

The Texas Open Meetings Act Made Easy

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

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

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

¹ This article was written by Scott Joslove with the assistance of the Municipal Advisory Committee of this office. The 2010 version was revised by Zindia Thomas. Much of the material in this article is drawn from the Texas Attorney General's *2010 Open Meetings Act Handbook*. In addition, this article was reviewed by Becky Casares and Paige Cooper.

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I. Application of the Open Meetings Act

When does the Open Meetings Act generally apply?

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

- A. a quorum² of a governmental body³ is present and discusses public business,⁴
or
- B. a quorum of a governmental body is present and the governmental body is receiving information from or providing information to a third party.⁵

However, it does not apply to a quorum of the governmental body at 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.⁶

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

A governmental body is subject to the Act when it receives a briefing from staff.⁷

Are committees 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.⁸ 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.⁹

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.¹⁰ 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

² See TEX. GOV’T CODE ANN. § 551.001(5) (Vernon Supp. 2010) (definition of “quorum”).

³ See *id.* § 551.001(3) (definition of “governmental body”).

⁴ *Id.* § 551.001(4)(A).

⁵ *Id.* § 551.001(4)(B). See Op. Tex. Att’y Gen. No. GA-98 (2003).

⁶ TEX. GOV’T CODE ANN. § 551.001(4) (Vernon Supp. 2010). See Op. Tex. Att’y Gen. No. H-785 (1976) at 2 (breakfast meetings of governing body must be purely social without any discussion of public business).

⁷ TEX. GOV’T CODE ANN. § 551.001(4)(B) (Vernon Supp. 2010).

⁸ Tex. Att’y Gen. Op. Nos. H-994 (1977), H-772 (1976).

⁹ *Willmann v. City of San Antonio*, 123 S.W.3d 469, 480 (Tex. App.–San Antonio 2003, pet. denied); Op. Tex. Att’y Gen. Nos. JC-60 at 3-5 (1999), H-438 (1974).

¹⁰ Op. Tex. Att’y Gen. Nos. JC-60 (1999), JM-1072 (1989). *But cf.* Op. Tex. Att’y Gen. No. JC-160 (1999) (ad hoc tax foreclosure committee is not subject to Act).

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.¹¹ The presence of a quorum of the appointing governmental body and 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.

Are private or non-profit entities that receive public funding subject to the Open Meetings Act?

Private or non-profit entities are not subject to the Act merely because that entity receives public funds.¹² 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.¹³ 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.¹⁴

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

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 governmental body may be able to withhold a document from the public under the Public Information Act does not mean that the governing body has authority to meet in a closed meeting regarding the subject covered in that document.¹⁵ 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.¹⁶

¹¹ Op. Tex. Att'y Gen. 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).)

¹² Tex. Att'y Gen. LO-98-40 at 2, LO-93-55, LO-69-113. See Op. Tex. Att'y Gen. No. JM-1072 (1989) at 2 (local-level entity must fall within definition of "governmental body" to be covered by Act); TEX. GOV'T CODE ANN. § 551.001(3) (Vernon Supp. 2010) (definition of "governmental body").

¹³ Tex. Att'y Gen. LO-93-55, LO-96-113.

¹⁴ Op. Tex. Att'y Gen. No. JC-327 (2001). See also Op. Tex. Att'y Gen. No. GA-206 (2004).

¹⁵ Op. Tex. Att'y Gen. No. JM-595 (1986).

¹⁶ *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).

II. Notice Provisions Under the Act

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

The Act requires that the notice for each open meeting be posted on a bulletin board at a place readily accessible to the public at all times in the county courthouse,¹⁷ city hall,¹⁸ school district's central administrative office¹⁹ or various locations for districts or political subdivision that extend in a certain number of counties.²⁰ The notice must be posted for at least 72 hours before the scheduled meeting.²¹

If the governmental body maintains an Internet website, then the governmental body is required to post notice on the Internet.²² Once a governmental body makes a good-faith attempt to post its notice on the Internet for the required time, the governmental body satisfies the requirement of having the physical posting accessible to the public at all time, and the physical posting only has to be readily accessible to the public during the governmental bodies' normal business hours.²³

Notice for an emergency meeting must follow the same procedure. However, the notice is only required to be posted 2 hours before the schedule meeting and it must state the reason for the emergency meeting.²⁴

Is a governmental 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 and economic development corporations to publish *notice* of its open meetings on its Internet website, if it maintains an Internet website.²⁵ Additionally, a specific group of governmental bodies or economic development corporations are required to post its *agenda* on its Internet website which includes:²⁶

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, or

¹⁷ TEX. GOV'T CODE ANN. § 551.049 (Vernon 2004).

¹⁸ *Id.* § 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).

¹⁹ TEX. GOV'T CODE ANN. § 551.051.

²⁰ *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).

²¹ TEX. GOV'T CODE ANN. § 551.043(a) (Vernon Supp. 2010).

²² *Id.* §§ 551.056, .043(b).

²³ *Id.* § 551.043(b)(1)-(3).

²⁴ *Id.* § 551.045.

²⁵ *Id.* § 551.056(a)-(b).

²⁶ *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.)

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.

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.²⁷

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. However, there are other Texas statutes that do require the governmental body to publish notice of its open meeting in the newspaper. For example, Texas law requires that a city have two public hearings before annexing an area, and notice of each of those hearings must be published in a local newspaper.²⁸ The governmental body will want to review its ordinances, orders, charters or bylaws to see if it has imposed a stricter notice requirement on itself than does the Act.

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.²⁹

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

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

²⁷ *Id.* § 551.056(d).

²⁸ TEX. LOC. GOV'T CODE ANN § 43.0561(c) (Vernon 2008).

²⁹ TEX. GOV'T CODE ANN. § 551.041 (Vernon 2004).

³⁰ Op. Tex. Att’y Gen. No. H-662 (1975). (Note: Many governmental bodies use an agenda as the posted notice for its open meetings. Agenda is not defined by the Act, but Merriam-Webster’s Dictionary defines agenda as “a list or outline of things to be considered or done.”)

³¹ *Id.*

³² *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).

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

³⁴ See Op. Tex. Att’y Gen. 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”.)

