

# OPEN MEETINGS

## 2012 HANDBOOK



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

My Fellow Texans:

The Texas Open Meetings Act honors the principle that government at all levels in this state should operate in a way that is open and accessible to the people. As Attorney General, I am committed to that vision as well, and I am working to ensure that Texas government is as transparent as possible.

Texas courts have upheld the statutory duty of public officials to conduct open meetings, except in certain limited circumstances, and have affirmed that ignorance of the law does not shield anyone from compliance with the law.

Public officials often ask my office for guidance in complying with the Open Meetings Act, and one of the ways we respond is to provide this *Open Meetings Handbook*. The *Handbook*, also available on the Internet at [https://www.oag.state.tx.us/AG\\_Publications/pdfs/openmeeting\\_hb.pdf](https://www.oag.state.tx.us/AG_Publications/pdfs/openmeeting_hb.pdf), is designed to help public officials avoid unintentional violations of the law and to help all Texans understand how the Open Meetings Act affects them.

The public has bestowed great trust in government officials, in large part because they have confidence that those officials will conduct business responsibly and in the open. My commitment to enforcing the open government laws of Texas is unwavering, and it is my sincere hope that this *Handbook* will serve as a guide for all governmental bodies as they conduct the people's business.

Sincerely,

Greg Abbott  
Attorney General of Texas



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## I. Introduction

### A. Open Meetings Act

The Open Meetings Act (the “Act”) was adopted to help make governmental decision-making accessible to the public. It requires meetings of governmental bodies to be open to the public, except for expressly authorized closed sessions,<sup>1</sup> and to be preceded by public notice of the time, place and subject matter of the meeting. “The provisions of [the Act] are mandatory and are to be liberally construed in favor of open government.”<sup>2</sup>

The Act was adopted in 1967<sup>3</sup> as article 6252-17 of the Revised Civil Statutes, substantially revised in 1973,<sup>4</sup> and codified without substantive change as Government Code chapter 551.<sup>5</sup> It has been amended many times since its enactment.

Before addressing the Act itself, we will briefly mention certain other issues relevant to conducting public meetings.

### B. A Governmental Body Must Hold a Meeting to Exercise its Powers

Predating the Act is the common-law rule that decisions entrusted to governmental bodies must be made by the body as a whole at a properly called meeting.<sup>6</sup> This requirement gives each member of the body an opportunity to state his or her views to other board members and to give them the benefit of his or her judgment, so that the decision “may be the composite judgment of the body as a whole.”<sup>7</sup> This rule may be changed by the Legislature.<sup>8</sup>

### C. Quorum and Majority Vote

The authority vested in a governmental body may be exercised only at a meeting of a quorum of its members. The Code Construction Act<sup>9</sup> states as follows:

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<sup>1</sup> The term “executive session” is often used to mean “closed meeting,” even though the Act uses the latter term. *See* TEX. GOV’T CODE ANN. § 551.101. *See Cox Enters., Inc. v. Bd. of Trs.*, 706 S.W.2d 956, 957 (Tex. 1986) (stating that an executive session is a meeting or part of a meeting that is closed to the public).

<sup>2</sup> *See City of Laredo v. Escamilla*, 219 S.W.3d 14, 19 (Tex. App.—San Antonio 2006, pet. denied); *Willmann v. City of San Antonio*, 123 S.W.3d 469, 473 (Tex. App.—San Antonio 2003, pet. denied); *Toyah Indep. Sch. Dist. v. Pecos-Barstow Indep. Sch. Dist.*, 466 S.W.2d 377, 380 (Tex. Civ. App.—San Antonio 1971, no writ).

<sup>3</sup> Act of May 8, 1967, 60th Leg., R.S., ch. 271, § 1, 1967 Tex. Gen. Laws 597, 597–98.

<sup>4</sup> Act of Mar. 28, 1973, 63d Leg., R.S., ch. 31, § 1, 1973 Tex. Gen. Laws 45, 45–48.

<sup>5</sup> Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 583–89.

<sup>6</sup> *See Webster v. Tex. & Pac. Motor Transp. Co.*, 166 S.W.2d 75, 76–77 (Tex. 1942); *Fielding v. Anderson*, 911 S.W.2d 858, 864 (Tex. App.—Eastland 1995, writ denied).

<sup>7</sup> *Webster*, 166 S.W.2d at 76–77.

<sup>8</sup> *See Faulder v. Tex. Bd. of Pardons & Paroles*, 990 S.W.2d 944, 946 (Tex. App.—Austin 1999, pet. ref’d) (concluding that board was authorized by statute to perform duties in clemency matters without meeting face-to-face as a body).

<sup>9</sup> TEX. GOV’T CODE ANN. ch. 311.

## Introduction

- (a) A grant of authority to three or more persons as a public body confers the authority on a majority of the number of members fixed by statute.<sup>10</sup>
- (b) A quorum of a public body is a majority of the number of members fixed by statute.<sup>11</sup>

The Act defines “quorum” as a majority of the governing body, unless otherwise defined by applicable law or the governing body’s charter.<sup>12</sup> For example, three members of the five-member commissioners court constitute a quorum for conducting county business, except for levying a county tax, which requires the presence of a least four members of the court.<sup>13</sup> Ex officio, nonvoting members of a governmental body are counted for purposes of determining the presence of a quorum.<sup>14</sup> A person who has been elected to serve as a member of a governmental body but whose election has not been certified and who has not yet taken the oath of office is not yet a member of the governmental body.<sup>15</sup> Thus, a meeting between two newly elected persons who have not taken the oath of office and two serving directors is not subject to the Act because no quorum is present.<sup>16</sup> A board member may not delegate his or her authority to deliberate or vote to another person, absent express statutory authority to do so.<sup>17</sup>

Absent an express provision to the contrary, a proposition is carried in a deliberative body by a majority of the legal votes cast, a quorum being present.<sup>18</sup> Thus, if a body is “composed of twelve members, a quorum of seven could act, and a majority of that quorum, four, could bind the body.”<sup>19</sup>

## D. Other Procedures

### 1. In General

Governmental bodies should consult their governing statutes for procedures applicable to their meetings. Home rule cities should also consult their charter provisions.<sup>20</sup>

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<sup>10</sup> A statute may expressly provide for a different rule. See TEX. LOC. GOV’T CODE ANN. § 363.105 (providing that two-thirds majority vote required of a board of crime control and prevention district to reject application for funding).

<sup>11</sup> TEX. GOV’T CODE ANN. § 311.013; see *id.* § 312.004 (“A joint authority given to any number of officers or other persons may be executed by a majority of them unless expressly provided otherwise.”). See also *Tex. State Bd. of Dental Exam’rs v. Silagi*, 766 S.W.2d 280, 284 (Tex. App.—El Paso 1989, writ denied) (stating that absent statutory provision, the common-law rule that a majority of all members of a board constitutes a quorum applies).

<sup>12</sup> TEX. GOV’T CODE ANN. § 551.001(6).

<sup>13</sup> TEX. LOC. GOV’T CODE ANN. § 81.006.

<sup>14</sup> Tex. Att’y Gen. Op. No. JC-0580 (2002) at 2–3 (overruling Tex. Att’y Gen. Op. No. DM-160 (1992) in part).

<sup>15</sup> Tex. Att’y Gen. Op. No. GA-0355 (2005) at 3.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> Tex. Att’y Gen. Op. No. JM-903 (1988) at 4–5.

<sup>18</sup> *Comm’rs Court of Limestone Cnty. v. Garrett*, 236 S.W. 970, 972 (Tex. Comm’n App. 1922, judgment adopted), *reh’g overruled*, 238 S.W. 894 (Tex. Comm’n App. 1922); Tex. Att’y Gen. Op. Nos. GA-0554 (2007) at 2, GA-0412 (2006) at 3.

<sup>19</sup> *Webster v. Tex. & Pac. Motor Transp. Co.*, 166 S.W.2d 75, 77 (Tex. 1942).

<sup>20</sup> See *Shackelford v. City of Abilene*, 585 S.W.2d 665, 667 (Tex. 1979) (considering home rule city charter that required all city meetings to be open to the public).



## Introduction

Governmental bodies may draw on a treatise such as *Robert's Rules of Order* to assist them in conducting their meetings, as long as the provisions they adopt are consistent with the Texas Constitution, statutes and common law.<sup>21</sup> A governmental body subject to the Act may not conduct its meetings according to procedures inconsistent with the Act.<sup>22</sup>

### 2. Preparing the Agenda

An agenda is “[a] list of things to be done, as items to be considered at a meeting.”<sup>23</sup> The terms “agenda” and “notice” are often used interchangeably in discussing the Act because of the practice of posting the agenda as the notice of a meeting or as an appendix to the notice.<sup>24</sup>

Some governmental entities are subject to statutes that expressly address agenda preparation.<sup>25</sup> Other entities may adopt their own procedures for preparing the agenda of a meeting.<sup>26</sup> Officers and employees of the governmental body must avoid deliberations subject to the Act while preparing the agenda.<sup>27</sup>

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<sup>21</sup> See Tex. Att’y Gen. Op. No. GA-0412 (2006) at 2; see also generally Tex. Att’y Gen. Op. No. GA-0554 (2007).

<sup>22</sup> See Tex. Att’y Gen. Op. Nos. GA-0412 (2006) at 2, DM-228 (1993) at 3 (addressing governmental body’s adoption of provisions of *Robert’s Rules of Order* to govern conduct of meetings).

<sup>23</sup> BLACK’S LAW DICTIONARY 72 (9th ed. 2009).

<sup>24</sup> See, e.g., *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 764 (Tex. 1991).

<sup>25</sup> See TEX. TRANSP. CODE ANN. § 201.054 (providing that Chair of Transportation Commission shall oversee the preparation of an agenda for each meeting).

<sup>26</sup> See Tex. Att’y Gen. Op. No. DM-473 (1998) at 3 (discussing home-rule city procedure for agenda preparation).

<sup>27</sup> *Id.*

## **II. Recent Amendments**

Amendments to the Act adopted by the Eighty-second Legislature are quoted or summarized below.

### **A. Section 551.130. Board of Trustees of Teacher Retirement System of Texas: Quorum Present at One Location**

Added section 551.130 provides as follows:

- (a) In this section, “board” means the board of trustees of the Teacher Retirement System of Texas.
- (b) This chapter does not prohibit the board or a board committee from holding an open or closed meeting by telephone conference call.
- (c) The board or a board committee may hold a meeting by telephone conference call only if a quorum of the applicable board or board committee is physically present at one location of the meeting.
- (d) A telephone conference call meeting is subject to the notice requirements applicable to other meetings. The notice must also specify:
  - (1) the location of the meeting where a quorum of the board or board committee, as applicable, will be physically present; and
  - (2) the intent to have a quorum present at that location.
- (e) The location where a quorum is physically present must be open to the public during the open portions of a telephone conference call meeting. The open portions of the meeting must be audible to the public at the location where the quorum is present and be tape-recorded at that location. The tape recording shall be made available to the public.
- (f) The location of the meeting shall provide two-way communication during the entire telephone conference call meeting, and the identification of each party to the telephone conference call must be clearly stated before the party speaks.
- (g) The authority provided by this section is in addition to the authority provided by Section 551.125.
- (h) A member of the board who participates in a board or board committee meeting by telephone conference call but is not physically present at the location of the meeting is not considered to be absent from the meeting for any purpose. The vote of a member of the board who participates in a board or board committee meeting by telephone conference call is counted for the purpose of determining the number of votes cast on a motion or other proposition before the board or board committee.
- (i) A member of the board may participate remotely by telephone conference call instead of by being physically present at the location of a board meeting for not more than one board meeting per calendar year. A board member who

participates remotely in any portion of a board meeting by telephone conference call is considered to have participated in the entire board meeting by telephone conference call. For purposes of the limit provided by this subsection, remote participation by telephone conference call in a meeting of a board committee does not count as remote participation by telephone conference call in a meeting of the board, even if:

- (1) a quorum of the full board attends the board committee meeting; or
  - (2) notice of the board committee meeting is also posted as notice of a board meeting.
- (j) A person who is not a member of the board may not speak at the meeting from a remote location by telephone conference call, except as provided by Section 551.129.<sup>28</sup>

## **B. Section 551.086. Certain Public Power Utilities: Competitive Matters**

Regarding an exception authorizing closed meetings for public power utilities, section 551.086 was amended to significantly alter the definition of “competitive matter.”<sup>29</sup> The amendment also did away with the requirement that the governing body of the public power utility first make a good faith determination that the matter to be discussed in a closed meeting is a competitive matter.<sup>30</sup> See Part IX.C.13.

## **C. Section 551.0415. Governing Body of Municipality or County: Reports about Items of Community Interest Regarding Which No Action Will Be Taken**

Section 551.0415 was amended to allow the governmental body of a county to receive reports from staff or a member of the governmental body regarding items of community interest.<sup>31</sup> No substantive change was made to the list of items that constitute an “item of community interest.”<sup>32</sup>

## **D. Section 551.0725. Commissioners Courts: Deliberation Regarding Contract Being Negotiated; Closed Meeting**

Section 551.0725(a) was amended to remove the population requirement.<sup>33</sup> After the amendment county governmental bodies of any size may meet in a closed session to deliberate business and financial issues relating to a contract being negotiated.

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<sup>28</sup> See Act of May 20, 2011, 82d Leg., R.S., ch. 455, § 3, 2011 Tex. Sess. Law Serv. 1128, 1129–30, (to be codified at TEX. GOV’T CODE ANN. § 551.130).

<sup>29</sup> See Act of May 23, 2011, 82d Leg., R.S., ch. 925 § 1, 2011 Tex. Sess. Law Serv. 2340, 2340, (to be codified as an amendment to TEX. GOV’T CODE ANN. § 551.086).

<sup>30</sup> *Id.*

<sup>31</sup> See Act of May 23, 2011, 82d Leg., R.S., ch. 1341, § 14, 2011 Tex. Sess. Law Serv. 3941, 3945 (to be codified as an amendment to TEX. GOV’T CODE ANN. § 551.0415); Act of May 25, 2011, 82d Leg., R.S., ch. 1007, § 1, 2011 Tex. Sess. Law Serv. 2549, 2549–50, (to be codified as an amendment to TEX. GOV’T CODE ANN. § 551.0415).

<sup>32</sup> See *supra* note 31 (section 551.0415(b) in both Acts).

<sup>33</sup> See Act of May 25, 2011, 82d Leg., R.S., ch. 758, § 1, 2011 Tex. Sess. Law Serv. 1782, 1782 (to be codified as an amendment to TEX. GOV’T CODE ANN. § 551.0725(a)); see Act of May 23, 2011, *supra* note 31, at § 15 (to be codified as an amendment to TEX. GOV’T CODE ANN. § 551.0725(a)).

**E. Section 551.050. Municipal Governmental Body: Place of Posting Notice**

Section 551.050 previously provided that a municipal governmental body shall post notice of each meeting on a bulletin board.<sup>34</sup> The section was amended to authorize a municipal governmental body to post its meeting notices on a physical or electronic bulletin board.<sup>35</sup> The new term “electronic bulletin board” is defined to mean “an electronic communication system that includes a perpetually illuminated screen on which the governmental body can post messages or notices viewable without manipulation by the public.”<sup>36</sup>

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<sup>34</sup> TEX. GOV'T CODE ANN. § 551.050.

<sup>35</sup> See Act of May 25, 2011, *supra* note 31, at § 2 (to be codified as an amendment to TEX. GOV'T CODE ANN. § 551.050).

<sup>36</sup> See *id.*

### III. Noteworthy Cases since 2010 Handbook

#### Judicial Decisions

In *Asgeirsson v. Abbott* and *Rangra v. Brown*, city council members from several cities asserted facial challenges to the constitutionality of section 551.144 of the Texas Government Code.<sup>37</sup> Section 551.144 forbids a member of a governmental body from knowingly organizing or participating in a closed meeting under certain circumstances.<sup>38</sup> The plaintiff city council members argued that the provision is unconstitutionally vague and overbroad in violation of the First Amendment.<sup>39</sup> The plaintiffs also contended that section 551.144 is a content-based restriction on speech that is subject to strict scrutiny, and that it fails to pass constitutional muster under this standard of review. The district court in both cases rejected these challenges and held that the Act only punishes members of governmental bodies “when those members hide that speech from Texas citizens in closed meetings. [The Act] neither suppresses the speakers’ viewpoint nor the content of his or her speech. Rather, [the Act] protects the compelling interest of government transparency.”<sup>40</sup>

The court held that section 551.144 is neither vague nor overbroad and concluded that the section was a content-neutral provision that satisfied the intermediate-scrutiny standard.<sup>41</sup> The court further concluded that, in the event section 551.144 was determined to be content-based, it also satisfied the strict-scrutiny standard.<sup>42</sup> The case is now on appeal in the Fifth Circuit.

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<sup>37</sup> See *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 690, 693 (W.D. Tex. 2011); *Rangra v. Brown*, No. P-05-CV-075, 2006 WL 3327634, at \*2 (W.D. Tex. Nov. 7, 2006), *rev’d*, 566 F.3d 515 (5th Cir. 2009), *vacated by* 576 F.3d 531 (5th Cir. 2009) (granting rehearing en banc), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009) (en banc).

<sup>38</sup> TEX. GOV’T CODE ANN. § 551.144.

<sup>39</sup> *Asgeirsson*, 773 F. Supp. 2d at 690 (reciting plaintiffs’ claims).

<sup>40</sup> *Id.* at 707.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

## IV. Training for Members of Governmental Bodies

### A. Section 551.005. Open Meetings Training

Section 551.005 requires each elected or appointed public official who is a member of a governmental body subject to the Act to complete a course of training addressing the member's responsibilities under the Act. The public official must complete the training not later than the 90th day after taking the oath of office, if required to take an oath to assume duties as a member of the governmental body, or after the public official otherwise assumes these duties if the oath is not required.

Completing training as a member of the governmental body satisfies the training requirements for the member's service on a committee or subcommittee of the governmental body and ex officio service on any other governmental body. The training may also be used to satisfy any corresponding training requirements concerning the Act that another law requires members of a governmental body to complete. The failure of one or more members of a governmental body to complete the required training does not affect the validity of an action taken by the governmental body.

The attorney general is required to ensure that the training is made available, and the attorney general's office may provide the training and may approve any acceptable training course offered by a governmental body or other entity. The attorney general must also ensure that at least one course approved or provided by the attorney general's office is available at no cost on videotape, DVD, or a similar and widely available medium.<sup>43</sup>

The training course must be at least one and no more than two hours long and must include instruction in the following subjects:

- (1) the general background of the legal requirements for open meetings;
- (2) the applicability of this chapter to governmental bodies;
- (3) procedures and requirements regarding quorums, notice and recordkeeping;
- (4) procedures and requirements for holding an open meeting and for holding a closed meeting; and
- (5) penalties and other consequences for failure to comply with this chapter.

The entity providing the training shall provide a certificate of completion to public officials who complete the training course. A governmental body shall maintain and make available for public inspection the record of its members' completion of the training. A certificate of course completion is admissible as evidence in a criminal prosecution under the Act, but evidence that a defendant completed a training course under this section is not *prima facie* evidence that the defendant knowingly violated the Act.

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<sup>43</sup> A training video is available online at [http://www.oag.state.tx.us/opinopen/og\\_training.shtml](http://www.oag.state.tx.us/opinopen/og_training.shtml).

## V. Governmental Bodies

### A. Definition

Section 551.002 of the Government Code provides that “[e]very regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.”<sup>44</sup> “Governmental body” is defined by section 551.001(3) as follows:

“Governmental body” means:

- (A) a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members;
- (B) a county commissioners court in the state;
- (C) a municipal governing body in the state;
- (D) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;
- (E) a school district board of trustees;
- (F) a county board of school trustees;
- (G) a county board of education;
- (H) the governing board of a special district created by law;
- (I) a local workforce development board created under Section 2308.253;
- (J) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state;<sup>45</sup> and
- (K) a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code.

Section 551.0015 provides that certain property owners’ associations in a defined geographic area in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more are subject to the Act in the same manner as a governmental body.<sup>46</sup>

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<sup>44</sup> An agency financed entirely by federal money is not required by the Act to conduct an open meeting. TEX. GOV’T CODE ANN. § 551.077.

<sup>45</sup> See 42 U.S.C.A. §§ 9901–9926 (Community Services Block Grant Program).

<sup>46</sup> TEX. GOV’T CODE ANN. § 551.0015.

## B. State-Level Governmental Bodies

Section 551.001(3)(A), the definition of “governmental body” applicable to state-level entities, does not name specific entities but instead sets out a general description of such entities. Thus, a state-level entity will be a governmental body within the Act if it is “within the executive or legislative branch of state government” and under the direction of “one or more elected or appointed members.”<sup>47</sup> Moreover, it must have supervision or control over public business or policy.<sup>48</sup> A university auxiliary enterprise was a governmental body under the Act because (1) as an auxiliary enterprise of a state university, it was part of the executive branch of state government; (2) a board of directors elected by its membership controlled the entity, formulated policy and operated the organization; (3) the board acted by vote of a quorum; (4) the board’s business concerned public education and involved spending public funds; and (5) the university exerted little control over the auxiliary enterprise.<sup>49</sup> In contrast, an advisory committee without control or supervision over public business or policy is not subject to the Act, even though its membership includes some members, but less than a quorum, of a governmental body.<sup>50</sup> See Part V.E.

The section 551.001(3)(A) definition of “governmental body” includes only entities within the executive and legislative departments of the state. It therefore excludes the judiciary from the Act.<sup>51</sup>

## C. Local Governmental Bodies

Subsection 551.001(3)(B) through (K) lists a number of specific types of local governmental bodies. These include a county commissioners court, a municipal governing body and the board of trustees of a school district.

Subsection 551.001(3)(D) describes another kind of local governmental body: “a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality.”<sup>52</sup> An inquiry into a local entity’s powers and relationship to the city or county government is necessary to determine whether it is a governmental body under subsection 551.001(3)(D).

A judicial decision guides us in applying subsection 551.001(3)(D) to particular entities. The court in *City of Austin v. Evans*<sup>53</sup> analyzed the powers of a city grievance committee and determined it was not a governmental body within this provision. The court stated that the committee had no authority to make rules governing personnel disciplinary standards or actions or to change the rules on

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<sup>47</sup> *Id.* § 551.001(3)(A); *see id.* § 551.003.

<sup>48</sup> *Id.* § 551.001(4) (definition of “meeting”); *Beasley v. Molett*, 95 S.W.3d 590, 606 (Tex. App.—Beaumont 2002, pet. denied); Tex. Att’y Gen. Op. No. GA-0019 (2003) at 5.

<sup>49</sup> *Gulf Reg’l Educ. Television Affiliates v. Univ. of Houston*, 746 S.W.2d 803, 809 (Tex. App.—Houston [14th Dist.] 1988, writ denied); Tex. Att’y Gen. Op. No. H-438 (1974) at 4 (concluding that Athletic Council of The University of Texas, as governmental body that supervises public business, must comply with the Act).

<sup>50</sup> Tex. Att’y Gen. Op. Nos. JM-331 (1985) at 3 (concluding that citizens advisory panel of Office of Public Utility Counsel, with no power to supervise or control public business, is not governmental body); H-994 (1977) at 2–3 (concluding that committee appointed to study process of choosing university president and make recommendations to Board of Regents not subject to Act).

<sup>51</sup> *See* Tex. Att’y Gen. Op. No. JM-740 (1987) at 4 (concluding that meeting of district judges to choose county auditor is not subject to Act).

<sup>52</sup> TEX. GOV’T CODE ANN. § 551.001(3)(D).

<sup>53</sup> *City of Austin v. Evans*, 794 S.W.2d 78, 83 (Tex. App.—Austin 1990, no writ).



## Governmental Bodies

disciplinary actions or complaints.<sup>54</sup> It could only make recommendations and could not adjudicate cases. The committee did not possess quasi-judicial power, described as including the following:

- (1) the power to exercise judgment and discretion;
- (2) the power to hear and determine or to ascertain facts and decide;
- (3) the power to make binding orders and judgments;
- (4) the power to affect the personal or property rights of private persons;
- (5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and
- (6) the power to enforce decisions or impose penalties.<sup>55</sup>

An entity did not need all of these powers to be considered quasi-judicial, but the more of those powers it had, the more clearly it was quasi-judicial in the exercise of its powers.<sup>56</sup>

The court in *Fiske v. City of Dallas*<sup>57</sup> concluded that a citizens group set up to advise the city council as to persons qualified to serve as municipal judges was not a governmental body within the Act because it was not part of the city council or a committee of the city council, and it had no rulemaking power or quasi-judicial power.<sup>58</sup>

In contrast, Attorney General Opinion DM-426 (1996) concluded that a municipal housing authority created under chapter 392 of the Local Government Code was a governmental body subject to the Act.<sup>59</sup> It was “a department, agency, or political subdivision of a . . . municipality” as well as “a deliberative body that has rule-making or quasi-judicial power” within section 551.001(3)(D) of the Act. Attorney General Opinion DM-426 concluded on similar grounds that a county housing authority was a governmental body.<sup>60</sup>

Subsection 551.001(3)(H) provides “the governing board of a special district created by law”<sup>61</sup> is a governmental body. This office has concluded that a hospital district<sup>62</sup> and the Dallas Area Rapid Transit Authority<sup>63</sup> are special districts.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (emphasis omitted). See also *Blankenship v. Brazos Higher Educ. Auth., Inc.*, 975 S.W.2d 353, 360 (Tex. App.—Waco 1998, pet. denied).

<sup>56</sup> *City of Austin*, 794 S.W.2d at 83.

<sup>57</sup> *Fiske v. City of Dallas*, 220 S.W.3d 547, 551 (Tex. App.—Texarkana 2007, no pet).

<sup>58</sup> See *id.*; see also Tex. Att’y Gen. Op. No. GA-0361 (2005) at 5–7 (concluding that a county election commission is not a deliberative body with rulemaking or quasi-judicial powers).

<sup>59</sup> Tex. Att’y Gen. Op. No. DM-426 (1996) at 2.

<sup>60</sup> *Id.*; see also Tex. Att’y Gen. Op. Nos. JC-0327 (2001) at 2 (concluding that board of the Bryan-College Station Economic Development Corporation did not act in a quasi-judicial capacity or have rule-making power); H-467 (1974) at 3 (concluding that city library board, a department or agency of the city, did not act in a quasi-judicial capacity or have rule-making power).

