

TEXAS OPEN MEETINGS ACT LAWS MADE EASY



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The Texas Open Meetings Act Made Easy

The Open Meeting Act Made Easy is a handbook in a question and answer format that covers the most frequently asked questions about the Texas Open Meetings Act (“the Act”). The handbook addresses when the Act applies, what constitutes reasonable notice and the application of the Act to informal gatherings. 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.

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. TML is available to answer questions about this from city officials, who should nonetheless consult with their local legal counsel regarding the application of the law to the facts of each particular situation.

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I. Application of the Open Meetings Act

1. *When does the Open Meetings Act generally apply?*

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

1. a quorum¹ of a governmental body² is present and discusses public business,³ or
2. a quorum of a governmental body is present and the governmental body is receiving information from or providing information to a third party.⁴

2. *Are there different quorum requirements for different types of cities?*

Generally, according to the Act, the definition of quorum is “a majority of a governmental body, unless defined differently by applicable law or rule or charter of the governmental body.”⁵ However, cities have different quorum requirements depending on the type of city it is:

- **Home Rule:** Generally, the charter expressly states the quorum requirements for the meetings.
- **General Law Type A:**⁶
 - *Regular meetings:* majority of the councilmembers (3)
 - *Special meetings or meetings to impose taxes:* two-thirds (2/3rd) of the council members (4)
- **General Law Type B:** The mayor and three aldermen or four aldermen, if the mayor is absent.⁷
- **General Law Type C:** A majority of the board of commissioners (2).

3. *Does the Open Meetings Act always apply when a quorum of a governmental body is present?*

The Act does not always apply when a quorum of the governmental body is present. There are exceptions throughout the Act when it does not apply when a quorum of the governmental body is present. These situations are:

¹ See Tex. Gov’t Code Ann. § 551.001(6) (definition of “quorum”).

² See *id.* § 551.001(3) (definition of “governmental body”).

³ *Id.* § 551.001(4)(A).

⁴ *Id.* § 551.001(4)(B).

⁵ *Id.* § 551.001(6).

⁶ Tex. Loc. Gov’t Code Ann. § 22.039.

⁷ *Id.* § 23.028.

1. 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;⁸
2. Attendance at a legislative committee or state agency meeting if the deliberations at the meeting by the members of the governing body consist only of:
 - a. Publicly testifying at the meeting,
 - b. Publicly commenting at the meeting, and
 - c. Publicly responding at the meeting to questions asked by a member of the legislative committee or agency;⁹ or
3. When the staff or a member of the governing body of a city or county makes a report about items of community interest during a meeting of the governing body without giving 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. Items of community interest include:
 - a. Expressions of thanks, congratulations or condolence;
 - b. Information regarding holiday schedules;
 - c. 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 purpose of this subdivision;
 - d. A reminder about an upcoming event organized or sponsored by the governing body;
 - e. Information regarding a social, ceremonial or community event organized or sponsored by an entity other than the governing body that was attended or is scheduled to be attended by a member of the governing body or an official or employee of the political subdivision; and
 - f. Announcement involving an imminent threat to the public health and safety of people in the political subdivision that has arisen after the posing of the agenda.¹⁰

⁸ Tex. Gov't Code Ann. § 551.001(4). See Tex. Att'y Gen. Op. No. H-785 (1976) at 2 (breakfast meetings of governing body must be purely social without any discussion of public business).

⁹ Tex. Gov't Code Ann. § 551.0035.

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

A governing body is subject to the Act when it receives a briefing from staff.¹¹

5. Are committees of a governing body 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.¹² 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.¹³

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.¹⁴ 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 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.¹⁵ The presence of a quorum of the appointing governmental

¹⁰ *Id.* § 551.0415. See Tex. Att’y Gen. Op. No. GA-668 (2008).

¹¹ Tex. Gov’t Code Ann. § 551.001(4)(B).

¹² Tex. Atty Gen. Op. Nos. H-994 (1977), H-772 (1976).

¹³ *Willmann v. City of San Antonio*, 123 S.W.3d 469, 480 (Tex. App. — San Antonio 2003, pet. denied); Tex. Att’y Gen. Op. Nos. JC-60 at 3-5 (1999), H-438 (1974).

¹⁴ Tex. Att’y Gen. Op. Nos. JC-60 (1999), Tex. Att’y Gen. Op. No. JC-160 (1999) (ad hoc tax foreclosure committee that does not include members of the governing bodies that the committee serves is not subject to Act), JM-1072 (1989). See also *Tarrant Regional Water Dist. v. Bennett*, 453 S.W.3d 51 (Tex. App. — Fort Worth 2014, pet. denied) (meetings of water district’s board committees in which less than a quorum of the board were present were not subject to TOMA’s open-meeting requirements.)

¹⁵ Tex. Att’y Gen. Op. 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

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.

6. *Are private or nonprofit entities that receive public funding subject to the Open Meetings Act?*

Private or nonprofit entities are not subject to the Act merely because that entity receives public funds.¹⁶ 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.¹⁷ 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.¹⁸

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 nonprofit entities will want to consult their legal counsel about whether their bylaws, state law or a particular contractual commitment make them subject to the Act.

7. *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 governing body may be able to withhold a document from the public under the Public Information Act does not mean that the governing body has the authority to meet in a closed meeting regarding the subject covered in that document.¹⁹ 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.²⁰

whether the committee members or any Board members engage in a deliberation as defined by Government Code section 551.001(2).)

¹⁶ Tex. Att'y Gen. LO-98-40 at 2, LO-93-55, LO-96-113. See Tex. Att'y Gen. Op. No. JM-1072 (1989) at 2 (local-level entity must fall within definition of "governmental body" to be covered by Act). See also Tex. Gov't Code Ann. § 551.001(3) (definition of "governmental body").

¹⁷ Tex. Att'y Gen. LO-93-55, LO-96-113.

¹⁸ Tex. Att'y Gen. Op. No. JC-327 (2001). See also Tex. Att'y Gen. Op. No. GA-206 (2004).

¹⁹ Tex. Att'y Gen. Op. No. JM-595 (1986).

²⁰ *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

8. *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,²¹ school district's central administrative office²² or various locations for districts or political subdivisions that extend into a certain number of counties.²³ A city can post its notice on a physical or electronic bulletin board at a place readily accessible to the public at all times in the city hall.²⁴ The notice must be posted for at least 72 hours before the scheduled meeting.²⁵

Certain governing bodies that maintain an Internet website are required to concurrently post a notice or an agenda on the Internet.²⁶ Once those governing bodies make a good-faith attempt to post their notice on the Internet for the required time, the governing bodies satisfy the requirement of having the physical posting accessible to the public at all times, and the physical posting only has to be readily accessible to the public during the governing bodies' normal business hours.²⁷

Notice for an emergency meeting must follow the same procedure. However, the notice is only required to be posted two hours before the scheduled meeting, and it must state the reason for the emergency meeting.²⁸

9. *Is a governing 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, economic development corporations and regional mobility authorities to publish notice of its open meetings on its Internet website, if it maintains an Internet website.²⁹ Additionally, the following governing bodies or economic development corporations are required to post their agenda, on their Internet websites:³⁰

²¹ Tex. Gov't Code Ann. § 551.049.