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

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.³⁶

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 the governing body, prior to the meeting, is aware or should be aware of the specific topics that may be discussed at the meeting.³⁷

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.³⁸ 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.

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.³⁹ Nonetheless, some local 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.⁴⁰

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

Members of the governmental body may not deliberate or make any decision about an unposted issue at a meeting of the governmental body. If an unposted item is raised by members or the general public, the governing body has four options. First, an official may respond with a statement of specific factual information or recite the governmental body’s existing policy on that issue.⁴¹ 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

³⁶ *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.).

³⁷ Op. Tex. Att’y Gen. No. JC-169 (2000).

³⁸ *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).

³⁹ Op. Tex. Att’y Gen. No. JC-57 (1999) at 5. See also Tex. Att’y Gen. LO-90-27.

⁴⁰ Op. Tex. Att’y Gen. No. JC-57 (1999) at 5.

⁴¹ TEX. GOV’T CODE ANN. § 551.042(a) (Vernon 2004).

meeting.⁴² Finally, the governing body may offer to post the matter as an emergency item if it meets the criteria for an emergency posting.

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

The Act requires literal compliance.⁴³ 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.⁴⁴ If the governmental body is presented with an emergency, it could utilize its power to call an emergency meeting which only requires two hours' notice.

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.⁴⁵ 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.⁴⁶ 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.

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.⁴⁷ 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.⁴⁸ On the day of the meeting, a governing body will sometimes change a meeting location to a bigger room within the same building to accommodate a large crowd. It is not clear whether such a change would constitute literal compliance with the Act. Governing bodies should consult their legal counsel if they decide to change a meeting location.

⁴² *Id.* § 551.042(b).

⁴³ *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299 (Tex. 1990).

⁴⁴ *See* TEX. GOV'T CODE ANN. §§ 551.041 (Vernon 2004), .043 (Vernon Supp. 2010) (notice must be posted for 72 hours in advance of meeting and notice must include place of meeting).

⁴⁵ *Acker*, 790 S.W.2d 299.

⁴⁶ *See* TEX. GOV'T CODE ANN. §§ 551.041 (Vernon 2004), .043 (Vernon Supp. 2010) (notice must be posted for 72 hours in advance of meeting and must include place of meeting).

⁴⁷ *Acker*, 790 S.W.2d 299.

⁴⁸ *See* TEX. GOV'T CODE ANN. §§ 551.041 (Vernon 2004), .043 (Vernon Supp. 2010) (notice must be posted for 72 hours in advance of meeting and must include place of meeting).

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.⁴⁹ 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.⁵⁰

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

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

III. Effect of Quorum on Issues Concerning the Act

General Quorum Provisions

What constitutes a quorum for purposes of the Act?

A quorum is considered by the Act to be a simple majority of the members of the governmental body.⁵¹ However, certain laws, rules or charters of a governmental body might have specific quorum requirements. Local entities should check with their legal counsel.

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

A meeting subject to the Act may not be convened unless a quorum is present in the meeting room. In fact, the Texas Supreme Court has ruled that a school board of trustees may not convene its meeting until a quorum is physically present in the same room.⁵² 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.

⁴⁹ *Id.* § 551.0411(a) (Vernon 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.)

⁵⁰ Op. Tex. Att’y Gen. No. JC-285 (2000).

⁵¹ TEX. GOV’T CODE ANN. § 551.001(6) (Vernon Supp. 2010).

⁵² *Cox Enters.*, 706 S.W.2d 956.

Application of the Act if Quorum of Governing Body is Present

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

The Act applies to a gathering of a quorum of a governing body if it discusses public business, regardless of whether there is any action or vote taken. All requirements under the Act must be followed for such gatherings unless otherwise provided under state law. As noted earlier, state law provides a limited exception for gatherings at social events unrelated to the body's public business, as well as regional, state, or national conventions or workshops, ceremonial events or press conferences if the discussion of public business is only incidental and no vote or action is taken.⁵³

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

Nothing in the Act would prohibit a quorum of the governing body from serving on a board or commission. However, the meetings of such a board or commission would have to meet all the requirements of the Act. 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. However, in certain situations, Texas statutes or a city charter specifically allow a governing body to appoint its own members to a board or commission. For example, the Development Corporation Act indicates that a city council may appoint up to four city council members to serve as board members of a Type B economic development corporation board.⁵⁴ A governing body will want to discuss the issue with local legal counsel before appointing one of its own members to a board or commission.

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

If members meet in a quorum without following open meetings procedures to discuss, create and/or sign a group letter or document, they would violate the Act.⁵⁵ 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.⁵⁶ 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 would be a violation of the Act if the members meet, or communicate by phone, memo or e-mail in numbers less than a quorum with the specific intent of circumventing the Act regarding a group letter or document.⁵⁷

⁵³ *But see Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n*, 2 S.W.3d 459, 462 (Tex. App.—San Antonio 1999, pet. denied) (deliberations took place at informational gathering of water district board with landowners in board member's barn, where one board member asked question and another board member answered questions, even though board members did not discuss business among themselves).

⁵⁴ See TEX. LOC. GOV'T CODE ANN. § 505.052(c) (Vernon Supp. 20010).

⁵⁵ Op. Tex. Att'y Gen. No. DM-95 (1992).

⁵⁶ Op. Tex. Att'y Gen. No. JC-307 (2000).

⁵⁷ TEX. GOV'T CODE ANN. § 551.143 (Vernon 2004).

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

A quorum of members of the governing body may attend a committee hearing. However, the attendance of a quorum would constitute a meeting of the governing body that would require compliance with the Act in certain circumstances. In Attorney General Opinion JC-313, the attorney general concluded that if enough members of a governmental body attended the meeting of a component committee on which some members of the governmental body sit, so that a quorum of the governmental body is present, then the committee would be subject to the Act, regardless of whether the committee members or any members of the governmental body spoke or otherwise engaged in deliberations.⁵⁸

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.⁵⁹

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 towards a quorum of the board under the Act.⁶⁰

Application of the Act to Gatherings of Less Than a Quorum

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

A gathering of less than a quorum of the governing body is not generally subject to the Act. However, if a standing committee or subgroup of the governmental body meets and a discussion of public business occurs, it is advisable that such gatherings should also be posted and conducted as open meetings. Moreover, if the city council routinely approves decisions of a subcommittee consisting of less than a quorum of the city council, the subcommittee must comply with the Act.⁶¹

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.⁶²

In other words, if members are holding their discussion of public business in numbers less than a quorum in order to avoid having to meet the requirements of the Act, criminal prosecution can be pursued. This warning should apply to discussions about which items to place on the agenda as well as the merits of issues.

