

Legal Q&A
By TML Legal Department

Q What is House Bill 2840?

A House Bill 2840 by Representative Terry Canales (D – Edinburg) passed during the 86th Regular Legislative Session. It became effective on September 1, 2019. The bill, codified at Texas Government Code Section 551.007, amends the Texas Open Meetings Act (Act) to allow certain public input at open meetings. Before the passage of the bill, the public had a legal right only to observe, rather than provide input on, an open meeting of a governmental body. *See* Tex. Att’y Gen. Op. No. JC-0169 (2000).

House Bill 2840 gives the public the right to address the following government bodies on an item on the agenda at an open meeting:

- a city council;
- a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a city (e.g., probably a city’s board of adjustment); and
- the governing body of a special district created by law (Each city should consult local legal counsel as to the applicability of this provision. *See, e.g., Sierra Club v. Austin Transp. Study Policy Advisory Committee*, 746 S.W.2d 298 (Tex. App. —Austin 1988, writ denied (concluding that Austin transportation advisory committee was a “special district”)).

TEX. GOV’T CODE §§ 551.001(3)(C), (D), (H), 551.007(a). The bill also applies to a handful of other nonmunicipal governmental bodies. *See id.* §§ 551.001(3), 551.007(a).

Notably, the bill doesn’t apply to state agencies. It also doesn’t appear to apply to entities that are subject to the Act, but don’t fall within the term “governmental body” as defined in the Act, such as a planning and zoning commission or an economic development corporation. *See, e.g., TEX. LOC. GOV’T CODE §§ 211.0075, 501.072; see also Tex. Att’y Gen. Op. No. JC-0327 (2001)* (concluding that the board of the Bryan-College State Economic Development Corporation is not a governmental body under the Act). City officials should consult local legal counsel to determine whether any particular entity is subject to the bill.

Q Does House Bill 2840 mandate that a governmental body have a “public hearing” on every agenda item?

A No. Public hearings are meetings legally required by law to record public comment on a matter being considered by a governmental entity. These same laws govern how the public hearings are to be conducted. *See, e.g., TEX. LOC. GOV’T CODE §§ 102.006(a)* (“The governing body of a municipality shall hold a public hearing on the proposed budget. Any person may attend and may participate in the hearing.”), 43.063(a) (“Before a municipality may institute annexation proceedings, the governing body of the municipality must conduct two public hearings at which persons interested in the annexation are given the opportunity to be heard.”).

Existing precedent makes clear the distinction between a public hearing and public comment at a meeting. *See* Tex. Att’y Gen. Op. Nos. M-220 (1968) at 5 (A meeting that is “open to the public” under the Act is one that the public is entitled to attend.); JM-584 (1986) at 3; H-188 (1973) at 2; LO-96-111 at 1; *see also Eudaly v. City of Colleyville*, 642 S.W.2d 75, 77 (Tex. App.—Fort Worth 1982, writ ref’d n.r.e.) (distinguishing between “public meeting,” where public was not entitled to comment, and “public hearing,” where public was entitled to comment).

House Bill 2840 doesn’t require a public hearing on every item on an agenda. It merely grants limited authority to a citizen to address a governmental body, subject to reasonable rules adopted by the body.

Q When does the public have the right to address a governmental body on items on the agenda of an open meeting?

A Some commentators suggested that the bill allows a citizen to address a governmental body throughout a meeting on agenda items before a vote, not only in the time designated by the city. That’s incorrect. Government Code Section 551.007(b) provides that “A governmental body shall allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting *before or during the body’s consideration of the item.*” TEX. GOV’T CODE § 551.007(b) (emphasis added).

The legislature typically uses the word “or” as a disjunctive. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000). “It separates words or phrases in the alternate relationship, indicating that either of the separated words or phrases may be employed without the other.” *Jones v. State*, 175 S.W.3d 927, 932 (Tex. App.—Dallas 2005, no pet.) (citing *Perez v. State*, 11 S.W.3d 218, 225 (Tex. Crim. App. 2000)). The legislature’s use of the disjunctive here evidences its intent to allow the governmental body to decide at which point in the meeting a member of the public addresses them.

The attorney general has opined that Section 551.007(b) does not grant a member of the public the right to address a governmental body both before and during the governmental body’s consideration of an item. Tex. Att’y Gen. Op. No. KP-0300 (2020)(“A governmental body may satisfy subsection 551.007(b)’s requirements by holding a single public comment period at the beginning of an open meeting to address all items on the agenda.”) Moreover, a member of the public has no right under Section 551.007(b) to address a governmental body *after* the body’s consideration of an item. *See also* TEX. GOV’T CODE § 551.007(c) (authorizing the governmental body to adopt “rules concerning the public’s right to speak at an open meeting”), TEX. LOC. GOV’T CODE § 22.038(c) (“The governing body shall determine the rules of its proceedings”), Tex. Att’y Gen. Op. No. DM-473 (1998) (concluding a home rule city is authorized to adopt reasonable rules of procedure for meetings).

