

The Texas Open Meetings Act

This presentation satisfies the training
requirement of Texas Government Code
Section 551.005

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Presentation Outline

- Background
- Applicability
 - Who is subject to the Act?
 - What is a “quorum”?
 - What constitutes a “meeting”?
- Notice Requirements
- Recordkeeping
- Procedures and Requirements for Open Meetings And Executive Sessions
- Penalties



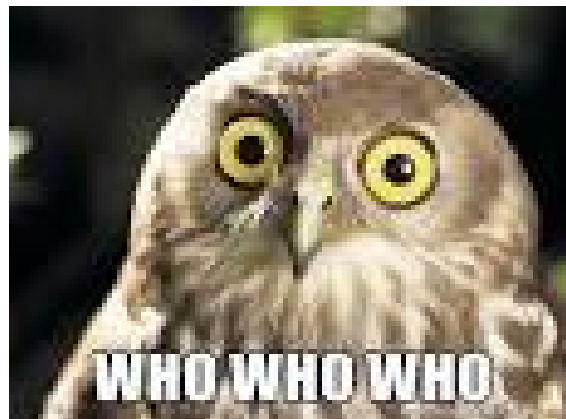
General Background

- Sharpstown stock fraud scandal of the 1970s: Following the scandal in the Texas Legislature, the Open Meetings Act was made tougher for local governments
- The Act was passed on the premise that “citizens are entitled . . . not only to know what government decides but to observe how and why every decision is reached.” *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 300 (Tex. 1990)
- Senator John Cornyn: “It is only natural that elected officials and government leaders want recognition for their successes, but not for their failures...but we as a healthy democracy need to know the good, the bad, and the ugly.”
- **General rule:** A governmental body’s meetings must be open to the public, unless a statute expressly permits an executive session



Applicability of the Act

Who is Subject to the Act?



- A **governmental body** as **expressly defined** in the Act – examples:
A **city council** or a department, agency, or subdivision of a city that has authority to promulgate policy-making rules (i.e., rulemaking) or to decide contested cases (i.e., quasi-judicial)
- Entities **required by other law** to comply with the Act – examples:
The board of directors of an economic development corporation or a local government corporation
- A **board or committee** of an **entity that is subject to the Act**, depending on the board’s or committee’s **membership** and/or the board’s or commission’s **authority** (i.e., final decision making authority or “routinely rubber-stamped”)



Applicability of the Act

What is a quorum?

- **General rule:** The Act applies to a gathering of a **quorum** of a governmental body’s members if **public business** is **deliberated or discussed**
- **Cities**
 - **Home rule:** Charter generally expressly states the quorum requirement
 - **Type A:**
 - **Regular meeting** – majority of the councilmembers (3)
 - **Special meeting or meeting to impose taxes** – two-thirds of the councilmembers (4)
 - **Type B:** The mayor and three aldermen or four aldermen
 - **Type C:** A majority of the board of commissioners (2)
 - **Boards and commissions:** Look to statute or ordinance/resolution creating
- **Economic Development Corporations**
 - **Type A:** a majority of the board members (Ex: 3 of 5)
 - **Type B:** a majority of the board member which is 4 of 7
- **General quorum rule:** a majority of a governmental body



What Constitutes a Meeting?



Definition One

- A **meeting** occurs when:
 1. A **quorum** of a governmental body gathers;
 2. the **public business** that the governmental body has authority to supervise or oversee is **discussed**; and
 3. a **member** of the governmental body **participates in the discussion**.
- **Examples:** formal meeting, attendance at another entity's meeting, using the restroom, "walking quorum," circulating an invoice or letter for signature outside of a meeting, e-mail, videoconferencing
- Develop a habit of asking yourself, "is this a meeting?"

(Circumvention: the Act may apply even when a quorum is not present.)



