 790 S.W.2d 299.

<sup>47</sup> See TEX. GOV'T CODE ANN. §§ 551.041 (West 2004), .043 (West Supp. 2010) (notice must be posted for 72 hours in advance of meeting and must include place of meeting).

<sup>48</sup> *Acker*, 790 S.W.2d 299.

<sup>49</sup> See TEX. GOV'T CODE ANN. §§ 551.041 (West 2004), .043 (West Supp. 2010) (notice must be posted for 72 hours in advance of meeting and must include place of meeting).

<sup>50</sup> *Id.* § 551.0411(a) (West Supp. 2010). See also *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) (Section 551.0411 codified the opinion set forth in DM-482 and the *Rivera* case.).

<sup>51</sup> Tex. Att'y Gen. Op. No. JC-285 (2000).

### **III. Effect of Quorum on Issues Concerning the Act**

#### **General Quorum Provisions**

**21. *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.<sup>52</sup> However, certain laws, rules or charters of a governmental body might have specific quorum requirements. Local entities should check with their legal counsel.

**22. *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.<sup>53</sup> 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 was not present.

#### **Application of the Act if Quorum of Governing Body is Present**

**23. *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.<sup>54</sup> All requirements under the Act must be followed for such gatherings unless otherwise provided under state law. As noted earlier, the Act's requirements do not apply even when a quorum of the governmental body is present in certain enumerated circumstances. Refer to Section I for the list of the exceptions.

**24. *May a quorum of a governing body serve on an appointed board or commission?***

Nothing in the Act would prohibit a quorum of a 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. Also, it would probably constitute a meeting of the governing body as well.

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 positions.<sup>55</sup> However, in certain situations, Texas statutes or a city charter can specifically allow a governing body to

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<sup>52</sup> TEX. GOV'T CODE ANN. § 551.001(6) (West Supp. 2010).

<sup>53</sup> *Cox Enters.*, 706 S.W.2d 956.

<sup>54</sup> 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).

<sup>55</sup> See *Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928).

appoint its own members to a board or commission. For example, the Development Corporation Act indicates that a city council may appoint as many as four city council members to serve as board members of a Type B economic development corporation board.<sup>56</sup> A governing body will want to discuss the issue with legal counsel before appointing one of its own members to a board or commission.

**25. *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, create and/or sign a group letter or document concerning public business, they could violate the Act.<sup>57</sup> For example, circulation of a claim, bill or invoice among members for approval of payment in writing without discussion at a meeting would violate the Act.<sup>58</sup> 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. Also, it may be a violation of the Act if the members meet or communicate by phone, memo or email in numbers less than a quorum with the specific intent of circumventing the Act regarding a group letter or document.<sup>59</sup>

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

A quorum of members of a governing body may attend a committee meeting. 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 a 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.<sup>60</sup>

**27. *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.<sup>61</sup>

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<sup>56</sup> See TEX. LOC. GOV'T CODE ANN. § 505.052(c) (West Supp. 2010).

<sup>57</sup> Tex. Att'y Gen. Op. No. DM-95 (1992).

<sup>58</sup> Tex. Att'y Gen. Op. No. JC-307 (2000).

<sup>59</sup> TEX. GOV'T CODE ANN. § 551.143 (West 2004).

<sup>60</sup> Tex. Att'y Gen. Op. No. JC-313 (2000).

<sup>61</sup> TEX. GOV'T CODE ANN. § 551.0035 (West 2004).



**28. *Could a gathering of less than a quorum of current board members with board members who have been elected, but not sworn in, constitute a quorum?***

No. The board members who have been elected, but not sworn in, would not count toward a quorum of the board under the Act.<sup>62</sup>

## **Application of the Act to Gatherings of Less Than a Quorum**

**29. *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 also be posted and conducted as open meetings. Moreover, if the governing body routinely approves decisions of a subcommittee consisting of less than a quorum of the governing body, the subcommittee must comply with the Act.<sup>63</sup>

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.<sup>64</sup> In other words, if members are holding their discussion of public business in numbers less than a quorum to avoid meeting the requirements of the Act, criminal prosecution can result.

**30. *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 common for several members to be present at a private or public gathering that is sponsored 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.<sup>65</sup>

**31. *May less than a quorum of members of the governing body talk over the phone without violating the Act?***

The mere fact that less than a quorum of members of a governing body talk over the phone does not in itself constitute a violation of the Act. However, if members are using telephone conversations to conduct their deliberations about public business, there may be potential criminal violations.<sup>66</sup> Physical presence in one place is not necessary to violate the Act.<sup>67</sup> It remains a fact issue whether certain phone conversations between less than a quorum of members would be a violation of the Act.<sup>68</sup>

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<sup>62</sup> Tex. Att’y Gen. Op. No. GA-0355 (2005).

<sup>63</sup> *Willmann*, 123 S.W.3d at 480.

<sup>64</sup> TEX. GOV’T CODE ANN. § 551.143 (West 2004).

<sup>65</sup> *See Id.*

<sup>66</sup> *See Id.*

<sup>67</sup> Tex. Att’y Gen. Op. No. DM-95 (1992).

<sup>68</sup> *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 [14<sup>th</sup> Dist.] 1999, no writ) (evidence that one board member of a five-

**32. *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 the governmental body's members' signatures on a group letter or other document constitutes a violation of the Act. 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 email in order to circumvent the Act, a violation of the Act would have occurred.<sup>69</sup>

## **IV. Regular Open Meetings**

### **Adoption of Procedural Guidelines to Administer the Act**

**33. *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 be properly posted, and a governmental body is limited in how it can respond to inquiries about issues that are not listed on its notice. Additionally, during all meetings, minutes of the meeting must be kept, and certain procedures must be followed when holding a closed meeting.

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 governing body must consult any applicable state laws and any rules of procedure that it has adopted.<sup>70</sup>

**34. *Does the Act give individual members of the governing body a right to place items on an open 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 the City of Dallas, a home rule city, may adopt a local provision that requires the consensus of several council members to place an item on the agenda.<sup>71</sup> In Attorney General Opinion DM-228, the attorney general concluded that individual county commissioners have a right to place items on the agenda for a county commissioner's court meeting.<sup>72</sup> A home rule city, a general law city, or other political subdivision that has not adopted a procedure to place items on an open meeting agenda should consult its legal counsel regarding this issue.

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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).

<sup>69</sup> See *Willman*, 123 S.W.3d at 480; Tex. Att'y Gen. Op. Nos. JC-307 (2000), DM-95 (1992); See also *Esperanza Peace and Justice Center v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001) (discussion of an illegal "walking quorum" facilitated by mayor and city manager).