⁵⁸ Op. Tex. Att’y Gen. No. JC-313 (2000).

⁵⁹ TEX. GOV’T CODE ANN. § 551.0035 (Vernon 2004).

⁶⁰ Op. Tex. Att’y Gen. No. GA-355 (2005).

⁶¹ *Willmann*, 123 S.W.3d at 480.

⁶² TEX. GOV’T CODE ANN. § 551.143 (Vernon 2004).

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 put on by another entity. The Act does not require that the gathering be treated as an open meeting if less than a quorum of members is present. However, as noted above, an official faces potential criminal penalties if such gatherings are used with the intent of circumventing a discussion of public business at an open meeting.⁶³

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

The mere fact that two members visit over the phone does not in itself constitute a violation of the Act. However, if members are using individual telephone conversations to poll all the members on an issue or are making such telephone calls to conduct their deliberations about public business, there may be a potential criminal violation.⁶⁴ Physical presence in one place is not necessary to violate the Act.⁶⁵ It remains a fact issue whether certain phone conversations between less than a quorum of members would be a violation of the Act.⁶⁶

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 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 e-mail in order to circumvent the Act, a violation of the Act would have occurred.⁶⁷

⁶³ See *Id.*

⁶⁴ See *Id.*

⁶⁵ Op. Tex. Att'y Gen. No. DM-95 (1992).

⁶⁶ See *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. – San Antonio 1985, no writ) (school trustees violated Act by telephone conferencing). But see *Harris County Emergency Serv, Dist. #1 v. Harris County Emergency Corps*, 999 S.W.2d 163 (Tex. App. – Houston [14th Dist.] 1999, no writ) (evidence that one board member of a five-member county emergency service district occasionally used telephone to discuss agenda for future meetings with one other board member did not amount to Act violation).

⁶⁷ Op. Tex. Att'y Gen. Nos. JC-307 (2000), DM-95 (1992); *Willmann*, 123 S.W.3d at 480. 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).

IV. Regular Open Meetings

Adoption of Procedural Guidelines to Administer the Act

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

Relatively few procedural rules are contained in the Act for meetings of a governmental body. All meetings must 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 rules 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 local governmental body must consult any local rules of procedure that it has adopted. If a governing body has not adopted any such rules, a majority of the body would determine how items are to be considered procedurally.⁶⁸

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

The Act does not specifically address the power of individual officials to place items on the agenda for a meeting. However, the attorney general has ruled that 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.⁶⁹ In a home rule city that has not adopted such a requirement, or in a general law city, an argument could be made that individual council members could each place items on the agenda. This argument is supported by the reasoning in Attorney General Opinion DM-228, which concluded that individual county commissioners have a right to place items on the agenda for a county commissioners court meeting.⁷⁰ A city should consult its local legal counsel regarding this issue.

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

The mayor or county judge serves as the presiding officer for purposes of running an open meeting.⁷¹ However, the Act itself does not define any specific powers of the mayor or county judge regarding the open portion of a meeting.

⁶⁸ Op. Tex. Att’y Gen. No. GA-412 (2006) (stating that a governmental body may adopt Robert’s Rules of Order if the adopted provisions are consistent with the Act and other applicable statutes). See TEX. LOC. GOV’T CODE ANN. § 22.038(c) (Vernon 2008) (the governing body of a Type A general law may determine the rules of its proceedings); Op. Tex. Att’y Gen. 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).

⁶⁹ Op. Tex. Att’y Gen. No. DM-473 (1998).

⁷⁰ Op. Tex. Att’y Gen. No. DM-228 (1993).

⁷¹ See TEX. LOC. GOV’T CODE ANN. §§ 22.037 (Vernon 2008) (mayor is presiding officer in a Type A general law city), 23.027 (mayor is president of a Type B general law city), 51.052(a) (Type C general law city with population between 501 through 4,999 has the powers of a Type A general law city), 51.052(b) (Type C general law city with population of 201 through 500 has the powers of a Type B general law city); TEX CONST. Art. V, § 18(b) (county judge is the presiding officer of the county commissioners court); TEX. LOC. GOV’T CODE ANN. § 81.001(b) (Vernon 2008) (If present, county judge is the presiding officer of the commissioners court).

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.⁷² 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.⁷³ Whether mayors of a Type C city may vote on all items, might depend on the population of the Type C city.⁷⁴

In the county, the county judge is a full voting member of the commissioners court.⁷⁵

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 local rules of parliamentary procedure have been adopted by the governmental body.

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

A member of the governing body must be present at a meeting in order to deliberate and to vote.⁷⁶ Members may not vote by proxy.⁷⁷

May a governing body hold an open meeting by teleconference?

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

1. An emergency or public necessity exists; and
2. It is difficult or impossible to convene a quorum at one location.⁷⁸

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

- A. The meeting must be posted and open to the public in the same manner as a regular meeting. 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.⁷⁹

⁷² TEX. LOC. GOV'T CODE ANN. § 22.037(a) (Vernon 2008).

⁷³ ALAN J. BOJORQUEZ, TEXAS MUNICIPAL LAW AND PROCEDURE MANUAL § 5.07(2) (5th ed. 2005).

⁷⁴ See TEX. LOC. GOV'T CODE ANN. § 51.052 (Vernon 2008).

⁷⁵ *Id.* § 81.001(a). See Op. Tex. Att'y Gen. Nos. O-2145 (1940); O-1716 (1939).

⁷⁶ Op. Tex. Att'y Gen. Nos. DM-207 (1993); JM-584 (1986).

⁷⁷ Tex. Att'y Gen. LO-94-028.

⁷⁸ TEX. GOV'T CODE ANN. § 551.125(b) (Vernon 2004).

⁷⁹ Op. Tex. Att'y Gen. No. JC-352 (2001).