²² *Id.* § 551.051.

²³ *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).

²⁴ Tex. Gov't Code Ann. § 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).

²⁵ Tex. Gov't Code Ann. § 551.043(a).

²⁶ *Id.* §§ 551.056, .043(b).

²⁷ *Id.* § 551.043(b)(1)-(3).

²⁸ *Id.* § 551.045.

²⁹ *Id.* § 551.056(a)-(b).

³⁰ *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.)

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;
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; or
5. A regional mobility authority.

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.³¹

10. *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.

11. *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.³²

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

The subject of the posted notice has to be sufficient to alert the public, in general terms, of the subjects that will be considered at the meeting.³³ However, descriptions such as “old business,” “new business,” “other business,”³⁴ “personnel”³⁵ and “litigation matters”³⁶ are usually not sufficiently detailed to meet the requirements of the Act.³⁷ 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

³¹ *Id.* § 551.056(d).

³² Tex. Gov’t Code Ann. § 551.041.

³³ Tex. Att’y Gen. Op. No. H-662 (1975).

³⁴ *Id.*

³⁵ *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).

³⁶ *Cox Enters., Inc. v. Bd. of Trustees*, 706 S.W.2d 956 (Tex. 1986).

³⁷ See Tex. Att’y Gen. Op. 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”.)

a sufficient posting for hiring a school teacher.³⁸ However, the same court found that this phrase was not sufficient when the school was considering hiring a key supervisor such as a principal.³⁹

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.⁴⁰

13. 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.⁴¹

14. 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.⁴² 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.

15. 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.⁴³ Nonetheless, some 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

³⁸ *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176 (Tex. App. — Corpus Christi 1990, writ denied).

³⁹ *Id.*

⁴⁰ *River Rd. Neighborhood Ass’n v. S. Tex. Sports*, 720 S.W.2d 551, 557 (Tex. App. — San Antonio 1986, writ dismissed w.o.j.)

⁴¹ Tex. Att’y Gen. Op. No. JC-169 (2000).

⁴² *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).

⁴³ Op. Tex. Att’y Gen. No. JC-57 (1999) at 5. See also Tex. Att’y Gen. LO-90-27.

and subjects for a closed meeting, an abrupt departure from this practice could deceive the public and thereby render the notice inadequate.⁴⁴

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

Members of the governing body may not deliberate or make any decision about an unposted issue at a meeting of the governing 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.⁴⁵ 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 meeting.⁴⁶ Finally, the governing body may offer to post the matter as an emergency item if it meets the criteria for an emergency posting. (See Section VI for a discussion on emergency meetings.)

17. 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.⁴⁷ 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.⁴⁸ 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. (See Section VI for a discussion on emergency meetings.)

18. 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.⁴⁹ 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.⁵⁰ 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.

⁴⁴ Op. Tex. Att'y Gen. No. JC-57 (1999) at 5.

⁴⁵ Tex. Gov't Code Ann. § 551.042(a)(1)-(2).

⁴⁶ *Id.* § 551.042(b).

⁴⁷ *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299 (Tex. 1990).

⁴⁸ See Tex. Gov't Code Ann. §§ 551.041, .043 (notice must be posted for 72 hours in advance of meeting and notice must include place of meeting).

⁴⁹ *Acker*, 790 S.W.2d 299.

⁵⁰ See Tex. Gov't Code Ann. §§ 551.041, .043 (notice must be posted for 72 hours in advance of meeting and notice must include place of meeting).

19. 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.⁵¹ 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.⁵² However, on the day of the meeting, a governing body may change a meeting location to a bigger room within the same building to accommodate a large crowd. Governing bodies should consult their legal counsel if they decide to change a meeting location.

20. 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.⁵³ 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.⁵⁴

21. 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, the Act does not expressly prohibit a governmental body from canceling 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 repost and follow all the requirements of the Act for the rescheduled meeting.

⁵¹ *Acker*, 790 S.W.2d 299.

⁵² See Tex. Gov't Code Ann. §§ 551.041, .043 (notice must be posted for 72 hours in advance of meeting and notice must include place of meeting).

⁵³ *Id.* § 551.0411(a). 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.).

⁵⁴ Tex. Att'y Gen. Op. No. JC-285 (2000).

III. Effect of Quorum on Issues Concerning the Act

General Quorum Provisions

22. *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.⁵⁵ However, certain laws, rules or charters of a governmental body might have specific quorum requirements. Different types of cities have different quorum requirements.⁵⁶ Local entities should check with their legal counsel.

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

A meeting subject to the Act probably cannot 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.⁵⁷ 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.

Application of the Act if Quorum of Governing Body is Present

24. *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.⁵⁸ All requirements under the Act must be followed for such gatherings unless otherwise provided under state law. As noted earlier, the Act's requirements do not apply even when a quorum of the governmental body is present in certain enumerated circumstances. Refer to Section I for the list of the exceptions.

25. *May a quorum of a governing body serve on an appointed board or commission?*

Nothing in the Act would prohibit a quorum of a governing body from serving on a board or commission. However, the meetings of such a board or commission would have to

⁵⁵ Tex. Gov't Code Ann. § 551.001(6).

⁵⁶ See Question 2 of this paper.

⁵⁷ *Cox Enters.*, 706 S.W.2d 956.

⁵⁸ 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).

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.⁵⁹ However, in certain situations, Texas statutes or a city charter can 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 as many as four city council members to serve as board members of a Type B economic development corporation board.⁶⁰ A governing body will want to discuss the issue with legal counsel before appointing one of its own members to a board or commission.

26. *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 concerning public business, they could violate the Act.⁶¹ 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.⁶² 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 may be a violation of the Act if the members meet or communicate by phone, memo, email or social media⁶³ in numbers less than a quorum with the specific intent of circumventing the Act regarding a group letter or document.⁶⁴

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

A quorum of members of a governing body may attend a committee meeting. 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 a 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

⁵⁹ See *Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928)

⁶⁰ See Tex. Loc. Gov't Code Ann. § 505.052(c).

⁶¹ Tex. Att'y Gen. Op. No. DM-95 (1992).

⁶² Tex. Att'y Gen. Op. No. JC-307 (2000).

⁶³ See Tex. Gov't Code Ann. § 551.006 (allows governmental bodies to discuss public business or public policy without it counting as a meeting on an online message board if the requirements are met.)

⁶⁴ Tex. Gov't Code Ann. § 551.143.

committee members or any members of the governmental body spoke or otherwise engaged in deliberations.⁶⁵

28. *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.⁶⁶

29. *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 toward a quorum of the board under the Act.⁶⁷

Application of the Act to Gatherings of Less Than a Quorum

30. *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 also be posted and conducted as open meetings. Moreover, if the governing body routinely approves decisions of a subcommittee consisting of less than a quorum of the governing body, the subcommittee must comply with the Act.⁶⁸

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.⁶⁹ In other words, if members are holding their discussion of public business in numbers less than a quorum to avoid meeting the requirements of the Act, criminal prosecution can result.

⁶⁵ Tex. Att'y Gen. Op. No. JC-313 (2000).

⁶⁶ Tex. Gov't Code Ann. § 551.0035.

⁶⁷ Tex. Att'y Gen. Op. No. GA-0355 (2005).

