

Open Government



A Municipal Guide to Open Meetings

by: Laura Mueller



Why Open Meetings Training?

AG Requires it!



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Why Open Meetings Training?

Legal Consequences of Violating OMA

Fines and even jail time



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Points to Remember

1. Understand what constitutes a meeting
2. Beware of email, text messages, & social media
3. Assume gatherings are “meetings”

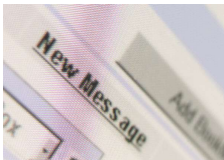


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Open Meetings

- Open Meetings Act
- Location
- Quorum & subcommittees
- Social gatherings & conferences
- Advisory boards
- Staff meetings
- Action without meetings
- Email & text messages
- Lobbying



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Open Meetings

- Open Meetings Act: Chapter 551 Texas Gov't Code
 - General Rule: Every gathering that meets the Act's definition of a meeting held by a governing body as defined in the Act must be open to the public
- Governing Body Defined: – Includes a municipal governing body in the state and a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality.
 - A non-exhaustive list of entities is in Section 551.001(3) of the Act



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Open Meetings

- Meeting Defined – Section 551.001(4) of the Act defines *meeting* as:
 - a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or
 - except as otherwise provided by this subdivision, a gathering:
 - (i) that is conducted by the governmental body or for which the governmental body is responsible;
 - (ii) at which a quorum of members of the governmental body is present;
 - (iii) that has been called by the governmental body; and
 - (iv) at which 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, about the public business or public policy over which the governmental body has supervision or control.

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Open Meetings

- Location
 - Accessible to the public and within the state of Texas
- Quorum
 - A quorum is a majority of the governing body - unless otherwise defined by law, rule or charter
 - Type A General Law City – Quorum for called meetings or tax imposition meetings require a super majority of 2/3 of aldermen
 - A quorum is required for body to exercise its authority
- Subcommittees
 - Caution: Some AG and court opinions have applied OMA to subcommittees comprised of governing body members even though not a quorum

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Open Meetings

- Social Gatherings & Conferences
 - Doesn't apply to purely social or ceremonial events or press conferences – so long as discussion of municipal business is incidental
 - 2019 Exception: does not apply to a candidate forum, appearance or debate to inform the electorate if no formal action is taken and discussion of public business is incidental
- Advisory Boards
 - OMA doesn't apply if actually advisory and not "rubber stamped"



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Open Meetings

- Staff Meetings
 - Not subject to OMA if no power to make decisions
- Deliberation of Public Business
 - Deliberation of public business by a quorum of a governmental body – whether or not agreement is reached - MUST be conducted under the OMA
- Email & Text Messages
- Lobbying
 - Individual lobbyists can be charged with knowingly assisting a member of a body subject to OMA with violation

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Open Meetings

- Executive Sessions:
 - Attorney, Personnel, Eco Development, Security, Real Estate, Gifts
- Joint meetings
 - e.g., P&Z, LCRA
- Ratification- 2nd Try
- Excluding certain persons
- Information from executive session



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Open Meetings: Executive Sessions

- Executive session procedures:
 - Must first convene in open session
 - Identify which issues to be discussed
 - Cite the applicable exception
- Permitted executive session topics:
 - Real Property Deliberations
 - Security Measures
 - Receipt of gifts
 - Consultation with Attorney
 - Competitive Matters Involving Electric Utilities
 - Economic Development
 - Homeland Security
 - Personnel Matters

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Permitted Executive Session Topics

- Real Property Deliberations

A governing body may discuss the purchase, exchange, lease or value of real property in an Executive Session IF an open meeting would be detrimental to negotiations

- Security Measures

A governing body may discuss security personnel, devices or procedures in Executive Session

- Receipt of Gifts

A governing body may meet in Executive Session to negotiate a contract for a prospective gift or donation IF discussion in an open meeting would be detrimental to negotiations



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Consultation with Attorney

- Permitted executed sessions topic

- A governmental body may meet behind closed doors for the purposes of receiving legal advice from its attorney about:

- Pending or contemplated litigation
- A settlement offer
- Administrative hearings; or
- Matters in which the duty of the attorney to the governmental body conflicts with the Open Meetings Act

- The Attorney must be present or may participate by telephone, internet or video conference under certain circumstances

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Consultation with Attorney



"Honey, our lawyer wishes us, but in no way guarantees, a Merry Christmas."