<sup>70</sup> Tex. Att'y Gen. Op. 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 statutes). See TEX. LOC. GOV'T CODE ANN. § 22.038(c) (West 2008) (the governing body of a Type A general law may determine the rules of its proceedings); Tex. Att'y Gen. Op. No. DM-473 (1998) (home rule city is authorized to adopt reasonable rules of procedure as long as they are not inconsistent with the constitution, statutes or city charter provisions).

<sup>71</sup> Tex. Att'y Gen. Op. No. DM-473 (1998).

<sup>72</sup> Tex. Att'y Gen. Op. No. DM-228 (1993).

**35. *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 during an open meeting.<sup>73</sup> However, the Act itself does not define any specific powers of a mayor or county judge regarding the open portion of a meeting.

**36. *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.<sup>74</sup> State statutes do not 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 may vote on all items, even when there is not a tie.<sup>75</sup> Whether mayors of a Type C city may vote on all items, might depend on the population of the Type C city.<sup>76</sup>

In the county, the county judge is a full voting member of the commissioners court.<sup>77</sup>

Also, the Act does not address who can or cannot make a second motion. As to who may make second motions, the answer would depend on what rules of parliamentary procedure have been adopted by the governmental body.

**37. *May members of a governing body enter their votes by proxy on an item without attending the meeting?***

Though the Act does not address voting by proxy, the attorney general has opined that a member of a governing body may not vote by proxy.<sup>78</sup> A member of a governing body must be present at a meeting in order to deliberate and to vote.<sup>79</sup>

**38. *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

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<sup>73</sup> See TEX CONST. Art. V, § 18(b) (county judge is the presiding officer of the county commissioners court); TEX. LOC. GOV'T CODE ANN. §§ 22.037 (West 2008) (mayor is presiding officer, in a Type A general law city), 23.027 (mayor is president of a Type B general law city), 51.051(a) (Type C general law city with population between 501 through 4,999 has the powers of a Type A general law city), 51.051(b) (Type C general law city with population of 201 through 500 has the powers of a Type B general law city); 81.001(b) (If present, county judge is the presiding officer of the commissioners court).

<sup>74</sup> TEX. LOC. GOV'T CODE ANN. § 22.037(a) (West 2008).

<sup>75</sup> ALAN J. BOJORQUEZ, TEXAS MUNICIPAL LAW AND PROCEDURE MANUAL § 5.07(2) (5<sup>th</sup> ed. 2005).

<sup>76</sup> See TEX. LOC. GOV'T CODE ANN. §§ 51.051, .052 (West 2008).

<sup>77</sup> *Id.* § 81.001(a). See Op. Tex. Att'y Gen. Nos. O-2145 (1940); O-1716 (1939).

<sup>78</sup> Tex. Att'y Gen. LO-94-028.

<sup>79</sup> Op. Tex. Att'y Gen. Nos. DM-207 (1993); JM-584 (1986).

2. It is difficult or impossible to convene a quorum at one location, or
3. The meeting is held by an advisory board.<sup>80</sup>

When holding such a meeting, there are several procedural requirements that must be met:

1. The meeting must be posted and open to the public in the same manner as a regular meeting.<sup>81</sup> The governmental body is not required to state in the agenda that the meeting will be held by telephone conference call pursuant to the Act.<sup>82</sup>
2. The meeting must be held in the same place where meetings of the governing body are usually held.<sup>83</sup>
3. The identity of each speaker must be clearly stated prior to that person speaking.<sup>84</sup>
4. The meeting must be set up to provide two-way communications throughout the entire meeting.
5. All portions of the meeting (other than executive sessions) must be audible to the public, including the entire conference call.<sup>85</sup>
6. The meeting must be tape-recorded and a copy of the tape-recording must be made available to the public.

Since extraordinary circumstances are needed to hold a meeting by telephone conference call, governmental bodies cannot have an open meeting by teleconference merely because attending a meeting on short notice would inconvenience members of the governmental body. If a quorum of the governmental body convenes at the meeting location, absent members will not be allowed to participate from other locations by telephone conference call.<sup>86</sup> 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.

### **39. *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.<sup>87</sup> If a governing body extends into three or more counties, then the governing body may hold an open meeting by video conference if a majority of the quorum of the body is physically present at one location for the meeting.<sup>88</sup> 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:

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<sup>80</sup> TEX. GOV'T CODE ANN. § 551.125(b) (West 2004). (Note: There are specific governing bodies that have specific statutes within the Act regarding teleconferencing. The governing body will want to check with its legal counsel to make sure the right statute is being used for your governing body. See TEX GOV'T CODE ANN. §§ 551.121(West Supp. 2010), .122, .123(West 2004), .124.)

<sup>81</sup> *Id.* § 551.125(c).

<sup>82</sup> Tex. Att'y Gen. Op. No. JC-352 (2001).

<sup>83</sup> TEX. GOV'T CODE ANN. § 551.125(d) (West 2004).

<sup>84</sup> *Id.* § 551.125(f).

<sup>85</sup> *Id.* § 551.125(e).

<sup>86</sup> Tex. Att'y Gen. Op. No. JC-352 (2001) at 4.

<sup>87</sup> TEX. GOV'T CODE ANN. § 551.127(b) (West 2004).

<sup>88</sup> *Id.* § 551.127(c).

1. The notice of a video conference meeting must specify the location where a quorum of the body will be physically present.
2. The notice must specify the physical location of each member who will be participating in the meeting from another location.
3. 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.
4. 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).
5. The quality of the audio and video signals at a video conference meeting must meet the requirements set forth by the Department of Information Resources and by section 551.127 of the Government Code.
6. The entire meeting must be recorded, and the tape must be made available to the public.<sup>89</sup>

**40. *May a governing body broadcast its meetings over the Internet?***

The governing body may broadcast its open meetings over the Internet.<sup>90</sup> 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 is required by the Act.

**41. *May a governing body use telephone conferencing, video conferencing or communication over the Internet to consult with its attorney?***

The Act does allow for the governing body to use telephone conferencing, video conferencing or communication over the Internet to consult with its attorney. The governing body can have a public consultation with its attorney in an open meeting or a private consultation in a closed meeting. The public consultation with the governing body's attorney must be audible to the public at the location specified in the notice of the meeting. This provision does not apply to a governing body whose attorney is an employee of the political subdivision.<sup>91</sup>

**42. *What accommodations must a governing body provide at its open meetings for an attendee who has a disability?***

Generally, a governing body 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.<sup>92</sup> In most cases, such a requirement means that the facility holding the meeting must be physically accessible to individuals with disabilities. Entities may ask individuals with disabilities to provide the entity with reasonable notice on any accommodations they may need to attend the meeting. Also, entities must be ready to provide an accessible meeting site and provide alternative forms of

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<sup>89</sup> *Id.* §551.127(d)-(j).