⁶⁸ *Willmann*, 123 S.W.3d at 480.

⁶⁹ Tex. Gov't Code Ann. §551.143.

31. 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 sponsored 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.⁷⁰

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

The mere fact that less than a quorum of members of a governing body talk over the phone does not in itself constitute a violation of the Act. However, if members are using telephone conversations to conduct their deliberations about public business, there may be potential criminal violations.⁷¹ Physical presence in one place is not necessary to violate the Act.⁷² It remains a fact issue whether certain phone conversations between less than a quorum of members would be a violation of the Act.⁷³

33. 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 the 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 email in order to circumvent the Act, a violation of the Act would have occurred.⁷⁴

⁷⁰ See *Id.*

⁷¹ See *Id.*

⁷² Tex. Att'y Gen. Op. No. DM-95 (1992).

⁷³ 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).

⁷⁴ See *Willmann*, 123 S.W.3d at 480; Tex. Att'y Gen. Op. Nos. JC-307 (2000), DM-95 (1992). 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

34. 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 procedures 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 governing body must consult any applicable state laws and any rules of procedure that it has adopted.⁷⁵

35. Does the Act give individual members of the governing body a right to place items on an open 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.⁷⁶ In Attorney General Opinion DM-228, the attorney general concluded that individual county commissioners have a right to place items on the agenda for a county commissioner's court meeting.⁷⁷ A home rule city, a general law city, or other political subdivision that has not adopted a procedure to place items on an open meeting agenda should consult its legal counsel regarding this issue.⁷⁸

⁷⁵ Tex. Att'y Gen. Op. 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) (the governing body of a Type A general law may determine the rules of its proceedings); Tex. Att'y Gen. Op. 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).

⁷⁶ Tex. Att'y Gen. Op. No. DM-473 (1998).

⁷⁷ Tex. Att'y Gen. Op. No. DM-228 (1993).

⁷⁸ See Tex. Att'y Gen. Op. No. JM-63 (1983).

36. 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 during an open meeting.⁷⁹ However, the Act itself does not define any specific powers of a mayor or county judge regarding the open portion of a meeting.

37. 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.

- **Home Rule Cities:** the power of the mayor to cast a vote is generally addressed in the city charter.
- **General Law Type A Cities:** state law specifies that the mayor may vote only in the case of a tie.⁸⁰
- **General Law Type B Cities:** State statutes do not address whether a mayor in a Type B 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.⁸¹
- **General Law Type C Cities:** Again, state statutes do not address whether a mayor in a Type C general law city may vote on items. Whether mayors of a Type C city may vote on all items, might depend on the population of the Type C city.⁸²
- **Counties:** the county judge is a full voting member of the commissioners court.⁸³

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

⁷⁹ See Tex. Const. Art. V, § 18(b) (county judge is the presiding officer of the county commissioners court); Tex. Loc. Gov't Code Ann. §§ 22.037 (mayor is presiding officer, in a Type A general law city), 23.027 (mayor is president of a Type B general law city), 51.051(a) (Type C general law city with population between 501 through 4,999 has the powers of a Type A general law city), 51.051(b) (Type C general law city with population of 201 through 500 has the powers of a Type B general law city); 81.001(b) (If present, county judge is the presiding officer of the commissioners court).

⁸⁰ Tex. Loc. Gov't Code Ann. § 22.037(a).

⁸¹ Alan J. Bojorquez, *Texas Municipal Law and Procedure Manual* § 1.23(2) (6th ed. 2015).

⁸² See Tex. Loc. Gov't Code Ann. §§ 51.051, .052.

⁸³ *Id.* § 81.001(a). See Op. Tex. Att'y Gen. Nos. O-2145 (1940); O-1716 (1939).

38. May members of a governing body enter their votes by proxy on an item without attending the meeting?

Though the Act does not address voting by proxy, the attorney general has opined that a member of a governing body may not vote by proxy.⁸⁴ A member of a governing body must be present at a meeting in order to deliberate and to vote.⁸⁵

39. 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, or
3. The meeting is held by an advisory board.⁸⁶

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

1. The meeting must be posted and open to the public in the same manner as a regular meeting.⁸⁷ 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.⁸⁸
2. The meeting must be held in the same place where meetings of the governing body are usually held.⁸⁹
3. The identity of each speaker must be clearly stated prior to that person speaking.⁹⁰
4. The meeting must be set up to provide two-way communications throughout the entire meeting.
5. All portions of the meeting (other than executive sessions) must be audible to the public, including the entire conference call.⁹¹
6. The meeting must be recorded and a copy of the recording must be made available to the public.

⁸⁴ Tex. Att'y Gen. LO-94-028.

⁸⁵ Op. Tex. Att'y Gen. Nos. DM-207 (1993); JM-584 (1986).

⁸⁶ Tex. Gov't Code Ann. § 551.125(b). (Note: There are specific governing bodies that have specific statutes within the Act regarding teleconferencing. The governing body will want to check with its legal counsel to make sure the right statute is being used for your governing body. See Tex. Gov't Code Ann. §§ 551.121, .122, .123, .124.).

⁸⁷ *Id.* § 551.125(c).

⁸⁸ Tex. Att'y Gen. Op. No. JC-352 (2001).

⁸⁹ Tex. Gov't Code Ann. § 551.125(d).

⁹⁰ *Id.* § 551.125(f).

⁹¹ *Id.* § 551.125(e).

Since extraordinary circumstances are needed to hold a meeting by telephone conference call, governmental bodies cannot have an open meeting by teleconference merely because attending a meeting on 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.⁹² 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.

40. May a governing body hold an open meeting by video conference?

Videoconference call is defined as a communication conducted between two or more persons in which one or more of the participants communicate with the other participants through duplex audio and video signals transmitted over a telephone network, a data network, or the Internet.⁹³ A governing body may hold an open meeting or closed meeting by video conference call.⁹⁴ A member or employee of the governing body may participate remotely in a meeting by video conference call if the video and audio feed of the member's or employee's participation is broadcast live at the meeting.⁹⁵ Also, the governing body's member who is participating remotely shall count as present at the meeting for all purposes.⁹⁶ However, the requirements of holding such a meeting depend on whether the governing body extends into three or more counties or not.⁹⁷

All governing bodies can have an open meeting by video conference only if:

1. The governing body makes available to the public at least one suitable physical space located within a reasonable distance of the geographic jurisdiction of the governing body equipped with appropriate video conferencing equipment for the public to actively participate;
2. The presiding member is present at that physical space; and

⁹² Tex. Att'y Gen. Op. No. JC-352 (2001) at 4.

⁹³ Tex. Gov't Code Ann. § 551.001(8).

⁹⁴ *Id.* § 551.127(a).

⁹⁵ *Id.* § 551.127(a-1).

⁹⁶ *Id.* § 551.127(a-2).

⁹⁷ See *Id.* § 551.127. (Section 551.127 was amended by 2 different bills during the 83rd Legislative Session. These bills were HB 2414 and SB 984 and they amended this section in two different ways. Unfortunately, the 84th Legislative Session did not address the differences.) See *also* Tex. Att'y Gen. Op. No. GA-1079 (2014).