- B. The meeting must be held in the same place where meetings of the governing body are usually held.
- C. The identity of each speaker must be clearly stated prior to that person speaking.
- D. The meeting must be set up to provide two-way communications throughout the entire meeting.
- E. All portions of the meeting (other than executive sessions) must be audible to the public, including the entire conference call.
- F. The meeting must be recorded and a copy of the recording must be made available to the public.⁸⁰

Since extraordinary circumstances are needed to hold a meeting by telephone conference call, governmental bodies cannot merely have a meeting by teleconference when attending a meeting at 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.⁸¹ 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.

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.⁸² 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:

- A. The notice of a video conference meeting must specify the location where a quorum of the body will be physically present.
- B. The notice must specify the physical location of each member who will be participating in the meeting from another location.
- C. 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.
- D. 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).
- E. The quality of the audio and video signals at a video conference meeting must meet the requirements set forth by the Texas Department of Information Resources and by section 551.127 of the Texas Government Code.

⁸⁰ *Id.* § 551.125(c)-(f).

⁸¹ Op. Tex. Att’y Gen. No. JC-352 (2001) at 4.

⁸² TEX. GOV’T CODE ANN. § 551.127(b) (Vernon 2004).

- F. The entire meeting must be recorded, and the tape must be made available to the public.⁸³

May a governing body broadcast its meetings over the Internet?

The governing body may broadcast its open meetings over the Internet.⁸⁴ 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.

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.⁸⁵ In most cases, such a requirement means that the facility holding the meeting must be physically accessible to individuals with disabilities. Entities may ask that individuals with disabilities provide the entity with reasonable notice on any accommodations they may need to attend the meeting. Entities must also be ready to provide an accessible meeting site and provide alternative forms of communications that address the needs of individuals with disabilities. This may involve providing sign language interpreters, readers, or large print or Braille documents upon request.

Managing Discussions at an Open Meeting

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

The Act allows the public to observe the open portion of a meeting. However, the attorney general has concluded that the Act does not give members of the public a right to speak on items considered at an open meeting.⁸⁶ 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.⁸⁷

⁸³ *Id.* § 551.127(d)-(j).

⁸⁴ *Id.* § 551.128.

⁸⁵ 42 U.S.C.A. §§ 1213 –12165 (West, Westlaw through Aug. 2010 amendments).

⁸⁶ Op. Tex. Att’y Gen. Nos. JC-169 (2000), H-188 (1973).

⁸⁷ Op. Tex. Att’y Gen. No. JC-169 (2000); Tex. Att’y Gen. LO-96-111.

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

A governing body is not required by the Act to allow members of the public to speak on regular agenda items at an open meeting.⁸⁸ However, during a public hearing, members of the public must be given a reasonable opportunity to speak.

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

May a governing body 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.⁸⁹ Arguably, such rules could include a requirement that a group select one of its members as a spokesperson. However, the body should not discriminate between one group and another on a particular issue. Further, in no case may the governing body adopt procedural rules that are inconsistent with the state or federal constitution, state or federal statutes, or city charter provisions (in a home rule city).⁹⁰ 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.

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

The presiding officer or the governing body as a whole may ask that individual members of the public be removed if they are causing a disturbance at a public meeting. What constitutes conduct that rises to the level of disorderly conduct is a fact issue for the 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.

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

The Act does not address whether a governing body may set time limits on the remarks of its members at an open meeting. However, the governing body may adopt procedural rules for its meetings that are not inconsistent with the state or federal constitution, state or federal statutes, or with local city charter provisions.⁹¹ Within these parameters, a governing body may arguably set reasonable time limits for its members' remarks in an open meeting.⁹²

⁸⁸ Op. Tex. Att'y Gen. Nos. JC-169 (2000), H-188 (1973).

⁸⁹ Op. Tex. Att'y Gen. No. JC-169 (2000); Tex. Att'y Gen. LO-96-111.

⁹⁰ Op. Tex. Att'y Gen. Nos. DM-473 (1998), H-188 (1973).

⁹¹ Op. Tex. Att'y Gen. Nos. DM-473 (1998), H-188 (1973).

⁹² Tex. Att'y Gen. LO-96-111; Op. Tex. Att'y Gen. No. H-188 (1973).

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

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

Keeping a Record of Open Meetings

What duty does a 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.⁹³ 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.⁹⁴

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.⁹⁵ 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 its minutes of its meetings. However, the unit is not required by state law to publicly post the minutes of an open meeting.

What right does the public have to record open meetings?

The Act gives any member of the public a legal right to make a video or audio recording of an open meeting.⁹⁶ However, the Act also gives a governmental body a right to adopt reasonable rules that are necessary to maintain order at a meeting. Thus, a governing body may regulate the location of recording equipment and the manner in which the recording is conducted. However, the body may not adopt any rule that would unreasonably impair a person's right to record an open meeting.

⁹³ TEX. GOV'T CODE ANN. § 551.021(a) (Vernon 2004).

⁹⁴ *Id.* § 551.021(b).

⁹⁵ *Id.* § 551.022. *See also* Tex. Att'y Gen. ORD-225 (1979) (tapes of meetings used to assist in writing minutes are open records).

⁹⁶ TEX. GOV'T CODE ANN. § 551.023 (Vernon 2004).

V. Closed Meetings/Executive Sessions⁹⁷

What are the general subjects for which a municipality or county may hold a closed meeting?

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

- 1) consideration of specific personnel matters;⁹⁸
- 2) certain consultations with its attorney;⁹⁹
- 3) discussions about the value or transfer of real property;¹⁰⁰
- 4) discussions about security personnel, security devices, or a security audit;¹⁰¹
- 5) discussions about a prospective gift or donation to a governmental body;¹⁰²
- 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;¹⁰³
- 7) discussions of certain economic development matters;¹⁰⁴
- 8) discussions of certain competitive matters relating to a city-owned electric or gas utility for which the city council is the governing body;¹⁰⁵ and
- 9) certain information relating to the subject of emergencies and disasters.¹⁰⁶

Closed Meetings to Discuss Personnel Issues

When may a governing body meet in a closed meeting to discuss personnel issues?

The Act allows a governmental body to hold a closed meeting to discuss the appointment, employment, evaluation, reassignment, duties, discipline or dismissal of a public officer or employee.¹⁰⁷ A governmental body may also hear a complaint or charge against such officer or employee in a closed meeting. However, the governmental 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

⁹⁷ Texas 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 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.