<sup>90</sup> *Id.* §551.128.

<sup>91</sup> *Id.* § 551.129 (West Supp. 2010).

<sup>92</sup> 42 U.S.C.A. §§ 1213 -12165 (West, Westlaw through Aug. 2010 amendments).

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.

## **Managing Discussions at an Open Meeting**

### ***43. 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.<sup>93</sup> 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 governing body must apply its rules equally to all members of the public.<sup>94</sup>

### ***44. 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 at an open meeting.<sup>95</sup> However, during a public hearing, members of the public must be given a reasonable opportunity to speak.

Another difference between public hearings and 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 an open meeting is the 72 hour posted notice.

### ***45. May a governing body limit the number of speakers at an open meeting?***

A governing body may make reasonable rules regulating the number of speakers on a particular subject and the length of each presentation.<sup>96</sup> Arguably, such rules could include a requirement that a group select one of its members as a spokesperson. However, the body should not differentiate between one group and another on a particular issue. Further, in no case may the governing body adopt procedural rules that are inconsistent with the state or federal constitution, state or federal statutes, or a home rule city charter.<sup>97</sup> 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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<sup>93</sup> Tex. Att'y Gen. Op. Nos. JC-169 (2000), H-188 (1973).

<sup>94</sup> Tex. Att'y Gen. Op. No. JC-169 (2000); Tex. Att'y Gen. LO-96-111.

<sup>95</sup> Tex. Att'y Gen. Op. Nos. JC-169 (2000), H-188 (1973).

<sup>96</sup> Tex. Att'y Gen. Op. No. JC-169 (2000); Tex. Att'y Gen. LO-96-111.

<sup>97</sup> Tex. Att'y Gen. Op. Nos. DM-473 (1998), H-188 (1973).

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

The Act does not address removal of a member of the public from an open meeting for causing a disturbance. However, 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 an open meeting. What constitutes conduct that rises to the level of disorderly conduct is a fact issue for the governing 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.

**47. *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 a home rule city charter.<sup>98</sup> Within these parameters, a governing body may arguably set reasonable time limits for its members’ remarks in an open meeting.<sup>99</sup>

**48. *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 member’s conduct were to constitute 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. A governing body should consult with its legal counsel if it wants to adopt rules of conduct for its members.

## **Keeping a Record of Open Meetings**

**49. *What duty does a governing body have to keep minutes of open meetings?***

A governing body must either keep minutes or make a tape recording of every open meeting.<sup>100</sup> 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.<sup>101</sup>

**50. *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.<sup>102</sup> 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 entity must permanently retain copies of the minutes of its meetings. However, the governing body is not required by state law to publicly post the minutes of an open meeting.

<sup>98</sup> Tex. Att’y Gen. Op. Nos. DM-473 (1998), H-188 (1973).

<sup>99</sup> Tex. Att’y Gen. LO-96-111; Tex. Att’y Gen. Op. No. H-188 (1973).

<sup>100</sup> TEX. GOV’T CODE ANN. § 551.021(a) (West 2004).

<sup>101</sup> *Id.* § 551.021(b).

<sup>102</sup> *Id.* § 551.022. *See also* Tex. Att’y Gen. ORD-225 (1979) (tapes of meetings used to assist in writing minutes are open records).

**51. What right does the public have to record an open meeting?**

The Act gives any member of the public a legal right to make a video or audio recording of an open meeting.<sup>103</sup> However, the Act also gives a governmental body a right to adopt reasonable rules that are necessary to maintain order. 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. Closed Meetings/Executive Sessions<sup>104</sup>**

**52. What are the general subjects for which a governing body may hold a closed meeting?**

Under the Act, a governing body may generally hold a closed meeting for one or more of the following nine reasons:

1. consideration of specific personnel matters;<sup>105</sup>
2. certain consultations with its attorney;<sup>106</sup>
3. discussions about the value or transfer of real property;<sup>107</sup>
4. discussions about security personnel, security devices, or a security audit;<sup>108</sup>
5. discussions about a prospective gift or donation to a governmental body;<sup>109</sup>
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;<sup>110</sup>
7. discussions of certain economic development matters;<sup>111</sup>
8. discussions of certain competitive matters relating to a city-owned electric or gas utility for which the city council is the governing body;<sup>112</sup> and
9. certain information relating to the subject of emergencies and disasters.<sup>113</sup>

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<sup>103</sup> TEX. GOV'T CODE ANN. § 551.023 (West 2004).

<sup>104</sup> Government Code § 551.001(1) defines *closed meeting* as “a meeting to which the public does not have access.” The Act does not define *executive session*. Black’s Law Dictionary defines *executive session* as “a meeting, usually held in secret that only the members and invited nonmembers may attend.” These terms are widely used interchangeably. This publication will primarily use *closed meeting* because it is defined by the Act.

<sup>105</sup> TEX. GOV'T CODE ANN. § 551.074 (West 2004).

<sup>106</sup> *Id.* § 551.071.

<sup>107</sup> *Id.* § 551.072.

<sup>108</sup> *Id.* § 551.076 (West Supp. 2010).

<sup>109</sup> *Id.* § 551.073 (West 2004).

<sup>110</sup> *Id.* § 551.088.

<sup>111</sup> *Id.* § 551.087.

<sup>112</sup> Act of June 17, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1613, § 1 (to be codified as an amendment of TEX. GOV'T CODE ANN. § 551.086).

<sup>113</sup> TEX. GOV'T CODE ANN. § 418.183(f) (West 2005).



## Closed Meetings to Discuss Personnel Issues

### 53. *When may a governing body meet in a closed meeting to discuss personnel issues?*

The Act allows a governing body to hold a closed meeting to discuss the appointment, employment, evaluation, reassignment, duties, discipline or dismissal of a public officer or employee.<sup>114</sup> Also, a governing body may hear a complaint or charge against such officer or employee in a closed meeting. However, the governing body is not allowed to meet in a closed meeting about an employee or official if the subject of the deliberation requests that the item be heard in a public hearing. Also, any final action by the governing body on a personnel matter must be taken in an open meeting.<sup>115</sup>

It is important to note that a governing body may meet in a closed meeting 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<sup>116</sup> nor the hiring of independent contractors<sup>117</sup> are proper subjects for closed meetings under the personnel exception. In addition, the personnel exception allows only the discussion of a particular person or persons in a closed meeting. A governmental body may not discuss general policies regarding an entire class of employees in a closed meeting held under the personnel exception.<sup>118</sup> Such general policies must be addressed during the open portion of a meeting.