<sup>61</sup> TEX. GOV’T CODE ANN. § 551.001(3)(H).

<sup>62</sup> See Tex. Att’y Gen. Op. No. H-238 (1974) at 2.

<sup>63</sup> See Tex. Att’y Gen. Op. No. JM-595 (1986) at 2.

*Sierra Club v. Austin Transportation Study Policy Advisory Committee*<sup>64</sup> is the only judicial decision that has addressed the meaning of “special district” in the Act. The court in *Sierra Club* decided that the Austin Transportation Study Policy Advisory Committee (ATSPAC) was a “special district” within the Act. The committee, a metropolitan planning organization that engaged in transportation planning under federal law, consisted of state, county, regional and municipal public officials. Its decisions as to transportation planning within a five-county area were used by federal agencies to determine funding for local highway projects. Although such committees did not exist when the Act was adopted in 1967, the court compared ATSPAC’s functions to those of a “governmental body” and concluded that the committee was the kind of body that the Act should govern.<sup>65</sup> The court relied on the following definition of “special district”:

[a] limited governmental structure created to bypass normal borrowing limitations, to insulate certain activities from traditional political influence, to allocate functions to entities reflecting particular expertise, to provide services in otherwise unincorporated areas, or to accomplish a primarily local benefit or improvement, e.g., parks and planning, mosquito control, sewage removal.<sup>66</sup>

Relying on the *Sierra Club* case, this office has concluded that a committee of judges meeting to participate in managing a community supervision and corrections department is a “special district” subject to the Act.<sup>67</sup> It also relied on *Sierra Club* to decide that the Act applied to the Border Health Institute, a consortium of public and private entities established to assist the work of health-related institutions in the Texas-Mexico border region.<sup>68</sup> It determined that other governmental entities, such as a county committee on aging created under the Non-Profit Corporation Act, were not “special districts.”<sup>69</sup>

#### D. Committees and Subcommittees of Governmental Bodies

Generally, meetings of less than a quorum of a governmental body are not subject to the Act.<sup>70</sup> However, when a governmental body appoints a committee that includes less than a quorum of the parent body and grants it authority to supervise or control public business or public policy, the committee may itself be a “governmental body” subject to the Act.<sup>71</sup> In *Willmann v. City of San*

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<sup>64</sup> *Sierra Club v. Austin Transp. Study Policy Advisory Comm.*, 746 S.W.2d 298, 301 (Tex. App.—Austin 1988, writ denied).

<sup>65</sup> *Id.* at 300–301.

<sup>66</sup> *Id.* at 301 (quoting BLACK’S LAW DICTIONARY 1253 (5th ed. 1986)).

<sup>67</sup> See Tex. Att’y Gen. Op. No. DM-395 (1996) at 3–4. *But see* Tex. Att’y Gen. Op. No. GA-0504 (2007) at 2 n.4 (observing that Texas Supreme Court Order No. 97-9141, 1997 WL 583726 (per curiam), had raised questions about the premises underlying this conclusion of Attorney General Opinion DM-395).

<sup>68</sup> See Tex. Att’y Gen. Op. No. GA-0280 (2004) at 8–9. See also Tex. Att’y Gen. Op. No. DM-426 (1996) at 4 (concluding that regional housing authority created under chapter 392 of the Local Government Code is special district within the Act).

<sup>69</sup> See Tex. Att’y Gen. Op. No. DM-7 (1991) at 2–3. See also Tex. Att’y Gen. Op. No. JC-0160 (1999) at 3 (concluding that *ad hoc* intergovernmental working group of public employees is not a “special district” within the Act).

<sup>70</sup> See *Hays Cnty. v. Hays Cnty. Water Planning P’ship*, 106 S.W.3d 349, 356 (Tex. App.—Austin 2003, no pet.); Tex. Att’y Gen. Op. No. JC-0407 (2001) at 9.

<sup>71</sup> Tex. Att’y Gen. Op. Nos. JC-0060 (1999) at 2, JC-0053 (1999) at 3; Tex. Att’y Gen. LO-97-058, at 2–5; LO-97-017, at 5.

*Antonio*,<sup>72</sup> the city council established a subcommittee consisting of less than a quorum of council members and charged it with recommending the appointment and reappointment of municipal judges.<sup>73</sup> The appellate court, reviewing the conclusion on summary judgment that the committee was not subject to the Act, stated that “a governmental body does not always insulate itself from . . . [the Act’s] application simply because less than a quorum of the parent body is present.”<sup>74</sup> Because the evidence indicated that the subcommittee actually made final decisions and the city council merely “rubber stamped” them, the appellate court reversed the summary judgment as to the Open Meetings Act issue.<sup>75</sup>

## E. Advisory Bodies

An advisory committee that does not control or supervise public business or policy is not subject to the Act,<sup>76</sup> even though its membership includes some members, but less than a quorum, of a governmental body.<sup>77</sup> For example, the multidisciplinary team established to review offenders’ records under the Commitment of Sexually Violent Predators Act was not subject to the Act.<sup>78</sup> The team made an initial assessment of certain offenders to determine whether they should be subject to further evaluation for civil commitment. Subsequent assessments by other persons determined whether commitment proceedings should be filed. Thus, the team lacked ultimate supervision or control over public business or policy.<sup>79</sup>

However, if a governmental body that has established an advisory committee routinely adopts or “rubber stamps” the advisory committee’s recommendations, the committee probably will be considered to be a governmental body subject to the Act.<sup>80</sup> Thus, the fact that a committee is called an advisory committee does not necessarily mean it is excepted from the Act.

The Legislature has, moreover, adopted statutes providing that particular advisory committees are subject to the Act, including a board or commission established by a municipality to assist it in developing a zoning plan or zoning regulations<sup>81</sup> and the nursing advisory committee established by the statewide health coordinating council.<sup>82</sup>

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<sup>72</sup> *Willmann v. City of San Antonio*, 123 S.W.3d 469 (Tex. App.—San Antonio 2003, pet. denied).

<sup>73</sup> *See id.* at 471–72.

<sup>74</sup> *Id.* at 478.

<sup>75</sup> *See id.* at 480. *See also Finlan v. City of Dallas*, 888 F. Supp. 779, 785 (N.D. Tex. 1995) (noting concern that danger exists that full council is merely a “rubber stamp” of committee); Tex. Att’y Gen. Op. Nos. JC-0060 (1999) at 3, H-823 (1976) at 2, H-438 (1974) at 3 (discussing “rubber stamping” of committee and subcommittee decisions).

<sup>76</sup> *See* Tex. Att’y Gen. Op. No. GA-0232 (2004) at 3–5 (concluding that student fee advisory committee established under Education Code section 54.5031 is not subject to the Act).

<sup>77</sup> Tex. Att’y Gen. Op. Nos. JM-331 (1985) at 3 (concluding that citizens advisory panel of Office of Public Utility Counsel, with no power to supervise or control public business, is not governmental body); H-994 (1977) at 3 (discussing fact question as to whether committee appointed to study process of choosing university president and make recommendations to Board of Regents is subject to the Act).

<sup>78</sup> *See Beasley v. Molett*, 95 S.W.3d 590, 606 (Tex. App.—Beaumont 2002, pet. denied).

<sup>79</sup> *Id.*

<sup>80</sup> Tex. Att’y Gen. Op. Nos. H-467 (1974) at 3–4, H-438 (1974) at 3.

<sup>81</sup> TEX. LOC. GOV’T CODE ANN. § 211.0075.

<sup>82</sup> TEX. HEALTH & SAFETY CODE ANN. § 104.0155(e).

## F. Public and Private Entities That Are Not Governmental Bodies

Nonprofit corporations established to carry out governmental business generally are not subject to the Act because they are not within the Act's definition of "governmental body."<sup>83</sup> A nonprofit corporation created under the Texas Nonprofit Corporation Act to provide services to a county's senior citizens was not a governmental body because it was not a governmental structure, and it had no power to supervise or control public business.<sup>84</sup>

However, the Act itself provides that certain nonprofit corporations are governmental bodies.<sup>85</sup> Other statutes provide that specific kinds of nonprofit corporations are subject to the Act, such as economic development corporations created under the Development Corporation Act of 1979<sup>86</sup> and the governing body of an open-enrollment charter school, which may be a private school or a nonprofit entity.<sup>87</sup> If a nonprofit corporation provides in its articles of incorporation or bylaws that its board of directors will conduct meetings in accord with the Act, then the board must do so.<sup>88</sup>

A private entity does not become a governmental body within the Act merely because it receives public funds.<sup>89</sup> A city chamber of commerce, a private entity, is not a governmental body within the Act although it receives public funds.<sup>90</sup> Nor is the Daughters of the Republic of Texas, a private corporation that acts as trustee for the Alamo on behalf of the state, a governmental body within the Act, despite its control of public funds.<sup>91</sup>

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<sup>83</sup> TEX. GOV'T CODE ANN. § 551.001(3). *Cf. id.* § 552.003(1)(A)(xi) (including certain nonprofit corporations in the definition of governmental body for the purposes of the Public Information Act).

<sup>84</sup> Tex. Att'y Gen. Op. No. DM-7 (1991) at 3.

<sup>85</sup> TEX. GOV'T CODE ANN. § 551.001(3)(J)–(K).

<sup>86</sup> TEX. LOC. GOV'T CODE ANN. § 501.072.

<sup>87</sup> TEX. EDUC. CODE ANN. § 12.1051.

<sup>88</sup> Tex. Att'y Gen. LO-96-146, at 5.

<sup>89</sup> Tex. Att'y Gen. LO-98-040, at 2.

<sup>90</sup> Tex. Att'y Gen. LO-93-055, at 3.

<sup>91</sup> Tex. Att'y Gen. LO-98-061, at 1–2.

## VI. Meetings

### A. Definitions

The Act applies to a governmental body, as defined by section 551.001(3), when it engages in a “regular, special, or called meeting.”<sup>92</sup> Informal meetings of a quorum of members of a governmental body are also subject to the Act.<sup>93</sup>

“Deliberation,” a key term for understanding the Act, is defined as follows:

“Deliberation” means a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.<sup>94</sup>

“Deliberation” and “discussion” are synonymous for purposes of the Act.<sup>95</sup> A “verbal exchange” clearly includes an exchange of spoken words,<sup>96</sup> but it may also include an exchange of written materials or electronic mail.<sup>97</sup>

The Act includes two definitions of “meeting.”<sup>98</sup> Section 551.001(4)(A) uses the term “deliberation” to define “meeting:”

(A) a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action . . . .<sup>99</sup>

### B. Deliberations among a Quorum of a Governmental Body or Between a Quorum and a Third Party

The following test has been applied to determine when a discussion among members of a statewide governmental entity is a “meeting” as defined by section 551.001(4)(A):

- (1) The body must be an entity within the executive or legislative department of the state.
- (2) The entity must be under the control of one or more elected or appointed members.

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<sup>92</sup> TEX. GOV'T CODE ANN. § 551.002.

<sup>93</sup> *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990) (considering meeting in restroom of two members of three person board); *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n*, 2 S.W.3d 459, 460–61 (Tex. App.—San Antonio 1999, pet. denied) (considering “informational gathering” of water district board with landowners in board member’s barn).

<sup>94</sup> TEX. GOV'T CODE ANN. § 551.001(2).

<sup>95</sup> *Bexar Medina Atascosa Water Dist.*, 2 S.W.3d at 461.

<sup>96</sup> *Gardner v. Herring*, 21 S.W.3d 767, 771 (Tex. App.—Amarillo 2000, no pet.).

<sup>97</sup> Tex. Att’y Gen. Op. Nos. JC-0307 (2000) at 5–6, DM-95 (1992) at 5.

<sup>98</sup> TEX. GOV'T CODE ANN. § 551.001(4)(A)–(B).

<sup>99</sup> *Id.* § 551.001(4)(A).

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- (3) The meeting must involve formal action or deliberation between a quorum of members.<sup>100</sup>
- (4) The discussion or action must involve public business or public policy.
- (5) The entity must have supervision or control over that public business or policy.<sup>101</sup>

Statewide governmental bodies that have supervision or control over public business or policy are subject to the Act; so are the local governmental bodies expressly named in the definition of “governmental body.”<sup>102</sup> In contrast, a group of public officers and employees in a county who met to share information about jail conditions did not supervise or control public business or public policy and thus was not subject to the Act.<sup>103</sup> A purely advisory body, which has no authority over public business or policy, is not subject to the Act,<sup>104</sup> unless a governmental body routinely adopts or “rubber stamps” the recommendations of the advisory board.<sup>105</sup> See Part V.E.

### C. A Gathering at Which a Quorum of Members Receives Information from or Provides Information to a Third Party

Section 551.001(4)(B) defines “meeting” as follows:

- (B) except as otherwise provided by this subdivision, a gathering:
  - (i) that is conducted by the governmental body or for which the governmental body is responsible;
  - (ii) at which a quorum of members of the governmental body is present;
  - (iii) that has been called by the governmental body; and
  - (iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

The term does not include the gathering of a quorum of a governmental body at a social function unrelated to the public

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<sup>100</sup> Deliberation between a quorum and a third party now satisfies this part of the test. See TEX. GOV'T CODE ANN. § 551.001(2).

<sup>101</sup> *Gulf Reg'l Educ. Television Affiliates v. Univ. of Houston*, 746 S.W.2d 803, 809 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (citing Attorney General Opinion H-772 (1976)). See also Tex. Att'y Gen. Op. No. GA-0232 (2004) at 3–5 (relying on quoted test to determine that student fee advisory committee established under Education Code section 54.5031 is not subject to the Act).

<sup>102</sup> See TEX. GOV'T CODE ANN. § 551.001(3)(B)–(K).

<sup>103</sup> See Tex. Att'y Gen. Op. No. GA-0504 (2007) at 3.

<sup>104</sup> Tex. Att'y Gen. Op. Nos. H-994 (1977) at 2 (concluding that committee appointed to study process of choosing university president and to make recommendations to board of regents likely is not subject to the Act); H-772 (1976) at 6 (concluding that meeting of group of employees, such as general faculty of university, is not subject to the Act); H-467 (1974) at 3 (concluding that city library board, which is advisory only, is not subject to the Act).

<sup>105</sup> Tex. Att'y Gen. Op. Nos. H-467 (1974) at 4, H-438 (1974) at 3–4.

## Meetings

business that is conducted by the body, or the attendance by a quorum of a governmental body at a regional, state or national convention or workshop, ceremonial event or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event or press conference.

The term includes a session of a governmental body.<sup>106</sup>

Section 551.001(4)(A) applies when a quorum of a governmental body engages in deliberations, either among the members of the quorum or between the quorum and a third party.<sup>107</sup> Section 551.001(4)(B) reaches gatherings of a quorum of a governmental body even when the members of the quorum do not participate in deliberations among themselves or with third parties.<sup>108</sup> Under the circumstances described by section 551.001(4)(B), the governmental body may be subject to the Act when it merely listens to a third party speak at a gathering the governmental body conducts or for which the governmental body is responsible.<sup>109</sup>

### D. Informal or Social Meetings

When a quorum of the members of a governmental body assembles in an informal setting, such as a social occasion, it will be subject to the requirements of the Act if the members engage in a verbal exchange about public business or policy. The Act's definition of a meeting expressly excludes gatherings of a "quorum of a governmental body at a social function unrelated to the public business that is conducted by the body."<sup>110</sup> The definition also excludes from its reach the attendance by a quorum at certain other events such as conventions, ceremonial events and press conferences.<sup>111</sup> In both instances, there is no "meeting" under the Act "if formal action is not taken and any discussion of public business is *incidental* to the social function, convention, workshop, ceremonial event, or press conference."<sup>112</sup>

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<sup>106</sup> TEX. GOV'T CODE ANN. § 551.001(4)(B).

<sup>107</sup> *Id.* § 551.001(4)(A).

<sup>108</sup> *Cf.* Tex. Att'y Gen. Op. Nos. JC-0248 (2000) at 2 (concluding that quorum of state agency board may testify at public hearing conducted by another agency); JC-0203 (2000) at 4 (concluding that quorum of members of standing committee of hospital district may attend public speech and comment on matters of hospital district business within supervision of committee).

<sup>109</sup> Tex. Att'y Gen. Op. No. JC-0169 (2000) at 3–4 (discussing Act's application when quorum of governmental body listens to members of the public in a session commonly known as a "public comment" session, "public forum" or "open mike" session).

<sup>110</sup> TEX. GOV'T CODE ANN. § 551.001(4)(B).

<sup>111</sup> *See id.*

<sup>112</sup> *Id.* (emphasis added).

## E. Meetings of Less than a Quorum in Attempt to Evade the Act: “Walking Quorums”

On occasion, a governmental body has tried to avoid complying with the Act by deliberating about public business without a quorum being physically present in one place and claiming that this was not a “meeting” within the Act. Conducting secret deliberations and voting over the telephone, when no statute authorized this, was one such method.<sup>113</sup>

A “walking quorum” is described in *Esperanza Peace and Justice Center v. City of San Antonio*.<sup>114</sup> The night before an open city council meeting was to be held, the mayor met with several city council members in the city manager’s office and spoke with others by telephone about the city budget. A decision was made that night and ratified at the public meeting the next day. The federal court stated that it would violate the spirit of the Act and render a result not intended by the Legislature “[i]f a governmental body may circumvent the Act’s requirements by ‘walking quorums’ or serial meetings of less than a quorum, and then ratify at a public meeting the votes already taken in private.”<sup>115</sup> The *Esperanza* court said that a meeting of less than a quorum is not subject to the Act “when there is no intent to avoid the Act’s requirements.”<sup>116</sup>

On the other hand, the Act would apply to meetings of groups of less than a quorum where a quorum or more of a body attempted to avoid the purposes of the Act by deliberately meeting in groups less than a quorum in closed sessions to discuss and/or deliberate public business, and then ratifying their actions as a quorum in a subsequent public meeting.<sup>117</sup>

The evidence showed that the city council intended to violate the Act. For example, the mayor met with council members constituting less than a quorum to reach a conclusion; the city manager kept track of the number of council members present so as to avoid a formal quorum; the consensus reached was memorialized in a memorandum containing the signatures of each council member; and the consensus was “manifested” when adopted at an open meeting.<sup>118</sup>

## F. New Technologies

In response to its charge to consider how advances in technology and increased use of social media affect the communications of governmental bodies, the Senate Committee on State Affairs prepared an Interim Report to the Eighty-second Legislature.<sup>119</sup> The Interim Report acknowledged the challenge that new technologies present in complying with the Act. It said:

The walking quorum concept combined with newer technologies such as microblogs (e.g., Twitter), social media websites (e.g., Facebook), text messaging and instant messaging, raise new issues for consideration by the Attorney General, the courts

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<sup>113</sup> See *Hitt v. Mabry*, 687 S.W.2d 791, 793, 796 (Tex. App.—San Antonio 1985, no writ).

<sup>114</sup> *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001).

<sup>115</sup> *Id.* at 476.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 476–77.

<sup>118</sup> See *id.*

<sup>119</sup> SENATE COMMITTEE ON STATE AFFAIRS, INTERIM REPORT to the 82D LEGISLATURE at 59 (Dec. 2010).



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and the Legislature. Neither the courts nor the Attorney General have determined the applicability of the [Act] to these new technologies; however, under the current interpretations of the Act, a quorum would exist if a majority of the governmental body discusses public business on a Facebook wall. The Facebook wall could be closed to the public, or open; however, absent prior notice of the “meeting” the [members of the governmental body] could be in violation of the [Act]. A similar situation could arise with Twitter where members can have public or private accounts.<sup>120</sup>

The Eighty-second Legislature considered various bills that would amend chapter 551 regarding such new technologies, but enacted none.

### G. Meetings Using Telephone, Videoconference and Internet

A governmental body may not conduct meetings subject to the Act by telephone or videoconference unless a statute expressly authorizes it to do so.<sup>121</sup> The Open Meetings Act authorizes governmental bodies to conduct meetings by telephone conference call under limited circumstances and subject to procedures that may include special requirements for notice, record-keeping and two-way communication between meeting locations.<sup>122</sup>

A governmental body may hold an open or closed meeting by telephone conference call if:

- (1) an emergency or public necessity exists within the meaning of Section 551.045 of [this chapter]; and
- (2) the convening at one location of a quorum of the governmental body is difficult or impossible; or
- (3) the meeting is held by an advisory board.<sup>123</sup>

The emergency telephone meeting is subject to the notice requirements applicable to other meetings held under the Act. The open portions of the meeting are required to be audible to the public at the location specified in the notice and must be tape-recorded. The provision also requires the location of the meeting to be set up to provide two-way communication during the entire conference call and the identity of each party to the conference call to be clearly stated prior to speaking.<sup>124</sup>

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<sup>120</sup> *See id.*

<sup>121</sup> *See generally Hitt*, 687 S.W.2d at 796; *Elizondo v. Williams*, 643 S.W.2d 765, 766–67 (Tex. App.—San Antonio 1982, no writ) (telephone meetings); Tex. Att’y Gen. Op. No. DM-207 (1993) at 3 (videoconference meeting). *But see Harris Cnty. Emergency Serv. Dist. No. 1 v. Harris Cnty. Emergency Corps*, 999 S.W.2d 163, 169 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (concluding that telephone discussion by fewer than a quorum of board members about placing items on the agenda, without evidence of intent, did not violate Act).

<sup>122</sup> TEX. GOV’T CODE ANN. §§ 551.121–.126 (authorizing meetings by telephone conference call under specified circumstances).

<sup>123</sup> TEX. GOV’T CODE ANN. § 551.125(b). *See* Tex. Att’y Gen. Op. No. GA-0379 (2005) at 2–3 (addressing Government Code section 551.125(b)(3)).

<sup>124</sup> TEX. GOV’T CODE ANN. § 551.125(b)–(f).

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Section 551.127 addresses meetings by videoconference call.<sup>125</sup> A meeting of a state governmental body or a governmental body that extends into three or more counties may be held by videoconference call if a majority of the quorum of the governmental body is physically present at one location of the meeting.<sup>126</sup> Meetings of other governmental bodies may be held by videoconference call only if a quorum of the governmental body is present at one meeting place.<sup>127</sup> The meetings are subject to special requirements regarding notice and visibility and audibility of open sessions to the public and two-way communication between locations of the meeting.<sup>128</sup> A governmental body may allow a member of the public to testify at a meeting from a remote location by videoconference call without regard to whether a member of the governmental body was participating in a meeting by videoconference call.<sup>129</sup>

A governmental body may consult with its attorney by telephone conference call, videoconference call or communications over the Internet, unless the attorney is an employee of the governmental body.<sup>130</sup> If the governmental body deducts employment taxes from the attorney's compensation, the attorney is an employee of the governmental body.<sup>131</sup> The restriction against remote communications with an employee attorney does not apply to the governing board of an institution of higher education or the Texas Higher Education Coordinating Board.<sup>132</sup>

Section 551.128 of the Act provides that “a governmental body may broadcast an open meeting over the Internet” and sets out the requirements for a broadcast.<sup>133</sup> The broadcast does not substitute for conducting an in-person meeting but provides an additional way of disseminating the meeting.

The Act authorizes the governing board of an institution of higher education, the Board for Lease of University Lands, or the Texas Higher Education Coordinating Board to meet by telephone conference call if the meeting is a special called meeting, immediate action is required, and it is difficult or impossible to convene a quorum at one location.<sup>134</sup> The Texas Board of Criminal Justice may hold an emergency meeting by telephone conference call,<sup>135</sup> and, at the call of its presiding officer, the Board of Pardons and Paroles may hold a hearing on clemency matters by telephone conference call.<sup>136</sup>

Statutes other than the Act authorize some governing bodies to meet by telephone conference call under limited circumstances. For example, if the joint chairs of the Legislative Budget Board are physically present at a meeting, and the meeting is held in Austin, any number of the other board

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* § 551.127(c).

<sup>127</sup> *Id.* § 551.127(b).

<sup>128</sup> *Id.* § 551.127(d)–(h).

<sup>129</sup> *Id.* § 551.127(k).

<sup>130</sup> *Id.* § 551.129(a), (d).

<sup>131</sup> *Id.* § 551.129(e).

<sup>132</sup> *Id.* § 551.129(f).

<sup>133</sup> *Id.* § 551.128(b)–(c).

<sup>134</sup> *Id.* § 551.121(c). *See* TEX. EDUC. CODE ANN. §§ 61.001–.9776 (Higher Education Coordinating Board), 66.61–.84 (Board for Lease of University Lands).

<sup>135</sup> TEX. GOV'T CODE ANN. § 551.123.

<sup>136</sup> *Id.* § 551.124.

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members may attend by use of telephone conference call, videoconference call, or other similar telecommunication device.<sup>137</sup>

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<sup>137</sup> *Id.* § 322.003(d). *See also* TEX. AGRIC. CODE ANN. § 62.0021 (State Seed and Plant Board); TEX. FIN. CODE ANN. § 11.106(c) (Finance Commission); TEX. GOV'T CODE ANN. § 501.139(b) (Correctional Managed Health Care Committee).

## VII. Notice Requirements

### A. Content

The Act requires written notice of all meetings. Section 551.041 of the Act provides:

A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body.<sup>138</sup>

A governmental body must give the public advance notice of the subjects it will consider in an open meeting or a closed executive session.<sup>139</sup> The Act does not require the notice of a closed meeting to cite the section or subsection numbers of provisions authorizing the closed meeting.<sup>140</sup> No judicial decision or attorney general opinion states that a governmental body must indicate in the notice whether a subject will be discussed in open or closed session,<sup>141</sup> but some governmental bodies do include this information. If the notices posted for a governmental body's meetings consistently distinguish between subjects for public deliberation and subjects for executive session deliberation, an abrupt departure from this practice may raise a question as to the adequacy of the notice.<sup>142</sup>

Governmental actions taken in violation of the notice requirements of the Act are voidable.<sup>143</sup> If some actions taken at a meeting do not violate the notice requirements while others do, only the actions in violation of the Act are voidable.<sup>144</sup> (For a discussion of the voidability of the governmental body's actions, refer to Part XI.C of this handbook.)

The notice must be sufficient to apprise the general public of the subjects to be considered during the meeting. In *City of San Antonio v. Fourth Court of Appeals*,<sup>145</sup> the Texas Supreme Court considered whether the following item in the notice posted for a city council meeting gave sufficient notice of the subject to be discussed:

An Ordinance determining the necessity for and authorizing the condemnation of certain property in County Blocks 4180, 4181, 4188, and 4297 in Southwest Bexar County for the construction of the Applewhite Water Supply Project.<sup>146</sup>

A property owner argued that this notice item violated the subject requirement of the statutory predecessor to section 551.041 because it did "not describe the condemnation ordinance, and in particular the land to be condemned by that ordinance, in sufficient detail" to notify an owner reading the description that the city was considering condemning the owner's land.<sup>147</sup> The Texas

<sup>138</sup> TEX. GOV'T CODE ANN. § 551.041.