"We've talked them down from destruction of property to misdemeanor huffing and puffing."

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Personnel Matters

- Permitted executive session topic
- A governmental body may meet in executive session to discuss the appointment, employment, evaluation, reassignment, discipline or dismissal of a public officer or employee; or to hear a complaint or charge against such persons
- May not meet in executive session to discuss an employee if he/she requests a public hearing - except consultation with attorney on pending lawsuit related to charges or complaints
- Appointments to or removal from advisory bodies or commissions generally not applicable



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Executive Session

- Excluding/Admitting Certain Persons
 - Only the members of the governmental body, i.e. mayor and councilmembers or aldermen have the right to convene in executive session – may exclude staff members
 - Governmental body may admit agents, representatives or third parties if their interest is aligned and the person's presence is necessary
- Information Received in Executive Session

Information received may be subject to the Public Information Act even though received in Executive Session



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Open Meetings

- Agendas – who, what, where, when
- Time & accessibility - 72 hours
- Specificity- reasonable person
- Notice of executive sessions
- Reports / council comments
- Emergency meetings - 2 hours
- Website notice
- Recess - next day
- Videoconference
- Chatroom



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Meeting Notice Content

- A governmental body must provide notice of the date, hour, place and subject of each meeting held by the body
- Generally notice is adequate for purposes of the OMA if it alerts or informs the public that some action will be taken on a particular topic - a higher degree of specificity is required when a subject is of special or significant interest to the public
- If a member of the public inquires about a subject for which notice was not given the ONLY allowed deliberation or decision is:
 - A proposal to place the subject on a future agenda;
 - A statement of factual information; or
 - A recitation of existing policy

Notice: When, Where and What to Post

- For Cities - notice must be given 72 hours in advance of the meeting, or 2 hours in advance for an emergency meeting and must be readily accessible to the public at all times
- Cities must post the Meeting Agenda on a bulletin board or electronic bulletin board at a location close to City Hall
- City Internet Posting – In addition to posting on the bulletin board, the OMA requires additional online posting requirements:
 - Any municipality that has a website must publish a meeting NOTICE online on the city's website which must include the date, time, place and subject of the meeting
 - Municipalities with a population over 48,000 must post the actual meeting agenda on the city website
- City's online notices or agendas must be posted for the same time periods as physical postings

Meeting Notice Content Cont'd

- Specificity of Notice
 - Must be sufficient to inform the public of the subjects to be addressed at the meeting.
 - Public Comment Sessions must be listed – but No "Staff Report" allowed must specify subject
 - Mayor's update, City Manager's Report – not allowed must notify of subjects – But can make non-substantive civic announcements as long as no action taken or discussed
 - Items of Special or Significant Interest – be clear
- Notice of Executive Sessions

Not required to specify if item in regular or executive session – but if custom and practice to do so do not abruptly depart from the practice

Emergency Meetings

- Meetings called to address an imminent threat to public health and safety or matters of urgent public necessity may be called after posting for two hours
- Notice must be given to media at least one hour before the meeting and must clearly identify the nature of the emergency or urgent public necessity



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Emergency Meetings Cont'd

- The mere necessity of quick action does not constitute an emergency where the situation calling for such action could have been reasonably anticipated
- The Texas Supreme Court has said an emergency is a condition arising suddenly and unexpectedly, not caused by any neglect or omission of the person in question, which calls for immediate action



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Recess

- Separate notice is required to reconvene a meeting after an extended recess
- The governmental body can reconvene the next day without additional notice IF done in good faith and not as an evasion of the OMA



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Open Meetings

- Minutes – transcript not required
- Retention – 2 to 5 years
- Individual notes & recordings
- Violations – civil & criminal penalties



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Open Meetings: Minutes

- Governmental body must keep a certified copy of the agenda or a tape recording for all meetings – open and closed
- A brief summary is all that is required – no verbatim transcript
- Must have:
 - date and time of the meeting
 - names of those present
 - subject of each deliberation
 - indicate each vote, order, decision or other action

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Retention and Use of Minutes

- Executive Sessions – at least two years after the date of the meeting – longer if litigation is pending
- Open Sessions – In compliance with the entity’s retention schedule
- Individual Recordings of Executive Session – Member of the governing body may not make his or her own recording of an executive session but can review the certified agenda or the official tape recording even if he/she did not attend the session

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Violations and Defenses to OMA