### 54. *Does a governing body have to post the name of an individual who is to be discussed in a closed meeting?*

A governing body is not required to post the name of the specific individual to be discussed in a closed meeting.<sup>119</sup> However, the more important the position being discussed, the more specific the posting will need to be in describing that position.<sup>120</sup> 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, for example, the city should indicate “possible personnel action regarding police chief” so that the public is clearly informed as to which high-level position is under discussion.<sup>121</sup>

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<sup>114</sup> *Id.* § 551.074 (West 2004).

<sup>115</sup> *Id.* § 551.102.

<sup>116</sup> Tex. Att’y Gen. Op. No. DM-149 (1992).

<sup>117</sup> *Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 699 (Tex. App. – San Antonio 1998, pet. denied); Tex. Att’y Gen. Op. No. MW-129 (1980).

<sup>118</sup> *Gardner v. Herring*, 21 S.W.3d 767, 777 (Tex. App. – Amarillo 2000, no pet.); Op. Tex. Att’y Gen. No. H-496 (1975).

<sup>119</sup> *See City of San Antonio*, 820 S.W.2d 762 (the Act does not raise due process implications; individual notice is not required).

<sup>120</sup> *See, e.g., Point Isabel*, 797 S.W.2d 176.

<sup>121</sup> *See Mayes*, 922 S.W.2d 200.

**55. Does a governing body have to give individual notice to the employee that he/she will be discussed in a closed meeting?**

The Act does not require that an employee or officer be given individual notice of a closed meeting in which that person will be discussed.<sup>122</sup> However, it is possible that other sources, such as constitutional due process, state statutes, a contractual agreement, a city charter or a city ordinance may require that certain staff employees or officers be given individual notice and a hearing before any disciplinary action is taken.<sup>123</sup> Local entities should consult their legal counsel regarding the applicable laws in such a situation.

**56. Does an employee have a right to attend the closed meeting if he/she is being discussed?**

When a governing body discusses an employee or officer in a closed meeting under the personnel exception, the person being discussed does not have an inherent right to attend the closed meeting. The governing body decides who the necessary parties are for attendance at the closed meeting. The governing body chooses whether to allow the attendance of the employee at the closed meeting.<sup>124</sup>

**57. Does an employee have a right to compel the governing body to hear a personnel matter regarding that employee in an open meeting instead of in a closed meeting?**

The employee that is to be discussed under the personnel exception has a right to compel that the item be discussed in a public hearing instead of during a closed meeting.<sup>125</sup> However, the Act does not give an employee or officer the right to compel that a personnel matter regarding that individual be discussed only within a closed meeting.<sup>126</sup>

**58. Is a governing body permitted to conduct personnel interviews for new hires or potential officers in a closed meeting?**

There does 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 a closed meeting. Given the language of the exception, it is an open question whether a governing body could interview job applicants or potential officers in a closed meeting, and local counsel should be consulted before doing so.

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<sup>122</sup> *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).

<sup>123</sup> E.g., TEX. LOC. GOV'T CODE ANN. § 22.077 (West 2008) (hearing for removal of certain municipal officers in Type A city).

<sup>124</sup> Tex. Att'y Gen. Op. No. JM-6 (1983).

<sup>125</sup> TEX. GOV'T CODE ANN. § 551.074(b) (West 2004).

<sup>126</sup> Tex. Att'y Gen. Op. No. JM-1191 (1990).

**59. *May a governing body admit members of the public selectively to a closed meeting to give feedback on an employee or official being evaluated in the meeting?***

No, the closed meeting is for the benefit of the governing body to meet away from public scrutiny under limited exceptions. This purpose would be defeated by selectively admitting the public.<sup>127</sup>

## **Closed Meetings for Consultations with an Attorney**

**60. *When may a governing body have a closed meeting using the exception for consultations with an attorney?***

The Act allows a governmental body to meet with its attorney to receive legal advice about:

1. pending or contemplated litigation;
2. settlement offers; or
3. a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.<sup>128</sup>

Also, the attorney general has concluded that a governmental body may meet with its attorney to receive legal advice on any matter.<sup>129</sup> However, the attorney general has warned that discussions in a closed meeting 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 closed meeting under this exception.<sup>130</sup>

**61. *May a governing body meet in a closed meeting for consultations with an attorney if the attorney is not physically present?***

A governmental body may use a telephone conference call, video conference call or Internet communications to consult with certain attorneys in a closed meeting. If the attorney is an employee of the local entity, 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 entity is considered to be an employee of the entity.<sup>131</sup>

**62. *May a governing body meet in a closed meeting with its attorney to discuss a proposed contract?***

A governing body may consult with its attorney in a closed meeting 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 non-legal matters related to the contract

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<sup>127</sup> Tex. Att’y Gen. Op. GA-0511 (2007).

<sup>128</sup> TEX. GOV’T CODE ANN. § 551.071 (West 2004).

<sup>129</sup> Tex. Att’y Gen. Op. No. JM-100 (1983). *See also* Tex. Att’y Gen. Op. 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 Tex. Att’y Gen. Op. 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).

<sup>130</sup> Tex. Att’y Gen. Op. No. JM-100 (1983) at 2.

<sup>131</sup> TEX. GOV’T CODE ANN. § 551.129 (West Supp. 2010).

simply because its attorney is present.<sup>132</sup> General discussion of policy unrelated to legal matters is not permitted in a closed meeting under the Act merely because an attorney is present.

## **Other Types of Closed Meetings**

### ***63. May a governing body discuss the acquisition of real estate in a closed meeting?***

The Act allows a governmental body to hold a closed meeting to discuss the purchase, exchange, lease or value of real estate.<sup>133</sup> However, such a closed meeting is allowed only if discussion of the real estate in an open meeting would have a detrimental effect on the ability of the governing body to negotiate with a third party.<sup>134</sup> For example, a closed meeting may in certain cases be permitted to discuss what the local entity is willing to pay for real property that it plans to acquire. There is no comparable authority for a governing body to go into a closed meeting to discuss the acquisition of items of personal property, such as the purchase of a new computer system.

### ***64. May a governing body discuss security personnel, security devices or a security audit in a closed meeting?***

The Act has permitted a governing body to discuss security personnel or security devices in a closed meeting. Also, the Act allows discussion of security audits in a closed meeting.<sup>135</sup>

### ***65. May a governing body discuss a contract involving a prospective gift or donation in a closed meeting?***

A governing body may meet in a closed meeting to discuss the negotiations for a contract for a prospective gift or donation.<sup>136</sup> 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 governing body may meet in a closed meeting only if its negotiating position with a third person would be negatively affected by the body's discussion of the contract in an open meeting.