Definition Two

- If the gathering is **called by the governmental body**, or the **governmental body is responsible for** the gathering, a **meeting** occurs when:
 1. A **quorum** of a governmental body gathers;
 2. the **public business** that the governmental body has authority to supervise or oversee is **discussed**; and
 3. the members **receive information from, give information to, ask questions of, or receive questions from any third person**, including an employee of the governmental body.
- **Examples:** attendance at a city's board or committee meeting, "staff briefings"

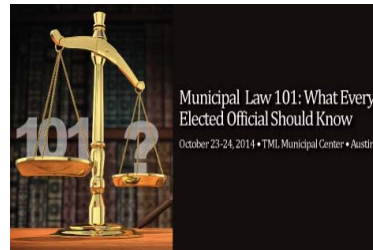
(Circumvention: the Act may apply even when a quorum is not present.)



Applicability of the Act

What Constitutes a Meeting?

- The Act does not apply to **social functions**, *regional, state, or national workshops*, or attendance by a quorum at a **candidate forum**, if no action is taken and discussion of public business is incidental to the event.



Is This a Meeting?

Scenario:

5 members City Council



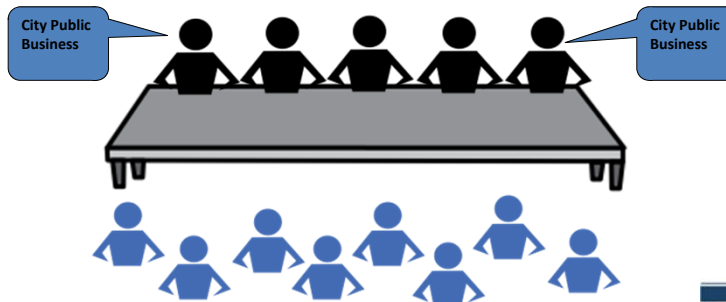
Quorum = 3 members



Is This a Meeting?

City Council Meeting

- Is there a quorum?
- Is there deliberation between GB members?
- Are they discussing public business under the City's control?



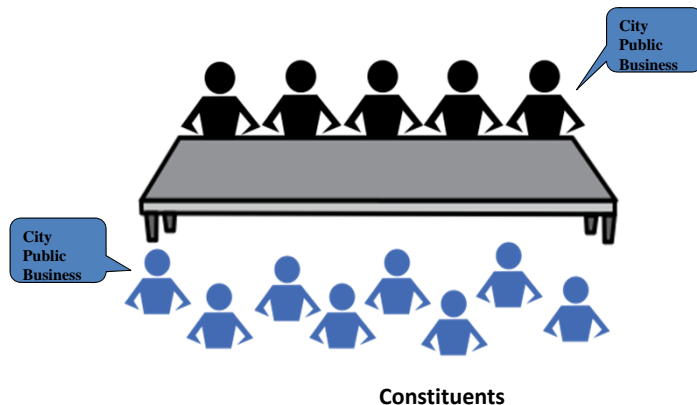
Constituents



Is This a Meeting?

City Council Meeting

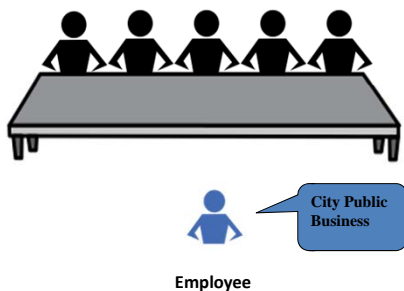
- Is there a quorum?
- Is there deliberation between GB member and another person?
- Are they discussing public business under the city's control?



Is This a Meeting?

Staff Briefing Meeting

- Gathering conducted by GB & was it called by GB?
- Is a quorum present?
- Are GB members receiving information from a third party?
- Is the information concerning public business in the control of the GB?