3. Members of the public at the physical space are provided the opportunity to participate in the meeting the same as those members of the public who are at the meeting.⁹⁸

The procedural requirement for all governing bodies is as follows:

1. Notice requirements are the same as other meetings⁹⁹, but if video conferencing the notice of a meeting must specify the physical space located within a reasonable distance of the geographic jurisdiction of governing body as the location of the meeting.¹⁰⁰
2. All open portions of the meeting must be visible and audible to the public in each location.¹⁰¹
3. Must have an audio recording of meeting and it shall be made available to the public.¹⁰²
4. The physical location in the notice shall have two-way audio and video communication with each member participating by video conferencing during the entire meeting. All participants must be able to see and hear all other participants at all locations.¹⁰³
5. The governing body must follow the Department of Information Resource's rules concerning the minimum standard for the audio and video signals at the meetings.¹⁰⁴ Audio and video signal must be of sufficient quality so that members of the public can observe the demeanor and hear the voice of each participant.¹⁰⁵
6. The governing body may allow members of the public to testify from the remote location.¹⁰⁶

A governing body extending into three or more counties can have an open meeting by video conference only if the presiding member of the governing body is physically present at one location of the meeting.¹⁰⁷ The procedural requirements for these governing bodies are as follows:

⁹⁸ Tex. Gov't Code Ann. § 551.127(c) (HB 2414 (2013)).

⁹⁹ Tex. Gov't Code Ann. § 551.127(d).

¹⁰⁰ *Id.* § 551.127(e) (HB 2414 (2013)).

¹⁰¹ *Id.* § 551.127(f).

¹⁰² *Id.* § 551.127(g).

¹⁰³ *Id.* § 551.127(h) (HB 2414 (2013)).

¹⁰⁴ *Id.* § 551.127(i).

¹⁰⁵ *Id.* § 551.127(j) (HB 2414 (2013)).

¹⁰⁶ *Id.* § 551.127(k).

¹⁰⁷ *Id.* § 551.127(c) (SB 984 (2013)).

1. Notice requirements are the same as other meetings with a few additional requirements:¹⁰⁸
 - a. The notice must specify location where a quorum of the GB will be physically present and the intent to have a quorum present there, and
 - b. The notice must specify the location where the presiding member will be physically present and intent to have the presiding member there. Location of presiding member must be open to the public.¹⁰⁹
2. All open portions of the meeting must be visible and audible to the public in each location. If a problem occurs with the video and audio, then the meeting must be recessed until problem is fixed. If not resolved in six hours or less, the meeting must be adjourned.¹¹⁰
3. Must have an audio recording of meeting and it shall be made available to the public.¹¹¹
4. All locations shall have two-way communication with the other locations during the entire meeting. The face of each participant, while the participant is speaking, shall be clearly visible and the voice audible to all participants of the meeting.¹¹²
5. The governing body must follow the Department of Information Resource's rules concerning the minimum standard for the audio and video signals at the meetings.¹¹³ Audio and video signal must:
 - a. Meet or exceed the quality perceptible by the members of the governing body; and
 - b. Be sufficient quality so that members of the public can observe the demeanor and hear the voice of each participant at each location.¹¹⁴
6. The governing body may allow members of the public to testify from the remote location.¹¹⁵

¹⁰⁸ *Id.* § 551.127(d).

¹⁰⁹ *Id.* § 551.127(e) (SB 984 (2013)).

¹¹⁰ *Id.* § 551.127(f) (SB 984 (2013)).

¹¹¹ *Id.* § 551.127(g).

¹¹² *Id.* § 551.127(h) (SB 984 (2013)).

¹¹³ *Id.* § 551.127(i).

¹¹⁴ *Id.* § 551.127(j).

¹¹⁵ *Id.* § 551.127(k).

Governing bodies should consult with their legal counsel to determine which requirements to follow if they plan to have a meeting by video conferencing.

41. May a governing body broadcast its meetings over the Internet?

The governing body may broadcast its open meetings over the Internet.¹¹⁶ 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.¹¹⁷

42. Is a governing body required to make an audio and video recording of its open meetings?

The following governing bodies are required to make an audio and video recording of its open meetings:

1. Home rule cities with population of 50,000 or more.
2. County with population of 125,000 or more.
3. School District with student enrollment of 10,000 or more.
4. Transit Authority or Department subject to Chapters 451, 452, 453 or 460 of the Transportation Code.¹¹⁸

These governing bodies shall make an audio and video recording of each regularly scheduled open meeting.¹¹⁹ This does not include works sessions or special called meeting. The governing body shall make available an archived copy of the audio and video recording of those meetings on the Internet.¹²⁰ The governing body is not required to establish a separate internet site.¹²¹ It may make the recordings available on an existing internet site, including a publicly available video-sharing or social network site. If the governing body maintains an internet site, then it shall make the archived recordings available on that internet site or an accessible link to the archived recording.¹²² The archived recordings shall be made available on the internet not later than seven days after the date the recordings were made.¹²³

The archived recordings shall be maintained on the internet for not less than two years after the date the recordings were made first available.¹²⁴ If there is a catastrophe¹²⁵ or

¹¹⁶ *Id.* § 551.128(b). See *id.* § 551.128(a) (definition on Internet in this section.)

¹¹⁷ *Id.* § 551.128(c).

¹¹⁸ *Id.* § 551.128(b-1).

¹¹⁹ *Id.* § 551.128(b-1)(1).

¹²⁰ *Id.* § 551.128(b-1)(2).

¹²¹ *Id.* § 551.128(b-2).

¹²² *Id.* § 551.128(b-3).

¹²³ *Id.* § 551.128(b-4)(1).

¹²⁴ *Id.* § 551.128(b-4)(2).

¹²⁵ See *id.* § 551.0411 (definition of catastrophe).

technical breakdown, the governing body is exempt from having the recordings up no later than seven day and maintaining up on the internet for two years.¹²⁶ Once, the catastrophe or technical breakdown is over, the governing body must make all reasonable efforts to make the required recordings available in a timely manner. Finally, these governing bodies can broadcast its regularly open meetings on television.¹²⁷

43. *May a governing body discuss public business over the Internet without it being considered a meeting?*

Members of a governing body can communicate or exchange information concerning public business or public policy under their supervision or control without it being a meeting if:¹²⁸

1. The communication is in writing.
2. The writings have to be posted on an online message board or a similar internet application and viewable and searchable by the public.
3. The communications have to be displayed in real time and for no less than 30 days after it is first posted.
4. The governing body can only have one online message board that is displayed on its website and can only be one click away from the primary governing body's internet web page.¹²⁹
5. Only members of the governing body or staff member with authorization can post to the online message board. If a staff member posts a message, then staff member must post their name and title along with the message.¹³⁰
6. If governing body removes a post that has been up for 30 days, the governing body must maintain the posting for six years and the posting is considered public information.¹³¹
7. The governing body may not vote or take any action by posting a communication to the online message board and a communication cannot be construed to be an action by the governing body.¹³²

Governing bodies should consult with their legal counsel when setting up an online message board.

¹²⁶ *Id.* § 551.128(b-5).

¹²⁷ *Id.* § 551.128(b-6).

¹²⁸ *Id.* § 551.006(a).

¹²⁹ *Id.* § 551.006(b).

¹³⁰ *Id.* § 551.006(c).

¹³¹ *Id.* § 551.006(d).