⁹⁸ *Id.* § 551.074.

⁹⁹ *Id.* § 551.071.

¹⁰⁰ *Id.* § 551.072.

¹⁰¹ *Id.* § 551.076 (Vernon Supp. 2010).

¹⁰² *Id.* § 551.073 (Vernon 2004).

¹⁰³ *Id.* § 551.088.

¹⁰⁴ *Id.* § 551.087.

¹⁰⁵ *Id.* § 551.086.

¹⁰⁶ *Id.* § 418.183(f) (Vernon 2005).

¹⁰⁷ *Id.* § 551.074 (Vernon 2004).

heard in an open session or in a public hearing. Also, any final action by the governing body on a personnel matter must be taken in open session.¹⁰⁸

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 members¹⁰⁹ nor the hiring of independent contractors¹¹⁰ 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.¹¹¹ Such general policies must be addressed during the open portion of a meeting.

Does the governing body have to post the name of the individual employees who are 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.¹¹² However, the more important the position being discussed, the more specific the posting will need to be in describing that position.¹¹³ Thus, the phrase “possible dismissal of a police officer” would normally be a sufficient posting for a city to consider firing a police officer of low rank, unless unusual circumstances made the item particularly newsworthy. On the other hand, if a city is considering the dismissal of the police chief, the posting arguably should indicate “possible personnel action regarding police chief” so that the public is clearly informed as to which high-level position is under discussion.¹¹⁴

Does the 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 an executive session in which that person will be discussed.¹¹⁵ However, it is possible that other sources, such as constitutional due process, state statutes, a contractual agreement, a city charter or a local city ordinance may require that certain staff positions be given individual notice and a hearing before any disciplinary action is taken.¹¹⁶ Local entities should consult their legal counsel regarding the applicable laws in such a situation.

¹⁰⁸ *Id.* § 551.102.

¹⁰⁹ Op. Tex. Att’y Gen. No. DM-149 (1992).

¹¹⁰ *Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 699 (Tex. App. – San Antonio 1998, pet. denied); Op. Tex. Att’y Gen. No. MW-129 (1980).

¹¹¹ *Gardner v. Herring*, 21 S.W.3d 767, 777 (Tex. App. – Amarillo 2000, no pet.); Op. Tex. Att’y Gen. No. H-496 (1975).

¹¹² *See City of San Antonio*, 820 S.W.2d 762 (the Act does not raise due process implications; individual notice is not required).

¹¹³ *See, e.g., Point Isabel*, 797 S.W.2d 176.

¹¹⁴ *See Mayes*, 922 S.W.2d 200.

¹¹⁵ *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).

¹¹⁶ *E.g., TEX. LOC. GOV’T CODE ANN § 22.077* (Vernon 1999) (hearing for removal of certain municipal officers in type A city).

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.¹¹⁷

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

The person that is to be discussed under the personnel exception has a right to insist that the item be discussed in a public hearing instead of during a closed meeting.¹¹⁸ However, the Act does not give an employee or officer the right to insist that a personnel matter regarding that individual be discussed only within a closed meeting.¹¹⁹

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.

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 is defeated by selectively admitting the public, and the Act does not condone this type of procedure.¹²⁰

Closed Meetings for Consultations with an Attorney

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. about settlement offers or
3. on 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 conflict with this chapter.¹²¹

¹¹⁷ Op. Tex. Att’y Gen. No. JM-6 (1983).

¹¹⁸ TEX. GOV’T CODE ANN. § 551.074(b) (Vernon 2004).

¹¹⁹ Op. Tex. Att’y Gen. No. JM-1191 (1990).

¹²⁰ Op. Tex. Att’y Gen. GA-511 (2007).

Also, the attorney general has concluded that a governmental body may meet with its attorney to receive legal advice on any matter.¹²² 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.¹²³

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 an open meeting or in a closed meeting. Each part of the public consultation with the attorney in an open meeting must be audible to the public at the location specified in the agenda. 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.¹²⁴

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 simply because its attorney is present.¹²⁵ General discussion of policy unrelated to legal matters is not permitted in a closed meeting under the Act merely because an attorney is present.

¹²¹ TEX. GOV'T CODE ANN. § 551.071 (Vernon 2004).

¹²² Op. Tex. Att'y Gen. No. JM-100 (1983). *See also* Op. Tex. Att'y Gen. No. JM-238 (1984) (governing body may admit to executive session persons aligned with governing body and necessary to governing body's full communication with its attorney) (modified by Op. Tex. Att'y Gen. No. JC-506 (2002) to require in addition that presence of person must not waive attorney-client privilege if person is admitted under attorney consultation exception).

¹²³ Op. Tex. Att'y Gen. No. JM-100 (1983) at 2.

¹²⁴ TEX. GOV'T CODE ANN. § 551.129 (Vernon Supp. 2010).

¹²⁵ *Olympic Waste Servs. v. City of Grand Saline*, 204 S.W.3d 496, 503-04 (Tex. App. – Tyler 2006, no pet.); Op. Tex. Att'y Gen. No. JC-233 (2000) at 3. *See also* *Finlan v. City of Dallas*, 888 F. Supp. 779, 782 n.9 (N.D. Tex. 1995).

Other Types of Closed Meetings

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.¹²⁶ 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 governmental body to negotiate with a third party.¹²⁷ 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. The entity should not use this exception when the other party in the transaction is present. There is no comparable authority for a governing body to go into a closed meeting to discuss the acquisition of items of personal property, such as the purchase of a new computer system.

May a governing body discuss security personnel, security devices or a security audit in 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.¹²⁸

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.¹²⁹ 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 only meet in a closed meeting if its negotiating position with a third person would be negatively affected by the body's discussion of the contract in an open meeting.

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.¹³⁰

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

The governing body of a public electric or gas utility is allowed to discuss information in a closed meeting if that information would give advantage to a competitor or potential competitor.¹³¹ Unlike other provisions authorizing closed meetings, this provision appears to authorize a governing body to take a final vote on a matter in a properly held closed meeting of this type.

¹²⁶ Tex. Gov't Code Ann. § 551.072 (Vernon 2004).