Email
To: Mayor, City Council & Staff
From: City Secretary
Subject: Staff Briefing Meeting

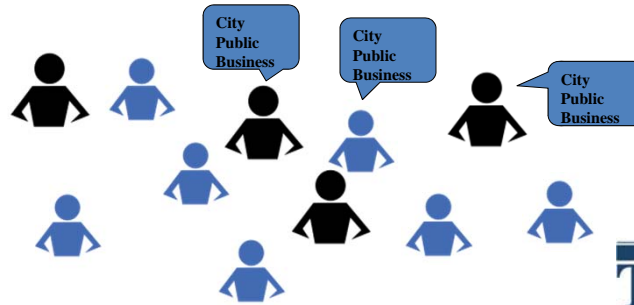
You will have your staff briefing meeting in council chambers an hour before our scheduled open meeting on Tuesday.



Is This a Meeting?

Church Social Hall: Christmas Party

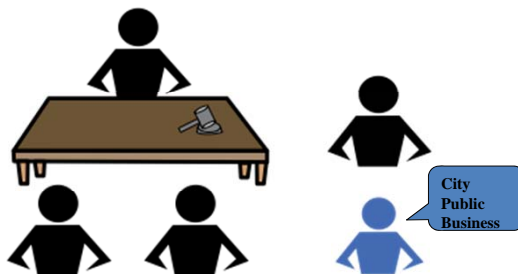
- Is there a quorum?
- Is there deliberation between GB members or between GB members and another person?
- Is public business being discussed that is in the control of the GB?



Is This a Meeting?

Mayor's Office

- Gathering conducted by GB & was it called by GB?
- Is a quorum present?
- Are GB members receiving information from a third party?
- Is the information concerning public business in the control of the GB?



Email
To: Mayor, City Council & City Manager
From: City Secretary
Subject: Meeting in Mayor's Office

You will have a meeting in the Mayor's office tomorrow to get information from the city manager on the latest development projects.

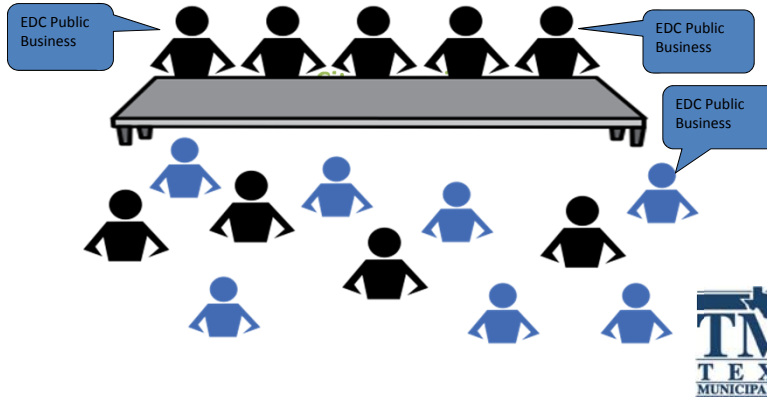
Employee



Is This a Meeting?

Economic Development Board Meeting

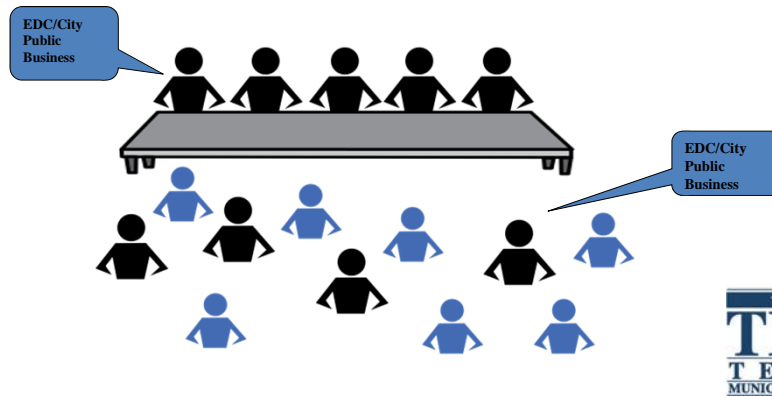
- Is there a quorum of the city council present?
- Is there deliberation by the city council concerning public business in control by the city?