¹³² *Id.* § 551.006(e).

44. *May a governing body use telephone conferencing, video conferencing or communication over the Internet to consult with its attorney?*

The Act does allow for the governing body to use telephone conferencing, video conferencing or communication over the Internet to consult with its attorney. The governing body can have a public consultation with its attorney in an open meeting or a private consultation in a closed meeting. The public consultation with the governing body's attorney must be audible to the public at the location specified in the notice of the meeting. This provision does not apply to a governing body whose attorney is an employee of the political subdivision.¹³³

45. *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.¹³⁴ In most cases, such a requirement means that the facility holding the meeting must be physically accessible to individuals with disabilities. Entities may ask individuals with disabilities to provide the entity with reasonable notice on any accommodations they may need to attend the meeting. Also, entities must 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

46. *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.¹³⁵ 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.¹³⁶

¹³³ *Id.* § 551.129.

¹³⁴ 42 U.S.C.A. §§ 12131 – 12165.

¹³⁵ Tex. Att'y Gen. Op. Nos. JC-169 (2000), H-188 (1973).

¹³⁶ Tex. Att'y Gen. Op. No. JC-169 (2000); Tex. Att'y Gen. LO-96-111.

47. 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 at an open meeting.¹³⁷ However, during a public hearing, members of the public must be given a reasonable opportunity to speak.

Another difference between public hearings and 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 an open meeting is the 72 hour posted notice.

48. 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.¹³⁸ Arguably, such rules could include a requirement that a group select one of its members as a spokesperson. However, the body should not differentiate 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 a home rule city charter.¹³⁹ 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.

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

The Act does not address removal of a member of the public from an open meeting for causing a disturbance. However, 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 an open 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.

¹³⁷ Tex. Att'y Gen. Op. Nos. JC-169 (2000), H-188 (1973).

¹³⁸ Tex. Att'y Gen. Op. No. JC-169 (2000); Tex. Att'y Gen. LO-96-111.

¹³⁹ Tex. Att'y Gen. Op. Nos. DM-473 (1998), H-188 (1973).

50. 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 a home rule city charter.¹⁴⁰ Within these parameters, a governing body may arguably set reasonable time limits for its members' remarks in an open meeting.¹⁴¹

51. 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 member's conduct were to constitute 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.¹⁴² A governing body should consult with its legal counsel if it wants to adopt rules of conduct for its members.

Keeping a Record of Open Meetings

52. What duty does a governing body have to keep minutes or recording of open meetings?

A governing body must either keep minutes or make a recording¹⁴³ of every open meeting.¹⁴⁴ If the body chooses to keep minutes rather than make a recording, the Act requires that the minutes indicate the subject of each deliberation and indicate every action that is taken.¹⁴⁵

53. What access does the public have to the minutes or recording of an open meeting?

The minutes or recording of an open meeting are open to the public and must be available for inspection or copying.¹⁴⁶ It should be noted that exceptions to required

¹⁴⁰ *Id.*

¹⁴¹ Tex. Att'y Gen. LO-96-111; Tex. Att'y Gen. Op. No. H-188 (1973).

¹⁴² See Tex. Penal Code § 42.05 (disrupting meeting or procession); *State v. Markovich*, 77 S.W.3d 274 (Tex. Crim. App. 2002) (the best way to ensure that the rights of all individuals are protected is to determine whether the actor's behavior substantially impaired the conduct of the meeting before his or her actions could be criminalized).

¹⁴³ See Tex. Gov't Code Ann. § 551.001(7) (definition of recording).

¹⁴⁴ Tex. Gov't Code Ann. § 551.021(a).

¹⁴⁵ *Id.* § 551.021(b).

¹⁴⁶ *Id.* § 551.022. See also Tex. Att'y Gen. ORD-225 (1979) (tapes of meetings used to assist in writing minutes are open records).

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 the minutes or recordings of its meetings. However, the governing body is not required by state law to publicly post the minutes of an open meeting. But, the public postings of audio and video recording of regularly scheduled meetings depends on the type of governing body.¹⁴⁷

54. What right does the public have to record an open meeting?

The Act gives any member of the public a legal right to make a video or audio recording of an open meeting.¹⁴⁸ However, the Act also gives a governmental body a right to adopt reasonable rules that are necessary to maintain order. 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.

V. Closed Meetings/Executive Sessions¹⁴⁹

55. What are the general subjects for which a governing body may hold a closed meeting?

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

1. consideration of specific personnel matters;¹⁵⁰
2. certain consultations with its attorney;¹⁵¹
3. discussions about the value or transfer of real property;¹⁵²
4. discussions about security personnel, security devices, or a security audit;¹⁵³
5. discussions about a prospective gift or donation to a governmental body;¹⁵⁴

¹⁴⁷ See Tex. Gov't Code Ann. § 551.128(b-1)-(b-6).

¹⁴⁸ Tex. Gov't Code Ann. § 551.023.

¹⁴⁹ 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's 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.

¹⁵⁰ Tex. Gov't Code Ann. § 551.074.

¹⁵¹ *Id.* § 551.071.

¹⁵² *Id.* § 551.072.

¹⁵³ *Id.* § 551.076.

¹⁵⁴ *Id.* § 551.073.

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;¹⁵⁵
7. discussions of certain economic development matters;¹⁵⁶
8. discussions of certain competitive matters relating to a city-owned electric or gas utility for which the city council is the governing body;¹⁵⁷ and
9. certain information relating to the subject of emergencies and disasters.¹⁵⁸

Closed Meetings to Discuss Personnel Issues

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

The Act allows a governing body to hold a closed meeting to discuss the appointment, employment, evaluation, reassignment, duties, discipline or dismissal of a public officer or employee.¹⁵⁹ Also, a governing body may hear a complaint or charge against such officer or employee in a closed meeting. However, the governing 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 heard in a public hearing. Also, any final action by the governing body on a personnel matter must be taken in an open meeting.¹⁶⁰

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 members¹⁶¹ nor the hiring of independent contractors¹⁶² 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.¹⁶³ Such general policies must be addressed during the open portion of a meeting.

¹⁵⁵ *Id.* § 551.088.

¹⁵⁶ *Id.* § 551.087.

¹⁵⁷ *Id.* § 551.086.

¹⁵⁸ *Id.* § 418.183(f).

¹⁵⁹ *Id.* § 551.074.

¹⁶⁰ *Id.* § 551.102.

¹⁶¹ Tex. Att'y Gen. Op. No. DM-149 (1992).

¹⁶² *Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 699 (Tex. App. — San Antonio 1998, pet. denied); Tex. Att'y Gen. Op. No. MW-129 (1980).

¹⁶³ *Gardner v. Herring*, 21 S.W.3d 767, 777 (Tex. App. — Amarillo 2000, no pet.); Op. Tex. Att'y Gen. No. H-496 (1975).

57. Does a governing body have to post the name of an individual who is 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.¹⁶⁴ However, the more important the position being discussed, the more specific the posting will need to be in describing that position.¹⁶⁵ 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, for example, the city should indicate “possible personnel action regarding police chief” so that the public is clearly informed as to which high-level position is under discussion.¹⁶⁶

58. Does a 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 a closed meeting in which that person will be discussed.¹⁶⁷ However, it is possible that other sources, such as constitutional due process, state statutes, a contractual agreement, a city charter or a city ordinance may require that certain staff employees or officers be given individual notice and a hearing before any disciplinary action is taken.¹⁶⁸ Local entities should consult their legal counsel regarding the applicable laws in such a situation.