<sup>139</sup> *Cox Enters., Inc. v. Bd. of Trs.*, 706 S.W.2d 956, 958 (Tex. 1986); *Porth v. Morgan*, 622 S.W.2d 470, 475–76 (Tex. App.—Tyler 1981, writ ref'd n.r.e.).

<sup>140</sup> See *Rettberg v. Tex. Dep't of Health*, 873 S.W.2d 408, 411–12 (Tex. App.—Austin 1994, no writ); Tex. Att'y Gen. Op. No. GA-0511 (2007) at 4.

<sup>141</sup> Tex. Att'y Gen. Op. No. JC-0057 (1999) at 5; Tex. Att'y Gen. LO-90-27, at 1.

<sup>142</sup> Tex. Att'y Gen. Op. No. JC-0057 (1999) at 5.

<sup>143</sup> TEX. GOV'T CODE ANN. § 551.141.

<sup>144</sup> *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 182–83 (Tex. App.—Corpus Christi 1990, writ denied).

<sup>145</sup> *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762 (Tex. 1991).

<sup>146</sup> *Id.* at 764.

<sup>147</sup> *Id.*

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Supreme Court rejected the argument that the notice be sufficiently detailed to notify specific owners that their tracts might be condemned. The court explained that the “Open Meetings Act is not a legislative scheme for service of process; it has no due process implications.”<sup>148</sup> Its purpose was to provide public access to and increase public knowledge of governmental decision making.<sup>149</sup>

The court held that the condemnation notice complied with the Act, because the notice apprised the public at large in general terms that the city would consider the condemnation of certain property in a specific area for purposes of the Applewhite project. The court also noted that the description would notify a landowner of property in the four listed blocks that the property might be condemned, even though it was insufficient to notify an owner that his or her tracts in particular were proposed for condemnation.<sup>150</sup>

In *City of San Antonio v. Fourth Court of Appeals*, the Texas Supreme Court reviewed its earlier decisions on notice.<sup>151</sup> In *Texas Turnpike Authority v. City of Fort Worth*,<sup>152</sup> the court had addressed the sufficiency of the following notice for a meeting at which the turnpike authority board adopted a resolution approving the expansion of a turnpike: “Consider request . . . to determine feasibility of a bond issue to expand and enlarge [the turnpike].”<sup>153</sup> Prior resolutions of the board had reflected the board’s intent to make the turnpike a free road once existing bonds were paid. The court found the notice sufficient, refuting the arguments that the notice should have included a copy of the proposed resolution, that the notice should have indicated the board’s proposed action was at variance with its prior intent, or that the notice should have stated all the consequences that might result from the proposed action.<sup>154</sup>

In *Lower Colorado River Authority v. City of San Marcos*,<sup>155</sup> the Texas Supreme Court found sufficient a Lower Colorado River Authority Board notice providing “ratification of the prior action of the Board taken on October 19, 1972, in response to changes in electric power rates for electric power sold within the boundaries of the City of San Marcos, Texas.”<sup>156</sup> “Although conceding that the notice was ‘not as clear as it might be,’” the Court held that it complied with the Act “because ‘it would alert a reader to the fact that some action would be considered with respect to charges for electric power sold in San Marcos.’”<sup>157</sup>

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<sup>148</sup> *Id.* at 765 (quoting *Acker*, 790 S.W.2d at 300); see *Rettberg*, 873 S.W.2d 408, 413 (holding that the Act does not entitle the executive secretary of a state agency to special notice of a meeting where his employment was terminated); *Stockdale v. Meno*, 867 S.W.2d 123, 125 (Tex. App.—Austin 1993, writ denied) (holding that Act does not entitle a teacher whose contract was terminated to more specific notice than notice that would inform public at large).

<sup>149</sup> *Fourth Court of Appeals*, 820 S.W.2d at 765.

<sup>150</sup> *Id.* at 765–66.

<sup>151</sup> *Id.* at 765.

<sup>152</sup> *Tex. Turnpike Auth. v. City of Fort Worth*, 554 S.W.2d 675 (Tex. 1977).

<sup>153</sup> *Id.* at 676.

<sup>154</sup> *Id.*; see also *Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc.*, 912 S.W.2d 271, 274 (Tex. App.—Austin 1995, writ dismissed) (holding that notice stating “Proposals for Decision and Other Actions—License and Other Cases” was sufficient to apprise public that Motor Vehicle Commission would consider proposals for decision in dealer-licensing cases). *But see Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 890 (Tex. App.—Austin 2010, pet. denied) (considering sufficiency of notice about development agreements and recognizing that a notice listing all possible consequences could overwhelm, rather than inform, the reader).

<sup>155</sup> *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975).

<sup>156</sup> *Id.* at 646.

<sup>157</sup> *Fourth Court of Appeals*, 820 S.W.2d at 765 (quoting *Lower Colorado River Auth.*, 523 S.W.2d at 646).

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The Texas Supreme Court noted that in *Cox Enterprises, Inc. v. Board of Trustees*<sup>158</sup> “we finally held a notice inadequate.”<sup>159</sup> In the *Cox Enterprises* case, the Court held insufficient the notice of a school board’s executive session that listed only general topics such as “litigation” and “personnel.”<sup>160</sup> One of the items considered at the closed session was the appointment of a new school superintendent. The court noted that the selection of a new superintendent was not in the same category as ordinary personnel matters, because it is a matter of special interest to the public; thus, the use of the term “personnel” was not sufficient to apprise the general public of the board’s proposed selection of the new superintendent. The court also noted that “litigation” would not sufficiently describe a major desegregation suit that had occupied the district’s time for a number of years.<sup>161</sup>

“If the facts as to the content of a notice are undisputed, the adequacy of the notice is a question of law.”<sup>162</sup> The courts examine the facts to determine whether a particular subject or personnel matter is sufficiently described or requires more specific treatment because it is of special interest to the community.<sup>163</sup> Consequently, counsel for the governing body should be consulted if any doubt exists concerning the specificity of notice required for a particular matter.

Generalized terms such as “old business,” “new business,” “regular or routine business,” and “other business” are not proper terms to give notice of a meeting because they do not inform the public of its subject matter.<sup>164</sup> The term “public comment,” however, provides sufficient notice of a “public comment” session, where the general public addresses the governmental body about its concerns and the governmental body does not comment or deliberate, except as authorized by section 551.042 of the Government Code.<sup>165</sup> “Public comment” will not provide adequate notice if the governmental body is, prior to the meeting, aware, or reasonably should have been aware, of specific topics to be

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<sup>158</sup> *Cox Enters. Inc. v. Bd. of Trs.*, 706 S.W.2d 956 (Tex. 1986).

<sup>159</sup> *Fourth Court of Appeals*, 820 S.W.2d at 765 (describing its opinion in *Cox Enterprises*).

<sup>160</sup> *Cox Enters. Inc.*, 706 S.W.2d at 959.

<sup>161</sup> *Id.*; see also *Mayer v. City of De Leon*, 922 S.W.2d 200, 203 (Tex. App.—Eastland 1996, writ denied) (determining that “personnel” was not sufficient notice of termination of police chief); *Stockdale*, 867 S.W.2d at 124–25 (holding that “discussion of personnel” and “proposed nonrenewal of teaching contract” provided sufficient notice of nonrenewal of band director’s contract); *Lone Star Greyhound Park, Inc. v. Tex. Racing Comm’n*, 863 S.W.2d 742, 747 (Tex. App.—Austin 1993, writ denied) (indicating that notice need not list “the particulars of litigation discussions,” which would defeat purpose of statutory predecessor to section 551.071 of the Government Code); *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 182 (Tex. App.—Corpus Christi 1990, writ denied) (holding that “employment of personnel” is insufficient to describe hiring of principals, but is sufficient for hiring school librarian, part-time counselor, band director, or school teacher); Tex. Att’y Gen. Op. No. H-1045 (1977) at 5 (holding “discussion of personnel changes” insufficient to describe selection of university system chancellor or university president).

<sup>162</sup> *Burks v. Yarbrough*, 157 S.W.3d 876, 883 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding [mand. denied]); see also *Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth.*, 96 S.W.3d 519, 529 (Tex. App.—Austin 2002, pet. denied).

<sup>163</sup> *River Rd. Neighborhood Ass’n v. S. Tex. Sports*, 720 S.W.2d 551, 557 (Tex. App.—San Antonio 1986, writ dismissed) (concluding that notice stating only “discussion” is insufficient to indicate board action is intended, given prior history of stating “discussion/action” in agenda when action is intended).

<sup>164</sup> Tex. Att’y Gen. Op. No. H-662 (1975) at 3.

<sup>165</sup> Tex. Att’y Gen. Op. No. JC-0169 (2000) at 4; see TEX. GOV’T CODE ANN. § 551.042 (providing that governmental body may respond to inquiry about subject not on posted notice by stating factual information, reciting existing policy or placing subject of inquiry on agenda of future meeting).

## Notice Requirements

raised.<sup>166</sup> When a governmental body is responsible for a presentation, it can easily give notice of its subject matter, but it usually cannot predict the subject matter of public comment sessions.<sup>167</sup> Thus, a meeting notice stating “Presentation by [County] Commissioner” did not provide adequate notice of the presentation, which covered the commissioner’s views on development and substantive policy issues of importance to the county.<sup>168</sup> The term “presentation” was vague; moreover, it was noticed for the “Proclamations & Presentations” portion of the meeting, which otherwise consisted of formalities.<sup>169</sup>

Attorney General Opinion GA-0668 (2008) had previously determined that notice such as “City Manager’s Report” was not adequate notice for items similar to those included in section 551.0415 and that the subject of a report by a member of the city staff or governing body must be included in the notice in a manner that informs a reader about the subjects to be addressed. Section 551.0415, modifying Attorney General Opinion GA-0668, authorizes a quorum of the governing body of a municipality or a county to receive reports about items of community interest during a meeting without having given notice of the subject of the report if no action is taken.<sup>170</sup> Section 551.0415 defines an “item of community interest” to include:

- (1) expressions of thanks, congratulations or condolence;
- (2) information regarding holiday schedules;
- (3) 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 purposes of this subdivision;
- (4) a reminder about an upcoming event organized or sponsored by the governing body;
- (5) 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
- (6) announcements involving an imminent threat to the public health and safety of people in the political subdivision that has arisen after the posting of the agenda.<sup>171</sup>

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<sup>166</sup> Tex. Att’y Gen. Op. No. JC-0169 (2000) at 4.

<sup>167</sup> *Id.*

<sup>168</sup> *Hays Cnty. Water Planning P’ship v. Hays Cnty.*, 41 S.W.3d 174, 180 (Tex. App.—Austin 2001, pet denied).

<sup>169</sup> *Id.* at 180 (citing Tex. Att’y Gen. Op. No. JC-0169 (2000)).

<sup>170</sup> TEX. GOV’T CODE ANN. § 551.0415(a).

<sup>171</sup> TEX. GOV’T CODE ANN. § 551.0415(b).

## **B. Time of Posting**

Notice must be posted for a minimum length of time before each meeting. Section 551.043(a) states the general time requirement as follows:

The notice of a meeting of a governmental body must be posted in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting, except as provided by Sections 551.044–551.046.<sup>172</sup>

Section 551.043(b) relates to posting notice on the Internet. Where the Act allows or requires a governmental body to post notice on the Internet, the following provisions apply to the posting:

- (1) the governmental body satisfies the requirement that the notice must be posted in a place readily accessible to the general public at all times by making a good-faith attempt to continuously post the notice on the Internet during the prescribed period;
- (2) the governmental body must still comply with any duty imposed by this chapter to physically post the notice at a particular location; and
- (3) if the governmental body makes a good-faith attempt to continuously post the notice on the Internet during the prescribed period, the notice physically posted at the location prescribed by this chapter must be readily accessible to the general public during normal business hours.<sup>173</sup>

Section 551.044, which excepts from the general rule governmental bodies with statewide jurisdiction, provides as follows:

- (a) The secretary of state must post notice on the Internet of a meeting of a state board, commission, department or officer having statewide jurisdiction for at least seven days before the day of the meeting. The secretary of state shall provide during regular office hours a computer terminal at a place convenient to the public in the office of the secretary of state that members of the public may use to view notices of meetings posted by the secretary of state.
- (b) Subsection (a) does not apply to:
  - (1) the Texas Department of Insurance, as regards proceedings and activities under Title 5, Labor Code, of the department, the commissioner of insurance, or the commissioner of workers' compensation; or
  - (2) the governing board of an institution of higher education.<sup>174</sup>

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<sup>172</sup> *Id.* § 551.043(a).

<sup>173</sup> *Id.* § 551.043(b).

<sup>174</sup> *Id.* § 551.044.



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Section 551.046 excepts a committee of the legislature from the general rule:

The notice of a legislative committee meeting shall be as provided by the rules of the house of representatives or of the senate.<sup>175</sup>

The interplay between the 72-hour rule applicable to local governmental bodies and the requirement that the posting be in a place convenient to the general public in a particular location, such as the city hall or the county courthouse, at one time created legal and practical difficulties for local entities, because the required locations are not usually accessible during the night or on weekends. Section 551.043(b) solves this problem in part, providing that “if the governmental body makes a good faith attempt to continuously post the notice on the Internet during the prescribed period, the notice physically posted at the location prescribed by this chapter must be readily accessible to the general public *during normal business hours*.”<sup>176</sup>

The Texas Supreme Court had previously addressed this matter in *City of San Antonio v. Fourth Court of Appeals*.<sup>177</sup> The city had posted notice of its February 15, 1990, meeting in two different locations. One notice was posted on a bulletin board inside the city hall, and the other notice was posted on a kiosk outside the main entrance to the city hall. This was done because the city hall was locked at night, thereby preventing continuous access during the 72-hour period to the notice posted inside. The court held that the double posting satisfied the requirements of the statutory predecessors to sections 551.043 and 551.050.<sup>178</sup>

State agencies have generally had little difficulty providing seven days notice of their meetings, but difficulties have arisen when a quorum of a state agency’s governing body wished to meet with a legislative committee.<sup>179</sup> If one or more of the state agency board members were to testify or answer questions, the agency itself would have held a meeting subject to the notice, record-keeping and openness requirements of the Act.<sup>180</sup> Legislative committees, however, post notices “as provided by the rules of the house of representatives or of the senate,”<sup>181</sup> and these generally require shorter time periods than the seven-day notice required for state agencies.<sup>182</sup> Thus, a state agency could find it impossible to give seven days notice of a quorum’s attendance at a legislative hearing concerning its legislation or budget. The Legislature dealt with this difference in notice requirements by adopting section 551.0035 of the Government Code, which provides as follows:

- (a) This section applies only to the attendance by a quorum of a governmental body at a meeting of a committee or agency of the legislature. This section does not apply to attendance at the meeting by members of the legislative committee or agency holding the meeting.

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<sup>175</sup> *Id.* § 551.046.

<sup>176</sup> *Id.* § 551.043(b)(3) (emphasis added).

<sup>177</sup> *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762 (Tex. 1991).

<sup>178</sup> *Id.* at 768.

<sup>179</sup> Tex. Att’y Gen. Op. No. JC-0308 (2000) at 2.

<sup>180</sup> *Id.* at 2; *see also* Tex. Att’y Gen. Op. No. JC-0248 (2000) at 2.

<sup>181</sup> TEX. GOV’T CODE ANN. § 551.046.

<sup>182</sup> Tex. Att’y Gen. Op. No. JC-0308 (2000) at 2.

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- (b) The attendance by a quorum of a governmental body at a meeting of a committee or agency of the legislature is not considered to be a meeting of that governmental body if the deliberations at the meeting by the members of that governmental body consist only of publicly testifying at the meeting, publicly commenting at the meeting, and publicly responding at the meeting to a question asked by a member of the legislative committee or agency.<sup>183</sup>

### **C. Place of Posting**

The Act expressly states where notice shall be posted. The posting requirements vary depending on the governing body posting the notice. Sections 551.048 through 551.055 address the posting requirements of state entities, cities and counties, school districts, and other districts and political subdivisions. These provisions are quite detailed and, therefore, are set out here in full:

#### **§ 551.048. State Governmental Body: Notice to Secretary of State; Place of Posting Notice**

- (a) A state governmental body shall provide notice of each meeting to the secretary of state.<sup>184</sup>
- (b) The secretary of state shall post the notice on the Internet. The secretary of state shall provide during regular office hours a computer terminal at a place convenient to the public in the office of the secretary of state that members of the public may use to view the notice.

#### **§ 551.049. County Governmental Body: Place of Posting Notice**

A county governmental body shall post notice of each meeting on a bulletin board at a place convenient to the public in the county courthouse.

#### **§ 551.050. Municipal Governmental Body: Place of Posting Notice**

- (a) In this section, “electronic bulletin board” means an electronic communication system that includes a perpetually illuminated screen on which the governmental body can post messages or notices viewable without manipulation by the public.
- (b) A municipal governmental body shall post notice of each meeting on a physical or electronic bulletin board at a place convenient to the public in the city hall.

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<sup>183</sup> TEX. GOV'T CODE ANN. § 551.0035.

<sup>184</sup> Notices of open meetings filed in the office of the secretary of state as provided by law are published in the Texas Register. *Id.* § 2002.011(3). *See* 1 TEX. ADMIN. CODE § 91.21 (Tex. Sec’y of State, How to File an Open Meeting Notice).

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**§ 551.051. School District: Place of Posting Notice**

A school district shall post notice of each meeting on a bulletin board at a place convenient to the public in the central administrative office of the district.

**§ 551.052. School District: Special Notice to News Media**

- (a) A school district shall provide special notice of each meeting to any news media that has:
  - (1) requested special notice; and
  - (2) agreed to reimburse the district for the cost of providing the special notice.
- (b) The notice shall be by telephone, facsimile transmission, or electronic mail.

**§ 551.053. District or Political Subdivision Extending Into Four or More Counties: Notice to Public, Secretary of State, and County Clerk; Place of Posting Notice**

- (a) The governing body of a water district or other district or political subdivision that extends into four or more counties shall:
  - (1) post notice of each meeting at a place convenient to the public in the administrative office of the district or political subdivision;
  - (2) provide notice of each meeting to the secretary of state; and
  - (3) provide notice of each meeting to the county clerk of the county in which the administrative office of the district or political subdivision is located.
- (b) The secretary of state shall post the notice provided under Subsection (a)(2) on the Internet. The secretary of state shall provide during regular office hours a computer terminal at a place convenient to the public in the office of the secretary of state that members of the public may use to view the notice.
- (c) A county clerk shall post the notice provided under Subsection (a)(3) on a bulletin board at a place convenient to the public in the county courthouse.

**§ 551.054. District or Political Subdivision Extending Into Fewer Than Four Counties: Notice to Public and County Clerks; Place of Posting Notice**

- (a) The governing body of a water district or other district or political subdivision that extends into fewer than four counties shall:

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- (1) post notice of each meeting at a place convenient to the public in the administrative office of the district or political subdivision; and
  - (2) provide notice of each meeting to the county clerk of each county in which the district or political subdivision is located.
- (b) A county clerk shall post the notice provided under Subsection (a)(2) on a bulletin board at a place convenient to the public in the county courthouse.

### § 551.055. Institution of Higher Education

In addition to providing any other notice required by this subchapter, the governing board of a single institution of higher education:

- (1) shall post notice of each meeting at the county courthouse of the county in which the meeting will be held;
- (2) shall publish notice of a meeting in a student newspaper of the institution if an issue of the newspaper is published between the time of the posting and the time of the meeting; and
- (3) may post notice of a meeting at another place convenient to the public.

Posting notice is mandatory and actions taken at a meeting for which notice was posted incorrectly will be voidable.<sup>185</sup> In *Sierra Club v. Austin Transportation Study Policy Advisory Committee*, the court held that the committee was a special district covering four or more counties for purposes of the Act and, as such, was required to submit notice to the secretary of state pursuant to the statutory predecessor to section 551.053.<sup>186</sup> Thus, a governmental body that does not clearly fall within one of the categories covered by sections 551.048 through 551.055 should consider satisfying all potentially applicable posting requirements.<sup>187</sup>

### § 551.056. Additional Posting Requirements for Certain Municipalities, Counties, School Districts, Junior College Districts, and Development Corporations

Section 551.056 requires certain governmental bodies and economic development corporations to post notice on their Internet websites, in addition to other postings required by the Act. This provision applies to the following entities, if the entity maintains an Internet website or has a website maintained for it:

- (1) a municipality;
- (2) a county;
- (3) a school district;

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<sup>185</sup> TEX. GOV'T CODE ANN. § 551.141; *See Smith Cnty. v. Thornton*, 726 S.W.2d 2, 3 (Tex. 1986).

<sup>186</sup> *Sierra Club v. Austin Transp. Policy Advisory Comm.*, 746 S.W.2d 298, 301 (Tex. App.—Austin 1988, writ denied).

<sup>187</sup> *See* Tex. Att'y Gen. Op. No. JM-120 (1983) at 3 (concluding that industrial development corporation must post notice in same manner and location as political subdivision on whose behalf it was created).

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- (4) the governing body of a junior college or junior college district, including a college or district that has changed its name in accordance with Chapter 130, Education Code; and
- (5) a development corporation organized under the Development Corporation Act (Subtitle C1, Title 12, Local Government Code).
- (6) a regional mobility authority included within the meaning of an “authority” as defined by Section 370.003, Transportation Code.<sup>188</sup>

If a covered municipality’s population is 48,000 or more and a county’s population is 65,000 or more, it must also post the agenda for the meeting on its website.<sup>189</sup> Section 551.056 also provides that the validity of a posted notice made in good faith to comply with the Act is not affected by a failure to comply with its requirements due to a technical problem beyond the control of the entity.<sup>190</sup>

### D. Emergency Meetings: Providing and Supplementing Notice

Special rules allow for posting notice of emergency meetings and for supplementing a posted notice with emergency items. These rules affect the timing and content of the notice but not its physical location. Section 551.045 provides:

- (a) In an emergency or when there is an urgent public necessity, the notice of a meeting or the supplemental notice of a subject added as an item to the agenda for a meeting for which notice has been posted in accordance with this subchapter is sufficient if it is posted for at least two hours before the meeting is convened.
- (b) An emergency or an urgent public necessity exists only if immediate action is required of a governmental body because of:
  - (1) an imminent threat to public health and safety; or
  - (2) a reasonably unforeseeable situation.
- (c) The governmental body shall clearly identify the emergency or urgent public necessity in the notice or supplemental notice under this section.
- (d) A person who is designated or authorized to post notice of a meeting by a governmental body under this subchapter shall post the notice taking at face value the governmental body’s stated reason for the emergency or urgent public necessity.

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<sup>188</sup> TEX. GOV’T CODE ANN. § 551.056(b).

<sup>189</sup> See *id.* § 551.056(c)(1)–(2). See also *id.* § 551.056(c)(3)–(6) (providing that certain other covered entities must post agenda on Internet).

<sup>190</sup> *Id.* § 551.056(d); see also *Argyle Indep. Sch. Dist. v. Wolf*, 234 S.W.3d 229, 248–49 (Tex. App.—Fort Worth 2007, no. pet) (determining there was no evidence of bad faith on the part of the school district). Cf. *Terrell v. Pampa Indep. Sch. Dist.*, 345 S.W.3d 641, 644 (Tex. App.—Amarillo 2011, pet. filed) (finding a material fact issue in summary judgment proceedings about whether ISD “actually attempted to post the notices and, therefore, met the good faith exception to the requirement to concurrently post notices”).

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- (e) For purposes of Subsection (b)(2), the sudden relocation of a large number of residents from the area of a declared disaster to a governmental body's jurisdiction is considered a reasonably unforeseeable situation for a reasonable period immediately following the relocation. Notice of an emergency meeting or supplemental notice of an emergency item added to the agenda of a meeting to address a situation described by this subsection must be given to members of the news media as provided by Section 551.047 not later than one hour before the meeting.<sup>191</sup>

The public notice of an emergency meeting must be posted at least two hours before the meeting is scheduled to begin. A governmental body may decide to consider an emergency item during a previously scheduled meeting instead of calling a new emergency meeting. The governmental body must post notice of the subject added as an item to the agenda at least two hours before the meeting begins.<sup>192</sup>

In addition to posting the public notice of an emergency meeting or supplementing a notice with an emergency item, the governmental body must give special notice of the emergency meeting or emergency item to members of the news media who have previously (1) filed a request with the governmental body, and (2) agreed to reimburse the governmental body for providing the special notice.<sup>193</sup> The notice to members of the news media is to be given by telephone, facsimile transmission or electronic mail.<sup>194</sup>

Because section 551.045 provides for two-hour notice only for emergency meetings or for adding emergency items to the agenda, a governmental body adding a *non*emergency item to its meeting agenda must satisfy the general notice period of section 551.043 or section 551.044, as applicable, regarding the subject of that item.

The public notice of an emergency meeting or an emergency item must “clearly identify” the emergency or urgent public necessity for calling the meeting or for adding the item to the agenda of a previously scheduled meeting.<sup>195</sup> The Act defines “emergency” for purposes of emergency meetings and emergency items.<sup>196</sup>

A governmental body's determination that an emergency exists is subject to judicial review.<sup>197</sup> The existence of an emergency depends on the facts in a given case.<sup>198</sup>

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<sup>191</sup> TEX. GOV'T CODE ANN. § 551.045.

<sup>192</sup> *Id.* § 551.045(a).

<sup>193</sup> *Id.* § 551.047(b).

<sup>194</sup> *Id.* § 551.047(c).

<sup>195</sup> *Id.* § 551.045(c).

<sup>196</sup> *Id.* § 551.045(b); *see River Rd. Neighborhood Ass'n v. S. Tex. Sports*, 720 S.W.2d 551, 557 (Tex. App.—San Antonio 1986, writ dismissed) (construing “emergency” consistently with definition later adopted by Legislature).