Is This a Meeting?

Economic Development Board Meeting

- Is there a quorum of the county commissioners present?
- Is there deliberation by a county commissioner and another person?
- Is there discussion of public business in the control of the county?



Online Message Board

- Communication between councilmembers about public business or public policy over which the council has supervision or control **does not** constitute a meeting if certain conditions are met. The communication must be:
 - in writing;
 - posted to an online message board that is viewable and searchable by the public; and
 - displayed in real time and displayed on the message board for no less than 30 days after the communication is first posted.

The message board:

- must be prominently displayed on the city's primary website and no more than one click away from the city's website;
- may only be used by city councilmembers (or city employees who post their name and title and that have received authorization from the council); and
- the council may not vote or take action by posting on the city's online message board, and if the city removes a posted message, the city must retain the posting for six years.



Notice Requirements

Meeting Agendas & Videos

Name	Meeting Date		Meeting Time
Planning and Zoning Commission	10/27/2015		7:00 PM
City Council Meeting	10/20/2015		7:00 PM
Water Utilities Community Facilities District	10/20/2015		6:00 PM
City Council Work Session	10/19/2015		7:00 PM
Planning and Zoning Commission	10/13/2015		7:00 PM
Special Work Session of the Apache Junction City Council and the Apache Junction School Board	10/7/2015		6:00 PM
Parks & Recreation Commission	10/7/2015		6:00 PM
City Council Meeting	10/6/2015		7:00 PM



Notice Requirements

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



Notice Requirements

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



Notice Scenario

AGENDA
City of Earthville
Regular City Council Meeting
Thursday, June 27, 2010, at 7:00 p.m.
Earthville's City Council Chambers

- 1) Call meeting to order and Pledge of Allegiance
- 2) Approval of the minutes of the regular city council meeting of June 17, 2010.
- 3) City Manager's report: Upcoming items
- 4) Reports: The following reports include questions by council to staff regarding city policies or activities; request by council for information or reports from staff; reports of activities of individual council members and staff; constituent concerns; current topics raised by media; follow-up on staff assignments; scheduling of future council meetings and activities; and other brief discussions regarding city-related matters.
- 5) Old business
- 6) Public comment



Notice Scenario - Question 1

- Are items #3 and #4 on the Earthville Agenda sufficient notice to inform the public of the subject to be discussed?
- 3) City Manager's report: Upcoming items
 - 4) Reports: The following reports include questions by council to staff regarding city policies or activities; request by council for information or reports from staff; reports of activities of individual council members and staff; constituent concerns; current topics raised by media; follow-up on staff assignments; scheduling of future council meetings and activities; and other brief discussions regarding city-related matters.
- A. Yes
B. No



Notice Scenario - Answer 1

- B. No
- The notice at issue 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 OMA.

Attorney General Opinion GA-668



Notice: Items of Community Interest

Gov. Code § 551.0415

- *Only* applies to municipalities and counties
- Allows a quorum of the governmental body of a municipality or county to receive a report from staff and governmental body members about ***items of community interest*** during a meeting of a governmental body **without having to give notice of the subject of the report**, if no action is taken and possible action is not discussed regarding the information provided in the report.



Notice: Items of Community Interest

Items of Community Interest

Gov. Code § 551.0415

- Expression of thanks, congratulations, or condolences
- Information regarding holiday schedules
- An honorary or salutary recognition of a public official, public employee, or other citizen, except that a discussion regarding a change in the status of a person's public office or public employment is not an honorary or salutary recognition for purposes of this subdivision
- A reminder about an upcoming event organized or sponsored by the governing body



Notice: Items of Community Interest

Items of Community Interest

Gov. Code § 551.0415

- Information regarding a social, ceremonial, or community event organized or sponsored by an entity other than the governmental body that was attended or is scheduled to be attended by a member of the governmental body or an official or employee of the municipality
- Announcements involving an imminent threat to the public health and safety of people in the municipality that has arisen after the posting of the agenda



Notice Scenario - Question 2

- The agenda states that the city council meeting is on Thursday, June 27. However, June 27 is a Sunday and the date was supposed to be June 24.
- Q: Can the city change the date to June 24 without posting a corrected notice for 72 hours?