59. 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.¹⁶⁹

¹⁶⁴ See *City of San Antonio*, 820 S.W.2d 762 (the Act does not raise due process implications; individual notice is not required).

¹⁶⁵ See, e.g., *Point Isabel*, 797 S.W.2d 176.

¹⁶⁶ See *Mayes*, 922 S.W.2d 200.

¹⁶⁷ *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).

¹⁶⁸ E.g., Tex. Loc. Gov't Code Ann. § 22.077 (hearing for removal of certain municipal officers in Type A city).

¹⁶⁹ Tex. Att'y Gen. Op. No. JM-6 (1983).

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

The employee that is to be discussed under the personnel exception has a right to compel that the item be discussed in a public hearing instead of during a closed meeting.¹⁷⁰ However, the Act does not give an employee or officer the right to compel that a personnel matter regarding that individual be discussed only within a closed meeting.¹⁷¹

61. 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.

62. 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 would be defeated by selectively admitting the public.¹⁷²

Closed Meetings for Consultations with an Attorney

63. 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. settlement offers; or
3. 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 conflicts with this chapter.¹⁷³

¹⁷⁰ Tex. Gov't Code Ann. § 551.074(b).

¹⁷¹ Tex. Att'y Gen. Op. No. JM-1191 (1990).

¹⁷² Tex. Att'y Gen. Op. GA-0511 (2007).

¹⁷³ Tex. Gov't Code Ann. § 551.071.

Also, the attorney general has concluded that a governmental body may meet with its attorney to receive legal advice on any matter.¹⁷⁴ 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.¹⁷⁵

64. *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 a closed meeting. 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.¹⁷⁶

65. *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.¹⁷⁷ General discussion of policy unrelated to legal matters is not permitted in a closed meeting under the Act merely because an attorney is present.

Other Types of Closed Meetings

66. *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.¹⁷⁸ However, such a closed meeting is allowed only if discussion of the real estate in an open meeting would have a detrimental effect

¹⁷⁴ Tex. Att’y Gen. Op. No. JM-100 (1983). See also Tex. Att’y Gen. Op. 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 Tex. Att’y Gen. Op. 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).

¹⁷⁵ Tex. Att’y Gen. Op. No. JM-100 (1983) at 2.

¹⁷⁶ Tex. Gov’t Code Ann. § 551.129.

¹⁷⁷ *Olympic Waste Servs. v. City of Grand Saline*, 204 S.W.3d 496, 503-04 (Tex. App. — Tyler 2006, no pet.); Tex. Att’y Gen. Op. No. JC-233 (2000) at 3. See also *Finlan v. City of Dallas*, 888 F. Supp. 779, 782 n.9 (N.D. Tex. 1995).

¹⁷⁸ Tex. Gov’t Code Ann. § 551.072.

on the ability of the governing body to negotiate with a third party.¹⁷⁹ 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. 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.

67. *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.¹⁸⁰

68. *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.¹⁸¹ 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 meet in a closed meeting only if its negotiating position with a third person would be negatively affected by the body's discussion of the contract in an open meeting.

69. *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.¹⁸²

70. *May the governing body of a public power utility discuss competitive matters in a closed meeting?*

The governing body of a public power utility (electric or gas utility)¹⁸³ is allowed to deliberate, vote or take final action in a closed meeting on any competitive matter.¹⁸⁴ The term "competitive matter" means a utility-related matter that is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors.¹⁸⁵ Also, the notice of the subject matter of an item that may be considered as a competitive matter is

¹⁷⁹ *City of Laredo v. Escamilla*, 219 S.W.3d 14, 20 (Tex. App. — San Antonio 2006, pet. denied). See Tex. Att'y Gen. Op. No. MW-417 (1981).

¹⁸⁰ Tex. Gov't Code Ann. § 551.076.

¹⁸¹ *Id.* § 551.073.

¹⁸² *Id.* § 551.088.

¹⁸³ See *id.* § 551.086(b)(1)(definition of public power utility).

¹⁸⁴ *Id.* § 551.086(c).

¹⁸⁵ *Id.* § 552.133 (definition of competitive matter).

required to contain more than a general representation of the subject matter to be considered, such that the competitive activity of the public power utility with respect to the issue in question is not compromised or disclosed.¹⁸⁶

71. *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.¹⁸⁷ 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.

Need for Statutory Authority to Hold Closed Meetings

72. *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.¹⁸⁸ 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 allows for closed meetings.

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

The governing body may not use the fact that the governing body will discuss documents that may be confidential under the Public Information Act, Chapter 552 of the Government Code, to justify a closed meeting. Instead, the governing body must specifically rely on one of the particular exceptions to the Open Meetings Act. The Open Meetings Act and the Public Information Act are entirely independent in their operation.¹⁸⁹ (See Section I concerning the relationship between the Open Meetings Act and the Public Information Act.)

¹⁸⁶ *Id.* § 551.086(d).

¹⁸⁷ *Id.* § 551.087.

¹⁸⁸ See *Bexar Medina Atascosa Water Dist.*, 2 S.W.3d at 462.

¹⁸⁹ Tex. Att'y. Gen. Op. No. GA-0019 (2003) at 6.

Procedural Requirements for Meeting in Closed Meetings

74. 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.¹⁹⁰

75. May a city council meet in a closed meeting if a 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.¹⁹¹

76. 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.¹⁹² 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 render the notice inadequate.¹⁹³

77. 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.¹⁹⁴ 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.¹⁹⁵ 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 consistently distinguish between subjects for public

¹⁹⁰ Tex. Gov't Code Ann. § 551.002. See n. 143

¹⁹¹ Tex. Gov't Code Ann. § 551.004. See *Shackelford v. City of Abilene*, 585 S.W.2d 665 (Tex. 1979).

¹⁹² See generally Tex. Gov't Code Ann. §§ 551.041, .043. See Tex. Att'y Gen. Op. No. GA-511 (2007) at 4. (notice does not have to cite the section or subsection numbers of the provision authorizing the closed session.)

¹⁹³ Tex. Att'y Gen. Op. No. JC-57 (1999).

¹⁹⁴ *Id.*

¹⁹⁵ See generally Tex. Gov't Code Ann. §§ 551.041, .043.

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.¹⁹⁶

78. 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.¹⁹⁷ 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.¹⁹⁸ At the end of that closed meeting, the presiding officer must again announce the date and time. In most instances, a certified agenda or recording must be made.¹⁹⁹ Also, any action or vote on an agenda item may be taken only during an open meeting.²⁰⁰

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

A closed session of an open 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.²⁰¹

80. 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 wish to consider refusing to attend or asking for a formal written interpretation from the local entity's attorney as to the legality of the meeting. Attendance at an unauthorized closed meeting may be a criminal offense.²⁰² If an official reasonably relies on a written opinion concerning whether a closed meeting is permitted from the

¹⁹⁶ Tex. Att'y Gen. Op. No. JC-57 (1999).

¹⁹⁷ Tex. Gov't Code Ann. § 551.101. 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).

