

The Texas Open Meetings Act



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Presentation Outline



- **Applicability**
 - Who is subject to the Act?
 - What is a “quorum”?
 - What constitutes a “meeting”?
- **Notice Requirements**
- **Recordkeeping**
- **Procedures and Requirements for Open Meetings**
- **Procedures and Requirements for Executive Sessions**
- **Penalties**
- **Recent Modifications**
- **Common Dilemmas**

What Entities are Subject to the Act?



- A *governmental body* as expressly defined in the Act – examples: A city council or a department, agency, or subdivision of a city that has authority to promulgate policy-making rules (i.e., rulemaking) or to decide contested cases (i.e., quasi-judicial)
- Entities *required by other law* to comply with the Act – examples: The board of directors of an economic development corporation or a local government corporation such as POSGCD.
SEE: Sections 36.063 and 064 of Water Code; Sections 2.3, 2.4 and 14.3 of POSGCD Board Policies
- A *board or committee* of an entity that is subject to the Act, depending on the board's or committee's *membership* and/or the board's or commission's *authority* (i.e., final decision making authority or "routinely rubber-stamped")

Applicability of the Act

What is a quorum?



- *General rule:* The Act applies to a gathering of a *quorum* of a governmental body's members if *public business is deliberated or discussed*
- Per 3.10(i), Enabling Legislation:
 - A quorum exists when at least two-thirds of the board 13-22 members are present. A majority vote of a quorum is required for 13-23 board action. If there is a tie vote, the proposed action fails.
- *General quorum rule:* a majority of a governmental body
- *Circumvention:* the Act may apply even *when a quorum is not present*

What Constitutes a Meeting?



- 551.004(A): A *meeting* occurs when there is a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action
- 551.004(B): A gathering at which a quorum receives information from or provides information to a third party and *either*:
 - a. a member of the governmental body *participates in the discussion* ; or
 - b. the governmental body (a) *called the meeting* and (b) *conducts or is responsible for the meeting*.

Meeting – Exceptions, Examples and Advice



The Act does not apply to *social functions* or *regional, state, or national workshops* if the governmental body's public business is not discussed

Examples for discussion: formal meeting, attendance at another entity's meeting, attendance at a city's board or committee meeting, social situations, "staff briefings," using the restroom, "walking quorum," circulating an invoice or letter for signature outside of a meeting, e-mail

Attorney general's advice: develop a habit of asking yourself, "is this a meeting?"

Notice of Meeting Requirements



- ◎ The Act requires *written notice* of the *date, hour, place, and subject* of each meeting – *both* open meetings *and* executive sessions
- ◎ *Specificity*: The notice must be *sufficient to apprise the general public* of the subject matter to be discussed – legal sufficiency depends on and can vary based on the facts:
 - › Listings like “personnel” or “new business/old business” generally *insufficient*
 - › *More important* the issue is to the public, the *more specific* the notice should be
 - › “Public forum” or “public comment” is sufficient to hear from residents

Notice Requirements



- Individual notice is *not required*
- *Accessibility*: A governmental body must post its notice in a place that is “*readily accessible to the general public for all times for at least 72 hours*” before the meeting is scheduled to start (e.g., bulletin board/kiosk outside of governmental entity or on the door of entity)
- *Internet posting*: If an entity operates a website, post notice on the entity’s Internet Web site
- When a entity *posts notice on its Internet Web site*, the physical notice has to be readily accessible to general public *only during normal business hours* instead of at “all times.”

Notice Requirements



- Texas Water Code 36.036 (b) At least 10 days before a hearing under Section 36.108(d-2) or a meeting at which a district will adopt a desired future condition under Section 36.108(d-4), the board must post notice that includes:
 - (1) the proposed desired future conditions and a list of any other agenda items;
 - (2) the date, time, and location of the meeting or hearing;
 - (3) the name, telephone number, and address of the person to whom questions or requests for additional information may be submitted;
 - (4) the names of the other districts in the district's management area; and
 - (5) information on how the public may submit comments.

Notice Requirements



- Texas Water Code 36.063(c) Except as provided by Subsection (b), notice of a hearing described by Subsection (b) must be provided in the manner prescribed for a rulemaking hearing under Section 36.101(d).

Notice - Special Circumstances



- *Emergency meeting or supplemental posting:* When there is an *imminent threat to public health and safety* or a *reasonably unforeseeable situation*, a meeting on an emergency matter may be held after only *two hours notice*
 - The notice must *CLEARLY describe the emergency*
 - What if we “forgot to post” an item? Not an emergency
 - Must give copy of notice to news media if previously asked for

Notice – Special Circumstances



- *Recess*: May recess to *following business day* if the action is taken in *good faith* and not to circumvent the Act's requirements
- *Amendments – Agendas*
Agendas may not be amended once posted unless still outside 72 hour notice period, *unless emergency*.

Recordkeeping



- A governmental body must *prepare and keep minutes* of a meeting *or a tape recording* of each open meeting.
- The *minutes must*:
 - State the subject of each deliberation
 - Indicate each vote, order, decision, or other action taken
- A brief summary is all that is required - A verbatim transcript is not necessary

Recordkeeping



- The *minutes or tape recording* of the meeting are *public records*, and must be made available pursuant to a request
- Under the *Records Retention Act*, a governmental body must have a Texas State Library-approved *retention schedule* for its records (for more information, please visit www.tsl.state.tx.us)
- Generally, if minutes are *transcribed from a tape*, the tape must be kept for *90 days* after the written minutes are approved

Procedures and Requirements

Open Meetings



- A meeting *may not be convened* unless a *quorum is present* in the meeting room
- The *Americans with Disabilities Act* requires a meeting to be held in a room that is *physically accessible* to those with disabilities
- Members of the public (including the media) *have a right to record* the meeting by audio or video tape or other comparable means
- A governmental body may adopt *reasonable rules* to maintain order in a meeting, including those relating to the location of recording equipment

Procedures and Requirements

Open Meetings



- The Act does *not* entitle members of the public to speak at open meetings
- If a governmental body allows public comment, it may set *reasonable rules* regarding the number, frequency, and length of presentations, but it should not discriminate against speakers

Procedures and Requirements

Open Meetings



- If a member of the public asks a question about an item that is *not on the agenda*, the members of the governmental body *may not deliberate the item*, and are limited to:
 - › A statement of *fact* regarding the issue
 - › A statement of *policy* regarding the issue
 - › A *proposal* to place the item on a future agenda for deliberation

Best Practices: No discussion, place on next agenda or have General Manager respond directly to speaker.