- Violations of the Open Meetings Act
 - Conspiracy to circumvent the OMA
 - Calling or participating in an illegal closed session
 - Closed meeting without agenda or tape recording
 - Disclosure of certified agenda or tape recording of closed meeting
- Affirmative Defense

If governmental body acted in reasonable reliance on:

 - A court order
 - A written interpretation in an opinion of a court of record
 - The attorney general; or
 - The written advice of the attorney for the governing body

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Enforcement and Penalties

- Prosecution by County or District Attorney
- Punishment – can be fines or jail time
- Ignorance is not a defense
- Possible civil liability
- Actions taken in violation of the OMA are voidable
- Possible civil liability for damages
- Actions taken in violation of the OMA are voidable



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Other Meeting Topics

- Agenda preparation
- Establishing a quorum
- Frequency of meetings
- Regulating public comment
- Procedural rules
- Records retention
- Disrupting meetings / disorderly conduct
- Topic-specific notice & hearing rules



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Agenda Preparation

- Governmental body as a whole has authority to determine
- Body may adopt reasonable rules consistent with law to conduct meetings
- May prescribe manner for items to be included but absent rules so adopted each member of the governmental body must be allowed to place items on the agenda
- No public control provided by law – but body may establish process
- Preparation process should not involve substantive deliberations by a quorum of members

Establishing a Quorum

- Type A City – Mayor and Five Aldermen
 - Quorum for regular meeting is a majority of the aldermen
 - Quorum for special or regarding taxes is 2/3
 - Presence of mayor not counted toward quorum
- Type B City
 - Quorum consists of Mayor and three councilmembers
 - If Mayor absent – four aldermen
- Type C City
 - Quorum consists of Mayor and one commissioner or two commissioners
- Home Rule City
 - Quorum is defined by the city's charter



Other Meeting Topics

- Frequency of Meetings
 - Type A & B Cities – can be set by resolution of the governmental body
 - Type C City must hold meetings at least once a month
- Regulating Public Comment
 - The OMA does not give the public a right to speak but courts have recognized right to address and petition a governing body
 - Some home rule charters require public comment
 - Most cities set aside time for public comment – if limit time cannot discriminate based on content
 - Must not arbitrarily deny citizens right to redress grievances

Other Meeting Topics

- Procedural Rules
 - Governmental Bodies can determine their own parliamentary procedure - Not prescribed by state statute
- Disrupting a Meeting
 - It is a Class B misdemeanor to disrupt a lawful meeting, procession or gathering by physical action or verbal utterance that substantially impairs the proceeding
- Mandatory Training
 - Since 2006 OMA and PIA require 2 hours of mandatory open government education for each elected or appointed official and the person designated as the public information coordinator
 - Must be within ninety days of election or appointment

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S.B. 1640 – TOMA Criminal Conspiracy

Texas' highest criminal court strikes down provision of Open Meetings Act as "unconstitutionally vague"

The ruling only pertains to a slice of the law, but open government advocates say the decision "removes a powerful discretion" put in place to keep public officials from hiding public business.

BY EMMA PLATOFF FEB. 27, 2019 UPDATED: 10 AM



S.B. 1640 – TOMA Criminal Conspiracy

Tried to fix the "unconstitutional" vagueness of the statute. New statute makes it a crime:

- A city councilmember or mayor to knowingly:
- (1)Engage in a communication or series of communications;
 - (2)Outside a properly posted meeting;
 - (3)Discussing a matter of city business;
 - (4)In numbers less than a quorum but when added together constitutes a quorum.

S.B. 1640 – TOMA Criminal Conspiracy

- Avoid Walking Quorums
- Do not reply all to e-mails
- Beware of texting and social media



Attention Public Officials: Please be reminded that a "Reply to All" could lead to violations of the Texas Open Meetings Act. Please reply only to the sender.

House Bill 2840-Public Communications

Allows each member of the public to speak at an open meeting either:

1. at the time of any item;
2. before the item is discussed.

Can continue with individual time limits, but likely have to allow each person to speak.

(Effective September 1, 2019)

House Bill 2840 – Public Communications

Current agenda language should reference “member of the public” rather than “citizen”.

Otherwise, language is sufficient because:

- Public Communications is before any other item
- Speakers are not limited to what they can discuss
- Time limit is clear and applies to individuals



Available Resources

- www.texasmunicipallawyers.com
- www.tml.org
- www.texasattorneygeneral.gov



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Conclusion

Questions?



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