

OPEN MEETINGS HANDBOOK

2004



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT



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My Fellow Texans:

The Texas Open Meetings Act commits every public official, at every level of government, to the principle of government in the sunshine. It codifies our guarantee that the public's business is conducted openly and without secrecy.

Our democracy depends on a fully informed citizenry, and a fully informed citizenry depends on an open and accessible government. The people of Texas do not give their public servants the right to decide what is good or not good for the people to know.

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

To help public officials in Texas, my office is often asked for guidance in complying with the Open Meetings Act. One of the ways we do that is to make this *Open Meetings Handbook* available to all state and local government officials.

The Handbook, also available on the Internet at www.oag.state.tx.us/newspubs/publications.shtml, is designed to help you avoid unintentional violations of the law. The Handbook also is available to all Texans who want to understand how the Open Meetings Act affects them.

My commitment to enforcing the open government laws of Texas is unwavering. The public's right to know is indispensable to an accountable, citizen-centered government. The sun must shine on our governmental bodies, and with your help in making sure that public meetings are conducted properly it will always do so.

Sincerely,

GREG ABBOTT
Attorney General of Texas

2004 Open Meetings Act Handbook

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I. Background and Overview

A. Open Meetings Act

The Open Meetings Act (the “act”), chapter 551 of the Government Code, provides that meetings of governmental bodies must be open to the public, except for expressly authorized executive sessions,¹ and that the public must be given notice of the time, place and subject matter of meetings of governmental bodies. It does not, however, set out all procedures applicable to meetings of governmental bodies. Issues of agenda preparation, for example, are addressed by other sources of law.² Any additional procedures that a governmental body adopts for the conduct of its meetings must be consistent with the Open Meetings Act.³

B. Common Law Background and Adoption of Open Meetings Act

Prior to the adoption of the Open Meetings Act, meetings of governmental entities were subject to common law rules designed to require the individual members to function as a body. These rules, as well as the provisions of the Open Meetings Act, apply to meetings of governmental bodies.⁴

Under the common law, a governmental body must act as a body at a meeting of which all members have notice.⁵ In *Webster v. Texas & Pacific Motor Transport Co.*,⁶ the Texas Supreme Court held that the three-member Railroad Commission, acting as such, and not the individual commissioners, has the authority to grant or refuse applications for permits to operate as common carriers. The court stated as follows:

It is a well-established rule in this State, as well as in other States, that where the Legislature has committed a matter to a board, bureau, or commission, or other administrative agency, such board, bureau, or commission must act thereon as a body at a stated meeting, or one properly called, and of which all the members of such board have notice, or of which they are given an opportunity to attend. Consent or acquiescence of, or agreement by the individual members acting separately, and not as a body, or by a number of the members less than the whole acting collectively at an unscheduled meeting without notice or opportunity of the other members to attend, is not sufficient.⁷

¹For purposes of this handbook the terms “closed meeting,” “closed session,” and “executive session” are used interchangeably. See TEX. GOV'T CODE ANN. § 551.001(1) revisor's note (Vernon 1994); see also *Cox Enters., Inc. v. Bd. of Trs.*, 706 S.W.2d 956, 958 (Tex. 1986) (an executive session is a meeting or part of a meeting that is closed to the public).

²Tex. Att'y Gen. Op. Nos. DM-473 (1998), DM-228 (1993), JM-63 (1983), MW-32 (1979).

³Tex. Att'y Gen. Op. No. DM-228 (1993) (addressing commissioners court's adoption of provisions of *Robert's Rules of Order* to govern conduct of meetings).

⁴See *Fielding v. Anderson*, 911 S.W.2d 858, 864 (Tex. App.—Eastland 1996, writ denied); Tex. Att'y Gen. Op. No. DM-95 (1992).

⁵The legislature may adopt legislation changing the common law rule. See *Faulder v. Tex. Bd. of Pardons & Paroles*, 990 S.W.2d 944, 946 (Tex. App.—Austin 1999, pet. ref'd) (Board authorized by section 508.047(b) of the Government Code to perform duties in clemency matters without meeting face-to-face as a body).

⁶166 S.W.2d 75, 76-77 (Tex. 1942).

⁷*Id.* at 76-77.

The purpose of this rule is to give 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 wisdom, so that the decision will be the composite judgment of the body as a whole. A board member may not delegate the authority to deliberate or vote to another person, in the absence of express statutory authority to do so.⁸

The Open Meetings Act was adopted in 1967⁹ as article 6252-17 of the Revised Civil Statutes and substantially revised in 1973.¹⁰ It has been amended many times since then. In 1993, the act was codified without substantive change as chapter 551 of the Government Code.¹¹

C. Quorum

The authority delegated to a governmental body may be exercised only at a meeting of a quorum of its members. The Code Construction Act¹² states as follows:

- (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.
- (b) A quorum of a public body is a majority of the number of members fixed by statute.¹³

The Open Meetings Act defines “quorum” as a majority of the governing body, unless otherwise defined by applicable law.¹⁴ 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.¹⁵ *Ex officio*, nonvoting members of a governmental body are counted for purposes of determining the presence of a quorum.¹⁶

⁸Tex. Att’y Gen. Op. No. JM-903 (1988).

⁹Act of May 8, 1967, 60th Leg., R.S., ch. 271 § 1, 1967 Tex. Gen. Laws 597.

¹⁰Act of Apr. 3, 1973, 63d Leg., R.S., ch. 31 § 1, 1973 Tex. Gen. Laws 45.

¹¹Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583-89.