- A. Yes
- B. No



Notice Scenario - Answer 2

- B. No
- OMA is literally construed and there are no provisions within the OMA for mistakes on the posted notice.

What about location of the meeting?

- *Maybe on the day of the meeting*, a governmental body will sometimes change a meeting location to a bigger room within the same building to accommodate a large crowd. But consult with legal counsel if they decide to change the meeting location.



Notice Scenario - Question 3

- Is item #6 on the Earthville Agenda sufficient notice to inform the public of the subject to be discussed?

“6) Public comment”

- A. Yes
- B. No



Notice Scenario - Answer 3

- A. Yes
- “Public comment” provides sufficient notice of a “public comment” session, where the general public addresses the governmental body about its concerns and the governmental body does not comment or deliberate, except in accordance with Gov. Code § 551.042.
- GB **cannot predict the subject matter** of public comment sessions.

Attorney General Opinion JC-169 (2000)



Notice Scenario - Question 4

- Is item #5 on the Earthville Agenda sufficient notice to inform the public of the subject to be discussed?

“5) Old Business”

- A. Yes
- B. No



Notice Scenario - Answer 4

- B. No
- Generalized terms such as “old business,” “new business,” “regular or routine business,” and “other business” are not proper terms to give notice of a meeting because they do not inform the public of the subject matter.

Attorney General Opinion H-662 (1975)



Notice Requirements

- **Emergency meeting or supplemental posting:** Where there is an **imminent threat to public health and safety** or a **reasonably unforeseeable situation**, a meeting on an emergency matter may be held after only **two hours notice**
 - The notice must **describe the emergency**
 - What if we “forgot to post” an item? Not an emergency
- **Recess:** May recess to **following business day** if the action is taken in **good faith** and not to circumvent the Act’s requirements



Recordkeeping

- A governmental body must **prepare and keep minutes** of a meeting **or a recording** of each open meeting.
- **“Recording”** means a tangible medium on which audio or combination of audio and video is recorded, including a disc, tape, wire, film, electronic storage drive, or other medium now existing or later developed.
- The **minutes must:**
 - State the subject of each deliberation
 - Indicate each vote, order, decision, or other action taken
- A brief summary is all that is required - A verbatim transcript is not necessary



Recordkeeping

Question

How long do you have to keep minutes or recording of a meeting?

- A. 2 years
- B. 5 years
- C. 10 years
- D. Forever



Recordkeeping

Answer

D. Forever

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

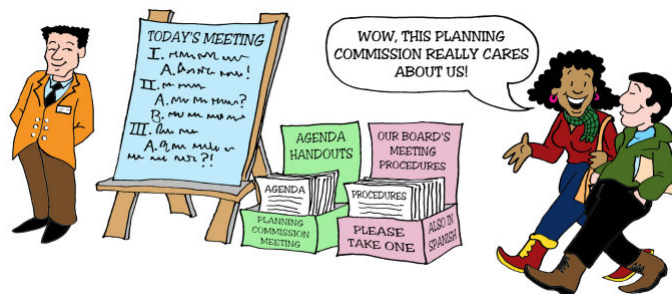


Recording of Meetings

- A home rule city with a population of 50,000 or more must:
 - Make a video and audio recording of reasonable quality of each regularly scheduled open meeting
 - Make available an archived copy of such recording on the internet site that the city maintains not later than 7 days after the recording
 - Maintain the archived recording on the Internet for not less than 2 years



