

The Texas Open Meetings Act

City Hall Essentials

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Presentation Outline

- Background
- Applicability
- Notice Requirements
- Recordkeeping
- Procedures and Requirements
- 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

What Entities are Subject to the Act?

- A **governmental body** as **expressly defined** in the Act – examples: A **city council** or a department, agency, or subdivision of a city that has authority to promulgate policy-making rules (i.e., rulemaking) or to decide contested cases (i.e., quasi-judicial)
- Entities **required by other law** to comply with the Act – examples: The board of directors of an economic development corporation or a local government corporation
- 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
- **General quorum rule:** a majority of a governmental body
- **Circumvention:** the Act may apply **even when a quorum is not present**

Applicability of the Act

What Constitutes a Meeting?

- 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. **either**:
 - a. a **member** of the governmental body **participates in the discussion**;
or
 - b. the governmental body (a) **called the meeting** and (b) **conducts or is responsible for the meeting**.
- The Act does not apply to **social functions** or *regional, state, or national workshops* if the governmental body's public business is not discussed
- **Examples**: formal meeting, attendance at another entity's meeting, attendance at a city's board or committee meeting, social situations, "staff briefings," using the restroom, "walking quorum," circulating an invoice or letter for signature outside of a meeting, e-mail
- **Attorney general's advice**: develop a habit of asking yourself, "is this a meeting?"

Notice 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 are now **required** to post notice on the city’s Internet Web site
- When a city **posts notice on its Internet Web site**, the physical notice has to be readily accessible to general public **only during normal business hours** instead of at “all times.”

Notice Requirements

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

Recordkeeping

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

Procedures and Requirements

Open Meetings

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

Procedures and Requirements

Open Meetings

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

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

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

Violations

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

Violations – Civil Penalties

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

Violations – Criminal Penalties

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

Violations – Criminal Penalties

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

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