

The Texas Open Meetings Act

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



PRESENTATION OUTLINE

- General Background
- Applicability of the Act
 - Governmental Bodies
 - Quorum
 - Meetings
- Notice Requirements
- Recordkeeping
- Procedures and Requirements for Open Meetings And Closed Meetings
- Penalties



GENERAL BACKGROUND

- Following the Sharpstown stock fraud scandal of the 1970s involving 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.”



APPLICABILITY OF THE ACT

- Every regular, special or called meeting of a governmental body shall be open to the public, except as provided by the Act.
- The Act generally applies whenever there is:
 - a governmental body; and
 - that body is meeting.



APPLICABILITY OF THE ACT

What is a Governmental Body?

- 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?

- **Generally**, the Act applies whenever a quorum of a governmental body meets.
- A quorum is a majority of a governmental body unless otherwise defined by law.
- **Cities:**
 - **Home rule:** Charter generally 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 the board or commission.



APPLICABILITY OF THE ACT

What is a Meeting?

➤ **Definition #1:**

- A **quorum** of a governmental body gathers;
- the **public business** that the governmental body has authority to supervise or oversee is **discussed**; and
- 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?"

Caution: the Act may apply *even when a quorum is not present*.



APPLICABILITY OF THE ACT

What is a Meeting?

➤ **Definition #2:**

- If a gathering is **called by the governmental body**, or the **governmental body is responsible for** the gathering, a **meeting** occurs when:
 - A **quorum** of a governmental body gathers;
 - **public business** that the governmental body has authority to supervise or oversee is **discussed**; and
 - 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"

Caution: the Act may apply *even when a quorum is not present*.



APPLICABILITY OF THE ACT

Telephone Meetings

- An open or closed meeting may be held by telephone conference if:
 - an emergency or public necessity exists; **and**
 - convening at one location of a quorum is difficult or impossible; or
 - the meeting is held by an advisory board.
- A governmental body may use a teleconference call to consult with outside legal counsel.



APPLICABILITY OF THE ACT

Videoconference Meetings

- A member or employee of a governmental body may participate remotely in a meeting by videoconference call when certain requirements are met, including among others:
 - The video and audio feed of the remote member or employee's participation, as applicable, in the meeting must be broadcast live at the meeting.
 - The presiding officer must be present in the physical space that is open to the public.
 - A quorum of the city council must be present at one physical location.
 - The meeting notice must specify where the quorum of the city council will be physically present and the intent to have a quorum present.
 - Each portion of the meeting held by videoconference call that is required to be open to the public must be visible and audible to the public at the location where the quorum is present.
 - The city council must make at least an audio recording of the meeting and the recording must be made available to the public.



APPLICABILITY OF THE ACT

Informal or Social Meetings

- The Act **does not** apply to a gathering of a quorum at:
 - social functions,
 - regional, state, or national workshops,
 - a candidate forum, appearance or debate
 - ceremonial events, or
 - press conferences
- **Provided that:**
 - no action is taken; and
 - discussion of public business is incidental to the event.



APPLICABILITY OF THE

Online Message Boards

- 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

- The Act requires **written notice** of the **date, hour, place, and subject** of each meeting - for **both** open **and** closed sessions.
- 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” are generally **insufficient**.
 - The **more important** the issue is to the public, the **more specific** the notice should be.
 - “Public forum” or “public comment” is sufficient notice to hear from residents concerning items not on the agenda.



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/electronic bulletin board/kiosk outside of city hall or on the door of city hall).
- **Internet posting:** Cities are **required** to post notice on the city’s internet website.
- When a city **posts notice on its internet website**, the physical notice has to be readily accessible to the general public **only during normal business hours** instead of at “all times.”



NOTICE REQUIREMENTS

- **Emergency meeting:** 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 **one hours notice**.
 - The notice must **describe the emergency**
 - **Reasonably unforeseeable situation includes:**
 - *Fire, flood, earthquake, hurricane, tornado, wind, rain, or snow storm;*
 - *Power failure, transportation failure, or interruption of communication facilities;*
 - *Epidemic; or*
 - *Riots, civil disturbance, enemy attack, or other actual or threatened act of lawlessness or violence.*
 - What if we “forgot to post” an item? Not an emergency.