<sup>197</sup> *See River Rd. Neighborhood Ass'n*, 720 S.W.2d at 557–58 (concluding that immediate need for action was brought about by board's decisions not to act at previous meetings and was not due to an emergency); *Garcia v. City of Kingsville*, 641 S.W.2d 339, 341–42 (Tex. App.—Corpus Christi 1982, no writ) (concluding that dismissal of city manager was not a matter of urgent public necessity); *see also Markowski v. City of Marlin*, 940 S.W.2d 720, 724 (Tex. App.—Waco 1997, writ denied) (concluding that city's receipt of lawsuit filed against it by fire captain and fire chief was emergency); *Piazza v. City of Granger*, 909 S.W.2d 529, 533 (Tex. App.—Austin 1995, no writ) (concluding that notice stating city council's “lack of confidence” in police officer did not identify emergency).

### **E. Recess in a Meeting: Postponement in Case of a Catastrophe**

Under section 551.0411, a governmental body that recesses an open meeting to the following regular business day need not post notice of the continued meeting if the action is taken in good faith and not to circumvent the Act. If a meeting continued to the following regular business day is then continued to another day, the governmental body must give notice of the meeting's continuance to the other day.<sup>199</sup>

Section 551.0411 also provides for a catastrophe that prevents the governmental body from convening an open meeting that was properly posted under section 551.041. The governmental body may convene in a convenient location within 72 hours pursuant to section 551.045 if the action is taken in good faith and not to circumvent the Act. However, if the governmental body is unable to convene the meeting within 72 hours, it may subsequently convene the meeting only if it gives written notice of the meeting.

A "catastrophe" is defined as "a condition or occurrence that interferes physically with the ability of a governmental body to conduct a meeting" including:

- (1) fire, flood, earthquake, hurricane, tornado or wind, rain or snow storm;
- (2) power failure, transportation failure or interruption of communication facilities;
- (3) epidemic; or
- (4) riot, civil disturbance, enemy attack or other actual or threatened act of lawlessness or violence.<sup>200</sup>

### **F. County Clerk May Charge a Fee for Posting Notice**

A county clerk may charge a reasonable fee to a district or political subdivision to post an Open Meetings Act notice.<sup>201</sup>

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<sup>198</sup> *Common Cause v. Metro. Transit Auth.*, 666 S.W.2d 610, 613 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see generally* Tex. Att'y Gen. Op. No. JC-0406 (2001) at 5–6.

<sup>199</sup> *See* TEX. GOV'T CODE ANN. § 551.0411(a). Before section 551.0411 was adopted, the court in *Rivera v. City of Laredo*, held that a meeting could not be continued to any day other than the immediately following day without reposting notice. *See Rivera v. City of Laredo*, 948 S.W.2d 787, 793 (Tex. App.—San Antonio 1997, writ denied).

<sup>200</sup> TEX. GOV'T CODE ANN. § 551.0411(c).

<sup>201</sup> *See* TEX. LOC. GOV'T CODE ANN. § 118.011(c); Tex. Att'y Gen. Op. Nos. GA-0152 (2004) at 3, M-496 (1969) at 3.

## VIII. Open Sessions

### A. Convening the Meeting

A meeting may not be convened unless a quorum of the governmental body is present in the meeting room.<sup>202</sup> This requirement applies even if the governmental body plans to go into an executive session immediately after convening.<sup>203</sup> The public is entitled to know which members are present for the executive session and whether there is a quorum.<sup>204</sup>

### B. Location of the Meeting

The Act requires a meeting of a governmental body to be held in a location accessible to the public.<sup>205</sup> It thus precludes a governmental body from meeting in an inaccessible location. The Board of Regents of a state university system could not meet in Mexico, regardless of whether the board broadcast the meeting by videoconferencing technology to areas in Texas where component institutions were located.<sup>206</sup> Nor could an entity subject to the Act meet in an underwriter's office in another state.<sup>207</sup> In addition, pursuant to the Americans with Disabilities Act, a meeting room in which a public meeting is held must be physically accessible to individuals with disabilities. *See infra* Part XII.C of this handbook.

### C. Rights of the Public

A meeting that is “open to the public” under the Act is one that the public is permitted to attend.<sup>208</sup> The Act does not entitle the public to choose the items to be discussed or to speak about items on the agenda.<sup>209</sup> A governmental body may, however, give members of the public an opportunity to speak at a public meeting.<sup>210</sup> If it does so, it may set reasonable limits on the number, frequency and length of presentations before it, but it may not unfairly discriminate among speakers for or against a particular point of view.<sup>211</sup>

Many governmental bodies conduct “public comment,” “public forum” or “open mike” sessions at which members of the public may address comments on any subject to the governmental body.<sup>212</sup> A

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<sup>202</sup> TEX. GOV'T CODE ANN. § 551.001(2), (4) (defining “deliberation” and “meeting”); *Cox Enters., Inc. v. Bd. of Trs.*, 706 S.W.2d 956, 959 (Tex. 1986).

<sup>203</sup> TEX. GOV'T CODE ANN. § 551.101; *see Martinez v. State*, 879 S.W.2d 54, 56 (Tex. Crim. App. 1994); *Cox Enters., Inc.*, 706 S.W.2d at 959.

<sup>204</sup> *Martinez*, 879 S.W.2d at 56; *Cox Enters., Inc.*, 706 S.W.2d at 959.

<sup>205</sup> Other statutes may specify the location of a governmental body's meeting. *See* Act of May 17, 2011, 82d Leg., R.S., ch. 473, §§ 1–2, 2011 Tex. Sess. Law Serv. 1223, 1223–24 (to be codified at TEX. LOC. GOV'T CODE ANN. §§ 504.054, .055.) (specifying alternative meeting locations for a board of an economic development corporation organized under the Development Corporation Act (subtitle C1, title 12, Local Government Code)).

<sup>206</sup> Tex. Att'y Gen. Op. No. JC-0487 (2002) at 7.

<sup>207</sup> Tex. Att'y Gen. Op. No. JC-0053 (1999) at 5–6 (concluding that state agency committee that is subject to Act may not meet in an inaccessible location such as an underwriter's office in another state).

<sup>208</sup> Tex. Att'y Gen. Op. No. M-220 (1968) at 5.

<sup>209</sup> *See Charlestown Homeowners Ass'n, Inc. v. LaCoke*, 507 S.W.2d 876, 883 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); Tex. Att'y Gen. Op. Nos. JC-0169 (2000) at 1, H-188 (1973) at 2.

<sup>210</sup> Tex. Att'y Gen. Op. Nos. JC-0169 (2000) at 1, H-188 (1973) at 2.

<sup>211</sup> Tex. Att'y Gen. LO-96-111, at 1.

<sup>212</sup> Tex. Att'y Gen. Op. No. JC-0169 (2000) at 4.



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public comment session is a meeting as defined by section 551.001(4)(B) of the Government Code, because the members of the governmental body “receive information from . . . or receive questions from [a] third person.”<sup>213</sup> Accordingly, the governmental body must give notice of a public comment session. *See supra* Part VII.A.

The Act permits a member of the public or a member of the governmental body to raise a subject that has not been included in the notice for the meeting, but any discussion of the subject must be limited to a proposal to place the subject on the agenda for a future meeting. Section 551.042 of the Act provides for this procedure:

- (a) If, at a meeting of a governmental body, a member of the public or of the governmental body inquires about a subject for which notice has not been given as required by this subchapter, the notice provisions of this subchapter do not apply to:
  - (1) a statement of specific factual information given in response to the inquiry; or
  - (2) a recitation of existing policy in response to the inquiry.
- (b) Any deliberation of or decision about the subject of the inquiry shall be limited to a proposal to place the subject on the agenda for a subsequent meeting.<sup>214</sup>

Another section of the Act permits members of the public to record open meetings with a tape recorder or a video camera:

- (a) A person in attendance may record all or any part of an open meeting of a governmental body by means of a tape recorder, video camera, or other means of aural or visual reproduction.
- (b) A governmental body may adopt reasonable rules to maintain order at a meeting, including rules relating to:
  - (1) the location of recording equipment; and
  - (2) the manner in which the recording is conducted.
- (c) A rule adopted under Subsection (b) may not prevent or unreasonably impair a person from exercising a right granted under Subsection (a).<sup>215</sup>

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<sup>213</sup> TEX. GOV'T CODE ANN. § 551.001(4)(B)(iv); *see* Tex. Att'y Gen. Op. No. JC-0169 (2000) at 3.

<sup>214</sup> TEX. GOV'T CODE ANN. § 551.042.

<sup>215</sup> *Id.* § 551.023.

## D. Final Actions

Section 551.102 of the Act provides as follows:

A final action, decision, or vote on a matter deliberated in a closed meeting under this chapter may only be made in an open meeting that is held in compliance with the notice provisions of this chapter.<sup>216</sup>

A governmental body's final action, decision or vote on any matter within its jurisdiction may be made only in an open session held in compliance with the notice requirements of the Act. The governmental body may not vote in an open session by secret written ballot.<sup>217</sup> Furthermore, a governmental body may not take action by written agreement without a meeting.<sup>218</sup>

A city governing body may delegate to others the authority to make decisions affecting the transaction of city business if it does so in a meeting by adopting a resolution or ordinance by majority vote.<sup>219</sup> When six cities delegated to a consultant corporation the right to investigate and pursue claims against a gas company, including the right to hire counsel for those purposes, the attorney hired by the consultant could opt out of a class action on behalf of each city, and the cities did not need to hold an open meeting to approve the attorney's decision to opt out in another instance.<sup>220</sup> When the city attorney had authority under the city charter to bring a lawsuit and did not need city council approval to appeal, a discussion of the appeal by the city manager, a quorum of council members and the city attorney did not involve a final action.<sup>221</sup>

Similarly, the fact that the State Board of Insurance discussed and approved a reduction in force at meetings that violated the Act did not affect the validity of the reduction, where the commissioner of insurance had independent authority to terminate employees.<sup>222</sup> The board's superfluous approval of the firings was irrelevant to their validity.<sup>223</sup>

In the usual case, when the authority to make a decision or to take an action is vested in the governmental body, the governmental body must act in an open session. In *Toyah Independent*

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<sup>216</sup> *Id.* § 551.102.

<sup>217</sup> Tex. Att'y Gen. Op. No. H-1163 (1978) at 2.

<sup>218</sup> *Webster v. Tex. & Pac. Motor Transp. Co.*, 166 S.W.2d 75, 77 (Tex. 1942); Tex. Att'y Gen. Op. Nos. GA-0264 (2004) at 6–7, JM-120 (1983) at 4; *see also* Tex. Att'y Gen. Op. No. DM-95 (1992) at 5–6 (considering letter concerning matter of governmental business or policy that was circulated and signed by individual members of governmental body outside of open meeting).

<sup>219</sup> *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 757 (Tex. 2003) (quoting from *Cent. Power & Light Co. v. City of San Juan*, 962 S.W.2d 602, 613 (Tex. App.—Corpus Christi 1998, pet. dismissed w.o.j.)).

<sup>220</sup> *See City of San Benito*, 109 S.W.3d at 758.

<sup>221</sup> *See City of San Antonio v. Aguilar*, 670 S.W.2d 681, 685–86 (Tex. App.—San Antonio 1984, writ dismissed); *see also* Tex. Att'y Gen. Op. No. MW-32 (1979) at 1–2 (concluding that procedure whereby executive director notified board of his intention to request attorney general to bring lawsuit and board member could request in writing that matter be placed on agenda of next meeting did not violate the Act).

<sup>222</sup> *Spiller v. Tex. Dep't of Ins.*, 949 S.W.2d 548, 551 (Tex. App.—Austin 1997, writ denied); *see also Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 698 (Tex. App.—San Antonio 1998, pet. denied) (concluding that hospital board's alleged violation of Act did not render termination void where hospital administrator had independent power to hire and fire).

<sup>223</sup> *Spiller*, 949 S.W.2d at 551.

*School District v. Pecos-Barstow Independent School District*,<sup>224</sup> for example, the Toyah school board sued to enjoin enforcement of an annexation order approved by the board of trustees of Reeves County in a closed meeting.<sup>225</sup> The board of trustees of Reeves County had excluded all members of the public from the meeting room before voting in favor of an order annexing the Toyah district to a third school district.<sup>226</sup> The court determined that the board of trustees' action violated the Act and held that the order of annexation was ineffective.<sup>227</sup> The *Toyah Independent School District* court thus developed the remedy of judicial invalidation of actions taken by a governmental body in violation of the Act. This remedy is now codified in section 551.141 of the Act. The voidability of a governmental body's actions taken in violation of the Act is discussed in Part XI.C of this handbook.

Furthermore, the actual vote or decision on the ultimate issue confronting the governmental body must be made in an open session.<sup>228</sup> In *Board of Trustees v. Cox Enterprises, Inc.*,<sup>229</sup> the court of appeals held that a school board violated the statutory predecessor to section 551.102 when it selected a board member to serve as board president. In an executive session, the board took a written vote on which of two board members would serve as president, and the winner of the vote was announced. The board then returned to the open session and voted unanimously for the individual who won the vote in the executive session.<sup>230</sup> Although the board argued that the written vote in the executive session was "simply a straw vote" that did not violate the Act, the court of appeals found that "there is sufficient evidence to support the trial court's conclusion that the actual resolution of the issue was made in the executive session contrary to the provisions of" the statutory predecessor to section 551.102.<sup>231</sup> Thus, as *Cox Enterprises* makes clear, a governmental body should not take a "straw vote" or otherwise attempt to count votes in an executive session.

On the other hand, members of a governmental body deliberating in a permissible executive session may express their opinions or indicate how they will vote in the open session. The court in *Cox Enterprises* stated: "A contrary holding would debilitate the role of the deliberations which are permitted in the executive sessions and would unreasonably limit the rights of expression and advocacy."<sup>232</sup>

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<sup>224</sup> *Toyah Indep. Sch. Dist. v. Pecos-Barstow Indep. Sch. Dist.*, 466 S.W.2d 377 (Tex. Civ. App.—San Antonio 1971, no writ).

<sup>225</sup> *Id.* at 377.

<sup>226</sup> *Id.* at 378 n.1.

<sup>227</sup> *Id.* at 380; *see also City of Stephenville v. Tex. Parks & Wildlife Dep't*, 940 S.W.2d 667, 674–75 (Tex. App.—Austin 1996, writ denied) (noting that Water Commission's decision to hear some complaints raised on motion for rehearing and to exclude others should have been taken in open session held in compliance with Act); *Gulf Reg'l Educ. Television Affiliates v. Univ. of Houston*, 746 S.W.2d 803, 809 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (concluding that governmental body's decision to hire attorney to bring lawsuit was invalid because it was not made in open meeting); Tex. Att'y Gen. Op. No. H-1198 (1978) at 2 (concluding that Act does not permit governmental body to enter into agreement and authorize expenditure of funds in closed session).

<sup>228</sup> TEX. GOV'T CODE ANN. § 551.102; *see also Nash v. Civil Serv. Comm'n*, 864 S.W.2d 163, 166 (Tex. App.—Tyler 1993, no writ).

<sup>229</sup> *Bd. of Trs. v. Cox Enters., Inc.*, 679 S.W.2d 86, 90 (Tex. App.—Texarkana 1984), *aff'd in part, rev'd in part on other grounds*, 706 S.W.2d 956 (Tex. 1986).

<sup>230</sup> *Id.* at 90.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 89 (footnote omitted); *see also Nash*, 864 S.W.2d at 166 (stating that Act does not prohibit board from reaching tentative conclusion in executive session and announcing it in open session where members have opportunity to comment and cast dissenting vote); *City of Dallas v. Parker*, 737 S.W.2d 845, 850 (Tex. App.—

## *Open Sessions*

In certain circumstances, a governmental body may make a “decision” or take an “action” in an executive session that will not be considered a “final action, decision, or vote” that must be taken in an open session. The court in *Cox Enterprises* held that the school board did not take a “final action” when it discussed making public the names and qualifications of the candidates for superintendent or when it discussed selling surplus property and instructed the administration to solicit bids. The court concluded that the board was simply announcing that the law would be followed rather than taking any action in deciding to make the names and qualifications of the candidates public. The court also noted that further action would be required before the board could decide to sell the surplus property; therefore, the instruction to solicit bids was not a “final action.”<sup>233</sup>

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Dallas 1987, no writ) (holding that proceedings complied with Act when “conditional” vote was taken during recess, result was announced in open session, and vote of each member was apparent).

<sup>233</sup> *Bd. of Trs.*, 679 S.W.2d at 89–90.

## IX. Closed Sessions

### A. Overview of Subchapter D of the Open Meetings Act

The Act provides certain narrowly drawn exceptions to the requirement that meetings of a governmental body be open to the public.<sup>234</sup> These exceptions are found in sections 551.071 through 551.088 and are discussed in detail in Part C of this section of the handbook.

Section 551.101 states the requirements for holding a closed session. It provides:

If a closed meeting is allowed under this chapter, a governmental body may not conduct the closed meeting unless a quorum of the governmental body first convenes in an open meeting for which notice has been given as provided by this chapter and during which the presiding officer publicly:

- (1) announces that a closed meeting will be held; and
- (2) identifies the section or sections of this chapter under which the closed meeting is held.<sup>235</sup>

Thus, a quorum of the governmental body must be assembled in the meeting room, the meeting must be convened as an open meeting pursuant to proper notice, and the presiding officer must announce that a closed session will be held and must identify the sections of the Act authorizing the closed session.<sup>236</sup> There are several purposes for requiring the presiding officer to identify the section or sections that authorize the closed session: to cause the governmental body to assess the applicability of the exceptions before deciding to close the meeting; to fix the governmental body's legal position as relying upon the exceptions specified; and to inform those present of the exceptions, thereby giving them an opportunity to object intelligently.<sup>237</sup> Judging the sufficiency of the presiding officer's announcement in light of whether it effectuated or hindered these purposes, the court of appeals in *Lone Star Greyhound Park, Inc. v. Texas Racing Commission* determined that the presiding officer's reference to the content of a section, rather than to the section number, sufficiently identified the exception.<sup>238</sup>

### B. Section 551.003. Application of Act to Meetings of the Legislature

There is very little authority on this section. A 1974 attorney general letter advisory discussed it in connection with Texas Constitution article III, section 11, which provides in part that "[e]ach House may determine the rules of its own proceedings."<sup>239</sup> The letter advisory raised the possibility that the predecessor of section 551.003 is unconstitutional to the extent of conflict with Texas Constitution article III, section 11, stating that "neither House may infringe upon or limit the present

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<sup>234</sup> TEX. GOV'T CODE ANN. §§ 551.071–.089; *see also Cox Enters., Inc. v. Bd. of Trs.*, 706 S.W.2d 956, 958 (Tex. 1986) (noting the narrowly drawn exceptions).

<sup>235</sup> TEX. GOV'T CODE ANN. § 551.101.

<sup>236</sup> *Martinez v. State*, 879 S.W.2d 54, 56 n.5 (Tex. Crim. App. 1994).

<sup>237</sup> *Lone Star Greyhound Park, Inc. v. Tex. Racing Comm'n*, 863 S.W.2d 742, 747 (Tex. App.—Austin 1993, writ denied).

<sup>238</sup> *Id.* at 747–48.

<sup>239</sup> TEX. CONST. art. III, § 11; *see Tex. Att'y Gen. LA-84* (1974) at 2.

## Closed Sessions

or future right of the other to adopt its own rules.”<sup>240</sup> However, it did not address the constitutional issue, describing the predecessor of Government Code section 551.003 as an exercise of rule-making power for the 1973–74 legislative sessions.<sup>241</sup>

The Texas Supreme Court addressed Government Code section 551.003 in a 2000 case challenging the Senate’s election by secret ballot of a senator to perform the duties of lieutenant governor.<sup>242</sup> Members of the media contended that the Act prohibited the Senate from voting by secret ballot.<sup>243</sup> The Supreme Court stated that section 551.003 “clearly covers the Committee of the Whole Senate. Thus, its meeting and votes cannot be secret ‘except as specifically provided’ by the Texas Constitution.”<sup>244</sup> The court then determined that Texas Constitution article III, section 41, which authorizes the Senate to elect its officers by secret ballot, provided an exception to section 551.003.<sup>245</sup>

### C. Provisions Authorizing Deliberations in Closed Session

#### 1. Section 551.071. Consultations with Attorney

Section 551.071 authorizes a governmental body to consult with its attorney in an executive session to seek his or her advice on legal matters. It provides as follows:

A governmental body may not conduct a private consultation with its attorney except:

- (1) when the governmental body seeks the advice of its attorney about:
  - (A) pending or contemplated litigation; or
  - (B) a settlement offer; or
- (2) on 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.<sup>246</sup>

This provision implements the attorney-client privilege, an attorney’s duty to preserve the confidences of a client.<sup>247</sup> It allows a governmental body to meet in executive session with its attorney when it seeks the attorney’s advice with respect to pending or contemplated litigation or settlement offers,<sup>248</sup> including pending or contemplated administrative proceedings governed by the Administrative Procedure Act.<sup>249</sup>

In addition, subsection 551.071(2) of the Government Code permits a governmental body to consult in an executive session with its attorney “on a matter in which the duty of the attorney to the

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<sup>240</sup> Tex. Att’y Gen. LA-84 (1974) at 2.

<sup>241</sup> *See id.*

<sup>242</sup> *In re The Texas Senate*, 36 S.W.3d 119 (Tex. 2000).

<sup>243</sup> *See id.* at 119.

<sup>244</sup> *Id.* at 120.

<sup>245</sup> *See id.*

<sup>246</sup> TEX. GOV’T CODE ANN. § 551.071.

<sup>247</sup> Tex. Att’y Gen. Op. Nos. JC-0506 (2002) at 4, JC-0233 (2000) at 3, H-816 (1976) at 4, M-1261 (1972) at 9–10.

<sup>248</sup> TEX. GOV’T CODE ANN. § 551.071(1); *Lone Star Greyhound Park, Inc. v. Tex. Racing Comm’n*, 863 S.W.2d 742, 748 (Tex. App.—Austin 1993, writ denied).

<sup>249</sup> Tex. Att’y Gen. LO-96-116, at 5.

governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts” with the Act.<sup>250</sup> Thus, a governmental body may hold an executive session to seek or receive its attorney’s advice on legal matters that are not related to litigation or the settlement of litigation.<sup>251</sup> A governmental body may not invoke section 551.071 to convene a closed session and then discuss matters outside of that provision.<sup>252</sup> “General discussion of policy, unrelated to legal matters, is not permitted under the language of [this exception] merely because an attorney is present.”<sup>253</sup> A governmental body may, for example, consult with its attorney in executive session about the legal issues raised in connection with awarding a contract, but it may not discuss the merits of a proposed contract, financial considerations, or other nonlegal matters in an executive session held under section 551.071 of the Government Code.<sup>254</sup>

The attorney-client privilege can be waived by communicating privileged matters in the presence of persons who are not within the privilege.<sup>255</sup> Two governmental bodies waived this privilege by meeting together for discussions intended to avoid litigation between them, each party consulting with its attorney in the presence of the other, “the party from whom it would normally conceal its intentions and strategy.”<sup>256</sup> An executive session under section 551.071 is not allowed for such discussions. A governmental body may, however, admit to a session closed under this exception its agents or representatives, where those persons’ interest in litigation is aligned with the governmental body’s and their presence is necessary for full communication between the governmental body and its attorney.<sup>257</sup>

## 2. Section 551.072. Deliberations about Real Property

Section 551.072 authorizes a governmental body to deliberate in executive session on certain matters concerning real property. It provides as follows:

A governmental body may conduct a closed meeting to deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.<sup>258</sup>

Section 551.072 permits an executive session only where public discussion of the subject would have a detrimental effect on the governmental body’s negotiating position with respect to a third

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<sup>250</sup> TEX. GOV’T CODE ANN. § 551.071(2).

<sup>251</sup> Cf. *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 486 (Tex. App.—Austin 2004, pet. denied) (concluding that city council did not violate Act when it went into executive session to seek attorney’s advice about land use provision); Tex. Att’y Gen. Op. Nos. JC-0233 (2000) at 3, JM-100 at 2 (1983).

<sup>252</sup> *Gardner v. Herring*, 21 S.W.3d 767, 776 (Tex. App.—Amarillo 2000, no pet.).

<sup>253</sup> Tex. Att’y Gen. Op. No. JM-100 (1983) at 2; see *Finlan*, 888 F. Supp. 779, 782 n.9 (N.D. Tex. 1995); Tex. Att’y Gen. Op. No. JC-0233 (2000) at 3.

<sup>254</sup> *Olympic Waste Servs.v. City of Grand-Saline*, 204 S.W.3d 496, 503–04 (Tex. App.—Tyler, 2006, no pet.) (citing Tex. Att’y Gen. Op. No. JC-0233 (2000) at 3).

<sup>255</sup> See Tex. Att’y Gen. Op. Nos. JC-0506 (2002) at 6, JM-100 (1983) at 2.

<sup>256</sup> Tex. Att’y Gen. Op. No. MW-417 (1981) at 2–3; see also Tex. Att’y Gen. Op. No. JM-1004 (1989) at 4 (concluding that school board member who has sued other board members may be excluded from executive session held to discuss litigation).

<sup>257</sup> See Tex. Att’y Gen. Op. No. JC-0506 (2002) at 6; see also Tex. Att’y Gen. Op. No. JM-238 (1984) at 5.

<sup>258</sup> TEX. GOV’T CODE ANN. § 551.072.

party.<sup>259</sup> Where a court found that open discussion would not be detrimental to a city's negotiations, a closed session under this provision was not permitted.<sup>260</sup> It does not allow a governmental body to "cut a deal in private, devoid of public input or debate."<sup>261</sup> A governmental body's discussion of nonmonetary attributes of property to be purchased that relate to the property's value may fall within this exception if deliberating in open session would detrimentally affect subsequent negotiations.<sup>262</sup>

### **3. Section 551.0725. Deliberation by Certain Commissioners Courts about Contract Being Negotiated**

Section 551.0725 provides as follows:

- (a) The commissioners court of a county may conduct a closed meeting to deliberate business and financial issues relating to a contract being negotiated if, before conducting the closed meeting:
  - (1) the commissioners court votes unanimously that deliberation in an open meeting would have a detrimental effect on the position of the commissioners court in negotiations with a third person; and
  - (2) the attorney advising the commissioners court issues a written determination that deliberation in an open meeting would have a detrimental effect on the position of the commissioners court in negotiations with a third person.
- (b) Notwithstanding Section 551.103(a), Government Code, the commissioners court must make a tape recording of the proceedings of a closed meeting to deliberate the information.

Section 551.103(a) provides that a governmental body shall either keep a certified agenda or make a tape recording of the proceedings of each closed meeting, except for a private consultation with its attorney permitted by section 551.071.