The legislative history of House Bill 2840 explains why a governmental body may limit a member of the public to one of the two options: “It has been suggested that the practice of the governing bodies of certain political subdivisions to provide for public input and comment only at the conclusion of a meeting of the governing body makes it too difficult for the public to

properly weigh in on decisions being made because they are forced to wait through the entire meeting to provide an opinion on any subject matter being addressed at the meeting.” *See* Senate Business & Commerce Comm., Bill Analysis, H.B. 2840, Senate Research Center, May 15, 2019.

Q Is a governmental body allowed to adopt reasonable rules regarding the public’s right to address them at open meetings?

A Yes. A governmental body may adopt reasonable rules concerning the public’s right to address the body at an open meeting, consistent with the relevant provisions of law allowing it to do so. *Id.* § 551.007(c); *See* Tex. Att’y Gen. Op. Nos. KP-300 (2020), H-188 (1973) at 2, LO-96-111 at 1. The rules may include, among many other things, the length of comments on a given item. *Id.* § 551.007(d) (If the person addressing the governmental body needs a translator, the governmental body is required to allow at least twice the normal amount of time for the non-English speaker to address the body.).

Prior to the passage of House Bill 2840, the attorney general summarized the authority of a local governmental body to control public comment at its meetings:

We think that the [governmental body] has broad discretion in exercising its statutory powers under the Local Government Code, and may limit the number of persons who may speak on a topic and the length and frequency of their presentations. However, it must act reasonably and may not discriminate on the basis of the particular views expressed, nor arbitrarily deny citizens their right to apply to the government for redress of grievances by “petition, address or remonstrance,” as guaranteed by article I, section 27 of the Texas Constitution. The [governmental body] as a whole has the authority to determine its own agenda. Attorney General Opinions DM-228 (1993) at 2-3, JM-63 (1983) at 1. The [body] may adopt reasonable rules consistent with relevant provisions of law – including, among other things, the Open Meetings Act – to govern the conduct of its meetings. Attorney General Opinion DM-228 (1993) at 3. The court may limit the number, frequency, and length of presentations to it. Attorney General Opinion H-188 (1973) at 2. We note that, as Attorney General Opinion H-188 points out, the Open Meetings Act does not of itself give citizens the right to participate in a public meeting, but only the right to observe it. However, if the [body] has adopted a policy of opening the floor to citizen comment, Attorney General Opinion H-188 counsels that such a policy must be administered in an even-handed fashion, and that the [body] may not discriminate against a particular point of view. Such limits as the [governmental body] adopts must not be arbitrary or unreasonable, and must not unfairly discriminate among views seeking expression.

Tex. Att’y Gen. Op. No. LO-96-111. Of course, House Bill 2840 modifies the conclusion that the Act doesn’t give members of the public the right to address a governmental body at an open meeting. Beyond that, however, the remaining conclusions remain valid. *See also* TEX. LOC. GOV’T CODE § 22.038(c) (“The governing body [of a general law city] shall determine the

rules of its proceedings”), Tex. Att’y Gen. Op. No. KP-300 (2020), DM-473 (1998) (concluding a 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).

The bottom line is that a member of the public’s right to address a governmental body under Section 511.007 is, by the express terms of the section, subject to reasonable rules adopted by the governmental body. Tex. Att’y Gen. Op. No. KP-300 (2020)(“Pursuant to Subsection 551.007(c), a governmental body may adopt a rule capping the total amount of time a member of the public has to address all items on the agenda if the rule is reasonable.”)

Q Does House Bill 2840 require a governmental body to allow a member of the public to address them during the body’s consideration of an agenda item if the person wishes to do so?

A No. The city council could comply with Section 551.007 by allowing a member of the public to address the body regarding the item any time before the body’s consideration of the item. What if a member of the public misses the opportunity to address a governmental body on an item during a designated public comment period at the beginning of an open meeting? Is a governmental body then required to allow that person to address them on the item later in the meeting during the body’s consideration of the item? No, because the governmental body retains control of its meetings. Tex. Att’y Gen. Op. No. KP-300 (2020)(“A governmental body may satisfy subsection 551.007(b)’s requirements by holding a single public comment period at the beginning of an open meeting to address all items on the agenda.”). The governmental body may set a designated time (e.g., before agenda items are considered) for members of the public to address the body regarding an item on the agenda. If a member of the public misses that opportunity, Section 551.007 does not grant the person the right to interrupt the meeting.