Procedures and Requirements

Executive Sessions



- A governmental body may hold a *closed meeting* only when a statute *expressly authorizes* it to do so
- To conduct an executive session, a governmental body must:
 1. have a *quorum*;
 2. properly *convene* in an open meeting;
 3. *announce* that a closed meeting will be held;
 4. *identify* in the open meeting the *section of the law* that allows the closed meeting; and
 5. keep a *certified agenda* or a *tape recording* of the closed meeting:

Procedures and Requirements

Executive Sessions



- Who may attend an executive session?

Only a governmental body's members have a right to attend a closed meeting. Although a governmental body may include others in a closed meeting if necessary to the matter under consideration, it may not admit a person whose presence is against the interests of the governmental body that the closed meeting is designed to protect.

Procedures and Requirements

Common Executive Sessions



Real Property Deliberations

- to deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person

Personnel Matters

- to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee
- to hear a complaint or charge against an officer or employee
- Must be conducted in open session if the officer or employee requests a public hearing

Procedures and Requirements

Common Executive Sessions



- *Economic Development*
 - to discuss or deliberate regarding commercial or financial information that the governmental body has received from a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and with which the governmental body is conducting economic development negotiations
 - to deliberate the offer of a financial or other incentive to a business prospect that meets the above requirements
- *Consultation with Attorney*
 - to seek advice about legal matters, pending or contemplated litigation, or settlement offers
 - Governmental body's attorney must be present if employee (may be present by conference call, videoconference, or Internet communications if a contract attorney)
 - General discussion of policy not permitted
- *Security/Homeland Security Measures*

Violations



- The Act provides for *civil remedies* and *criminal penalties* for noncompliance
- Criminal provisions are enforced by:
 - District attorneys
 - County attorneys
 - Criminal district attorneys
- Attorney general is not directly authorized to enforce the Open Meetings Act, *but may assist local prosecutors*

Violations – Civil Penalties



- An action taken in violation of the *Act* is *voidable*
 - An voidable action may be redone at a later meeting, but that action will not be given retroactive effect
 - Termination of employee example
- Civil actions
 - Any interested person may bring a *civil lawsuit* to force officials to comply with the *Act*, to *enjoin* officials from acting, or to *void actions taken* in an illegal meeting
 - A person injured by the unlawful disclosure of a certified agenda or tape recording of a lawfully closed meeting *may sue for damages, attorney fees, and exemplary damages*

Violations – Criminal Penalties



- ◎ Participating in a closed meeting
“knowing that a certified agenda . . . or . . .
. a tape recording . . . is not being made”
- ◎ In general, knowingly disclosing a
certified agenda or tape recording of a
closed meeting to a member of the public
 - › Not a crime to discuss what went on in executive
session, but may subject you to a civil lawsuit

Violations – Criminal Penalties



- Knowingly conspiring to circumvent the Act “by meeting in numbers less than a quorum for the purpose of secret deliberations”
 - Knowingly: reasonably certain that the action would violate the law
 - Walking quorum: where a quorum is not present in one place at the same time and secretly discusses public business with the goal of avoiding a public meeting – may subject members to criminal and civil liability

Violations – Criminal Penalties



- Knowingly calling, aiding in calling, organizing, or participating in an unlawful closed meeting
 - Affirmative defense: member acted in reasonable reliance on a court order, attorney general opinion, or the written opinion of the governmental body's attorney

Reports - Community Interest Items



Section 551.0415 now allows reports about items of community interest which no action will be taken

- Section 551.0415 provides as follows:

(a) Notwithstanding Sections 551.041 and 551.042, a quorum of the governing body of a municipality may receive from municipal staff and a member of the governing body may make a report about items of community interest during a meeting of the governing body without having given notice of the subject of the report as required by this subchapter if no action is taken and, except as provided by Section 551.042, possible action is not discussed regarding the information provided in the report.

(b) For purposes of Subsection (a), “items of community interest” include:



- expressions of thanks, congratulations or condolence;
- recognition of a public official, public employee or other citizen
- a reminder about an upcoming event organized or sponsored by the governing body or announcement of holiday;
- 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 municipality; and
- announcements involving an imminent threat to the public health and safety of people in the municipality that has arisen after the posting of the agenda.

AG Opinion GA-0957 (2012)



- Attorney General Opinion GA-0957 (2012) concluded that if a quorum of a governmental body attends a meeting of a committee of the governmental body at which a deliberation as defined by the Open Meetings Act takes place, the committee meeting will constitute a meeting of the governmental body.

COMMON DILEMMAS



- Elected officials and conversations outside a meeting with other elected officials
- Telephone conferences, Videoconferences and the Internet

Resources



Keep current by contacting our office:

The Knight Law Firm, LLP: (512) 323-5778

Mobile: (512) 771-7171

bbw@cityattorneytexas.com

Additional resources:

www.tml.org (512-231-7400)

www.oag.state.tx.us (877-OPEN TEX)

www.tsl.state.tx.us (for records retention)