### **4. Section 551.0726. Texas Facilities Commission: Deliberation Regarding Contract Being Negotiated**

This section, which provides as follows, is very similar to section 551.0725:

- (a) The Texas Facilities Commission may conduct a closed meeting to deliberate business and financial issues relating to a contract being negotiated if, before conducting the closed meeting:
  - (1) the commission votes unanimously that deliberation in an open meeting would have a detrimental effect on the position of the state in negotiations with a third person; and

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<sup>259</sup> Tex. Att'y Gen. Op. No. MW-417 (1981) at 2 (construing statutory predecessor to Government Code section 551.072).

<sup>260</sup> See *City of Laredo v. Escamilla*, 219 S.W.3d 14, 21 (Tex. App.—San Antonio 2006, pet. denied).

<sup>261</sup> *Finlan*, 888 F. Supp. at 787.

<sup>262</sup> *Save Our Springs Alliance, Inc. v. Austin Indep. Sch. Dist.*, 973 S.W.2d 378, 382 (Tex. App.—Austin 1998, no pet.).



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- (2) the attorney advising the commission issues a written determination finding that deliberation in an open meeting would have a detrimental effect on the position of the state in negotiations with a third person and setting forth that finding therein.
- (b) Notwithstanding Section 551.103(a), the commission must make a tape recording of the proceedings of a closed meeting to deliberate the information.<sup>263</sup>

### **5. Section 551.073. Deliberations Regarding Gifts and Donations**

Section 551.073 provides as follows:

A governmental body may conduct a closed meeting to deliberate a negotiated contract for a prospective gift or donation to the state or the governmental body if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.<sup>264</sup>

Before the Act was codified as Government Code chapter 551 in 1993, a single provision encompassed the present sections 551.073 and 551.072.<sup>265</sup> The authorities construing the statutory predecessor to section 551.072 may be relevant to section 551.073.<sup>266</sup>

### **6. Section 551.074. Personnel Matters**

Section 551.074 authorizes certain deliberations about officers and employees of the governmental body to be held in executive session:

- (a) This chapter does not require a governmental body to conduct an open meeting:
  - (1) to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or
  - (2) to hear a complaint or charge against an officer or employee.
- (b) Subsection (a) does not apply if the officer or employee who is the subject of the deliberation or hearing requests a public hearing.<sup>267</sup>

This section permits executive session deliberations concerning an individual officer or employee. Deliberations about a *class* of employees, however must, be held in an open session.<sup>268</sup> For

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<sup>263</sup> TEX. GOV'T CODE ANN. § 551.0726.

<sup>264</sup> *Id.* § 551.073.

<sup>265</sup> See Act of Mar. 28, 1973, 63d Leg., R.S., ch. 31, § 2, 1973 Tex. Gen. Laws 45, 46 (former article 6252-17, § 2(f), Revised Civil Statutes).

<sup>266</sup> See, e.g., *Dallas Cnty. Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 282–83 (Tex. App.—Dallas 1991, writ denied).

<sup>267</sup> TEX. GOV'T CODE ANN. § 551.074.

<sup>268</sup> *Gardner*, 21 S.W.3d at 777; Tex. Att'y Gen. Op. No. H-496 (1975) (construing predecessor to Government Code, section 551.074).

example, when a governmental body discusses salary scales without referring to a specific employee, it must meet in an open session.<sup>269</sup> The closed meetings authorized by section 551.074 may deal only with officers and employees of a governmental body; closed deliberations about the selection of an independent contractor are not authorized.<sup>270</sup>

Section 551.074 authorizes the public officer or employee under consideration to request a public hearing.<sup>271</sup> In *Bowen v. Calallen Independent School District*,<sup>272</sup> a teacher requested a public hearing concerning nonrenewal of his contract, but did not object when the school board moved to go into executive session. The court concluded that the school board did not violate the Act.<sup>273</sup> Similarly, in *James v. Hitchcock Independent School District*,<sup>274</sup> a school librarian requested an open meeting on the school district's unilateral modification of her contract. The court stated that refusal of the request for a hearing before the school board "is permissible only where the teacher does not object to its denial."<sup>275</sup> However, silence may not be deemed a waiver if the employee has no opportunity to object.<sup>276</sup> When a board heard the employee's complaint, moved on to other topics, and then convened an executive session to discuss the employee after he left, the court found that the employee had not had an opportunity to object.<sup>277</sup>

## **7. Section 551.0745. Deliberations by Commissioners Court about County Advisory Body**

Attorney General Opinion DM-149 (1992) concluded that members of an advisory committee are not public officers or employees within section 551.074 of the Government Code, authorizing executive session deliberations about certain personnel matters. Section 551.0745 now provides that a commissioners court of a county is not required to deliberate in an open meeting about the "appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a member of an advisory body; or... to hear a complaint or charge against a member of an advisory body."<sup>278</sup> However, this provision does not apply if the person who is the subject of the deliberation requests a public hearing.<sup>279</sup>

## **8. Section 551.076. Deliberations Regarding Security Devices or Security Audits: Closed Meeting**

Section 551.076 provides as follows:

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<sup>269</sup> See Tex. Att'y Gen. Op. No. H-496 (1975).

<sup>270</sup> *Swate*, 966 S.W.2d at 699; *Bd. of Trs. v. Cox Enters., Inc.*, 679 S.W.2d 86, 90 (Tex. App.—Texarkana 1984), *aff'd in part, rev'd in part on other grounds*, 706 S.W.2d 956 (Tex. 1986); Tex. Att'y Gen. Op. No. MW-129 (1980) at 1–2; see also Tex. Att'y Gen. Op. No. DM-149 (1992) at 3 (concluding that members of advisory committee are not public officers or employees within personnel exception).

<sup>271</sup> TEX. GOV'T CODE ANN. § 551.074(b); see *City of Dallas*, 737 S.W.2d at 848; *Corpus Christi Classroom Teachers Ass'n v. Corpus Christi Indep. Sch. Dist.*, 535 S.W.2d 429, 430 (Tex. Civ. App.—Corpus Christi 1976, no writ).

<sup>272</sup> *Bowen v. Calallen Indep. Sch. Dist.*, 603 S.W.2d 229 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

<sup>273</sup> *Id.* at 236; accord *Thompson v. City of Austin*, 979 S.W.2d 676, 685 (Tex. App.—Austin 1998, no pet.).

<sup>274</sup> *James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

<sup>275</sup> *Id.* at 707 (citing *Bowen*, 603 S.W.2d at 236).

<sup>276</sup> *Gardner*, 21 S.W.3d at 775.

<sup>277</sup> *Id.*

<sup>278</sup> TEX. GOV'T CODE ANN. § 551.0745.

<sup>279</sup> See *id.*

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This chapter does not require a governmental body to conduct an open meeting to deliberate:

- (1) the deployment, or specific occasions for implementation, of security personnel or devices; or
- (2) a security audit.<sup>280</sup>

There has been very little discussion of this provision.<sup>281</sup>

### **9. Sections 551.078, 551.0785. Deliberations Involving Individuals' Medical or Psychiatric Records**

These two provisions permit specified governmental bodies to discuss an individual's medical or psychiatric records in closed session. Section 551.078 is the narrower provision, applying to a medical board or medical committee when discussing the records of an applicant for a disability benefit from a public retirement system.<sup>282</sup> Section 551.0785 is much broader, allowing a governmental body that administers a public insurance, health or retirement plan to hold a closed session when discussing the records or information from the records of an individual applicant for a benefit from the plan. The benefits appeals committee for a public self-funded health plan may also meet in executive session for this purpose.<sup>283</sup>

#### **§ 551.078. Medical Board or Medical Committee**

This chapter does not require a medical board or medical committee to conduct an open meeting to deliberate the medical or psychiatric records of an individual applicant for a disability benefit from a public retirement system.

#### **§ 551.0785. Deliberations Involving Medical or Psychiatric Records of Individuals**

This chapter does not require a benefits appeals committee for a public self-funded health plan or a governmental body that administers a public insurance, health, or retirement plan to conduct an open meeting to deliberate:

- (1) the medical records or psychiatric records of an individual applicant for a benefit from the plan; or
- (2) a matter that includes a consideration of information in the medical or psychiatric records of an individual applicant for a benefit from the plan.

### **10. Sections 551.079–551.0811. Exceptions Applicable to Specific Entities**

Sections 551.079 through 551.0811 are set out below. The judicial decisions and attorney general opinions construing the Act have had little to say about these provisions.

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<sup>280</sup> *Id.* § 551.076.

<sup>281</sup> *See* Tex. Att'y Gen. LO-93-105, at 3 (indicating a belief that “the applicability of 551.076 rests upon the definition of ‘security personnel’”).

<sup>282</sup> TEX. GOV'T CODE ANN. § 551.078; *see also* Tex. Att'y Gen. Op. No. DM-340 (1995) at 2 (concluding that section 551.078 authorizes board of trustees of a public retirement system to consider medical and psychiatric records in closed session).

<sup>283</sup> TEX. GOV'T CODE ANN. § 551.078.

**§ 551.079. Texas Department of Insurance**

- (a) The requirements of this chapter do not apply to a meeting of the commissioner of insurance or the commissioner's designee with the board of directors of a guaranty association established under Chapter 2602, Insurance Code, or Article 21.28–C or 21.28–D, Insurance Code, in the discharge of the commissioner's duties and responsibilities to regulate and maintain the solvency of a person regulated by the Texas Department of Insurance.
- (b) The commissioner of insurance may deliberate and determine the appropriate action to be taken concerning the solvency of a person regulated by the Texas Department of Insurance in a closed meeting with persons in one or more of the following categories:
  - (1) staff of the Texas Department of Insurance;
  - (2) a regulated person;
  - (3) representatives of a regulated person; or
  - (4) members of the board of directors of a guaranty association established under Chapter 2602, Insurance Code, or Article 21.28–C or 21.28–D, Insurance Code.

**§ 551.080. Board of Pardons and Paroles**

This chapter does not require the Board of Pardons and Paroles to conduct an open meeting to interview or counsel an inmate of the Texas Department of Criminal Justice.

**§ 551.081. Credit Union Commission**

This chapter does not require the Credit Union Commission to conduct an open meeting to deliberate a matter made confidential by law.

**§ 551.0811. The Finance Commission of Texas**

This chapter does not require the Finance Commission of Texas to conduct an open meeting to deliberate a matter made confidential by law.

## 11. Sections 551.082, 551.0821, 551.083. Certain School Board Deliberations

Section 551.082 provides as follows:

- (a) This chapter does not require a school board to conduct an open meeting to deliberate in a case:
  - (1) involving discipline of a public school child; or
  - (2) in which a complaint or charge is brought against an employee of the school district by another employee and the complaint or charge directly results in a need for a hearing.
- (b) Subsection (a) does not apply if an open hearing is requested in writing by a parent or guardian of the child or by the employee against whom the complaint or charge is brought.<sup>284</sup>

A student who makes a written request for an open hearing on a disciplinary matter, but does not object to an executive session when announced, waives his or her right to an open hearing.<sup>285</sup>

Section 551.0821 provides as follows:

- (a) This chapter does not require a school board to conduct an open meeting to deliberate a matter regarding a public school student if personally identifiable information about the student will necessarily be revealed by the deliberation.
- (b) Directory information about a public school student is considered to be personally identifiable information about the student for purposes of Subsection (a) only if a parent or guardian of the student, or the student if the student has attained 18 years of age, has informed the school board, the school district, or a school in the school district that the directory information should not be released without prior consent. In this subsection, “directory information” has the meaning assigned by the federal Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g), as amended.
- (c) Subsection (a) does not apply if an open meeting about the matter is requested in writing by a parent or guardian of the student or by the student if the student has attained 18 years of age.

The Federal Family Educational Rights and Privacy Act provides for withholding federal funds from an educational agency or institution with a policy or practice of releasing education records or personally identifiable information.<sup>286</sup> Section 551.0821 enables school boards to deliberate in closed session to avoid revealing personally identifiable information about a student.

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<sup>284</sup> *Id.* § 551.082.

<sup>285</sup> *United Indep. Sch. Dist. v. Gonzalez*, 911 S.W.2d 118, 127 (Tex. App.—San Antonio 1995), *writ denied*, 940 S.W.2d 593 (Tex. 1996).

<sup>286</sup> *See generally Axtell v. Univ. of Tex.*, 69 S.W.3d 261, 267 (Tex. App.—Austin 2002, no pet.) (holding that student did not have cause of action under Tort Claims Act for release of his grades to radio station); 20 U.S.C.A. § 1232g; 34 C.F.R. § 99.3.

Section 551.083 provides as follows:

This chapter does not require a school board operating under a consultation agreement authorized by Section 13.901, Education Code, to conduct an open meeting to deliberate the standards, guidelines, terms, or conditions the board will follow, or instruct its representatives to follow, in a consultation with a representative of an employee group.

Section 13.901 of the Education Code was repealed in 1993.<sup>287</sup>

## **12. Section 551.085. Deliberation by Governing Board of Certain Providers of Health Care Services**

Section 551.085 provides as follows:

- (a) This chapter does not require the governing board of a municipal hospital, municipal hospital authority, county hospital, county hospital authority, hospital district created under general or special law, or nonprofit health maintenance organization created under Section 534.101, Health and Safety Code,<sup>288</sup> to conduct an open meeting to deliberate:
  - (1) pricing or financial planning information relating to a bid or negotiation for the arrangement or provision of services or product lines to another person if disclosure of the information would give advantage to competitors of the hospital, hospital district, or nonprofit health maintenance organization; or
  - (2) information relating to a proposed new service or product line of the hospital, hospital district, or nonprofit health maintenance organization before publicly announcing the service or product line.
- (b) The governing board of a health maintenance organization created under Section 281.0515, Health and Safety Code<sup>289</sup> that is subject to this chapter is not required to conduct an open meeting to deliberate information described by Subsection (a).<sup>290</sup>

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<sup>287</sup> See Act of May 28, 1993, 73d Leg., R.S., ch. 347, § 8.33, 1993 Tex. Gen. Laws 1479, 1556. See Tex. Att’y Gen. Op. No. H-651 (1975) at 3 (construing predecessor of Government Code section 551.083).

<sup>288</sup> Section 534.101 of the Health and Safety Code authorizes community mental health and mental retardation centers to create a limited purpose health maintenance organization. TEX. HEALTH & SAFETY CODE ANN. § 534.101.

<sup>289</sup> This provision authorizes certain hospital districts to establish HMOs.

<sup>290</sup> TEX. GOV’T CODE ANN. § 551.085.

### 13. Section 551.086. Certain Public Power Utilities: Competitive Matters

This section was adopted as part of an act relating to electric utility restructuring and is only briefly summarized here.<sup>291</sup> Anyone wishing to know when and how it applies should read it in its entirety.<sup>292</sup> It provides that certain public power utilities are not required to conduct an open meeting to deliberate, vote or take final action on any competitive matter as defined by section 552.133 of the Government Code.<sup>293</sup> Section 552.133 defines “competitive matter” as “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.”<sup>294</sup> The definition of “competitive matter” further provides that the term is reasonably related to several categories of information specifically defined<sup>295</sup> and does not include other specified categories of information.<sup>296</sup> “Public power utility” is defined as “an entity providing electric or gas utility services” that is subject to the provisions of the Act.<sup>297</sup> Finally, this executive session provision includes the following provision on notice:

For purposes of Section 551.041, the notice of the subject matter of an item that may be considered as a competitive matter under this section is required to contain no 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.<sup>298</sup>

### 14. Section 551.087. Deliberation Regarding Economic Development Negotiations

This provision reads as follows:

This chapter does not require a governmental body to conduct an open meeting:

- (1) to discuss or deliberate regarding commercial or financial information that the governmental body has received from a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and with which the governmental body is conducting economic development negotiations; or
- (2) to deliberate the offer of a financial or other incentive to a business prospect described by Subdivision (1).

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<sup>291</sup> See Act of May 27, 1999, 76th Leg., R.S., ch. 405, 1999 Tex. Gen. Laws 2543, 2543–2625.

<sup>292</sup> TEX. GOV’T CODE ANN. § 551.086.

<sup>293</sup> *Id.* § 551.086(c).

<sup>294</sup> *Id.* § 552.133(a-1).

<sup>295</sup> *Id.* § 552.133(a-1)(1)(A)–(F).

<sup>296</sup> *Id.* § 552.133(a-1)(2)(A)–(O).

<sup>297</sup> *Id.* § 551.086(b)(1).

<sup>298</sup> *Id.* § 551.086(d).

**15. Section 551.088. Deliberation Regarding Test Item**

This provision states as follows:

This chapter does not require a governmental body to conduct an open meeting to deliberate a test item or information related to a test item if the governmental body believes that the test item may be included in a test the governmental body administers to individuals who seek to obtain or renew a license or certificate that is necessary to engage in an activity.

An executive session may be held only when expressly authorized by law. Thus, before section 551.088 was adopted, the Act did not permit a governmental body to meet in executive session to discuss the contents of a licensing examination.<sup>299</sup>

**16. Section 551.089. Department of Information Resources**

Section 551.089 provides as follows:

This chapter does not require the governing board of the Department of Information Resources to conduct an open meeting to deliberate:

- (1) security assessments or deployments relating to information resources technology;
- (2) network security information as described by Section 2059.055(b); or
- (3) the deployment, or specific occasions for implementation, of security personnel, critical infrastructure or security devices.<sup>300</sup>

**D. Closed Meetings Authorized by Other Statutes**

Some state agencies are authorized by their governing law to hold closed meetings in addition to those authorized by the Act.<sup>301</sup> Chapter 418 of the Government Code, the Texas Disaster Act, which relates to managing emergencies and disasters, including those caused by terroristic acts, provides in section 418.183(f):

A governmental body subject to Chapter 551 is not required to conduct an open meeting to deliberate information to which this section applies. Notwithstanding Section 551.103(a), the governmental body must make a tape recording of the proceedings of a closed meeting to deliberate the information.<sup>302</sup>

Section 418.183 states that “[t]his section applies only to information that is confidential under Sections [enumerating specific sections of chapter 418].”<sup>303</sup>

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<sup>299</sup> See Tex. Att’y Gen. LO-96-058, at 2.

<sup>300</sup> TEX. GOV’T CODE ANN. § 551.089.

<sup>301</sup> See, e.g., TEX. FAM. CODE ANN. § 264.005(g) (County Child Welfare Boards); TEX. LAB. CODE ANN. § 401.021(3) (certain proceedings of Workers’ Compensation Commission); TEX. OCC. CODE ANN. § 152.009(c) (Board of Medical Examiners; deliberation about license applications and disciplinary actions).

<sup>302</sup> TEX. GOV’T CODE ANN. § 418.183(f).

<sup>303</sup> *Id.* § 418.183(a).



## E. No Implied Authority for Closed Sessions

Older attorney general opinions have stated that a governmental body could deliberate in a closed session about confidential information, even though no provision of the Act authorizing a closed session applied to the deliberations.<sup>304</sup> These opinions reasoned that information made confidential by statute was not within the Act's prohibition against privately discussing "public business or public policy," or that the board members could deliberate on information in a closed session if an open meeting would result in violation of a confidentiality provision.<sup>305</sup>

However, Attorney General Opinion MW-578 (1982) held that the Texas Employment Commission had no authority to review unemployment benefit cases in closed session, even though in some of the cases very personal information was disclosed about claimants and employers. Reasoning that the Act states that closed meetings may be held only where specifically authorized, the opinion concluded that there was no basis to read into it implied authority for closed meetings.<sup>306</sup> It disapproved the language in earlier opinions that suggests otherwise, but stated that the commission could protect privacy rights by avoiding discussion of private information.<sup>307</sup> Thus, the disapproved opinions should no longer be relied on as a source of authority for a closed session.

## F. Who May Attend a Closed Session

Only the members of a governmental body have a right to attend an executive session,<sup>308</sup> except that the governmental body's attorney must be present when it meets under section 551.071. A governmental body has discretion to include in an executive session any of its officers and employees whose participation is necessary to the matter under consideration.<sup>309</sup> Thus, a school board could require its superintendent of schools to attend all executive sessions of the board without violating the Act.<sup>310</sup> Given the board's responsibility to oversee the district's management and the superintendent's administrative responsibility and leadership of the district, the board could reasonably conclude that the superintendent's presence was necessary at executive sessions.<sup>311</sup>

A commissioners court may include the county auditor in a meeting closed under section 551.071 to consult with its attorney if the court determines that (1) the auditor's interests are not adverse to the county's; (2) the auditor's presence is necessary for the court to communicate with its attorney; and

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<sup>304</sup> Tex. Att'y Gen. Op. Nos. H-1154 (1978) at 3 (concluding that county child welfare board may meet in executive session to discuss case files made confidential by statute); H-780 (1976) at 3 (concluding that Medical Advisory Board must meet in closed session to consider confidential reports about medical condition of applicants for a driver's license); H-484 (1974) at 3 (concluding that licensing board may discuss confidential information from applicant's file and may prepare examination questions in closed session); H-223 (1974) at 5 (concluding that administrative hearings in comptroller's office concerning confidential tax information may be closed).

<sup>305</sup> Tex. Att'y Gen. Op. No. H-484 (1974) at 2.

<sup>306</sup> See Tex. Att'y Gen. Op. No. MW-578 (1982) at 4.

<sup>307</sup> *Id.*

<sup>308</sup> See Tex. Att'y Gen. Op. No. JM-6 (1983) at 1–2 (stating that only members of the governmental body have the right to convene in executive session).

<sup>309</sup> Tex. Att'y Gen. Op. No. JC-0375 (2001) at 2. See also Tex. Att'y Gen. Op. No. GA-0277 (2004) at 3 (concluding that commissioners court may allow the county clerk to attend its executive sessions).

<sup>310</sup> Tex. Att'y Gen. Op. No. JC-0375 (2001) at 2.

<sup>311</sup> *Id.*

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(3) the county auditor's presence will not waive the attorney-client privilege.<sup>312</sup> If the meeting is closed under an executive session provision other than section 551.071, the commissioners court may include the county auditor if the auditor's interests are not adverse to the county and his or her participation is necessary to the discussion.<sup>313</sup>

A governmental body must not admit to an executive session a person whose presence is contrary to the governmental interest protected by the provision authorizing the session. For example, a person who wishes to sell real estate to a city may not attend an executive session under 551.072, a provision designed to protect the city's bargaining position in negotiations with a third party.<sup>314</sup> Nor may a governmental body admit the opposing party in litigation to an executive session under section 551.071.<sup>315</sup> A governmental body has no authority to admit members of the public to a meeting closed under section 551.074 to give input about the public officer or employee being considered at the meeting.<sup>316</sup>

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<sup>312</sup> Tex. Att'y Gen. Op. No. JC-0506 (2002) at 6; *see* Tex. Att'y Gen. Op. No. JM-238 (1984) at 5 (concluding that county officers and employees may attend closed session of commissioners court to discuss litigation against sheriff and commissioners court about county jail conditions).

<sup>313</sup> *See* Tex. Att'y Gen. Op. No. JC-0506 (2002) at 6.

<sup>314</sup> *Finlan*, 888 F. Supp. 779, 787 (N.D. Tex. 1995).

<sup>315</sup> *See* Tex. Att'y Gen. Op. No. JM-1004 (1989) at 4 (concluding that school board member who has sued other board members may be excluded from executive session held to discuss litigation); Tex. Att'y Gen. Op. No. MW-417 (1981) at 2-3 (concluding that provision authorizing governmental body to consult with attorney in executive session about contemplated litigation does not apply to joint meeting between two governmental bodies to avoid lawsuit between them).

<sup>316</sup> *See* Tex. Att'y Gen. Op. No. GA-0511 (2007) at 6.

## X. Records of Meetings

### A. Minutes or Tape Recordings of Open Session

Section 551.021 of the Government Code provides as follows:

- (a) A governmental body shall prepare and keep minutes or make a tape recording of each open meeting of the body.
- (b) The minutes must:
  - (1) state the subject of each deliberation; and
  - (2) indicate each vote, order, decision, or other action taken.<sup>317</sup>

Section 551.022 of the Government Code provides:

The minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee.<sup>318</sup>

If minutes are kept instead of a tape recording, the minutes should record every action taken by the governmental body. If open sessions of a commissioners court meeting are taped, the tape recordings are available to the public under the Public Information Act.<sup>319</sup>

### B. Certified Agenda or Tape Recording of Closed Session

A governmental body must make and keep either a certified agenda or a tape recording of each closed executive session, except for an executive session held by the governmental body to consult with its attorney in accordance with section 551.071 of the Government Code.<sup>320</sup> If a certified agenda is kept, the presiding officer must certify that the agenda is a true and correct record of the executive session.<sup>321</sup> The certified agenda must include “(1) a statement of the subject matter of each deliberation, (2) a record of any further action taken, and (3) an announcement by the presiding officer at the beginning and the end of the closed meeting indicating the date and time.”<sup>322</sup> While

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<sup>317</sup> TEX. GOV'T CODE ANN. § 551.021; *see also* Tex. Att'y Gen. Op. No. GA-0727 (2009) at 2 (opining that Texas State Library and Archives Commission rule requiring written minutes of every open meeting of a state agency is likely invalid as inconsistent with section 551.021(a), which authorizes a governmental body to make a tape recording of an open meeting).

<sup>318</sup> *Id.* § 551.022.

<sup>319</sup> Tex. Att'y Gen. Op. No. JM-1143 (1990) at 2–3 (concluding that tape recording of open session of commissioners court meeting subject to Open Records Act); *see* Tex. Att'y Gen. ORD-225 (1979) at 3 (concluding that handwritten notes of open meetings made by secretary of governmental body are subject to disclosure under Open Records Act); ORD-32 (1974) at 2 (concluding that audio tape recording of open meeting of state licensing agency used as aid in preparation of accurate minutes is subject to disclosure under Open Records Act).

<sup>320</sup> TEX. GOV'T CODE ANN. § 551.103(a); *see* Tex. Att'y Gen. Op. No. JM-840 (1988) at 3 (discussing meaning of “certified agenda”). *But see* TEX. GOV'T CODE ANN. §§ 551.0725(b) (providing that notwithstanding Government Code section 551.103(a), the commissioners court must make a tape recording of the proceedings of a closed meeting under this section); 551.0726(b) (“Notwithstanding Section 551.103(a), the [Texas Facilities] Commission must make a tape recording of the proceedings of a closed meeting held under this section.”).