¹²⁷ *City of Laredo v. Escamilla*, 219 S.W.3d 14, 20 (Tex. App. – San Antonio 2006, pet. denied). See Op. Tex. Att'y Gen. No. MW-417 (1981).

¹²⁸ TEX. GOV'T CODE ANN. § 551.076 (Vernon Supp. 2010).

¹²⁹ *Id.* § 551.073 (Vernon 2004).

¹³⁰ *Id.* § 551.088.

¹³¹ *Id.* § 551.086.

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

This provision lists several types of information that may not be discussed in this type of closed meeting. Thus, before using this authority, the governing body of a public utility should discuss this matter with its legal counsel.

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.¹³² 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. The entity should not use this exception when representatives for the business prospect are present.

Need for Statutory Authority to Hold Closed Meetings

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.¹³³ 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 is permitted for closed meetings.

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

The governing body may not discuss documents that may be confidential under the Public Information Act, Chapter 552 of the Government Code, in a closed meeting unless one of the particular exceptions to the Open Meetings Act applies. The Open Meetings Act and the Public Information Act are entirely independent in their operation.¹³⁴

¹³² *Id.* § 551.087.

¹³³ *See Bexar Medina Atascosa Water Dist.*, 2 S.W.3d at 462.

¹³⁴ *Op. Tex. Att'y Gen. No. GA-19 (2003)* at 6.

Procedural Requirements for Meeting in Closed Meetings

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.¹³⁵

May a city council meet in a closed meeting if a local 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.¹³⁶

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.¹³⁷ 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 deceive the public and thereby render the notice inadequate.¹³⁸

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.¹³⁹ 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.¹⁴⁰ The Open Meetings Act requires only that the posted notice give reasonable notice of the subjects that will be discussed. There is no requirement that the local entity indicate whether an item will be handled in open or closed session. However, if the notices posted for a governmental body’s meetings consistently distinguish between subjects for public deliberation and subjects for closed session deliberation, an abrupt departure from this practice may raise a question as to the adequacy of a notice to inform the public.¹⁴¹

¹³⁵ TEX. GOV’T CODE ANN. § 551.002 (Vernon 2004).

¹³⁶ *Id.* § 551.004. See *Shackelford v. City of Abilene*, 585 S.W.2d 665 (Tex. 1979).

¹³⁷ See generally TEX. GOV’T CODE ANN. §§ 551.041, .043 (Vernon 2004). See Op. Tex. Att’y Gen. No. GA-511 (2007) at 4. (notice does not have to cite the section or subsection numbers of the provision authorizing the closed session.)

¹³⁸ Op. Tex. Att’y Gen. No. JC-57 (1999).

¹³⁹ *Id.*

¹⁴⁰ See generally TEX. GOV’T CODE ANN. §§ 551.041, .043 (Vernon 2004).

¹⁴¹ Op. Tex. Att’y Gen. No. JC-57 (1999).

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.¹⁴² 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.¹⁴³ At the end of that closed meeting, the presiding officer must again announce the date and time. A tape recording or certified agenda must be made.¹⁴⁴ Also, any action or vote on an agenda item may be taken only during an open meeting.¹⁴⁵

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

A closed meeting of a public 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.¹⁴⁶

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 either want to refuse to attend or ask for a formal written interpretation from the local entity's attorney as to the legality of the meeting. Attendance of an unauthorized closed meeting is a criminal offense.¹⁴⁷ 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.¹⁴⁸ Simply objecting or not speaking during an illegal closed meeting will not relieve the member of potential criminal liability for participating in the meeting.

¹⁴² TEX. GOV'T CODE ANN. § 551.101 (Vernon 2004). See *Lone Star Greyhound Park v. Tex. Racing Comm'n*, 863 S.W.2d 742, 747-48 (Tex. App.- Austin 1993, writ denied) (presiding officer's announcement of content of applicable section, but not section number, gives sufficient notice).

¹⁴³ TEX. GOV'T CODE ANN. § 551.103 (Vernon 2004).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* § 551.102.

¹⁴⁶ *Id.* § 551.101; Op. Tex. Att'y Gen. No. JC-285 (2000). See also TEX. GOV'T CODE ANN. § 551.0411(a) (Vernon Supp 2010).

¹⁴⁷ TEX. GOV'T CODE ANN. § 551.144 (Vernon 2004).

¹⁴⁸ *Id.*

Who is permitted to attend a closed meeting?

The Act does not specify who may or may not attend a closed meeting.¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹ 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.¹⁵²

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.¹⁵³

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.¹⁵⁴ 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.

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.¹⁵⁵ 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.¹⁵⁶ 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

¹⁴⁹ Op. Tex. Att'y Gen. No. JC-375 (2001).

¹⁵⁰ Op. Tex. Att'y Gen. No. GA-511 (2007).

¹⁵¹ See Op. Tex. Att'y Gen. Nos. JC-506 (2002); JC-375 (2001); JM-238 (1984).

¹⁵² Op. Tex. Att'y Gen. No. JC-506 (2002).

¹⁵³ *Id.*

¹⁵⁴ Op. Tex. Att'y Gen. No. JM-1004 (1989).

¹⁵⁵ See Op. Tex. Att'y Gen. Nos. JM-6 (1983), JC-506 (2002); Tex. Att'y Gen. LO-97-017.

¹⁵⁶ Op. Tex. Att'y Gen. Nos. JM-6 (1983), GA-277 (2004).

under the Act but would not preclude her exclusion by the board.¹⁵⁷ However, some city charters and certain statutory provisions provide that the city secretary shall attend all city meetings.¹⁵⁸ It is not clear whether such a provision would require the attendance of the city secretary at a closed meeting.

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.¹⁵⁹ However, the governing body may not conduct a straw vote or a formal vote during such a session.¹⁶⁰ The Act requires that any final action, decision or vote be taken in open session.¹⁶¹

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

Is a governmental body required to create a certified agenda or tape recording of discussions held in a closed meeting?

A governmental 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.¹⁶² The body may turn off the tape or stop taking notes during the portion of a closed meeting that involves consultations with an attorney.

The certified agenda must state the subject matter of each deliberation and record any further action taken.¹⁶³ 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.¹⁶⁴ In addition, the certified agenda or tape must include an announcement by the presiding officer of the date and time that the closed meeting began and ended.¹⁶⁵

¹⁵⁷ Op. Tex. Att’y Gen. No. JC-375 (2001).