Procedures and Requirements *Open Meetings*



Procedures and Requirements

Open Meetings

- meeting **may not be convened** unless a **quorum is present** in the meeting room (even when holding a meeting using videoconference)
 - A member of the council who participates in a meeting by videoconference call is considered **absent** from the meeting during any portion of the meeting when the audio or video communication with the member is lost
- The **Americans with Disabilities Act** requires a meeting to be held in a room that is **physically accessible** to those with disabilities



Procedures and Requirements

Open Meetings

- Members of the public (including the media) **have a right to record** the meeting by audio or video tape or other comparable means
- A governmental body may adopt **reasonable rules** to maintain order in a meeting, including those relating to the location of recording equipment



Procedures and Requirements

Open Meetings

Question

Does the public have the right to speak at an open meeting?

- A. Yes
- B. No



Procedures and Requirements

Open Meetings

Answer

- B. No

The Act **does not** entitle members of the public to speak at open meetings, *it only entitles the public to observe the meeting.*



Procedures and Requirements

Open Meetings

- If a governmental body allows public comment, it may set **reasonable rules** regarding the number, frequency, and length of presentations, but it should not discriminate against speakers
- If a member of the public asks a question about an item that is **not on the agenda**, the members of the governmental body **may not deliberate the item**, and are limited to:
 - A statement of **fact** regarding the issue
 - A statement of **policy** regarding the issue
 - A **proposal** to place the item on a future agenda for deliberation



Procedures and Requirements

Executive Sessions



Procedures and Requirements

Executive Sessions

- A governmental body may hold a **closed meeting** only when a statute **expressly authorizes** it to do so
- To conduct an executive session, a governmental body must:
 1. have a **quorum**;
 2. properly **convene** in an open meeting;
 3. **announce** that a closed meeting will be held;
 4. **identify** in the open meeting the **section of the law** that allows the closed meeting; and
 5. keep a **certified agenda** or a **recording** of the closed meeting:
 - a. the certified agenda must include a **statement of the subject of each deliberation** and a **record of any further action taken**
 - b. The certified agenda or recording is **confidential** and may not be released absent court action
 - c. A **sitting member** of the governmental body may review the certified agenda or recording.



Procedures and Requirements

Executive Sessions

- **Who may attend an executive session?**

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



Procedures and Requirements *Common Executive Sessions*

- ***Real Property Deliberations***

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

- ***Personnel Matters***

- to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee
- to hear a complaint or charge against an officer or employee

****Must be conducted in open session if the officer or employee requests a public hearing***



Procedures and Requirements *Common Executive Sessions*

Question

Does an employee have a right to attend the closed meeting if the employee is being discussed?

- A. Yes
- B. No



Procedures and Requirements *Common Executive Sessions*

Answer

B. No

The city councils decides who can attend an executive session.

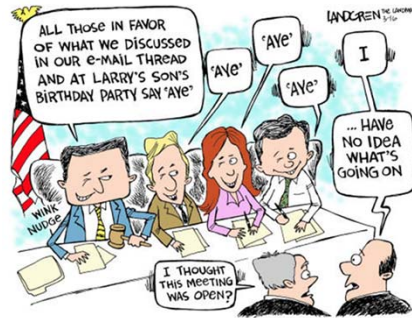


Procedures and Requirements *Common Executive Sessions*

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



Penalties



Violations

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



Violations – Civil Penalties

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



Violations – Criminal Penalties

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



Violations – Criminal Penalties

- **Knowingly conspiring to circumvent the Act “by meeting in numbers less than a quorum for the purpose of secret deliberations”**
 - Knowingly: reasonably certain that the action would violate the law
 - Walking quorum: where a quorum is not present in one place at the same time and secretly discusses public business with the goal of avoiding a public meeting – may subject members to criminal and civil liability
- **Knowingly calling, aiding in calling, organizing, or participating in an unlawful closed meeting**
 - Affirmative defense: member acted in reasonable reliance on a court order, attorney general opinion, or the written opinion of the governmental body’s attorney



Resources

Keep current by using these resources:

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

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

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