<sup>321</sup> TEX. GOV'T CODE ANN. § 551.103(b).

<sup>322</sup> *Id.* § 551.103(c).

the agenda does not have to be a verbatim transcript of the meeting, it must at least provide a brief summary of each deliberation.<sup>323</sup> Whether a particular agenda satisfies the Act is a question of fact that must be addressed by the courts. Attorney General Opinion JM-840 (1988) cautioned governmental bodies to consider providing greater detail in the agenda with regard to topics not authorized for consideration in executive session or to avoid the uncertainty concerning the requisite detail required in an agenda by tape recording executive sessions.<sup>324</sup> Any member of a governmental body participating in a closed session knowing that an agenda or recording is not being made commits a Class C misdemeanor.<sup>325</sup>

The certified agenda or tape recording of an executive session must be kept a minimum of two years after the date of the session.<sup>326</sup> If during that time a lawsuit that concerns the meeting is brought, the agenda or tape of that meeting must be kept pending resolution of the lawsuit.<sup>327</sup> The commissioners court, not the county clerk, is the proper custodian for the certified agenda or tape recording of a closed meeting, but it may delegate that duty to the county clerk.<sup>328</sup>

A certified agenda or tape recording of an executive session is confidential. A person who knowingly and without lawful authority makes these records public commits a Class B misdemeanor and may be held liable for actual damages, court costs, reasonable attorney fees and exemplary or punitive damages.<sup>329</sup> Section 551.104 provides for court-ordered access to the certified agenda or tape recording under specific circumstances:

- (b) In litigation in a district court involving an alleged violation of this chapter, the court:
  - (1) is entitled to make an in camera inspection of the certified agenda or tape;
  - (2) may admit all or part of the certified agenda or tape as evidence, on entry of a final judgment; and
  - (3) may grant legal or equitable relief it considers appropriate, including an order that the governmental body make available to the public the certified agenda or tape of any part of a meeting that was required to be open under this chapter.
- (c) the certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).<sup>330</sup>

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<sup>323</sup> Tex. Att’y Gen. Op. No. JM-840 (1988) at 4–7.

<sup>324</sup> *Id.* at 5–6 (referring to legislative history of section indicating that its primary purpose is to document fact that governmental body did not discuss unauthorized topics in closed session).

<sup>325</sup> TEX. GOV’T CODE ANN. § 551.145.

<sup>326</sup> *Id.* § 551.104(a).

<sup>327</sup> *Id.*

<sup>328</sup> Tex. Att’y Gen. Op. No. GA-0277 (2004) at 3–4.

<sup>329</sup> TEX. GOV’T CODE ANN. § 551.146.

<sup>330</sup> *Id.* § 551.104 (emphasis added).

## Records of Meetings

Section 551.104 authorizes a district court to admit all or part of the certified agenda or tape recording of a closed session as evidence in an action alleging a violation of the Act, thus providing the only means under state law whereby a certified agenda or tape recording of a closed session may be released to the public.<sup>331</sup> The Office of the Attorney General has recognized that it lacks authority under the Public Information Act<sup>332</sup> to review certified agendas or tape recordings of closed sessions for compliance with the Open Meetings Act.<sup>333</sup> However, the confidentiality provision may be preempted by federal law.<sup>334</sup> When the Equal Employment Opportunity Commission served a Texas city with an administrative subpoena for tapes of closed city council meetings, the Open Meetings Act did not excuse compliance.<sup>335</sup>

A member of the governmental body has a right to inspect the certified agenda or tape recording of a closed meeting, even if he or she did not participate in the meeting.<sup>336</sup> This is not a release to the public in violation of the confidentiality provisions of the Act, because a board member is not a member of the public within that prohibition. The governmental body may adopt a procedure permitting review of the certified agenda or tape recording, but may not entirely prohibit a board member from reviewing the record. The board member may not copy the tape recording or certified agenda of a closed meeting, nor may a former member of a governmental body inspect these records once he or she leaves office.<sup>337</sup>

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<sup>331</sup> Tex. Att’y Gen. Op. No. JM-995 (1988) at 5.

<sup>332</sup> TEX. GOV’T CODE ANN. ch. 552.

<sup>333</sup> See Tex. Att’y Gen. ORD-495 (1988) at 2, 4.

<sup>334</sup> *Equal Emp’t Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995).

<sup>335</sup> *Id.*

<sup>336</sup> Tex. Att’y Gen. Op. No. JC-0120 (1999) at 4, 5, 7 (overruling Tex. Att’y Gen. Op. No. DM-227 (1993) in part).

<sup>337</sup> Tex. Att’y Gen. LO-98-033, at 2–3.

## XI. Penalties and Remedies

### A. Introduction

The Act provides civil remedies and criminal penalties for violations of its provisions. District courts have original jurisdiction over criminal violations of the Act as misdemeanors involving official misconduct.<sup>338</sup> The Act does not authorize the attorney general to enforce its provisions. *See infra* Part XII.D of this handbook. However, a district attorney, criminal district attorney or county attorney may request the attorney general's assistance in prosecuting a criminal case, including one under the Act.<sup>339</sup>

### B. Mandamus, Injunction or Declaratory Judgment

Section 551.142 of the Act provides as follows:

- (a) An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.
- (b) The court may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or defendant who substantially prevails in an action under Subsection (a). In exercising its discretion, the court shall consider whether the action was brought in good faith and whether the conduct of the governmental body had a reasonable basis in law.<sup>340</sup>

The four-year residual limitations period in section 16.051 of the Civil Practices and Remedies Code applies to an action under this provision.<sup>341</sup>

Generally, a writ of mandamus would be issued by a court to require a public official or other person to perform duties imposed on him or her by law. Thus, mandamus ordinarily commands a person or entity to act, while an injunction restrains action.<sup>342</sup> The Act does not automatically confer jurisdiction on the county court, but where the plaintiff's money demand brings the amount in controversy within the court's monetary limits, the county court has authority to issue injunctive and mandamus relief.<sup>343</sup> Absent such a pleading, jurisdiction in original mandamus and original injunction proceedings lies in the district court.<sup>344</sup>

Section 551.142(a) authorizes any interested person, including a member of the news media, to bring a civil action seeking either a writ of mandamus or an injunction.<sup>345</sup> In keeping with the purpose of

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<sup>338</sup> *See State v. Williams*, 780 S.W.2d 891, 892–93 (Tex. App.—San Antonio 1989, no writ).

<sup>339</sup> *See* TEX. GOV'T CODE ANN. § 402.028(a).

<sup>340</sup> *Id.* § 551.142.

<sup>341</sup> *Rivera v. City of Laredo*, 948 S.W.2d 787, 793 (Tex. App.—San Antonio 1997, writ denied).

<sup>342</sup> *Boston v. Garrison*, 256 S.W.2d 67, 69 (Tex. 1953).

<sup>343</sup> *Martin v. Victoria Indep. Sch. Dist.*, 972 S.W.2d 815, 818 (Tex. App.—Corpus Christi 1998, pet. denied).

<sup>344</sup> *Id.*

<sup>345</sup> TEX. GOV'T CODE ANN. § 551.142(a); *see Cameron Cnty. Good Gov't League v. Ramon*, 619 S.W.2d 224, 230–31 (Tex. App.—Beaumont 1981, writ ref'd n.r.e.).

the Act, standing under the Act is interpreted broadly.<sup>346</sup> Standing conferred by the Act is broader than taxpayer standing, and a citizen does not need to prove an interest different from the general public, “because ‘the interest protected by the Open Meetings Act is the interest of the general public.’”<sup>347</sup> The phrase “any interested person” includes a government league,<sup>348</sup> an environmental group,<sup>349</sup> the president of a local homeowners group,<sup>350</sup> a city challenging the closure of a hospital by the county hospital district,<sup>351</sup> and a town challenging annexation ordinances.<sup>352</sup> A suspended police officer and a police officers’ association were “interested persons” who could bring a suit alleging that the city council had violated the Act in selecting a police chief.<sup>353</sup>

Texas courts have also recognized that an individual authorized to seek a writ of mandamus or an injunction under the Act may also bring a declaratory judgment action pursuant to the Uniform Declaratory Judgments Act, chapter 37 of the Texas Civil Practice and Remedies Code.<sup>354</sup> In such a proceeding, the court is authorized to determine the rights, status, duties and other legal relations of various persons, including public officers, and thus may determine the validity of a governmental body’s actions under the Act.<sup>355</sup>

Section 551.142(b) authorizes a court to award reasonable attorney fees and litigation costs to the party who substantially prevails in an action brought under the Act.<sup>356</sup> This relief, however, is discretionary. The Uniform Declaratory Judgments Act also authorizes a court to award reasonable attorney fees.<sup>357</sup>

Depending on the nature of the violation, additional monetary damages may be assessed against a governmental body that violated the Act. In *Ferris v. Texas Board of Chiropractic Examiners*,<sup>358</sup> the appellate court awarded back pay and reinstatement to an executive director whom the board had attempted to fire at two meetings convened in violation of the Act. Finally, at the third meeting held to discuss the matter, the board lawfully fired the executive director. Back pay was awarded for the

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<sup>346</sup> See *Burks v. Yarbrough*, 157 S.W.3d 876, 880 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding [mand. denied]); *Hays Cnty. Water Planning P’ship*, 41 S.W.3d at 177.

<sup>347</sup> See *Hays Cnty. Water Planning P’ship*, 41 S.W.3d at 177–78 (quoting *Save Our Springs Alliance, Inc. v. Lowry*, 934 S.W.2d 161, 163 (Tex. App.—Austin 1996, orig. proceeding [mand. denied])).

<sup>348</sup> See *Cameron Cnty.*, 619 S.W.2d at 230.

<sup>349</sup> See *Save Our Springs Alliance, Inc., v. Lowry*, 934 S.W.2d 161, 164 (Tex. App.—Austin 1996, orig. proceeding [mand. denied]).

<sup>350</sup> *Id.*

<sup>351</sup> *Matagorda Cnty. Hosp. Dist. v. City of Palacios*, 47 S.W.3d 96, 102 (Tex. App.—Corpus Christi 2001, no pet.).

<sup>352</sup> *City of Port Isabel v. Pinnell*, 161 S.W.3d 233, 241 (Tex. App.—Corpus Christi 2005, no pet.).

<sup>353</sup> *Rivera v. City of Laredo*, 948 S.W.2d 787, 792 (Tex. App.—San Antonio 1997, writ denied).

<sup>354</sup> *Bd. of Trs. v. Cox Enters., Inc.*, 679 S.W.2d 86, 88 (Tex. App.—Texarkana 1984), *aff’d in part, rev’d in part on other grounds*, 706 S.W.2d 956 (Tex. 1986) (recognizing news media’s right to bring declaratory judgment action to determine if board had violated the Act); see also *City of Fort Worth v. Groves*, 746 S.W.2d 907, 913 (Tex. App.—Fort Worth 1988, no writ) (concluding that resident and taxpayer of city had standing to bring suit for declaratory judgment and injunction against city for violation of the Act).

<sup>355</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 37.003.

<sup>356</sup> TEX. GOV’T CODE ANN. § 551.142(b); see *Austin Transp. Study Policy Advisory Comm. v. Sierra Club*, 843 S.W.2d 683, 690 (Tex. App.—Austin 1992, writ denied) (upholding award of attorney fees).

<sup>357</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 37.009; *City of Fort Worth*, 746 S.W.2d at 911, 917–19 (affirming trial court’s award in excess of \$40,000 in attorney fees to prevailing plaintiff in action pursuant to Uniform Declaratory Judgments Act).

<sup>358</sup> *Ferris v. Tex. Bd. of Chiropractic Exam’rs*, 808 S.W.2d 514, 518–19 (Tex. App.—Austin 1991, writ denied).

period between the initial unlawful firing and the third meeting at which the director's employment was lawfully terminated.<sup>359</sup>

Court costs or attorney fees as well as certain other monetary damages can also be assessed under section 551.146, which relates to the confidentiality of the certified agenda. It provides that an individual, corporation or partnership that knowingly and without lawful authority makes public the certified agenda or tape recording of an executive session shall be liable for:

- (1) actual damages, including damages for personal injury or damage, lost wages, defamation, or mental or other emotional distress;
- (2) reasonable attorney fees and court costs; and
- (3) at the discretion of the trier of fact, exemplary damages.<sup>360</sup>

### **C. Voidability of a Governmental Body's Action in Violation of the Act; Ratification of Questionable Actions**

Section 551.141 provides that “[a]n action taken by a governmental body in violation of this chapter is voidable.” Before this section was adopted, Texas courts held as a matter of common law that a governmental body's actions that are in violation of the Act are subject to judicial invalidation.<sup>361</sup> Section 551.141 does not require a court to invalidate an action taken in violation of the Act, and it may choose not to do so, given the facts of a specific case.<sup>362</sup>

In *Point Isabel Independent School District v. Hinojosa*,<sup>363</sup> the Corpus Christi Court of Appeals construed this provision to permit the judicial invalidation of only the specific action or actions found to violate the Act. Prior to doing so, the court in *Point Isabel Independent School District* addressed the sufficiency of the notice for the school board's July 12, 1988, meeting. With regard to that issue, the court determined that the description “personnel” in the notice was insufficient notice of the selection of three principals at the meeting, a matter of special interest to the public, but was sufficient notice of the selection of a librarian, an English teacher, an elementary school teacher, a band director and a part-time counselor.<sup>364</sup> (For further discussion of required content of notice under the Act, see *supra* Part VII.A of this handbook.) The court in *Point Isabel Independent School District* then turned to the question of whether the board's invalid selection of the three principals tainted all hiring decisions made at the meeting. The court felt that, given the reference in the

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<sup>359</sup> *Id.* at 519 (awarding executive director attorney fees of \$7,500).

<sup>360</sup> TEX. GOV'T CODE ANN. § 551.146(a)(2).

<sup>361</sup> See *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 646 (Tex. 1975); *Toyah Indep. Sch. Dist. v. Pecos-Barstow Indep. Sch. Dist.*, 466 S.W.2d 377, 380 (Tex. Civ. App.—San Antonio 1971, no writ); see also *Ferris*, 808 S.W.2d at 517; Tex. Att'y Gen. Op. No. H-594 (1975) at 2 (noting that governmental body cannot independently assert its prior action that governmental body failed to ratify is invalid when it is to governmental body's advantage to do so).

<sup>362</sup> See *Collin Cnty., Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods*, 716 F. Supp. 953, 960 n.12 (N.D. Tex. 1989) (declining to dismiss lawsuit that county authorized in violation of Act's notice requirements if county within thirty days of court's opinion and order authorized lawsuit at meeting in compliance with Act). But see *City of Bells v. Greater Texoma Util. Auth.*, 744 S.W.2d 636, 640 (Tex. App.—Dallas 1987, no writ) (dismissing authority's lawsuit initiated at meeting in violation of Act's notice requirements).

<sup>363</sup> *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176 (Tex. App.—Corpus Christi 1990, writ denied).

<sup>364</sup> *Id.* at 182.



statutory predecessor to section 551.141 to “an action taken” and not to “all actions taken,” this provision meant only that a specific action or specific actions violating the Act were subject to judicial invalidation. Consequently, the court refused the plaintiff’s request to invalidate all hiring decisions made at the meeting and held void only the board’s selection of the three principals.<sup>365</sup>

A governmental body cannot give retroactive effect to a prior action taken in violation of the Act, but it may ratify the invalid act in an open meeting held in compliance with the Act.<sup>366</sup> The ratification will be effective only from the date of the meeting at which the valid action is taken.<sup>367</sup>

In *Ferris v. Texas Board of Chiropractic Examiners*, the Austin Court of Appeals refused to give retroactive effect to a decision to fire the executive director reached at a meeting of the board that was held in compliance with the Act.<sup>368</sup> The board had attempted to fire the director at two previous meetings that did not comply with the Act. The subsequent lawful termination did not cure the two previous unlawful firings retroactively, and the court awarded back pay to the director for the period between the initial unlawful firing and the final lawful termination.<sup>369</sup>

Ratification of an action previously taken in violation of the Act must comply with all applicable provisions of the Act.<sup>370</sup> In *Porth v. Morgan*, the Houston County Hospital Authority Board attempted to reauthorize the appointment of an individual to the board but did not comply fully with the Act.<sup>371</sup> The board had originally appointed the individual during a closed meeting, violating the requirement that final action take place in an open meeting. The original appointment also violated the notice requirement, because the posted notice did not include appointing a board member as an item of business. At a subsequent open meeting, the board chose the individual as its vice-chairman and, as such, a member of the board, but the notice did not say that the board might appoint a new member or ratify its prior invalid appointment. Accordingly, the board’s subsequent selection of the individual as vice-chairman did not ratify the board’s prior invalid appointment.

## **D. Criminal Provisions**

Certain violations of the Act’s requirements concerning certified agendas or tape recordings of executive sessions are punishable as Class C or Class B misdemeanors. *See supra* Part X.B. Section 551.145 provides as follows:

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<sup>365</sup> *Id.* at 182–83 (noting that previous decisions did not expressly address whether invalidation was limited to specific actions violating Act).

<sup>366</sup> *Lower Colorado River Auth.*, 523 S.W.2d at 646–47 (recognizing effectiveness of increase in electric rates only from date reauthorized at lawful meeting); *City of San Antonio v. River City Cabaret, Ltd.*, 32 S.W.3d 291, 293 (Tex. App.—San Antonio 2000, pet. denied). *Cf. Dallas Cnty. Flood Control v. Cross*, 815 S.W.2d 271, 284 (Tex. App.—Dallas 1991, writ denied) (holding ineffective district’s reauthorization at lawful meeting of easement transaction initially authorized at unlawful meeting, because to do so, given facts in that case, would give retroactive effect to transaction).

<sup>367</sup> *River City Cabaret, Ltd.*, 32 S.W.3d at 293.

<sup>368</sup> *Ferris*, 808 S.W.2d at 518–19.

<sup>369</sup> *Id.*

<sup>370</sup> *See id.* at 518 (“A governmental entity may ratify only what it could have lawfully authorized initially.”).

<sup>371</sup> *Porth v. Morgan*, 622 S.W.2d 470, 473, 475–76 (Tex. App.—Tyler 1981, writ ref’d n.r.e.).

## *Penalties and Remedies*

- (a) A member of a governmental body commits an offense if the member participates in a closed meeting of the governmental body knowing that a certified agenda of the closed meeting is not being kept or that a tape recording of the closed meeting is not being made.
- (b) An offense under Subsection (a) is a Class C misdemeanor.<sup>372</sup>

### **Section 551.146 provides:**

- (a) An individual, corporation, or partnership that without lawful authority knowingly discloses to a member of the public the certified agenda or tape recording of a meeting that was lawfully closed to the public under this chapter:
  - (1) commits an offense; and
  - (2) is liable to a person injured or damaged by the disclosure for:
    - (A) actual damages, including damages for personal injury or damage, lost wages, defamation, or mental or other emotional distress;
    - (B) reasonable attorney fees and court costs; and
    - (C) at the discretion of the trier of fact, exemplary damages.
- (b) An offense under Subsection (a)(1) is a Class B misdemeanor.
- (c) It is a defense to prosecution under Subsection (a)(1) and an affirmative defense to a civil action under Subsection (a)(2) that:
  - (1) the defendant had good reason to believe the disclosure was lawful; or
  - (2) the disclosure was the result of a mistake of fact concerning the nature or content of the certified agenda or tape recording.<sup>373</sup>

In order to find that a person has violated one of these provisions, the trier of fact must determine that the person acted “knowingly.” Section 6.03(b) of the Texas Penal Code defines that state of mind as follows:

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.<sup>374</sup>

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<sup>372</sup> TEX. GOV'T CODE ANN. § 551.145.

<sup>373</sup> *Id.* § 551.146.

<sup>374</sup> TEX. PENAL CODE ANN. § 6.03(b).

Section 551.146 does not prohibit members of the governmental body or other persons who attend an executive session from making public statements about the subject matter of the executive session.<sup>375</sup> Other statutes or duties, however, may limit what a member of the governmental body may say publicly.

Sections 551.143 and 551.144 of the Government Code establish criminal sanctions for certain conduct that violates openness requirements. A member of a governmental body must be found to have acted “knowingly” to be found guilty of either of these offenses.

**Section 551.143 provides as follows:**

- (a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.
- (b) An offense under Subsection (a) is a misdemeanor punishable by:
  - (1) a fine of not less than \$100 or more than \$500;
  - (2) confinement in the county jail for not less than one month or more than six months; or
  - (3) both the fine and confinement.<sup>376</sup>

**Section 551.144 provides as follows:**

- (a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
  - (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
  - (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
  - (3) participates in the closed meeting, whether it is a regular, special, or called meeting.
- (b) An offense under Subsection (a) is a misdemeanor punishable by:
  - (1) a fine of not less than \$100 or more than \$500;
  - (2) confinement in the county jail for not less than one month or more than six months; or
  - (3) both the fine and confinement.<sup>377</sup>

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<sup>375</sup> Tex. Att’y Gen. Op. No. JM-1071 (1989) at 2–3.

<sup>376</sup> TEX. GOV’T CODE ANN. § 551.143. *See* Tex. Att’y Gen. Op. No. GA-0326 (2005) at 7 (concluding that Government Code section 551.143 is not on its face void for vagueness).

## *Penalties and Remedies*

- (c) It is an affirmative defense to prosecution under Subsection (a) that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body.<sup>378</sup>

Section 551.144(c) was adopted by the Seventy-sixth Legislature in 1999.<sup>379</sup> In 1998, the Texas Court of Criminal Appeals determined in *Tovar v. State*<sup>380</sup> that a government official who knowingly participated in an impermissible closed meeting may be found guilty of violating the Act even though he did not know that the meeting was prohibited under the Act. There was no statutory good faith exception to the Act.<sup>381</sup> Subsection 551.144(c) now provides an affirmative defense to prosecution under subsection (a) if the member of the governmental body acted in reasonable reliance on a court order or a legal opinion as set out in subsection (c).<sup>382</sup>

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<sup>377</sup> See *Martinez v. State*, 879 S.W.2d 54, 55–56 (Tex. Crim. App. 1994) (upholding validity of information which charged county commissioners with violating Act by failing to comply with procedural prerequisites for holding closed session).

<sup>378</sup> TEX. GOV'T CODE ANN. § 551.144.

<sup>379</sup> Act of May 22, 1999, 76th Leg., R.S., ch. 647, 1999 Tex. Gen. Laws 3218, 3219.

<sup>380</sup> *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

<sup>381</sup> *Tovar v. State*, 949 S.W.2d 370, 374 (Tex. App.—San Antonio 1997), *aff'd*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

<sup>382</sup> TEX. GOV'T CODE ANN. § 551.144(c).

## XII. Open Meetings Act and Other Statutes

### A. Other Statutes May Apply to a Public Meeting

The Act is not the only provision of law relevant to a public meeting of a particular governmental entity. For example, section 551.004 of the Government Code expressly provides that:

This chapter does not authorize a governmental body to close a meeting that a charter of the governmental body:

- (1) prohibits from being closed; or
- (2) requires to be open.<sup>383</sup>

In *Shackelford v. City of Abilene*,<sup>384</sup> the Texas Supreme Court held that an Abilene resident had a right to require public meetings under the Abilene city charter, which included the following provision:

All meetings of the Council and all Boards or Commissions appointed by the Council shall be open to the public.<sup>385</sup>

Members of a particular governmental body should consult any applicable statutes, charter provisions, ordinances and rules for provisions affecting the entity's public meetings. Laws other than the Act govern preparing the agenda for a meeting,<sup>386</sup> but the procedures for agenda preparation must be consistent with the openness requirements of the Act.<sup>387</sup>

Even though a particular entity is not a "governmental body" as defined by the Act, another statute may require it to comply with the Act's provisions.<sup>388</sup> Some exercises of governmental power, for example, a city's adoption of zoning regulations, require the city to hold a public hearing at which parties in interest and citizens have an opportunity to be heard.<sup>389</sup> Certain governmental actions may be subject to statutory notice provisions<sup>390</sup> in addition to notice required by the Act.

The Act does not answer all questions about conducting a public meeting. Thus, persons responsible for a particular governmental body's meetings must know about other laws applicable to these meetings. While this handbook cannot identify all provisions relevant to meetings of Texas governmental bodies, we will point out three statutes that are of special importance to governmental bodies.

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<sup>383</sup> TEX. GOV'T CODE ANN. § 551.004.

<sup>384</sup> *Shackelford v. City of Abilene*, 585 S.W.2d 665, 667 (Tex. 1979).

<sup>385</sup> *Id.* at 667 (emphasis omitted).

<sup>386</sup> Tex. Att'y Gen. Op. Nos. DM-473 (1998) at 3, DM-228 (1993) at 2–3, JM-63 (1983) at 3, MW-32 (1979) at 1.

<sup>387</sup> Tex. Att'y Gen. Op. Nos. DM-473 (1998) at 3, DM-228 (1993) at 3.

<sup>388</sup> See TEX. EDUC. CODE ANN. § 12.1051 (applying open meetings and public information laws to open-enrollment charter schools). See also TEX. ELEC. CODE ANN. §§ 31.033(d), .155(d) (applying the Act to county election commissions and joint election commission).

<sup>389</sup> See TEX. LOC. GOV'T CODE ANN. § 211.006.

<sup>390</sup> See *id.* § 152.013(b). See also TEX. ELEC. CODE ANN. §§ 31.033(d), .155(d).