### ***66. May a governing body discuss a test item in a closed meeting?***

A governing body may discuss a test item or information related to a test item in a closed meeting 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.<sup>137</sup>

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<sup>132</sup> *Olympic Waste Servs. v. City of Grand Saline*, 204 S.W.3d 496, 503-04 (Tex. App. – Tyler 2006, no pet.); Tex. Att'y Gen. Op. No. JC-233 (2000) at 3. *See also Finlan v. City of Dallas*, 888 F. Supp. 779, 782 n.9 (N.D. Tex. 1995).

<sup>133</sup> TEX. GOV'T CODE ANN. § 551.072 (West 2004).

<sup>134</sup> *City of Laredo v. Escamilla*, 219 S.W.3d 14, 20 (Tex. App. – San Antonio 2006, pet. denied). *See* Tex. Att'y Gen. Op. No. MW-417 (1981).

<sup>135</sup> TEX. GOV'T CODE ANN. § 551.076 (West Supp. 2010).

<sup>136</sup> *Id.* § 551.073 (West 2004).

<sup>137</sup> *Id.* § 551.088.

**67. *May the governing body of a public power utility discuss competitive matters in a closed meeting?***

The governing body of a public power utility (electric or gas utility)<sup>138</sup> is allowed to deliberate, vote or take final action in a closed meeting on any competitive matter.<sup>139</sup> The term “competitive matter” means a utility-related matter that is related to the public power utility’s competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors.<sup>140</sup>

**68. *May a governing body discuss potential business incentives and other economic development negotiations in a closed meeting?***

A governing body may meet in a closed meeting to discuss certain matters related to economic development.<sup>141</sup> 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 territory of the local entity. Also, under this exception, a governing body may hold a closed meeting to discuss a potential offer of financial or other incentives to the business prospect.

## **Need for Statutory Authority to Hold Closed Meetings**

**69. *May a governing body hold workshops or retreats in a closed meeting?***

The provisions of the Act would apply to workshops or retreats of the governing body if a quorum of the body is present and the governing body deliberates about public business.<sup>142</sup> To go into a closed meeting, the local entity must show that the issue to be discussed fits within one of the specific statutory categories that allows for closed meetings.

**70. *Does the Public Information Act provide a basis for meeting in a closed meeting?***

The governing body may not use the fact that the governing body will discuss documents that may be confidential under the Public Information Act, Chapter 552 of the Government Code, to justify a closed meeting. Instead, the governing body must specifically rely on one of the particular exceptions to the Open Meetings Act. The Open Meetings Act and the Public Information Act are entirely independent in their operation.<sup>143</sup> (See Section I concerning the relationship between the Open Meetings Act and the Public Information Act.)

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<sup>138</sup> Act of June 17, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1613, § 2 (to be codified as an amendment of TEX. GOV’T CODE ANN. § 552.133).

<sup>139</sup> Act of June 17, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1613, § 1 (to be codified as an amendment of TEX. GOV’T CODE ANN. § 551.086).

<sup>140</sup> Act of June 17, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1613, § 2 (to be codified as an amendment of TEX. GOV’T CODE ANN. § 552.133).

<sup>141</sup> TEX. GOV’T CODE ANN. § 551.087 (West 2004).

<sup>142</sup> See *Bexar Medina Atascosa Water Dist.*, 2 S.W.3d at 462.

<sup>143</sup> Tex. Att’y Gen. Op. No. GA-19 (2003) at 6.

## Procedural Requirements for Meeting in Closed Meetings

**71. *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.<sup>144</sup>

**72. *May a city council meet in a closed meeting if a city charter provision requires that all city council meetings be conducted as open meetings?***

A city council may not hold a closed meeting if the city charter specifically requires that all meetings or the type of meeting in question be held as open meetings.<sup>145</sup>

**73. *What notice must be posted to consider an item in a closed meeting?***

The rules for posting closed meeting items are the same as the general rules for posting issues that will be considered in an open meeting.<sup>146</sup> Most local governments 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 notice to state which items will be discussed in a closed meeting. Should a governing body consistently distinguish between subjects for public deliberation and subjects for executive session, an abrupt departure from this practice could render the notice inadequate.<sup>147</sup>

**74. *May an item be considered in a closed meeting if the posted agenda does not indicate it will be discussed in a closed meeting?***

In certain cases, a properly posted agenda item may be considered in a closed meeting even though the posted agenda did not indicate that the item would be discussed in a closed meeting.<sup>148</sup> As mentioned above, the rules for posting closed meeting items are the same as the rules for posting items that will be considered in open session.<sup>149</sup> 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 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.<sup>150</sup>

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<sup>144</sup> TEX. GOV'T CODE ANN. § 551.002 (West 2004). See n. 110.

<sup>145</sup> TEX. GOV'T CODE ANN. § 551.004 (West 2004). See *Shackelford v. City of Abilene*, 585 S.W.2d 665 (Tex. 1979).

<sup>146</sup> See generally TEX. GOV'T CODE ANN. §§ 551.041, .043 (West 2004). See Tex. Att'y Gen. Op. No. GA-511 (2007) at 4. (notice does not have to cite the section or subsection numbers of the provision authorizing the closed session.)

<sup>147</sup> Tex. Att'y Gen. Op. No. JC-57 (1999).

<sup>148</sup> *Id.*

<sup>149</sup> See generally TEX. GOV'T CODE ANN. §§ 551.041 (West 2004), .043 (West Supp. 2010).

<sup>150</sup> Tex. Att'y Gen. Op. No. JC-57 (1999).

**75. What procedure should a governing body follow to go into a closed meeting?**

If a governing body chooses to discuss an item in a closed meeting, it must follow the statutory procedures required for such a meeting. The governing body must first convene in a properly posted open meeting. During that open meeting, 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.<sup>151</sup> A local entity may wish to have a prior written opinion from its attorney setting forth a reasonable basis for holding the closed meeting for the involved item whenever the matter is in dispute. Once a closed meeting has begun, the presiding officer must announce the date and time the session started.<sup>152</sup> At the end of that closed meeting, the presiding officer must again announce the date and time. In most instances, a certified agenda or tape recording must be made.<sup>153</sup> Also, any action or vote on an agenda item may be taken only during an open meeting.<sup>154</sup>

**76. May a governing body continue a closed meeting to the immediate next day?**

A closed session of an open meeting may be continued to the immediate next day so long as before convening the second-day closed meeting, 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 closed meeting is authorized.<sup>155</sup>

**77. If a member of a governing body is not certain that a closed meeting is permitted, what actions should the official take if a closed meeting is called?**

If a member is not certain that a closed meeting is permitted on an issue, the member may wish to consider refusing to attend or asking for a formal written interpretation from the local entity's attorney as to the legality of the meeting. Attendance at an unauthorized closed meeting may be a criminal offense.<sup>156</sup> If an official reasonably relies on a written opinion concerning whether a closed meeting is permitted from the governing body's attorney, the attorney general or a court, then the official has an affirmative defense to any criminal prosecution for violation of the Act.<sup>157</sup> Simply objecting or not speaking during an illegal closed meeting will not relieve the member of potential criminal liability for participating in the meeting.