¹⁵⁸ See TEX. LOC. GOV’T CODE ANN. § 22.073 (Vernon 1999) (requires a city secretary in Type A city to attend all meetings and keep required minutes).

¹⁵⁹ *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).

¹⁶⁰ *Id.*

¹⁶¹ TEX. GOV’T CODE ANN. § 551.102 (Vernon 2004).

¹⁶² *Id.* § 551.103(a).

¹⁶³ *Id.* § 551.103(c)(1)-(2).

¹⁶⁴ Op. Tex. Att’y Gen. No. JM-840 (1988) at 4-7.

¹⁶⁵ TEX. GOV’T CODE ANN. § 551.103(c)(3), (d) (Vernon 2004).

Who is responsible for creating the certified agenda or the 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 of a closed meeting. However, the presiding officer is responsible for certifying that the certified agenda or tape is a true and correct record of the proceedings.¹⁶⁶ It is important to note that a member of a governing body commits a Class C misdemeanor if he/she participates in a closed meeting knowing that a certified agenda or tape is not being made.¹⁶⁷

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 kept during a closed meeting may be disclosed to a member of the public only under a court order.¹⁶⁸ There are criminal penalties for releasing a copy of the certified agenda to the public without a court order.¹⁶⁹

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.¹⁷⁰ A reasonable argument can be made that a governmental body may give permission to one of its members to tape a closed meeting. However, it does not appear that either the courts or the attorney general have directly addressed this issue.

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 of that closed meeting.¹⁷¹ Also, a member that was absent during a closed meeting may review the certified agenda or tape recording. Presumably, this would include tapes made of closed meetings conducted prior to the start of the member's term of office. The governing body should adopt procedures for reviewing a recording to preserve the recording's evidentiary integrity, but the governing body could not absolutely prohibit the review by a member. Once the member has left office, the member does not have the right to review the certified agendas or tapes of closed meetings.¹⁷² Also, the governmental body may not provide the absent member with a copy of the certified agenda or tape recording of the closed meeting.¹⁷³

¹⁶⁶ *Id.* § 551.103(b).

¹⁶⁷ *Id.* § 551.145.

¹⁶⁸ *Id.* § 551.104(c).

¹⁶⁹ *Id.* § 551.146.

¹⁷⁰ *Zamora v. Edgewood Indep. Sch. Dist.*, 592 S.W.2d 649 (Tex. Civ. App. – Beaumont 1979, writ ref'd n.r.e.); Op. Tex. Att'y Gen. No. JM-351 (1985) at 2.

¹⁷¹ Op. Tex. Att'y Gen. No. DM-227 (1993).

¹⁷² Op. Tex. Att'y Gen. No. JC-120 (1999).

¹⁷³ Tex. Att'y Gen. LO-98-033.

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

The Act contains two requirements on how certified agendas or tape recordings of closed meetings are to be handled once they have been created:

- 1) the certified agenda or tape may not be disclosed to the public without a court order, and
- 2) the certified agenda or tape must be preserved for a period of at least two years after the date of the closed meeting.¹⁷⁴

If any legal action involving the closed meeting is brought within this time period, the certified agenda or tape must be preserved until the action is finished. The governing body is the proper custodian for the certified agenda or tape, not the city secretary or county clerk, but the governing body may delegate its duty to these individuals.¹⁷⁵

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.¹⁷⁶ However, it is not clear whether a governing body may affirmatively prohibit its members from publicly discussing what takes place in a closed meeting. Attorney General Opinion JM-1071 implies that such a restriction may violate the First Amendment of the United States Constitution.¹⁷⁷

Of course, 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 drastically affect the wisdom of 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.

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

The certified agenda and tape of a closed meeting are considered confidential under the Public Information Act.¹⁷⁸

¹⁷⁴ TEX. GOV'T CODE ANN. § 551.104 (Vernon 2004).

¹⁷⁵ Op. Tex. Att'y Gen. No. GA-277 (2004) at 3.

¹⁷⁶ Op. Tex. Att'y Gen. No. JM-1071 (1989).

¹⁷⁷ *Id.* See also Op. Tex. Att'y Gen. No. MW-563 (1980) at 5 (city ordinance attempting to prohibit public discussion of the contents of an executive session may raise First Amendment concerns but does not violate the Public Information Act).

¹⁷⁸ Tex. Att'y Gen. ORD-495 (1988).

Are notes made by an official in a closed meeting confidential under the Public Information Act?

Whether the notes made by an official in a closed meeting are confidential depends on whether an exception under the Public Information Act 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.¹⁷⁹ 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 an open record request for any such notes, the local entity will want to confer with its local legal counsel.

VI. Emergency Meetings

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

Under the Act, an emergency “exists only if immediate action is required of a governmental body because of an imminent threat to public health and safety” or “because of a reasonably unforeseeable situation.”¹⁸⁰ The courts and the Attorney General have traditionally construed the emergency posting exception strictly.¹⁸¹ 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 risk to public welfare or safety that would occur if action were not taken within 72 hours, then it would be difficult to argue that an emergency existed. 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.”¹⁸²

¹⁷⁹ See, e.g., ORD-635 (1995); ORD-574 (1990) (inter-agency and intra-agency written memoranda containing advice, recommendations and opinion can be withheld); Tex. Att’y Gen. ORD-462 (1987).

¹⁸⁰ TEX. GOV’T CODE ANN. § 551.045(b) (Vernon 2004).

¹⁸¹ See Op. Tex. Att’y Gen. 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).

¹⁸² See *River Rd. Neighborhood Ass’n*, 720 S.W.2d at 557-58.

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.”¹⁸³ The emergency is “clearly identified” when the governing body states the reason for the emergency.¹⁸⁴

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 governmental 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.

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.¹⁸⁵ First, they must file a request to be notified of such items. This request must be filed at the headquarters of the governmental body. The request must also include information on how to contact the media member by telephone, facsimile transmission or electronic mail. Second, the media member must agree to reimburse the local entity for the cost of providing the special notice. Members of the media are not entitled to special notice of an emergency item unless they meet these criteria.¹⁸⁶

VII. Enforcement of the Act's Requirements

Civil Enforcement of the Act

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

An individual may sue to prevent, stop or reverse a violation of the Act.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹

¹⁸³ TEX. GOV'T CODE ANN. § 551.045(c) (Vernon 2004).