## B. Administrative Procedure Act

The Administrative Procedure Act (the “APA”) establishes “minimum standards of uniform practice and procedure for state agencies” in the rulemaking process and in hearing and resolving contested cases.<sup>391</sup> The state agencies subject to the APA are as a rule also subject to the Act.<sup>392</sup> The decision-making process under the APA is not excepted from the requirements of the Act.<sup>393</sup>

However, this office has concluded that the APA creates an exception to the requirements of the Act with regard to contested cases.<sup>394</sup> A governmental body may consider a claim of privilege in a closed meeting when (1) the claim is made during a contested case proceeding under the APA, and (2) the resolution of the claim requires the examination and discussion of the allegedly privileged information.<sup>395</sup> Although the Act does not authorize a closed session for this purpose, the APA incorporates certain rules of evidence and of civil procedure, including the requirement that claims of privilege or confidentiality be determined in a nonpublic forum.<sup>396</sup>

The APA does not, on the other hand, create exceptions to the requirements of the Act when the two statutes can be harmonized. In *Acker v. Texas Water Commission*, the Texas Supreme Court concluded that the statutory predecessor to section 2001.061 of the Government Code did not authorize a quorum of the members of a governmental body to confer in private regarding a contested case.<sup>397</sup> Section 2001.061(b) provides in pertinent part: “A state agency member may communicate ex parte with another member of the agency.”<sup>398</sup> The court concluded that, when harmonized with the provisions of the Act, this section permits a state agency’s members to confer ex parte, but only when less than a quorum is present.<sup>399</sup>

## C. The Americans with Disabilities Act

Title II of the Americans with Disabilities Act of 1990 (the “ADA”) prohibits discrimination against disabled individuals in the activities, services and programs of public entities.<sup>400</sup> All the activities of state and local governmental bodies are covered by the ADA, including meetings. Governmental bodies subject to the Act must also ensure that their meetings comply with the ADA.<sup>401</sup> For purposes of the ADA, an individual is an individual with a disability if he or she meets one of the following three tests: the individual must have a physical or mental impairment that substantially limits one or more of the individual’s major life activities; he or she has a record of having this type of physical or mental impairment; or he or she is regarded by others as having this type of impairment.<sup>402</sup>

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<sup>391</sup> TEX. GOV’T CODE ANN. § 2001.001(1); *see also id.* § 2001.003(1), (6).

<sup>392</sup> *See id.* § 2001.003(7) (defining “state agency”).

<sup>393</sup> Tex. Att’y Gen. Op. No. H-1269 (1978) at 1 (considering statutory predecessor to APA).

<sup>394</sup> Tex. Att’y Gen. Op. No. JM-645 (1987) at 5–6.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 4–5; *see* TEX. GOV’T CODE ANN. § 2001.083.

<sup>397</sup> *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990).

<sup>398</sup> TEX. GOV’T CODE ANN. § 2001.061.

<sup>399</sup> *Acker*, 790 S.W.2d at 301.

<sup>400</sup> 42 U.S.C.A. §§ 12131–12165.

<sup>401</sup> *See id.* § 12132; 28 C.F.R. §§ 35.130, .149, .160. *See generally Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1434–35 (D. Kan. 1994).

<sup>402</sup> 42 U.S.C.A. § 12102(2); 28 C.F.R. § 35.104.

A governmental body may not exclude a disabled individual from participation in the activities of the governmental body because the facilities are physically inaccessible.<sup>403</sup> The room in which a public meeting is held must be physically accessible to a disabled individual.<sup>404</sup> A governmental body must also ensure that communications with disabled individuals are as effective as communications with others.<sup>405</sup> Thus, a governmental body must take steps to ensure that disabled individuals have access to and can understand the contents of the meeting notice and to ensure that they can understand what is happening at the meeting. This duty includes furnishing appropriate auxiliary aids and services when necessary.<sup>406</sup>

The following statement about meeting accessibility is included on the Secretary of State's Internet site where state and regional agencies submit notice of their meetings:

Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining the type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.<sup>407</sup>

#### **D. The Open Meetings Act Distinguished from the Public Information Act**

Although the Open Meetings Act and the Public Information Act<sup>408</sup> both serve the purpose of making government accessible to the people, they work differently to accomplish this goal. The definitions of "governmental body" in the two statutes are generally similar, but the Public Information Act applies to entities supported by public funds,<sup>409</sup> while the Open Meetings Act does not.<sup>410</sup> Each statute contains a different set of exceptions.<sup>411</sup> The Public Information Act authorizes the attorney general to determine whether records requested by a member of the public may be withheld and to enforce his rulings by writ of mandamus.<sup>412</sup> The Open Meetings Act has no comparable provisions. Chapter 402, subchapter C of the Government Code authorizes the attorney general to issue legal opinions at the request of certain public officers. Pursuant to this authority, the attorney general has addressed and resolved numerous questions of law arising under the Open Meetings Act.<sup>413</sup> Because questions of fact cannot be resolved in the opinion process, an attorney

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<sup>403</sup> 28 C.F.R. §§ 35.149–.150.

<sup>404</sup> *See Dees v. Austin Travis Cnty. Mental Health & Mental Retardation*, 860 F. Supp. 1186, 1190 (W.D. Tex. 1994); *see generally Tyler*, 849 F. Supp. at 1442.

<sup>405</sup> 28 C.F.R. § 35.160.

<sup>406</sup> *Id.* § 35.160(b)(1).

<sup>407</sup> Available at <http://www.sos.state.tx.us/open/access.shtml>.

<sup>408</sup> TEX. GOV'T CODE ANN. ch. 552.

<sup>409</sup> *Id.* § 552.003(1)(A).

<sup>410</sup> *See Tex. Att'y Gen. LO-98-040*, at 2.

<sup>411</sup> *See Tex. Att'y Gen. ORD-491* (1988) at 4.

<sup>412</sup> *See TEX. GOV'T CODE ANN. §§ 552.301–.307, 552.321–.327.*

<sup>413</sup> *Id.* §§ 402.041–.045.

general opinion will not determine whether particular conduct of a governmental body violated the Open Meetings Act.<sup>414</sup>

In addition, the exceptions in one statute are not necessarily incorporated into the other statute. The mere fact that a document was discussed in an executive session does not make it confidential under the Public Information Act.<sup>415</sup> Nor does the Public Information Act authorize a governmental body to hold an executive session to discuss records merely because the records are within one of the exceptions to the Public Information Act.<sup>416</sup> While some early attorney general opinions treated the exceptions to one statute as incorporated into the other, these decisions have been expressly or implicitly overruled.<sup>417</sup> See *supra* Part IX.E of this handbook.

## **E. The Open Meetings Act and the Whistleblower Act**

In *City of Elsa v. Gonzalez*, a former city manager complained to the city council that it had violated the Open Meetings Act in the meeting at which he was fired.<sup>418</sup> His court challenge included a Whistleblower Act claim based on his report to the city council of the violation of the Open Meetings Act.<sup>419</sup> The Texas Supreme Court determined that the former city manager had not established that the city council was, under the Whistleblower Act, an appropriate law enforcement agency to which to report a violation.<sup>420</sup>

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<sup>414</sup> See Tex. Att’y Gen. Op. Nos. GA-0326 (2005) at 4, JC-0307 (2000) at 1, DM-95 (1992) at 1, JM-840 (1988) at 6, H-772 (1976) at 6; see also *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners’ Ass’n*, 2 S.W.3d 459, 461 (Tex. App.—San Antonio 1999, pet. denied) (stating that whether any specific conduct violates the Act is generally a question of fact).

<sup>415</sup> See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 366–67 (Tex. 2000); Tex. Att’y Gen. ORD-605 (1992) at 3 (names of applicants); ORD-485 (1987) at 4–5 (investigative report). See also Tex. Att’y Gen. ORD-491 (1988) at 7 (noting the fact that meeting was not subject to the Act does not make minutes of meeting confidential under Open Records Act).

<sup>416</sup> Tex. Att’y Gen. Op. Nos. JM-595 (1986) at 4–5 (concluding that Open Records Act does not authorize executive session discussion of written evaluations on selection of consultants and bidders); MW-578 (1982) at 4 (concluding there is no implied authority under the Act to hold closed session to review private information in unemployment benefit case files).

<sup>417</sup> See, e.g., Tex. Att’y Gen. Op. No. H-1154 (1978) at 3 (closed meeting for discussion of confidential child welfare case files); Tex. Att’y Gen. ORD-461 (1987) (tape recording of closed session is not public under Open Records Act); ORD-259 (1980) (value of donation pledged to city is confidential under statutory predecessor to section 551.072 of the Government Code).

<sup>418</sup> *City of Elsa v. Gonzalez*, 325 S.W.3d 622 (Tex. 2010).

<sup>419</sup> See *id.* at 626–28.

<sup>420</sup> See *id.* at 628.



## Appendix A: Text of the Texas Open Meetings Act

### GOVERNMENT CODE CHAPTER 551. OPEN MEETINGS

#### Subchapter A. General Provisions

##### § 551.001. Definitions

###### In this chapter:

- (1) “Closed meeting” means a meeting to which the public does not have access.
- (2) “Deliberation” means a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.
- (3) “Governmental body” means:
  - (A) a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members;
  - (B) a county commissioners court in the state;
  - (C) a municipal governing body in the state;
  - (D) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;
  - (E) a school district board of trustees;
  - (F) a county board of school trustees;
  - (G) a county board of education;
  - (H) the governing board of a special district created by law;
  - (I) a local workforce development board created under Section 2308.253;
  - (J) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and
  - (K) a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code.
- (4) “Meeting” means:
  - (A) a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision

or control is discussed or considered or during which the governmental body takes formal action; or

- (B) except as otherwise provided by this subdivision, a gathering:
  - (i) that is conducted by the governmental body or for which the governmental body is responsible;
  - (ii) at which a quorum of members of the governmental body is present;
  - (iii) that has been called by the governmental body; and
  - (iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

The term does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, or the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.

The term includes a session of a governmental body.

- (5) “Open” means open to the public.
- (6) “Quorum” means a majority of a governmental body, unless defined differently by applicable law or rule or the charter of the governmental body.

**§ 551.0015. Certain Property Owners’ Associations Subject to Law**

- (a) A property owners’ association is subject to this chapter in the same manner as a governmental body:
  - (1) if:
    - (A) membership in the property owners’ association is mandatory for owners or for a defined class of owners of private real property in a defined geographic area in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more;
    - (B) the property owners’ association has the power to make mandatory special assessments for capital improvements or mandatory regular assessments; and
    - (C) the amount of the mandatory special or regular assessments is or has ever been based in whole or in part on the value at which the state or a local governmental body assesses the property for purposes of ad

valorem taxation under Section 20, Article VIII, Texas Constitution;  
or

- (2) if the property owners' association:
  - (A) provides maintenance, preservation, and architectural control of residential and commercial property within a defined geographic area in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more; and
  - (B) is a corporation that
    - (i) is governed by a board of trustees who may employ a general manager to execute the association's bylaws and administer the business of the corporation;
    - (ii) does not require membership in the corporation by the owners of the property within the defined area; and
    - (iii) was incorporated before January 1, 2006.
- (b) The governing body of the association, a committee of the association, and members of the governing body or of a committee of the association are subject to this chapter in the same manner as the governing body of a governmental body, a committee of a governmental body, and members of the governing body or of a committee of the governmental body.

**§ 551.002. Open Meetings Requirement**

Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.

**§ 551.003. Legislature**

In this chapter, the legislature is exercising its powers to adopt rules to prohibit secret meetings of the legislature, committees of the legislature, and other bodies associated with the legislature, except as specifically permitted in the constitution.

**§ 551.0035. Attendance by Governmental Body at Legislative Committee or Agency Meeting**

- (a) This section applies only to the attendance by a quorum of a governmental body at a meeting of a committee or agency of the legislature. This section does not apply to attendance at the meeting by members of the legislative committee or agency holding the meeting.
- (b) The attendance by a quorum of a governmental body at a meeting of a committee or agency of the legislature is not considered to be a meeting of that governmental body if the deliberations at the meeting by the members of that governmental body consist only of publicly testifying at the meeting, publicly commenting at the meeting, and publicly responding at the meeting to a question asked by a member of the legislative committee or agency.

**§ 551.004. Open Meetings Required by Charter**

This chapter does not authorize a governmental body to close a meeting that a charter of the governmental body:

- (1) prohibits from being closed; or
- (2) requires to be open.

**§ 551.005. Open Meetings Training**

- (a) Each elected or appointed public official who is a member of a governmental body subject to this chapter shall complete a course of training of not less than one and not more than two hours regarding the responsibilities of the governmental body and its members under this chapter not later than the 90th day after the date the member:
  - (1) takes the oath of office, if the member is required to take an oath of office to assume the person's duties as a member of the governmental body; or
  - (2) otherwise assumes responsibilities as a member of the governmental body, if the member is not required to take an oath of office to assume the person's duties as a member of the governmental body.
- (b) The attorney general shall ensure that the training is made available. The office of the attorney general may provide the training and may also approve any acceptable course of training offered by a governmental body or other entity. The attorney general shall ensure that at least one course of training approved or provided by the attorney general is available on videotape or a functionally similar and widely available medium at no cost. The training must include instruction in:
  - (1) the general background of the legal requirements for open meetings;
  - (2) the applicability of this chapter to governmental bodies;
  - (3) procedures and requirements regarding quorums, notice, and recordkeeping under this chapter;
  - (4) procedures and requirements for holding an open meeting and for holding a closed meeting under this chapter; and
  - (5) penalties and other consequences for failure to comply with this chapter.
- (c) The office of the attorney general or other entity providing the training shall provide a certificate of course completion to persons who complete the training required by this section. A governmental body shall maintain and make available for public inspection the record of its members' completion of the training.
- (d) Completing the required training as a member of the governmental body satisfies the requirements of this section with regard to the member's service on a committee or subcommittee of the governmental body and the member's ex officio service on any other governmental body.

- (e) The training required by this section may be used to satisfy any corresponding training requirements concerning this chapter or open meetings required by law for the members of a governmental body. The attorney general shall attempt to coordinate the training required by this section with training required by other law to the extent practicable.
- (f) The failure of one or more members of a governmental body to complete the training required by this section does not affect the validity of an action taken by the governmental body.
- (g) A certificate of course completion is admissible as evidence in a criminal prosecution under this chapter. However, evidence that a defendant completed a course of training offered under this section is not prima facie evidence that the defendant knowingly violated this chapter.

## **Subchapter B. Record of Open Meeting**

### **§ 551.021. Minutes or Tape Recording of Open Meeting Required**

- (a) A governmental body shall prepare and keep minutes or make a tape recording of each open meeting of the body.
- (a) The minutes must:
  - (1) state the subject of each deliberation; and
  - (2) indicate each vote, order, decision, or other action taken.

### **§ 551.022. Minutes and Tape Recordings of Open Meeting: Public Record**

The minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee.

### **§ 551.023. Recording of Meeting by Person in Attendance**

- (a) A person in attendance may record all or any part of an open meeting of a governmental body by means of a tape recorder, video camera, or other means of aural or visual reproduction.
- (b) A governmental body may adopt reasonable rules to maintain order at a meeting, including rules relating to:
  - (1) the location of recording equipment; and
  - (2) the manner in which the recording is conducted.
- (c) A rule adopted under Subsection (b) may not prevent or unreasonably impair a person from exercising a right granted under Subsection (a).

## Subchapter C. Notice of Meetings

### § 551.041. Notice of Meeting Required

A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body.

### § 551.0411. Meeting Notice Requirements in Certain Circumstances

- (a) Section 551.041 does not require a governmental body that recesses an open meeting to the following regular business day to post notice of the continued meeting if the action is taken in good faith and not to circumvent this chapter. If an open meeting is continued to the following regular business day and, on that following day, the governmental body continues the meeting to another day, the governmental body must give written notice as required by this subchapter of the meeting continued to that other day.
- (b) A governmental body that is prevented from convening an open meeting that was otherwise properly posted under Section 551.041 because of a catastrophe may convene the meeting in a convenient location within 72 hours pursuant to Section 551.045 if the action is taken in good faith and not to circumvent this chapter. If the governmental body is unable to convene the open meeting within those 72 hours, the governmental body may subsequently convene the meeting only if the governmental body gives written notice of the meeting as required by this subchapter.
- (c) In this section, “catastrophe” means a condition or occurrence that interferes physically with the ability of a governmental body to conduct a meeting, including:
  - (1) fire, flood, earthquake, hurricane, tornado, or wind, rain, or snow storm;
  - (2) power failure, transportation failure, or interruption of communication facilities;
  - (3) epidemic; or
  - (4) riot, civil disturbance, enemy attack, or other actual or threatened act of lawlessness or violence.

### § 551.0415. Governing Body of Municipality or County: Reports About Items of Community Interest Regarding Which No Action Will be Taken

- (a) Notwithstanding Sections 551.041 and 551.042, a quorum of the governing body of a municipality or county may receive from staff of the political subdivision and a member of the governing body may make a report about items of community interest during a meeting of the governing body without having given notice of the subject of the report as required by this subchapter if no action is taken and, except as provided by Section 551.042, possible action is not discussed regarding the information provided in the report.<sup>421</sup>

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<sup>421</sup> House Bill 2313 and Senate Bill 1233 amended section 551.0415 in the Eighty-second Legislature to add a county to the section’s application. *See supra* Part II.C. House Bill 2313 uses the term “political subdivision” in its

- (b) For purposes of Subsection (a), “items of community interest” includes:
- (1) expressions of thanks, congratulations, or condolence;
  - (2) information regarding holiday schedules;
  - (3) 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 purposes of this subdivision;
  - (4) a reminder about an upcoming event organized or sponsored by the governing body;
  - (5) 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
  - (6) announcements involving an imminent threat to the public health and safety of people in the political subdivision that has arisen after the posting of the agenda.

**§ 551.042. Inquiry Made at Meeting**

- (a) If, at a meeting of a governmental body, a member of the public or of the governmental body inquires about a subject for which notice has not been given as required by this subchapter, the notice provisions of this subchapter do not apply to:
- (1) a statement of specific factual information given in response to the inquiry; or
  - (2) a recitation of existing policy in response to the inquiry.
- (b) Any deliberation of or decision about the subject of the inquiry shall be limited to a proposal to place the subject on the agenda for a subsequent meeting.

**§ 551.043. Time and Accessibility of Notice; General Rule**

- (a) The notice of a meeting of a governmental body must be posted in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting, except as provided by Sections 551.044–551.046.
- (b) If this chapter specifically requires or allows a governmental body to post notice of a meeting on the Internet:
- (1) the governmental body satisfies the requirement that the notice must be posted in a place readily accessible to the general public at all times by making a good-faith attempt to continuously post the notice on the Internet during the prescribed period;

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subsequent references to the applicable entities, whereas Senate Bill 1233 uses the term “county” for those subsequent references. *Compare* Tex. H.B. 2313, *with* Tex. S.B. 1233. The text of House Bill 2313 is quoted above.

- (2) the governmental body must still comply with any duty imposed by this chapter to physically post the notice at a particular location; and
- (3) if the governmental body makes a good-faith attempt to continuously post the notice on the Internet during the prescribed period, the notice physically posted at the location prescribed by this chapter must be readily accessible to the general public during normal business hours.

**§ 551.044. Exception to General Rule: Governmental Body With Statewide Jurisdiction**

- (a) The secretary of state must post notice on the Internet of a meeting of a state board, commission, department, or officer having statewide jurisdiction for at least seven days before the day of the meeting. The secretary of state shall provide during regular office hours a computer terminal at a place convenient to the public in the office of the secretary of state that members of the public may use to view notices of meetings posted by the secretary of state.
- (b) Subsection (a) does not apply to:
  - (1) the Texas Department of Insurance, as regards proceedings and activities under Title 5, Labor Code, of the department, the commissioner of insurance, or the commissioner of workers' compensation; or
  - (2) the governing board of an institution of higher education.

**§ 551.045. Exception to General Rule: Notice of Emergency Meeting or Emergency Addition to Agenda**

- (a) In an emergency or when there is an urgent public necessity, the notice of a meeting or the supplemental notice of a subject added as an item to the agenda for a meeting for which notice has been posted in accordance with this subchapter is sufficient if it is posted for at least two hours before the meeting is convened.
- (b) An emergency or an urgent public necessity exists only if immediate action is required of a governmental body because of:
  - (1) an imminent threat to public health and safety; or
  - (2) a reasonably unforeseeable situation.
- (c) The governmental body shall clearly identify the emergency or urgent public necessity in the notice or supplemental notice under this section.
- (d) A person who is designated or authorized to post notice of a meeting by a governmental body under this subchapter shall post the notice taking at face value the governmental body's stated reason for the emergency or urgent public necessity.
- (e) For purposes of Subsection (b)(2), the sudden relocation of a large number of residents from the area of a declared disaster to a governmental body's jurisdiction is considered a reasonably unforeseeable situation for a reasonable period immediately following the relocation. Notice of an emergency meeting or supplemental notice of an emergency item added to the agenda of a meeting to address a situation described



by this subsection must be given to members of the news media as provided by Section 551.047 not later than one hour before the meeting.

**§ 551.046. Exception to General Rule: Committee of Legislature**

The notice of a legislative committee meeting shall be as provided by the rules of the house of representatives or of the senate.

**§ 551.047. Special Notice to News Media of Emergency Meeting or Emergency Addition to Agenda**

- (a) The presiding officer of a governmental body, or the member of a governmental body who calls an emergency meeting of the governmental body or adds an emergency item to the agenda of a meeting of the governmental body, shall notify the news media of the emergency meeting or emergency item as required by this section.
- (b) The presiding officer or member is required to notify only those members of the news media that have previously:
  - (1) filed at the headquarters of the governmental body a request containing all pertinent information for the special notice; and
  - (2) agreed to reimburse the governmental body for the cost of providing the special notice.
- (c) The presiding officer or member shall give the notice by telephone, facsimile transmission, or electronic mail.

**§ 551.048. State Governmental Body: Notice to Secretary of State; Place of Posting Notice**

- (a) A state governmental body shall provide notice of each meeting to the secretary of state.
- (b) The secretary of state shall post the notice on the Internet. The secretary of state shall provide during regular office hours a computer terminal at a place convenient to the public in the office of the secretary of state that members of the public may use to view the notice.

**§ 551.049. County Governmental Body: Place of Posting Notice**

A county governmental body shall post notice of each meeting on a bulletin board at a place convenient to the public in the county courthouse.

**§ 551.050. Municipal Governmental Body: Place of Posting Notice**

- (a) In this section, “electronic bulletin board” means an electronic communication system that includes a perpetually illuminated screen on which the governmental body can post messages or notices viewable without manipulation by the public.
- (b) A municipal governmental body shall post notice of each meeting on a physical or electronic bulletin board at a place convenient to the public in city hall.

**§ 551.051. School District: Place of Posting Notice**

A school district shall post notice of each meeting on a bulletin board at a place convenient to the public in the central administrative office of the district.

**§ 551.052. School District: Special Notice to News Media**

- (a) A school district shall provide special notice of each meeting to any news media that has:
  - (1) requested special notice; and
  - (2) agreed to reimburse the district for the cost of providing the special notice.
- (b) The notice shall be by telephone, facsimile transmission, or electronic mail.

**§ 551.053. District or Political Subdivision Extending Into Four or More Counties: Notice to Public, Secretary of State, and County Clerk; Place of Posting Notice**

- (a) The governing body of a water district or other district or political subdivision that extends into four or more counties shall:
  - (1) post notice of each meeting at a place convenient to the public in the administrative office of the district or political subdivision;
  - (2) provide notice of each meeting to the secretary of state; and
  - (3) provide notice of each meeting to the county clerk of the county in which the administrative office of the district or political subdivision is located.
- (b) The secretary of state shall post the notice provided under Subsection (a)(2) on the Internet. The secretary of state shall provide during regular office hours a computer terminal at a place convenient to the public in the office of the secretary of state that members of the public may use to view the notice.
- (c) A county clerk shall post the notice provided under Subsection (a)(3) on a bulletin board at a place convenient to the public in the county courthouse.

**§ 551.054. District or Political Subdivision Extending Into Fewer Than Four Counties: Notice to Public and County Clerks; Place of Posting Notice**

- (a) The governing body of a water district or other district or political subdivision that extends into fewer than four counties shall:
  - (1) post notice of each meeting at a place convenient to the public in the administrative office of the district or political subdivision; and
  - (2) provide notice of each meeting to the county clerk of each county in which the district or political subdivision is located.
- (b) A county clerk shall post the notice provided under Subsection (a)(2) on a bulletin board at a place convenient to the public in the county courthouse.

**§ 551.055. Institution of Higher Education**

In addition to providing any other notice required by this subchapter, the governing board of a single institution of higher education:

- (1) shall post notice of each meeting at the county courthouse of the county in which the meeting will be held;
- (2) shall publish notice of a meeting in a student newspaper of the institution if an issue of the newspaper is published between the time of the posting and the time of the meeting; and
- (3) may post notice of a meeting at another place convenient to the public.

**§ 551.056. Additional Posting Requirements for Certain Municipalities, Counties, School Districts, Junior College Districts, and Development Corporations**

- (a) This section applies only to a governmental body or economic development corporation that maintains an Internet website or for which an Internet website is maintained. This section does not apply to a governmental body described by Section 551.001(3)(D).
- (b) In addition to the other place at which notice is required to be posted by this subchapter, the following governmental bodies and economic development corporations must also concurrently post notice of a meeting on the Internet website of the governmental body or economic development corporation:
  - (1) a municipality;
  - (2) a county;
  - (3) a school district;
  - (4) the governing body of a junior college or junior college district, including a college or district that has changed its name in accordance with Chapter 130, Education Code;

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- (5) a development corporation organized under the Development Corporation Act (Subtitle C1, Title 12, Local Government Code).
- (6) a regional mobility authority included within the meaning of an “authority” as defined by Section 370.003, Transportation Code.
- (c) The following governmental bodies and economic development corporations must also concurrently post the agenda for the meeting on the Internet website of the governmental body or economic development corporation:
  - (1) a municipality with a population of 48,000 or more;
  - (2) a county with a population of 65,000 or more;
  - (3) a school district that contains all or part of the area within the corporate boundaries of a municipality with a population of 48,000 or more;
  - (4) the governing body of a junior college district, including a district that has changed its name in accordance with Chapter 130, Education Code, that contains all or part of the area within the corporate boundaries of a municipality with a population of 48,000 or more;
  - (5) a development corporation organized under the Development Corporation Act (Subtitle C1, Title 12, Local Government Code)<sup>422</sup> that was created by or for:
    - (A) a municipality with a population of 48,000 or more; or
    - (B) a county or district that contains all or part of the area within the corporate boundaries of a municipality with a population of 48,000 or more.
  - (6) a regional mobility authority included within the meaning of an “authority” as defined by Section 370.003, Transportation Code.
- (d) The validity of a posted notice of a meeting or an agenda by a governmental body or economic development corporation subject to this section that made a good faith attempt to comply with the requirements of this section is not affected by a failure to comply with a requirement of this section that is due to a technical problem beyond the control of the governmental body or economic development corporation.

**Subchapter D. Exceptions to Requirement That Meetings Be Open**

**§ 551.071. Consultation with Attorney; Closed Meeting**

A governmental body may not conduct a private consultation with its attorney except:

- (1) when the governmental body seeks the advice of its attorney about:
  - (A) pending or contemplated litigation; or

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<sup>422</sup> The citation to the Development Corporation Act in sections 511.056(b)(5) and (c)(6) became effective April 1, 2009, in a nonsubstantive revision of statutes. *See* Act of May 15, 2007, 80th Leg., R.S., ch. 886, § 3.10, 2007 Tex. Gen. Laws 1905, 2141.