¹⁹⁸ Tex. Gov't Code Ann. § 551.103 (c)(3) & (d).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* § 551.102.

²⁰¹ *Id.* § 551.101; Tex. Att'y Gen. Op. No. JC-285 (2000). See also Tex. Gov't Code Ann. § 551.0411(a).

²⁰² Tex. Gov't Code Ann. § 551.144.

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.²⁰³ Simply objecting or not speaking during an illegal closed meeting will not relieve the member of potential criminal liability for participating in the meeting.

81. Who is permitted to attend a closed meeting?

The Act does not specify who may or may not attend a closed meeting.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷

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.²⁰⁸

82. 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.²⁰⁹ 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-

²⁰³ *Id.*

²⁰⁴ Tex. Att'y Gen. Op. No. JC-375 (2001).

²⁰⁵ Tex. Att'y Gen. Op. No. GA-0511 (2007).

²⁰⁶ See Tex. Att'y Gen. Op. Nos. JC-506 (2002), JC-375 (2001), JM-238 (1984).

²⁰⁷ Tex. Att'y Gen. Op. No. JC-506 (2002).

²⁰⁸ *Id.*

²⁰⁹ Tex. Att'y Gen. Op. No. JM-1004 (1989).

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.

83. *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.²¹⁰ 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.²¹¹ 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 under the Act, but would not preclude her exclusion by the board.²¹² However, some city charters and certain statutory provisions provide that the city secretary shall attend all city meetings.²¹³

84. *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.²¹⁴ However, the governing body may not conduct a straw vote or a formal vote during such a session.²¹⁵ The Act requires that any final action, decision or vote be taken in an open meeting.²¹⁶

Production and Handling of Certified Agenda or Recording for Closed Meetings

85. *Is a governing body required to create a certified agenda or recording of discussions held in a closed meeting?*

A governing body must create a certified agenda or make a recording²¹⁷ of every closed meeting unless the closed meeting is being held under the exception for consultation

²¹⁰ See Tex. Att'y Gen. Op. Nos. JM-6 (1983), JC-506 (2002); Tex. Att'y Gen. LO-97-017.

²¹¹ Tex. Att'y Gen. Op. Nos. JM-6 (1983), GA-277 (2004).

²¹² Tex. Att'y Gen. Op. No. JC-375 (2001).

²¹³ See Tex. Gov't Code Ann. § 22.073 (requires a city secretary in Type A city to attend all meetings and keep required minutes).

²¹⁴ *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).

²¹⁵ *Id.*

²¹⁶ Tex. Gov't Code Ann. § 551.102.

²¹⁷ See *id.* § 551.001(7) (definition of recording).

with an attorney.²¹⁸ The governing body may stop taking notes or turn off the recording during the portion of a closed meeting that involves consultations with an attorney.

The presiding officer shall certify that the agenda or recording of the closed meeting is true and correct record of the proceeding.²¹⁹ The certified agenda must state the subject matter of each deliberation and record any further action taken.²²⁰ 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.²²¹ In addition, the certified agenda or recording must include an announcement by the presiding officer of the date and time that the closed meeting began and ended.²²²

86. *Who is responsible for creating a certified agenda or recording of a closed meeting?*

The Act does not specify a particular individual or officer responsible for producing the certified agenda or making the recording of a closed meeting. However, the presiding officer is responsible for certifying that the certified agenda or recording is a true and correct record of the proceedings.²²³ 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 recording is not being made.²²⁴

87. *May a member of a governing body or staff release a copy of a certified agenda or recording to the public?*

A certified agenda or recording kept during a closed meeting may be disclosed to a member of the public only under a court order.²²⁵ There are criminal penalties for releasing a copy of the certified agenda to the public without a court order.²²⁶

88. *May a member of a governing body record a closed meeting for the member's own use?*

A member of a governmental body has no right to record a closed meeting over the objection of a majority of the governmental body's members.²²⁷

²¹⁸ *Id.* § 551.103(a).

²¹⁹ *Id.* § 551.103(b).

²²⁰ *Id.* § 551.103(c)(1)-(2).

²²¹ Tex. Att'y Gen. Op. No. JM-840 (1988) at 4-7.

²²² Tex. Gov't Code Ann. § 551.103(c)(3), (d).

²²³ *Id.* § 551.103(b).

²²⁴ *Id.* § 551.145.

²²⁵ *Id.* § 551.104(c).

²²⁶ *Id.* § 551.146.

²²⁷ *Zamora v. Edgewood Indep. Sch. Dist.*, 592 S.W.2d 649 (Tex. Civ. App. — Beaumont 1979, writ ref'd n.r.e.); Tex. Att'y Gen. Op. No. JM-351 (1985) at 2.

89. *May a member of the governing body review a copy of a certified agenda or recording of a closed meeting?*

A member of a governing body who attended a closed meeting may later review the certified agenda or recording of that closed meeting.²²⁸ Also, a member who was absent during a closed meeting may review the certified agenda or recording. The governing body should adopt procedures for reviewing a certified agenda or recording to preserve the 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 recordings of closed meetings.²²⁹ Also, the governmental body may not provide the absent member with a copy of the certified agenda or recording of the closed meeting.²³⁰

90. *How should a governing body handle a certified agenda or recording once it is prepared?*

The Act contains two requirements on how a certified agenda or recording of closed meetings is to be handled once created:

1. the certified agenda or recording may not be disclosed to the public without a court order, and
2. the certified agenda or recording must be preserved for a period of at least two years after the date of the closed meeting.²³¹

If any legal action involving the closed meeting is brought within this time period, the certified agenda or recording must be preserved until the action is finished. The governing body is the proper custodian for the certified agenda or recording, not the city secretary or county clerk; however the governing body may delegate its duty to these individuals.²³²

91. *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.²³³ 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

²²⁸ Tex. Att'y Gen. Op. No. DM-227 (1993).

²²⁹ Tex. Att'y Gen. Op. No. JC-120 (1999).

²³⁰ Tex. Att'y Gen. LO-98-033.

²³¹ Tex. Gov't Code Ann. § 551.104.

²³² Tex. Att'y Gen. Op. No. GA-0277 (2004) at 3.

²³³ Tex. Att'y Gen. Op. No. JM-1071 (1989). See Tex. Att'y Gen. Op. 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).

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 counsel against 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.

92. *Is the certified agenda or recording of the closed meeting confidential under the Public Information Act?*

The certified agenda and recording of a closed meeting are considered confidential under the Public Information Act.²³⁴

93. *Are notes made by an official in a closed meeting confidential under the Open Meetings Act or the Public Information Act?*

The Open Meetings Act does not specifically address whether the notes made by an official during a closed meeting are confidential. Whether the notes made by an official in a closed meeting are confidential under the Public Information Act depends on whether an exception 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.²³⁵ 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 a public information request for any such notes, the local entity will want to confer with its legal counsel.

VI. Emergency Meetings

94. *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.”²³⁶ The courts and the attorney

²³⁴ Tex. Att’y Gen. ORD-495 (1988).

²³⁵ See, e.g., Tex. Att’y Gen. ORD-635 (1995); ORD-574 (1990) (inter-agency and intra-agency written memoranda containing advice, recommendations and opinion can be withheld); ORD-462 (1987).