¹⁸⁴ *Piazza v. City of Granger*, 909 S.W.2d 529 (Tex. App. — Austin 1995, no writ).

¹⁸⁵ TEX. GOV'T CODE ANN. § 551.047 (Vernon Supp. 2010).

¹⁸⁶ *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).

¹⁸⁷ TEX. GOV'T CODE ANN. § 551.142(a) (Vernon 2004).

¹⁸⁸ *See City of Port Isabel v. Pinnell*, 161 S.W.3d 233, 241 (Tex. App.—Corpus Christi 2005, no pet.).

¹⁸⁹ *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).

2. The court may invalidate any action that a governmental body has taken in violation of the Act.¹⁹⁰
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.¹⁹¹
4. The court, at its own discretion, may make the losing side in such a case pay costs of litigation and reasonable attorney fees.¹⁹²

Also, the Act provides that an individual, corporation or partnership that releases a certified agenda or tape of a closed meeting to the public may be held liable in a civil lawsuit.¹⁹³ In such a suit, the person or entity that is harmed may get damages, attorney fees and court costs.

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

Actions that violate the Act are not automatically voided, they are voidable.¹⁹⁴ 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.¹⁹⁵ Nonetheless, it is always the safer course to attempt to achieve full compliance with the Act to avoid the likelihood of court challenges.

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

If a governing body has taken an action at a meeting that may not have fully complied with the requirements of the Act, the governing body may at a later meeting re-authorize the same action. If the second meeting is held in accordance with all the requirements of law, including the Act, then the action under certain circumstances may be considered valid from the date of the second meeting.¹⁹⁶ 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 finds that the action taken at the first meeting was invalid.¹⁹⁷

¹⁹⁰ TEX. GOV'T CODE ANN. § 551.141 (Vernon 2004).

¹⁹¹ *Ferris v. Bd. of Chiropractic Exam'rs*, 808 S.W.2d 514 (Tex. App. — Austin 1991, writ denied).

¹⁹² TEX. GOV'T CODE ANN. § 551.142(b) (Vernon 2004).

¹⁹³ *Id.* § 551.146(a)(2).

¹⁹⁴ *Id.* § 551.141. See *City of Point Isabel*, 161 S.W.3d 233 (actions violating notice provisions voidable).

¹⁹⁵ *Collin County v. Homeowners Ass'n*, 716 F. Supp. 953, 960 n.12 (N.D. Tex. 1989).

¹⁹⁶ *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975) (increase in electric rates effective only from date re-authorized at lawful meeting).

¹⁹⁷ *Ferris*, 808 S.W.2d 514.

Criminal Enforcement for Violations of the Act

What are the criminal penalties for noncompliance with the Act?

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

- 1) **Unauthorized 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.¹⁹⁸ This violation is a misdemeanor punishable by a fine of between \$100 and \$500, one to six months in jail, or both.¹⁹⁹ 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 a defense to prosecution under this section of the Act.²⁰⁰ A governing body may want to ask its local 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.²⁰¹ 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 or tape recording of the closed meeting is not being made.²⁰² This violation is a Class C misdemeanor and is punishable by a fine of up to \$500.²⁰³
- 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.²⁰⁴ 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.²⁰⁵ Also, the person or entity that is harmed by the release of the certified agenda may get damages, attorney fees and court costs.²⁰⁶ 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.

¹⁹⁸ TEX. GOV'T CODE ANN. § 551.144(a) (Vernon 2004).

¹⁹⁹ *Id.* § 551.144(b).

²⁰⁰ *Id.* § 551.144(c) (Vernon 2004).

²⁰¹ *Id.* § 551.143.

²⁰² *Id.* § 551.145(a).

²⁰³ *Id.* § 551.145(b). *See* TEX. PEN. CODE ANN. § 12.23 (Vernon 2003).

²⁰⁴ TEX. GOV'T CODE ANN. § 551.146(a) (Vernon 2004).

²⁰⁵ *Id.* § 551.146(b). *See* TEX. PEN. CODE ANN. § 12.22 (Vernon 2003).

²⁰⁶ TEX. GOV'T CODE ANN. § 551.146(a)(2) (Vernon 2004).

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.²⁰⁷

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

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

What is the role of the 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.²⁰⁸ Only certain public officials, including the district and county attorney, 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.²⁰⁹

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 local district attorney or prosecuting criminal county attorney. However, a local prosecutor may request assistance from the OAG in prosecuting a violation of the Act.²¹⁰ 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 resources of the agency and the interest of the State of Texas make such assistance proper.

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

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

²⁰⁷ Op. Tex. Att'y Gen. No. JC-0307 (2000).

²⁰⁸ TEX. GOV'T CODE ANN. §§ 402.041-.045 (Vernon 2005).

²⁰⁹ Op. Tex. Att'y Gen. Nos. DM-95 (1992); JM-840 (1988); H-772 (1976).

²¹⁰ TEX. GOV'T CODE ANN. § 402.028 (Vernon 2005).

her own legal fees or the legal fees of another member indicted on the same facts for the same offense.²¹¹

VIII. Additional Information on the Act

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

Elected or appointed governmental officials must have a minimum of one hour of training that has been prepared or approved by the Office of the Attorney General. Officials have 90 days after their election or appointment to complete the required training.²¹² 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.

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 Municipal Affairs Section or the County Affairs Section of the Office of the Attorney General at (800) 252-5476. Additionally, the Office of the Attorney General produces the *Open Meetings Handbook*, an in-depth publication about the Act and its interpretation in attorney general opinions and court cases. That publication may be ordered by calling (512) 936-1737. It is also available in a downloadable PDF format on the Attorney General's website at www.texasattorneygeneral.gov. Finally, the Office of the Attorney General sponsors an Open Government Hotline where public officials and concerned citizens can get answers to basic questions about the Act. The Open Government Hotline number is (512) 478-6736 or (877) 673-6839 (OPEN-TEX).

²¹¹ Op. Tex. Att'y Gen. No. JC-294 (2000).

²¹² TEX. GOV'T CODE ANN. § 551.005 (Vernon Supp. 2010).