- (B) a settlement offer; or
- (2) on 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.

**§ 551.072. Deliberation Regarding Real Property; Closed Meeting**

A governmental body may conduct a closed meeting to deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.

**§ 551.0725. Commissioners Courts: Deliberation Regarding Contract Being Negotiated; Closed Meeting**

- (a) The commissioners court of a county may conduct a closed meeting to deliberate business and financial issues relating to a contract being negotiated if, before conducting the closed meeting:
  - (1) the commissioners court votes unanimously that deliberation in an open meeting would have a detrimental effect on the position of the commissioners court in negotiations with a third person; and
  - (2) the attorney advising the commissioners court issues a written determination that deliberation in an open meeting would have a detrimental effect on the position of the commissioners court in negotiations with a third person.
- (b) Notwithstanding Section 551.103(a), Government Code, the commissioners court must make a tape recording of the proceedings of a closed meeting to deliberate the information.

**§ 551.0726. Texas Facilities Commission: Deliberation Regarding Contract Being Negotiated; Closed Meeting**

- (a) The Texas Facilities Commission may conduct a closed meeting to deliberate business and financial issues relating to a contract being negotiated if, before conducting the closed meeting:
  - (1) the commission votes unanimously that deliberation in an open meeting would have a detrimental effect on the position of the state in negotiations with a third person; and
  - (2) the attorney advising the commission issues a written determination finding that deliberation in an open meeting would have a detrimental effect on the position of the state in negotiations with a third person and setting forth that finding therein.
- (b) Notwithstanding Section 551.103(a) the commission must make a tape recording of the proceedings of a closed meeting held under this section.

**§ 551.073. Deliberation Regarding Prospective Gift; Closed Meeting**

A governmental body may conduct a closed meeting to deliberate a negotiated contract for a prospective gift or donation to the state or the governmental body if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.

**§ 551.074. Personnel Matters; Closed Meeting**

- (a) This chapter does not require a governmental body to conduct an open meeting:
  - (1) to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or
  - (2) to hear a complaint or charge against an officer or employee.
- (b) Subsection (a) does not apply if the officer or employee who is the subject of the deliberation or hearing requests a public hearing.

**§ 551.0745. Personnel Matters Affecting County Advisory Body; Closed Meeting**

- (a) This chapter does not require the commissioners court of a county to conduct an open meeting:
  - (1) to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a member of an advisory body; or
  - (2) to hear a complaint or charge against a member of an advisory body.
- (b) Subsection (a) does not apply if the individual who is the subject of the deliberation or hearing requests a public hearing.

**§ 551.075. Conference Relating to Investments and Potential Investments Attended by Board of Trustees of Texas Growth Fund; Closed Meeting**

- (a) This chapter does not require the board of trustees of the Texas growth fund to confer with one or more employees of the Texas growth fund or with a third party in an open meeting if the only purpose of the conference is to:
  - (1) receive information from the employees of the Texas growth fund or the third party relating to an investment or a potential investment by the Texas growth fund in:
    - (A) a private business entity, if disclosure of the information would give advantage to a competitor; or
    - (B) a business entity whose securities are publicly traded, if the investment or potential investment is not required to be registered under the Securities and Exchange Act of 1934 (15 U.S.C. Section 78a et seq.), and its subsequent amendments, and if disclosure of the information would give advantage to a competitor; or
  - (2) question the employees of the Texas growth fund or the third party regarding an investment or potential investment described by Subdivision (1), if

disclosure of the information contained in the questions or answers would give advantage to a competitor.

- (b) During a conference under Subsection (a), members of the board of trustees of the Texas growth fund may not deliberate public business or agency policy that affects public business.
- (c) In this section, “Texas growth fund” means the fund created by Section 70, Article XVI, Texas Constitution.

**§ 551.076. Deliberation Regarding Security Devices or Security Audits; Closed Meeting**

This chapter does not require a governmental body to conduct an open meeting to deliberate:

- (1) the deployment, or specific occasions for implementation, of security personnel or devices; or
- (2) a security audit.

**§ 551.077. Agency Financed by Federal Government**

This chapter does not require an agency financed entirely by federal money to conduct an open meeting.

**§ 551.078. Medical Board or Medical Committee**

This chapter does not require a medical board or medical committee to conduct an open meeting to deliberate the medical or psychiatric records of an individual applicant for a disability benefit from a public retirement system.

**§ 551.0785. Deliberations Involving Medical or Psychiatric Records of Individuals**

This chapter does not require a benefits appeals committee for a public self-funded health plan or a governmental body that administers a public insurance, health, or retirement plan to conduct an open meeting to deliberate:

- (1) the medical records or psychiatric records of an individual applicant for a benefit from the plan; or
- (2) a matter that includes a consideration of information in the medical or psychiatric records of an individual applicant for a benefit from the plan.

**§ 551.079. Texas Department of Insurance**

- (a) The requirements of this chapter do not apply to a meeting of the commissioner of insurance or the commissioner’s designee with the board of directors of a guaranty association established under Chapter 2602, Insurance Code, or Article 21.28-C or 21.28-D, Insurance Code, in the discharge of the commissioner’s duties and responsibilities to regulate and maintain the solvency of a person regulated by the Texas Department of Insurance.

- (b) The commissioner of insurance may deliberate and determine the appropriate action to be taken concerning the solvency of a person regulated by the Texas Department of Insurance in a closed meeting with persons in one or more of the following categories:
  - (1) staff of the Texas Department of Insurance;
  - (2) a regulated person;
  - (3) representatives of a regulated person; or
  - (4) members of the board of directors of a guaranty association established under Chapter 2602, Insurance Code, or Article 21.28-C, or 21.28-D, Insurance Code.

**§ 551.080. Board of Pardons and Paroles**

This chapter does not require the Board of Pardons and Paroles to conduct an open meeting to interview or counsel an inmate of the Texas Department of Criminal Justice.

**§ 551.081. Credit Union Commission**

This chapter does not require the Credit Union Commission to conduct an open meeting to deliberate a matter made confidential by law.

**§ 551.0811. The Finance Commission of Texas**

This chapter does not require The Finance Commission of Texas to conduct an open meeting to deliberate a matter made confidential by law.

**§ 551.082. School Children; School District Employees; Disciplinary Matter or Complaint**

- (a) This chapter does not require a school board to conduct an open meeting to deliberate in a case:
  - (1) involving discipline of a public school child; or
  - (2) in which a complaint or charge is brought against an employee of the school district by another employee and the complaint or charge directly results in a need for a hearing.
- (b) Subsection (a) does not apply if an open hearing is requested in writing by a parent or guardian of the child or by the employee against whom the complaint or charge is brought.

**§ 551.0821. School Board: Personally Identifiable Information about Public School Student**

- (a) This chapter does not require a school board to conduct an open meeting to deliberate a matter regarding a public school student if personally identifiable information about the student will necessarily be revealed by the deliberation.
- (b) Directory information about a public school student is considered to be personally identifiable information about the student for purposes of Subsection (a) only if a parent or guardian of the student, or the student, if the student has attained 18 years



of age, has informed the school board, the school district, or a school in the school district that the directory information should not be released without prior consent. In this subsection, “directory information” has the meaning assigned by the federal Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g), as amended.

- (c) Subsection (a) does not apply if an open meeting about the matter is requested in writing by a parent or guardian of the student or by the student if the student has attained 18 years of age.

**§ 551.083. Certain School Boards; Closed Meeting Regarding Consultation With Representative of Employee Group**

This chapter does not require a school board operating under a consultation agreement authorized by Section 13.901, Education Code, to conduct an open meeting to deliberate the standards, guidelines, terms, or conditions the board will follow, or instruct its representatives to follow, in a consultation with a representative of an employee group.

**§ 551.084. Investigation; Exclusion of Witness From Hearing**

A governmental body that is investigating a matter may exclude a witness from a hearing during the examination of another witness in the investigation.

**§ 551.085. Governing Board of Certain Providers of Health Care Services**

- (a) This chapter does not require the governing board of a municipal hospital, municipal hospital authority, county hospital, county hospital authority, hospital district created under general or special law, or nonprofit health maintenance organization created under Section 534.101, Health and Safety Code, to conduct an open meeting to deliberate:
  - (1) pricing or financial planning information relating to a bid or negotiation for the arrangement or provision of services or product lines to another person if disclosure of the information would give advantage to competitors of the hospital, hospital district, or nonprofit health maintenance organization; or
  - (2) information relating to a proposed new service or product line of the hospital, hospital district, or nonprofit health maintenance organization before publicly announcing the service or product line.
- (b) The governing board of a health maintenance organization created under Section 281.0515, Health and Safety Code, that is subject to this chapter is not required to conduct an open meeting to deliberate information described by Subsection (a).

**§ 551.086. Certain Public Power Utilities: Competitive Matters**

- (a) Notwithstanding anything in this chapter to the contrary, the rules provided by this section apply to competitive matters of a public power utility.
- (b) In this section:

- (1) “Public power utility” means an entity providing electric or gas utility services that is subject to the provisions of this chapter.
- (2) “Public power utility governing body” means the board of trustees or other applicable governing body, including a city council, of a public power utility.
- (c) This chapter does not require a public power utility governing body to conduct an open meeting to deliberate, vote, or take final action on any competitive matter, as that term is defined by Section 552.133. This section does not limit the right of a public power utility governing body to hold a closed session under any other exception provided for in this chapter.
- (d) For purposes of Section 551.041, the notice of the subject matter of an item that may be considered as a competitive matter under this section is required to contain no 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.
- (e) With respect to municipally owned utilities subject to this section, this section shall apply whether or not the municipally owned utility has adopted customer choice or serves in a multiply certificated service area under the Utilities Code.
- (f) Nothing in this section is intended to preclude the application of the enforcement and remedies provisions of Subchapter G.

**§ 551.087. Deliberation Regarding Economic Development Negotiations; Closed Meeting**

This chapter does not require a governmental body to conduct an open meeting:

- (1) to discuss or deliberate regarding commercial or financial information that the governmental body has received from a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and with which the governmental body is conducting economic development negotiations; or
- (2) to deliberate the offer of a financial or other incentive to a business prospect described by Subdivision (1).

**§ 551.088. Deliberations Regarding Test Item**

This chapter does not require a governmental body to conduct an open meeting to deliberate a test item or information related to a test item if the governmental body believes that the test item may be included in a test the governmental body administers to individuals who seek to obtain or renew a license or certificate that is necessary to engage in an activity.

**§ 551.089. Department of Information Resources**

This chapter does not require the governing board of the Department of Information Resources to conduct an open meeting to deliberate:

- (1) security assessments or deployments relating to information resources technology;
- (2) network security information as described by Section 2059.055(b); or
- (3) the deployment, or specific occasions for implementation, of security personnel, critical infrastructure, or security devices.

**Subchapter E. Procedures Relating To Closed Meeting**

**§ 551.101. Requirement to First Convene in Open Meeting**

If a closed meeting is allowed under this chapter, a governmental body may not conduct the closed meeting unless a quorum of the governmental body first convenes in an open meeting for which notice has been given as provided by this chapter and during which the presiding officer publicly:

- (1) announces that a closed meeting will be held; and
- (2) identifies the section or sections of this chapter under which the closed meeting is held.

**§ 551.102. Requirement to Vote or Take Final Action in Open Meeting**

A final action, decision, or vote on a matter deliberated in a closed meeting under this chapter may only be made in an open meeting that is held in compliance with the notice provisions of this chapter.

**§ 551.103. Certified Agenda or Tape Recording Required**

- (a) A governmental body shall either keep a certified agenda or make a tape recording of the proceedings of each closed meeting, except for a private consultation permitted under Section 551.071.
- (b) The presiding officer shall certify that an agenda kept under Subsection (a) is a true and correct record of the proceedings.
- (c) The certified agenda must include:
  - (1) a statement of the subject matter of each deliberation;
  - (2) a record of any further action taken; and
  - (3) an announcement by the presiding officer at the beginning and the end of the meeting indicating the date and time.
- (d) A tape recording made under Subsection (a) must include announcements by the presiding officer at the beginning and the end of the meeting indicating the date and time.

**§ 551.104. Certified Agenda or Tape; Preservation; Disclosure**

- (a) A governmental body shall preserve the certified agenda or tape recording of a closed meeting for at least two years after the date of the meeting. If an action involving the meeting is brought within that period, the governmental body shall preserve the certified agenda or tape while the action is pending.
- (b) In litigation in a district court involving an alleged violation of this chapter, the court:
  - (1) is entitled to make an in camera inspection of the certified agenda or tape;
  - (2) may admit all or part of the certified agenda or tape as evidence, on entry of a final judgment; and
  - (3) may grant legal or equitable relief it considers appropriate, including an order that the governmental body make available to the public the certified agenda or tape of any part of a meeting that was required to be open under this chapter.
- (c) The certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).

**Subchapter F. Meetings Using Telephone, Videoconference, or Internet**

**§ 551.121. Governing Board of Institution of Higher Education; Board for Lease of University Lands; Texas Higher Education Coordinating Board: Special Meeting for Immediate Action**

- (a) In this section, “governing board,” “institution of higher education,” and “university system” have the meanings assigned by Section 61.003, Education Code.
- (b) This chapter does not prohibit the governing board of an institution of higher education, the Board for Lease of University Lands, or the Texas Higher Education Coordinating Board from holding an open or closed meeting by telephone conference call.
- (c) A meeting held by telephone conference call authorized by this section may be held only if:
  - (1) the meeting is a special called meeting and immediate action is required; and
  - (2) the convening at one location of a quorum of the governing board, the Board for Lease of University Lands or the Texas Higher Education Coordinating Board, as applicable, is difficult or impossible.
- (d) The telephone conference call meeting is subject to the notice requirements applicable to other meetings.
- (e) The notice of a telephone conference call meeting of a governing board must specify as the location of the meeting the location where meetings of the governing board are usually held. For a meeting of the governing board of a university system, the notice must specify as the location of the meeting the board’s conference room at the

university system office. For a meeting of the Board for Lease of University Lands, the notice must specify as the location of the meeting a suitable conference or meeting room at The University of Texas System office. For a meeting of the Texas Higher Education Coordinating Board, the notice must specify as the location of the meeting a suitable conference or meeting room at the offices of the Texas Higher Education Coordinating Board or at an institution of higher education.

- (f) Each part of the telephone conference call meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting as the location of the meeting and shall be tape recorded. The tape recording shall be made available to the public.

**§ 551.122. Governing Board of Junior College District: Quorum Present at One Location**

- (a) This chapter does not prohibit the governing board of a junior college district from holding an open or closed meeting by telephone conference call.
- (b) A meeting held by telephone conference call authorized by this section may be held only if a quorum of the governing board is physically present at the location where meetings of the board are usually held.
- (c) The telephone conference call meeting is subject to the notice requirements applicable to other meetings.
- (d) Each part of the telephone conference call meeting that is required to be open to the public shall be audible to the public at the location where the quorum is present and shall be tape-recorded. The tape recording shall be made available to the public.
- (e) The location of the meeting shall provide two-way communication during the entire telephone conference call meeting, and the identification of each party to the telephone conference shall be clearly stated before the party speaks.
- (f) The authority provided by this section is in addition to the authority provided by Section 551.121.
- (g) A member of a governing board of a junior college district who participates in a board meeting by telephone conference call but is not physically present at the location of the meeting is considered to be absent from the meeting for purposes of Section 130.0845, Education Code.

**§ 551.123. Texas Board of Criminal Justice**

- (a) The Texas Board of Criminal Justice may hold an open or closed emergency meeting by telephone conference call.
- (b) The portion of the telephone conference call meeting that is open shall be recorded. The recording shall be made available to be heard by the public at one or more places designated by the board.

**§ 551.124. Board of Pardons and Paroles**

At the call of the presiding officer of the Board of Pardons and Paroles, the board may hold a hearing on clemency matters by telephone conference call.

**§ 551.125. Other Governmental Body**

- (a) Except as otherwise provided by this subchapter, this chapter does not prohibit a governmental body from holding an open or closed meeting by telephone conference call.
- (b) A meeting held by telephone conference call may be held only if:
  - (1) an emergency or public necessity exists within the meaning of Section 551.045 of this chapter; and
  - (2) the convening at one location of a quorum of the governmental body is difficult or impossible; or
  - (3) the meeting is held by an advisory board.
- (c) The telephone conference call meeting is subject to the notice requirements applicable to other meetings.
- (d) The notice of the telephone conference call meeting must specify as the location of the meeting the location where meetings of the governmental body are usually held.
- (e) Each part of the telephone conference call meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting as the location of the meeting and shall be tape-recorded. The tape recording shall be made available to the public.
- (f) The location designated in the notice as the location of the meeting shall provide two-way communication during the entire telephone conference call meeting and the identification of each party to the telephone conference shall be clearly stated prior to speaking.

**§ 551.126. Higher Education Coordinating Board**

- (a) In this section, “board” means the Texas Higher Education Coordinating Board.
- (b) The board may hold an open meeting by telephone conference call or video conference call in order to consider a higher education impact statement if the preparation of a higher education impact statement by the board is to be provided under the rules of either the house of representatives or the senate.
- (c) A meeting held by telephone conference call must comply with the procedures described in Section 551.125.
- (d) A meeting held by video conference call is subject to the notice requirements applicable to other meetings. In addition, a meeting held by video conference call shall:

- (1) be visible and audible to the public at the location specified in the notice of the meeting as the location of the meeting;
- (2) be recorded by audio and video; and
- (3) have two-way audio and video communications with each participant in the meeting during the entire meeting.

**§ 551.127. Videoconference Call**

- (a) Except as otherwise provided by this section, this chapter does not prohibit a governmental body from holding an open or closed meeting by videoconference call.
- (b) A meeting may be held by videoconference call only if a quorum of the governmental body is physically present at one location of the meeting, except as provided by Subsection (c).
- (c) A meeting of a state governmental body or a governmental body that extends into three or more counties may be held by videoconference call only if a majority of the quorum of the governmental body is physically present at one location of the meeting.
- (d) A meeting held by videoconference call is subject to the notice requirements applicable to other meetings in addition to the notice requirements prescribed by this section.
- (e) The notice of a meeting to be held by videoconference call must specify as a location of the meeting the location where a quorum of the governmental body will be physically present and specify the intent to have a quorum present at that location, except that the notice of a meeting to be held by videoconference call under Subsection (c) must specify as a location of the meeting each location where a majority of the quorum of the governmental body will be physically present and specify the intent to have a majority of the quorum of the governmental body present at that location. In addition, the notice of the meeting must specify as a location of the meeting each other location where a member of the governmental body who will participate in the meeting will be physically present during the meeting. Each of the locations shall be open to the public during the open portions of the meeting.
- (f) Each portion of a meeting held by videoconference call that is required to be open to the public shall be visible and audible to the public at each location specified under Subsection (e).
- (g) The governmental body shall make at least an audio recording of the meeting. The recording shall be made available to the public.
- (h) Each location specified under Subsection (e) shall have two-way communication with each other location during the entire meeting. Each participant in the videoconference call, while speaking, shall be clearly visible and audible to each other participant and, during the open portion of the meeting, to the members of the public in attendance at a location of the meeting.
- (i) The Department of Information Resources by rule shall specify minimum standards for audio and video signals at a meeting held by videoconference call. The quality of

the audio and video signals perceptible at each location of the meeting must meet or exceed those standards.

- (j) The quality of the audio and video signals perceptible by members of the public at each location of the meeting must:
  - (1) meet or exceed the quality of the audio and video signals perceptible by the members of the governmental body participating in the meeting; and
  - (2) be of sufficient quality so that members of the public at each location of the meeting can observe the demeanor and hear the voice of each participant in the open portion of the meeting.
- (k) Without regard to whether a member of the governmental body is participating in a meeting from a remote location by videoconference call, a governmental body may allow a member of the public to testify at a meeting from a remote location by videoconference call.

**§ 551.128. Internet Broadcast of Open Meeting**

- (a) In this section, “Internet” means the largest nonproprietary cooperative public computer network, popularly known as the Internet.
- (b) Subject to the requirements of this section, a governmental body may broadcast an open meeting over the Internet.
- (c) A governmental body that broadcasts a meeting over the Internet shall establish an Internet site and provide access to the broadcast from that site. The governmental body shall provide on the Internet site the same notice of the meeting that the governmental body is required to post under Subchapter C. The notice on the Internet must be posted within the time required for posting notice under Subchapter C.

**§ 551.129. Consultations Between Governmental Body and Its Attorney**

- (a) A governmental body may use a telephone conference call, video conference call, or communications over the Internet to conduct a public consultation with its attorney in an open meeting of the governmental body or a private consultation with its attorney in a closed meeting of the governmental body.
- (b) Each part of a public consultation by a governmental body with its attorney in an open meeting of the governmental body under Subsection (a) must be audible to the public at the location specified in the notice of the meeting as the location of the meeting.
- (c) Subsection (a) does not:
  - (1) authorize the members of a governmental body to conduct a meeting of the governmental body by telephone conference call, video conference call, or communications over the Internet; or
  - (2) create an exception to the application of this subchapter.
- (d) Subsection (a) does not apply to a consultation with an attorney who is an employee of the governmental body.



- (e) For purposes of Subsection (d), an attorney who receives compensation for legal services performed, from which employment taxes are deducted by the governmental body, is an employee of the governmental body.
- (f) Subsection (d) does not apply to:
  - (1) the governing board of an institution of higher education as defined by Section 61.003, Education Code; or
  - (2) the Texas Higher Education Coordinating Board.

**§ 551.130. Board of Trustees of Teacher Retirement System of Texas: Quorum Present at One Location**

- (a) In this section, “board” means the board of trustees of the Teacher Retirement System of Texas.
- (b) This chapter does not prohibit the board or a board committee from holding an open or closed meeting by telephone conference call.
- (c) The board or a board committee may hold a meeting by telephone conference call only if a quorum of the applicable board or board committee is physically present at one location of the meeting.
- (d) A telephone conference call meeting is subject to the notice requirements applicable to other meetings. The notice must also specify:
  - (1) the location of the meeting where a quorum of the board or board committee, as applicable, will be physically present; and
  - (2) the intent to have a quorum present at that location
- (e) The location where a quorum is physically present must be open to the public during the open portions of a telephone conference call meeting. The open portions of the meeting must be audible to the public at the location where the quorum is present and be tape-recorded at that location. The tape recording shall be made available to the public.
- (f) The location of the meeting shall provide two-way communication during the entire telephone conference call meeting, and the identification of each party to the telephone conference call must be clearly stated before the party speaks.
- (g) The authority provided by this section is in addition to the authority provided by Section 551.125.
- (h) A member of the board who participates in a board or board committee meeting by telephone conference call but is not physically present at the location of the meeting is not considered to be absent from the meeting for any purpose. The vote of a member of the board who participates in a board or board committee meeting by telephone conference call is counted for the purpose of determining the number of votes cast on a motion or other proposition before the board or board committee.
- (i) A member of the board may participate remotely by telephone conference call instead of by being physically present at the location of a board meeting for not

more than one board meeting per calendar year. A board member who participates remotely in any portion of a board meeting by telephone conference call is considered to have participated in the entire board meeting by telephone conference call. For purposes of the limit provided by this subsection, remote participation by telephone conference call in a meeting of a board committee does not count as remote participation by telephone conference call in a meeting of the board, even if:

- (1) a quorum of the full board attends the board committee meeting; or
  - (2) notice of the board committee meeting is also posted as notice of a board meeting.
- (j) A person who is not a member of the board may not speak at the meeting from a remote location by telephone conference call, except as provided by Section 551.129.

### **Subchapter G. Enforcement and Remedies; Criminal Violations**

#### **§ 551.141. Action Voidable**

An action taken by a governmental body in violation of this chapter is voidable.

#### **§ 551.142. Mandamus; Injunction**

- (a) An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.
- (b) The court may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or defendant who substantially prevails in an action under Subsection (a). In exercising its discretion, the court shall consider whether the action was brought in good faith and whether the conduct of the governmental body had a reasonable basis in law.

#### **§ 551.143. Conspiracy to Circumvent Chapter; Offense; Penalty**

- (a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.
- (b) An offense under Subsection (a) is a misdemeanor punishable by:
  - (1) a fine of not less than \$100 or more than \$500;
  - (2) confinement in the county jail for not less than one month or more than six months; or
  - (3) both the fine and confinement.

#### **§ 551.144. Closed Meeting; Offense; Penalty**

*Appendix A: Text of the Texas Open Meetings Act*

- (a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
  - (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
  - (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
  - (3) participates in the closed meeting, whether it is a regular, special, or called meeting.
- (b) An offense under Subsection (a) is a misdemeanor punishable by:
  - (1) a fine of not less than \$100 or more than \$500;
  - (2) confinement in the county jail for not less than one month or more than six months; or
  - (3) both the fine and confinement.
- (c) It is an affirmative defense to prosecution under Subsection (a) that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body.

**§ 551.145. Closed Meeting Without Certified Agenda or Tape Recording; Offense; Penalty**

- (a) A member of a governmental body commits an offense if the member participates in a closed meeting of the governmental body knowing that a certified agenda of the closed meeting is not being kept or that a tape recording of the closed meeting is not being made.
- (b) An offense under Subsection (a) is a Class C misdemeanor.

**§ 551.146. Disclosure of Certified Agenda or Tape Recording of Closed Meeting; Offense; Penalty; Civil Liability**

- (a) An individual, corporation, or partnership that without lawful authority knowingly discloses to a member of the public the certified agenda or tape recording of a meeting that was lawfully closed to the public under this chapter:
  - (1) commits an offense; and
  - (2) is liable to a person injured or damaged by the disclosure for:
    - (A) actual damages, including damages for personal injury or damage, lost wages, defamation, or mental or other emotional distress;
    - (B) reasonable attorney fees and court costs; and
    - (C) at the discretion of the trier of fact, exemplary damages.
- (b) An offense under Subsection (a)(1) is a Class B misdemeanor.

*Appendix A: Text of the Texas Open Meetings Act*

- (c) It is a defense to prosecution under Subsection (a)(1) and an affirmative defense to a civil action under Subsection (a)(2) that:
  - (1) the defendant had good reason to believe the disclosure was lawful; or
  - (2) the disclosure was the result of a mistake of fact concerning the nature or content of the certified agenda or tape recording.

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