NOTICE REQUIREMENTS

- **Recess:** May recess to **following business day** if the action is taken in **good faith** and not to circumvent the Act's requirements.
- **Items of Community Interest:** quorum of the governmental body of a **municipality or county** may 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.
 - Expression of thanks, congratulations, or condolences
 - Information regarding holiday schedules
 - Honorary or salutary recognition of a public official, public employee or citizen
 - Reminder of upcoming event sponsored the governing body
 - Information of upcoming events sponsored by other entities if governmental body, public official, or public employee plans to attend
 - Announcement involving an imminent threat to the public health and safety of people in the city that has risen after posting of the agenda



RECORDKEEPING



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"As I read the minutes of our last meeting,
please keep in mind that each minute
actually felt more like an hour."



RECORD KEEPING

- 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



RECORD KEEPING

Recording of Meetings

- The **minutes or recording** of the meeting are **public records**, and must be made available pursuant to a request.
- The minutes or recording of a meeting **are required** to be posted on the city's website.*
- 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.

*HB 305(2019): Effective Sept. 1, 2019



RECORD KEEPING

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; and
 - Maintain the archived recording on the Internet for not less than 2 years



PROCEDURES AND REQUIREMENTS

Open Meetings



PROCEDURES AND REQUIREMENTS

Open Meetings

- A 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

- The Act **gives the public the right to speak on agenda items either before or during the governmental body's consideration of the item.**
- A governmental body may set **reasonable rules** regarding the public's right to address the governmental body, including how long the person may speak on the agenda item.
 - At least double the amount of time if person addresses the governmental body through a translator.
- The governmental body may not prohibit public criticism of the governmental body unless the public criticism is otherwise prohibited by law.



PROCEDURES AND REQUIREMENTS

Open Meetings

- A governmental body can still determine if it will allow the public to ask question about items ***not on the agenda***.
- If the governmental body still allows the public to ask a question about an item that is ***not on the agenda***:
 - Reasonable rules may still be set regarding the number, frequency, and length of presentation, but should not discriminate against speakers.
 - the members of the governmental body ***may not deliberate on 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

Closed Meetings



PROCEDURES AND REQUIREMENTS

Closed Meetings

- A governmental body may hold a *closed meeting* only when a statute *expressly authorizes* it to do so.
- To conduct a closed meeting, 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

Closed Meetings

- **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

Closed Meetings

Common Exceptions

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; or
- 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.*

Security Devices or Audits

- Security assessments related to IT or network security information.



PROCEDURES AND REQUIREMENTS

Closed Meetings

Common Exceptions

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.



PENALTIES AND REMEDIES



PENALTIES AND REMEDIES

- 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.*



CIVIL PENALTIES

- An action taken in violation of the Act is **voidable**
 - A voidable action may be redone at a later meeting (ratified), but that action will not be given retroactive effect.
- 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.**



CRIMINAL PENALTIES

- Criminal penalties exist for knowingly violating the Act in the following ways:
 - Failure to keep a certified agenda or recording.
 - Unlawfully disclosing a certified agenda or recording to member of the public.
 - 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.
 - Engaging in a prohibited series of communications that occur outside of a meeting.



CRIMINAL PENALTIES

- **Prohibited Series of Communications:** replaces “Conspiring to Circumvent the Act” which was found unconstitutional by the Texas Court of Criminal Appeals in *Doyle v. State*.
 - **Deliberation** is redefined as “a verbal or written exchange between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body.”
 - An offense is committed is when **a member of a governmental body:**
 - **Knowingly** engages in at least **one communication among a series of communications** that each occur **outside of a meeting** authorized by this chapter and that concern an issue within the jurisdiction of the governmental body in which **the members engaging in the individual communications constitute fewer than a quorum of members** but **the members engaging in the series of communications constitute a quorum of members**; and
 - **knew at the time** the member engaged in the communication that the series of communications:
 - involved or would involve a **quorum**; and
 - **would constitute a deliberation** once a quorum of members engaged in the series of communications.



Resources

TML

www.tml.org
(512) 231-7400

Texas State Library & Archives

Record Management

<https://www.tsl.texas.gov/slrn>

OAG's Open Government Hotline

(877) OPEN TEX
(512) 478-6736

OAG website

<http://www.texasattorneygeneral.gov>

OAG Open Government Training

<https://texasattorneygeneral.gov/og/open-government-training>



QUESTIONS?