**78. Who is permitted to attend a closed meeting?**

The Act does not specify who may or may not attend a closed meeting.<sup>158</sup> Generally, a governmental body has discretion to determine who may attend closed meetings. Members of the public may not be selectively admitted to an executive session.<sup>159</sup>

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<sup>151</sup> TEX. GOV'T CODE ANN. § 551.101 (West 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).

<sup>152</sup> TEX. GOV'T CODE ANN. § 551.103 (West 2004).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* § 551.102.

<sup>155</sup> *Id.* § 551.101; Tex. Att'y Gen. Op. No. JC-285 (2000). See also TEX. GOV'T CODE ANN. § 551.0411(a) (West Supp. 2010).

<sup>156</sup> TEX. GOV'T CODE ANN. § 551.144 (West 2004).

<sup>157</sup> *Id.*

<sup>158</sup> Tex. Att'y Gen. Op. No. JC-375 (2001).

<sup>159</sup> Tex. Att'y Gen. Op. No. GA-0511 (2007).

When a governmental body holds a closed meeting to discuss a lawsuit under the attorney consultation exception, section 551.071 of the Government Code, the governmental body's attorney must be present, but an opposing party may not be present.<sup>160</sup> In considering whether to admit any nonmember to a closed meeting 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.<sup>161</sup>

With respect to closed meetings 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.<sup>162</sup>

**79. *May a governing body prevent a member from attending a closed meeting?***

A governmental body can prevent one of its members from attending a closed meeting when that member is suing the governing body or entity.<sup>163</sup> In Attorney General Opinion JM-1004, 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.

**80. *May a governing body prevent its staff from attending a closed meeting?***

As mentioned above, a governing body may exclude all nonmembers from attending a closed meeting.<sup>164</sup> Thus, a governing body may exclude its staff from attending a closed meeting. There are attorney general opinions that have 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.<sup>165</sup> 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.<sup>166</sup> However, some city charters and certain statutory provisions provide that the city secretary shall attend all city meetings.<sup>167</sup>

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<sup>160</sup> See Tex. Att'y Gen. Op. Nos. JC-506 (2002), JC-375 (2001), JM-238 (1984).

<sup>161</sup> Tex. Att'y Gen. Op. No. JC-506 (2002).

<sup>162</sup> *Id.*

<sup>163</sup> Tex. Att'y Gen. Op. No. JM-1004 (1989).

<sup>164</sup> See Tex. Att'y Gen. Op. Nos. JM-6 (1983), JC-506 (2002); Tex. Att'y Gen. LO-97-017.

<sup>165</sup> Tex. Att'y Gen. Op. Nos. JM-6 (1983), GA-277 (2004).

<sup>166</sup> Tex. Att'y Gen. Op. No. JC-375 (2001).

<sup>167</sup> See TEX. LOC. GOV'T CODE ANN. § 22.073 (West 2008) (requires a city secretary in Type A city to attend all meetings and keep required minutes).



**81. *May a governing body approve items or take a straw poll in a closed meeting?***

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.<sup>168</sup> However, the governing body may not conduct a straw vote or a formal vote during such a session.<sup>169</sup> The Act requires that any final action, decision or vote be taken in an open meeting.<sup>170</sup>

## **Production and Handling of Certified Agenda or Tape Recording for Closed Meetings**

**82. *Is a governing body required to create a certified agenda or tape recording of discussions held in a closed meeting?***

A governing body must create a certified agenda or make a tape recording of every closed meeting unless the closed meeting is being held under the exception for consultation with an attorney.<sup>171</sup> The governing body may stop taking notes or turn off the tape during the portion of a closed meeting that involves consultations with an attorney.<sup>172</sup>

The certified agenda must state the subject matter of each deliberation and record any further action taken.<sup>173</sup> The certified agenda does not have to be a verbatim transcript of what happened in the closed meeting, but it must summarize what was discussed on each topic.<sup>174</sup> In addition, the certified agenda or tape recording must include an announcement by the presiding officer of the date and time that the closed meeting began and ended.<sup>175</sup>

**83. *Who is responsible for creating a certified agenda or tape recording of a closed meeting?***

The Act does not specify a particular individual or officer responsible for producing the certified agenda or making the tape recording of a closed meeting. However, the presiding officer is responsible for certifying that the certified agenda or tape recording is a true and correct record of the proceedings.<sup>176</sup> 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 recording is not being made.<sup>177</sup>

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<sup>168</sup> *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).

<sup>169</sup> *Id.*

<sup>170</sup> TEX. GOV'T CODE ANN. § 551.102 (West 2004).

<sup>171</sup> *Id.* § 551.103(a).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* § 551.103(c)(1)-(2).

<sup>174</sup> Tex. Att'y Gen. Op. No. JM-840 (1988) at 4-7.

<sup>175</sup> TEX. GOV'T CODE ANN. § 551.103(c)(3), (d) (West 2004).

<sup>176</sup> *Id.* § 551.103(b).

<sup>177</sup> *Id.* § 551.145.

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

A certified agenda or tape recording kept during a closed meeting may be disclosed to a member of the public only under a court order.<sup>178</sup> There are criminal penalties for releasing a copy of the certified agenda to the public without a court order.<sup>179</sup>

**85. May a member of a governing body tape a closed meeting for the member's own use?**

A member of a governmental body has no right to tape a closed meeting over the objection of a majority of the governmental body's members.<sup>180</sup>

**86. May a member of the governing body review a copy of a certified agenda or tape recording of a closed meeting?**

A member of a governing body who attended a closed meeting may later review the certified agenda or tape recording of that closed meeting.<sup>181</sup> Also, a member who was absent during a closed meeting may review the certified agenda or tape recording. The governing body should adopt procedures for reviewing a certified agenda or tape recording to preserve the evidentiary integrity, but the governing body could not absolutely prohibit the review by a member. Once the member has left office, the member does not have the right to review the certified agendas or tape recordings of closed meetings.<sup>182</sup> Also, the governmental body may not provide the absent member with a copy of the certified agenda or tape recording of the closed meeting.<sup>183</sup>

**87. How should a governing body handle a certified agenda or tape recording once it is prepared?**

The Act contains two requirements on how a certified agenda or tape recording of closed meetings is to be handled once created:

1. the certified agenda or tape recording may not be disclosed to the public without a court order, and
2. the certified agenda or tape recording must be preserved for a period of at least two years after the date of the closed meeting.<sup>184</sup>

If any legal action involving the closed meeting is brought within this time period, the certified agenda or tape recording must be preserved until the action is finished. The governing body is the proper custodian for the certified agenda or tape recording, not the city secretary or county clerk; however the governing body may delegate its duty to these individuals.<sup>185</sup>

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<sup>178</sup> *Id.* § 551.104(c).