²³⁶ Tex. Gov’t Code Ann. § 551.045(b).

general have traditionally construed the emergency posting exception strictly.²³⁷ 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 threat to public health 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”.²³⁸

95. 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.”²³⁹ The emergency is “clearly identified” when the governing body states the reason for the emergency.²⁴⁰

96. 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 governing 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.

97. 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.²⁴¹ First, they must file a request to be notified of such items. This request must be filed at the headquarters of the governmental body. Also, the request must include information on how to contact the media member by telephone, facsimile transmission or electronic mail. Second, the

²³⁷ See Tex. Att’y Gen. Op. 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).

²³⁸ See *River Rd. Neighborhood Ass’n*, 720 S.W.2d at 557-58.

²³⁹ Tex. Gov’t Code Ann. § 551.045(c).

²⁴⁰ *Piazza v. City of Granger*, 909 S.W.2d 529 (Tex. App. — Austin 1995, no writ).

²⁴¹ Tex. Gov’t Code Ann. § 551.047.

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.²⁴²

VII. Enforcement of the Act's Requirements

Civil Enforcement of the Act

98. *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.²⁴³ 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.²⁴⁴ 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.²⁴⁵
2. The court may invalidate any action that a governmental body has taken in violation of the Act.²⁴⁶
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.²⁴⁷
4. The court, at its own discretion, may make the losing side in such a case pay cost of litigation and reasonable attorney fees.²⁴⁸

Also, the Act provides that an individual, corporation or partnership that releases a certified agenda or recording of a closed meeting to the public may be held liable in a civil lawsuit.²⁴⁹ In such a suit, the person or entity that is harmed may get damages, attorney fees and court costs.

²⁴² *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).

²⁴³ Tex. Gov't Code Ann. § 551.142(a).

²⁴⁴ See *City of Port Isabel v. Pinnell*, 161 S.W.3d 233, 241 (Tex. App. — Corpus Christi 2005, no pet.).

²⁴⁵ 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 S.W.2d 86 (declaratory judgment available for violations of Act).

²⁴⁶ Tex. Gov't Code Ann. § 551.141.

²⁴⁷ *Ferris v. Bd. of Chiropractic Exam'rs*, 808 S.W.2d 514 (Tex. App. — Austin 1991, writ denied).

²⁴⁸ Tex. Gov't Code Ann. § 551.142(b).

²⁴⁹ *Id.* § 551.146(a)(2).

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

Actions that violate the Act are not automatically void; rather they are voidable.²⁵⁰ 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.²⁵¹ Nonetheless, it is always the safer course to attempt to achieve full compliance with the Act to avoid the likelihood of court challenges.

100. 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 reauthorize 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.²⁵² 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 voids the action taken at the first meeting to terminate the employment.²⁵³

Criminal Enforcement of the Act

101. 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.²⁵⁴ This violation is a misdemeanor punishable by a fine of between \$100 and \$500, one to six months in jail, or both.²⁵⁵ 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 an affirmative defense to

²⁵⁰ *Id.* § 551.141. See *City of Point Isabel*, 161 S.W.3d 233 (actions violating notice provisions voidable).

²⁵¹ *Collin County v. Homeowners Ass’n*, 716 F. Supp. 953, 960 n.12 (N.D. Tex. 1989).

²⁵² *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975) (increase in electric rates effective only from date reauthorized at lawful meeting).

²⁵³ *Ferris*, 808 S.W.2d 514.

²⁵⁴ Tex. Gov’t Code Ann. § 551.144(a).

²⁵⁵ *Id.* § 551.144(b).

prosecution under this section of the Act.²⁵⁶ A governing body may want to ask its 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.²⁵⁷ This violation is a misdemeanor punishable by a fine of between \$100 and \$500, one to six months in jail, or both.²⁵⁸
3. **Failure to Keep a Certified Agenda or Recording.** A member of a governing body commits a crime if he or she participates in a closed meeting knowing that a certified agenda or recording of the closed meeting is not being made.²⁵⁹ This violation is a Class C misdemeanor and is punishable by a fine of up to \$500.²⁶⁰
4. **Disclosure of Copy of Certified Agenda or Recording.** An individual, corporation or partnership commits a crime if it releases to the public a copy of the certified agenda or recording of a lawfully closed meeting.²⁶¹ 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.²⁶² Also, the person or entity that is harmed by the release of the certified agenda or recording may get damages, attorney fees and court costs.²⁶³ However, if the defendant had good reason to believe releasing the certified agenda or recording was lawful, or was mistaken as to the nature or the content of the certified agenda or recording, the member has a defense to prosecution and an affirmative defense to any civil suit.²⁶⁴

102. *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

²⁵⁶ *Id.* § 551.144(c).

²⁵⁷ *Id.* § 551.143(a)..

²⁵⁸ *Id.* § 551.143(b).

²⁵⁹ *Id.* § 551.145(a).

²⁶⁰ *Id.* § 551.154(b). See Tex. Pen. Code Ann. § 12.23 (Class C Misdemeanor punishment).

²⁶¹ Tex. Gov't Code Ann. § 551.146(a).

²⁶² *Id.* § 551.146(b). See Tex. Pen. Code Ann. § 12.22 (Class B Misdemeanor punishment).

²⁶³ Tex. Gov't Code Ann. § 511.146(a)(2).

²⁶⁴ *Id.* § 551.146(c).

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.²⁶⁵

103. What is the role of the district attorney or prosecuting criminal county attorney regarding violations of the Act?

The 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.

104. 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.²⁶⁶ Only certain public officials 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.²⁶⁷

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 district attorney or prosecuting criminal county attorney. However, a local prosecutor may request assistance from the OAG in prosecuting a violation of the Act.²⁶⁸ 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 interest of the State of Texas makes such assistance proper.

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

The Act does not specifically address this issue. However, 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

²⁶⁵ Tex. Att'y Gen. Op. No. JC-0307 (2000).

²⁶⁶ Tex. Gov't Code Ann. §§ 402.041 - .045.

²⁶⁷ Tex. Att'y Gen. Op. Nos. DM-95 (1992); JM-840 (1988); H-772 (1976).

²⁶⁸ Tex. Gov't Code Ann. § 402.028.

resolution to pay his or her own legal fees or the legal fees of another member indicted on the same facts for the same offense.²⁶⁹

VIII. Additional Information on the Act

106. Are all elected or appointed government 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 OAG. Officials have 90 days after their election or appointment to complete the required training.²⁷⁰ 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 <https://texasattorneygeneral.gov/og/open-government-training>.

107. Where may local governmental bodies get more information about the Act?

The Texas Municipal League (TML) has information on the Act on its website at http://www.tml.org/legal_topics-legal_opengov. Also, member cities of TML can email or call the TML Legal Staff with any questions concerning the Act. Additionally, the OAG produces the Open Meetings Handbook, an in-depth publication about the Act and its interpretation in attorney general opinions and court cases. That publication is available in a downloadable PDF format on the Attorney General's website at <https://texasattorneygeneral.gov/og/open-government-related-publications>. Finally, the OAG 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).

²⁶⁹ Tex. Att'y Gen. Op. No. JC-294 (2000).

²⁷⁰ Tex. Gov't Code Ann. § 551.005.