What if a member of the public is in attendance during a designated public comment period at the beginning of an open meeting, but chooses not to comment on an agenda item until later in the meeting during the body’s consideration of the item? Is the governmental body required to allow that person to comment on the item during the body’s consideration of the item? No, because the governmental body retains control of its meetings.

Q Is a governmental body required to allow the public to address them on agenda items at “workshops” or “work sessions?”

A Cities sometimes post meeting notices indicating that the city council will hold a “council work session” or “council workshop.” These terms are not defined in the Act, but are commonly used to refer to a meeting in which the council will be briefed by staff (or other experts) on a single matter of interest to the city. Oftentimes, the subject of a work session is highly technical in nature and/or requires a detailed and thorough explanation. A city council generally will not plan to take action during a work session as it is frequently intended as an educational precursor to some possible future action. For instance, city councils often hold meetings referred to as “work sessions” leading up to the adoption of the budget.

City attorneys disagree about whether Section 551.007 applies to a workshop or work sessions. While some believe it applies, others have a different interpretation. That interpretation is largely based on when the governmental body “considers” an item. For example, a city may hold budget workshops for city councilmembers to discuss financial priorities amongst themselves. Some argue that the city council isn’t “considering” the item at that time. Rather, they argue, the budget itself will be considered when it is placed on the city council’s agenda for action at a future meeting. The bill author’s staff has indicated that the bill isn’t meant to apply to a workshop or work session.

Q May the governmental body still allow the public to ask questions about items not on the agenda? Must a governmental body allow the public to address them about items not on the agenda?

A It has long been “common for units of local government to invite any member of the public to make whatever comments they desire in the public forum at the time of the public meeting,” including comments about items not on the agenda. Tex. Att’y Gen. Op. Nos. JC-0169 (2000). A governmental body may, but does not have to, allow the public to make comments about items not on the agenda. House Bill 2840 mandates that a governmental body allow a citizen to speak only in regard to items on an agenda.

If the governmental body allows the public to comment on items not on the agenda, the governmental body can still apply reasonable rules regarding the number, frequency, and length of presentation, but it cannot discriminate against speakers. *See, e.g.*, Tex. Att’y Gen. Op. No. LO-96-111. The governmental body may not deliberate on any item that is not on the agenda. For such an item, the governmental body may: (1) make a statement of fact regarding the item; (2) make a statement concerning the policy regarding the item; or (3) propose that the item be placed on a future agenda. TEX. GOV’T CODE § 551.042.

Q May the governmental body prevent the public from criticizing the governmental body or actions of the governmental body?

A A governmental body may not prohibit public criticism of the governmental body, including criticism of any act, omission, policy, procedure, program, or service. However, the bill “does not apply to public criticism that is otherwise prohibited by law.” *Id.* § 551.007(e). Exactly what type of public criticism is prohibited by law remains to be seen. Defamation would probably fall under that prohibition. In any case, a city should be able to enforce a decorum policy for public speakers, so long as it doesn’t prohibit criticism.

Q How has COVID-19 impacted House Bill 2840?

A In March 2020, Governor Abbott temporarily suspended various parts of the Open Meetings Act in response to the COVID-19 disaster. *See* <https://www.texasattorneygeneral.gov/open-government/open-meetings-act-update>. As of this writing, the suspensions are still in place.

One part of the Act that is suspended is the requirement in Texas Government Code Section 551.007(b) that a governmental body allow each member of the public who desires to address the

body regarding an item on an agenda to address the body before or during the body's consideration of the item. The suspension order does, however, require that a governmental body "offer alternative methods of communicating" with public officials. The suspension order does not impact a governmental body's ability to have reasonable rules regarding the public's right to address the body.

A quick online search reveals myriad ways that governmental bodies allow for public interaction and comment during a remote meeting held under the governor's suspension order. For instance, some cities engage in the following practices:

- Provide a dedicated voicemail or email where the public may submit comments. These comments may be read or played aloud at the meeting, or simply provided to the city council for review prior to the meeting.
- Allow the public to address the city council by phone during the meeting. This is typically achieved by requiring an individual to provide a contact phone number prior to the meeting that can be used by the presiding officer to call the individual.
- Utilize videoconference software that offers a "moderator" function, giving the presiding officer the ability to unmute a registered speaker to deliver live comments.

The variety of methods used by cities to interact with the public during remote meetings is likely a function of both the assortment of technologies used to hold meetings and differing legal interpretations of the suspension order.

Each city should consult its own legal counsel in making a final decision about how best to address this issue.