<sup>179</sup> *Id.* § 551.146.

<sup>180</sup> *Zamora v. Edgewood Indep. Sch. Dist.*, 592 S.W.2d 649 (Tex. Civ. App. – Beaumont 1979, writ ref'd n.r.e.); Tex. Att'y Gen. Op. No. JM-351 (1985) at 2.

<sup>181</sup> Tex. Att'y Gen. Op. No. DM-227 (1993).

<sup>182</sup> Tex. Att'y Gen. Op. No. JC-120 (1999).

<sup>183</sup> Tex. Att'y Gen. LO-98-033.

<sup>184</sup> TEX. GOV'T CODE ANN. § 551.104 (West 2004).

<sup>185</sup> Tex. Att'y Gen. Op. No. GA-0277 (2004) at 3.

**88. *May members of the governing body publicly discuss what was considered in a closed meeting?***

The Act does not prohibit a member from discussing or making statements about what occurred in a closed meeting.<sup>186</sup> The fact that a person may legally discuss what occurred in a closed meeting 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 a closed meeting. 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 counsel against such a course of action. A governing body will want to carefully review this issue with its legal counsel before attempting to enact any such policy.

**89. *Is the certified agenda or tape recording of the closed meeting confidential under the Public Information Act?***

The certified agenda and tape recording of a closed meeting are considered confidential under the Public Information Act.<sup>187</sup>

**90. *Are notes made by an official in a closed meeting confidential under the Open Meetings Act or the Public Information Act?***

The Open Meetings Act does not specifically address whether the notes made by an official during a closed meeting are confidential. Whether the notes made by an official in a closed meeting are confidential under the Public Information Act depends on whether an exception would apply to the information. Whether the Public Information Act would protect the notes would depend in part on their content and the facts surrounding their creation.<sup>188</sup> Some factors that should be considered are:

1. who prepared the notes,
2. who possesses and controls the notes,
3. who has access to the notes,
4. whether the notes were used in conducting public business, and
5. whether public funds were expended in creating or maintaining the notes.

If there is a public information request for any such notes, the local entity will want to confer with its legal counsel.

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<sup>186</sup> Tex. Att'y Gen. Op. No. JM-1071 (1989). *See* Tex. Att'y Gen. Op. 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).

<sup>187</sup> Tex. Att'y Gen. ORD-495 (1988).

<sup>188</sup> *See, e.g.*, Tex. Att'y Gen. ORD-635 (1995); ORD-574 (1990) (inter-agency and intra-agency written memoranda containing advice, recommendations and opinion can be withheld); ORD-462 (1987).

## **VI. Emergency Meetings**

### **91. 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.”<sup>189</sup> The courts and the attorney general have traditionally construed the emergency posting exception strictly.<sup>190</sup> As a general rule, the members of a governmental body should ask themselves two questions when considering whether an emergency exists:

1. What would happen if the meeting on the “emergency” issue were postponed for 72 hours?
2. 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 or the governing body cannot point to an imminent threat to public health or safety that would occur if action were not taken within 72 hours, then it would be difficult to argue that an emergency existed. Also, a situation is not “unforeseeable” merely because a deadline is less than 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.”<sup>191</sup>

### **92. What must be indicated in a notice for an emergency meeting or item?**

The notice of an emergency meeting must “clearly identify the emergency or urgent public necessity.”<sup>192</sup> The emergency is “clearly identified” when the governing body states the reason for the emergency.<sup>193</sup>

### **93. May a governing body add non-emergency items onto an agenda that was otherwise validly posted for two hours as an emergency?**

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

### **94. Does the media have a right to specific notice of any items that are considered at an emergency meeting?**

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.<sup>194</sup> First, they must file a request to be notified of such items. This request must be filed at the headquarters of the governmental body. Also, the request must 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

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<sup>189</sup> TEX. GOV'T CODE ANN. § 551.045(b) (West Supp. 2010).

<sup>190</sup> See Tex. Att’y Gen. Op. Nos. JM-985 (1988), 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).

<sup>191</sup> See *River Rd. Neighborhood Ass’n*, 720 S.W.2d at 557-58.

<sup>192</sup> TEX. GOV'T CODE ANN. § 551.045(c) (West Supp. 2010).

<sup>193</sup> *Piazza v. City of Granger*, 909 S.W.2d 529 (Tex. App. — Austin 1995, no writ).

<sup>194</sup> TEX. GOV'T CODE ANN. § 551.047 (West Supp. 2010).

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.<sup>195</sup>

## VII. Enforcement of the Act's Requirements

### Civil Enforcement of the Act

#### 95. *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.<sup>196</sup> Standing for bringing such an action has been very liberally construed, even in areas like annexation challenges that normally require an action to be brought by the state's attorney.<sup>197</sup> If a court finds that there will be or has been a violation of the Act, the court has at least four options:

1. 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.<sup>198</sup>
2. The court may invalidate any action that a governmental body has taken in violation of the Act.<sup>199</sup>
3. The courts may order the governmental body to provide back pay to the employee in cases where the Act was violated in the course of firing an employee.<sup>200</sup>
4. The court, at its own discretion, may make the losing side in such a case pay costs of litigation and reasonable attorney fees.<sup>201</sup>

Also, the Act provides that an individual, corporation or partnership that releases a certified agenda or tape recording of a closed meeting to the public may be held liable in a civil lawsuit.<sup>202</sup> In such a suit, the person or entity that is harmed may get damages, attorney fees and court costs.

#### 96. *Is an action automatically void if it was accomplished without compliance with the Act?*

Actions that violate the Act are not automatically void; rather they are voidable.<sup>203</sup> Whether a particular action is voided is determined by the court. In fact, it is possible that a court may not void an action even if the court finds that the action was taken in violation of the Act.<sup>204</sup> Nonetheless, it is always the safer course to attempt to achieve full compliance with the Act to avoid the likelihood of court challenges.

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<sup>195</sup> *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).

<sup>196</sup> TEX. GOV'T CODE ANN. § 551.142(a) (West 2004).

<sup>197</sup> *See City of Port Isabel v. Pinnell*, 161 S.W.3d 233, 241 (Tex. App.—Corpus Christi 2005, no pet.).

<sup>198</sup> *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).

<sup>199</sup> TEX. GOV'T CODE ANN. § 551.141 (West 2004).

<sup>200</sup> *Ferris v. Bd. of Chiropractic Exam'rs*, 808 S.W.2d 514 (Tex. App. — Austin 1991, writ denied).

<sup>201</sup> TEX. GOV'T CODE ANN. § 551.142(b) (West 2004).

<sup>202</sup> *Id.* § 551.146(a)(2).

<sup>203</sup> *Id.* § 551.141. *See City of Point Isabel*, 161 S.W.3d 233 (actions violating notice provisions voidable).

<sup>204</sup> *Collin County v. Homeowners Ass'n*, 716 F. Supp. 953, 960 n.12 (N.D. Tex. 1989).

**97. 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 governing body may at a later meeting reauthorize 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.<sup>205</sup> For example, if a governing 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 meeting that meets the requirements of the Act. However, the governing body may owe back pay to the employee for the time period between the first meeting and second meeting if a court voids the action taken at the first meeting to terminate the employment.<sup>206</sup>

## **Criminal Enforcement of the Act**

**98. 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 Closed Meeting.** A member of a governing body commits a crime if he or she calls or aids in calling an unauthorized closed meeting; closes or aids in closing such a meeting; or participates in a unauthorized closed meeting.<sup>207</sup> This violation is a misdemeanor punishable by a fine of between \$100 and \$500, one to six months in jail, or both.<sup>208</sup> However, if the member of a governing body relied on official written advice from a court, the attorney general or the governing body’s attorney regarding the legality of a closed meeting, the member has an affirmative defense to prosecution under this section of the Act.<sup>209</sup> A governing body may want to ask its legal counsel to provide in advance a written opinion noting the legal authority for a closed meeting when doubt exists about the authority for it.
- 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 member intentionally or knowingly conspires to circumvent the Act by meeting in numbers of less than a quorum for the purpose of secret deliberations.<sup>210</sup> This violation is a misdemeanor punishable by a fine of between \$100 and \$500, one to six months in jail, or both.
- 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

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<sup>205</sup> *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975) (increase in electric rates effective only from date reauthorized at lawful meeting).

<sup>206</sup> *Ferris*, 808 S.W.2d 514.

<sup>207</sup> TEX. GOV’T CODE ANN. § 551.144(a) (West 2004).

<sup>208</sup> *Id.* § 551.144(b).

<sup>209</sup> *Id.* § 551.144(c).

<sup>210</sup> *Id.* § 551.143.

or tape recording of the closed meeting is not being made.<sup>211</sup> This violation is a Class C misdemeanor and is punishable by a fine of up to \$500.<sup>212</sup>

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 certified agenda or tape recording of a lawfully closed meeting.<sup>213</sup> This violation 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.<sup>214</sup> Also, the person or entity that is harmed by the release of the certified agenda or tape recording may get damages, attorney fees and court costs.<sup>215</sup> However, if the defendant had good reason to believe releasing the certified agenda or tape recording was lawful, or was mistaken as to the nature or the content of the certified agenda or tape recording, the member has a defense to prosecution and an affirmative defense to any civil suit.

**99. *May a private citizen violate the Act by urging members of the governing body to place an item on the agenda or by informing some members how other members intend to vote on a particular item?***

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 a violation of the Act, even if he or she informs members of other members' views on the matter. However, a person who is not a member of the governing body may be charged with a violation of circumventing the Act (section 551.143) or an unauthorized closed meeting of the Act (section 551.144), but only if the person acts with intent to aid or assist a member or members who knowingly violate the Act.<sup>216</sup>

**100. *What is the role of the district attorney or prosecuting criminal county attorney regarding violations of the Act?***

The 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.

**101. *What is the role of the Office of the Attorney General regarding issues concerning the Act?***

The Office of the Attorney General (OAG) may issue an official opinion answering questions regarding the legal interpretation of the Act.<sup>217</sup> Only certain public officials are authorized to request an opinion. As mentioned above, the OAG will only make legal interpretations of the Act. The OAG 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.<sup>218</sup>

The OAG 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 district attorney

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<sup>211</sup> *Id.* § 551.145(a).

<sup>212</sup> *Id.* § 551.145(b). See TEX. PEN. CODE ANN. § 12.23 (West 2011).

<sup>213</sup> TEX. GOV'T CODE ANN. § 551.146(a) (West 2004).

<sup>214</sup> *Id.* § 551.146(b). See TEX. PEN. CODE ANN. § 12.22 (West 2011).

<sup>215</sup> TEX. GOV'T CODE ANN. § 551.146(a)(2) (West 2004).

<sup>216</sup> Tex. Att'y Gen. Op. No. JC-0307 (2000).

<sup>217</sup> TEX. GOV'T CODE ANN. §§ 402.041-.045 (West 2005).

<sup>218</sup> Tex. Att'y Gen. Op. Nos. DM-95 (1992); JM-840 (1988); H-772 (1976).

or prosecuting criminal county attorney. However, a local prosecutor may request assistance from the OAG in prosecuting a violation of the Act.<sup>219</sup> It is within the discretion of that local prosecutor to determine whether to request such assistance from the OAG, and it is within the discretion of the OAG whether the interest of the State of Texas make such assistance proper.

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

The Act does not specifically address this issue. However, a governing body may spend public funds to reimburse a member for the legal expenses of defending against an unjustified prosecution of violations under the Act. However, the governing body may not decide to pay for such legal expenses until it knows the outcome of the criminal prosecution. If the member is found guilty, the governing body may not pay the legal expenses. Additionally, the member under prosecution is disqualified 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.<sup>220</sup>

## **VIII. Additional Information on the Act**

**103. *Are all elected or appointed government 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 OAG. Officials have 90 days after their election or appointment to complete the required training.<sup>221</sup> The official should receive a certificate of course completion, and the governmental body shall maintain the official's certificate. The certificate must be available for public inspection at any time. A training video is available online at [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov).

**104. *Where may local governmental bodies get more information about the Act?***

For further discussion of the issues raised in this article, local officials or employees may contact the Local Government Section of the OAG at (800) 252-5476. Additionally, the OAG 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) 936-1737. It is also available in a downloadable PDF format on the Attorney General's website at [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov). Finally, the OAG 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 (512) 478-6736 or (877) 673-6839 (OPEN-TEX).

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<sup>219</sup> TEX. GOV'T CODE ANN. § 402.028 (West 2005).

<sup>220</sup> Tex. Att'y Gen. Op. No. JC-294 (2000).

<sup>221</sup> TEX. GOV'T CODE ANN. § 551.005 (West Supp. 2010).