¹²TEX. GOV’T CODE ANN. ch. 311 (Vernon 1998).

¹³*Id.* § 311.013; *see id.* § 312.001 (construction of civil statutes); *see also Tex. State Bd. of Dental Exam’rs v. Silagi*, 766 S.W.2d 280, 284 (Tex. App.—El Paso 1989, writ denied) (absent statutory provision, the common-law rule that a majority of all members of a board constitutes a quorum applies).

¹⁴TEX. GOV’T CODE ANN. § 551.001(6) (Vernon Supp. 2004).

¹⁵TEX. LOC. GOV’T CODE ANN. § 81.006 (Vernon 1999).

¹⁶Tex. Att’y Gen. Op. No. JC-0580 (2002) at 3 (overruling Tex. Att’y Gen. Op. No. DM-160 (1992) in part).

II. Recent Amendments

The amendments to the Open Meetings Act adopted by the 78th Legislature are listed according to subchapter and section number of the act.

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

The 78th Regular Session of the Legislature adopted three new executive session provisions, all effective immediately.¹⁷

Section 551.0725 allows the commissioners court of a county with a population of 400,000 or more to conduct a closed meeting to deliberate business and financial issues relating to a contract being negotiated, subject to procedures set out in the statute.¹⁸ The commissioners court must make a tape recording of the proceedings of a closed meeting under section 551.0725, notwithstanding Government Code section 551.103(a), which authorizes a governmental body to keep a certified agenda or make a tape recording of a closed meeting.¹⁹

Section 551.0785 protects certain deliberations about individual medical or psychiatric records. It provides that a benefits appeals committee for a public self-funded health plan or a governmental body that administers a public insurance, health, or retirement plan is not required to conduct an open meeting to deliberate:

- the medical records or psychiatric records of an individual applicant for a benefit from the plan; or
- a matter that includes a consideration of information in the medical or psychiatric records of an individual applicant for a benefit from the plan.²⁰

Section 551.0821 provides that a school board need not hold an open meeting to deliberate a matter about a public school student if personally identifiable information about the student will necessarily be revealed by the deliberation.²¹ “Directory information,” as defined by the Federal Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g),²² is considered personally identifiable information only if the student’s parent or guardian or the student, if 18 years of age or older, informs the school board that directory information should not be released without prior consent. The parent or guardian, or student if 18 years or older, may request an open meeting.

¹⁷Act of May 9, 2003, 78th Leg., R.S., ch. 158, § 1, 2003 Tex. Sess. Law Serv. 232; Act of May 13, 2003, 78th Leg., R.S., ch. 190, § 1, 2003 Tex. Sess. Law Serv. 604; Act of May, 29, 2003, 78th Leg., R.S., ch. 1287, § 1, 2003 Tex. Sess. Law Serv. 4683.

¹⁸TEX. GOV’T CODE ANN. § 551.0725 (Vernon Supp. 2004).

¹⁹*Id.*

²⁰*Id.* § 551.0785.

²¹*Id.* § 551.0821.

²²“Directory information” includes, but is not limited to, a student’s name, address, telephone listing, e-mail address, photograph, date and place of birth, dates of attendance, grade level, participation in officially recognized activities and sports, and degrees, honors and awards received. 20 U.S.C. § 1232g(a)(5)(A) (2000); 34 C.F.R. § 99.3 (2002).

The 78th Legislature also amended section 551.085 of the Government Code, which authorizes the governing boards of certain health care providers to meet in closed session to deliberate information relevant to services or product lines to be provided to another person. The amendment adds the governing board of a health maintenance organization created under Health and Safety Code section 281.0515²³ to the list of entities that may hold an executive session under this provision.²⁴ The effective date of the amendment was September 1, 2003.²⁵

B. Subchapter F. Meetings Using Telephone, Videoconference or Internet

Section 551.121, which authorizes the governing board of an institution of higher education to meet by telephone conference call if certain criteria are met, was amended to include the Board for Lease of University Lands in its provisions.²⁶

C. Texas Disaster Act Amendments Affecting the Open Meetings Act²⁷

The legislature also adopted a number of amendments to the Texas Disaster Act, Government Code chapter 418, including a provision that authorizes a governmental body to meet in executive session to deliberate certain information related to emergencies and disasters, such as those caused by terroristic acts.²⁸ This provision, Government Code section 418.183(f), is discussed in Part VII.D. of this handbook.

²³This provision authorizes certain hospital districts to establish HMOs.

²⁴TEX. GOV'T CODE ANN. § 551.085(b) (Vernon Supp. 2004).

²⁵Act of Apr. 10, 2003, 78th Leg., R.S., ch. 7, §2, 2003 Tex. Sess. Law Serv. 9, 10.

²⁶TEX. GOV'T CODE ANN. § 551.121 (Vernon Supp. 2004). *See* TEX. EDUC. CODE ANN. ch. 66, subch. D (Vernon 2002) (Board for Lease of University Lands).

²⁷The 78th Legislature renumbered Government Code section 552.136, adopted by chapter 545, Acts of the 77th Legislature, Regular Session, 2001, as Government Code section 551.140. Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2(77), 2003 Tex. Sess. Law Serv. 4140, 4144. Government Code section 552.136, a provision of the Public Information Act, TEX. GOV'T CODE ANN. ch. 552 (Vernon 1994 & Supp. 2004), excepted from public disclosure an e-mail address of a member of the public provided to communicate with a governmental body. The renumbering of section 552.136 as section 551.140 appears to be a typographical error.

²⁸TEX. GOV'T CODE ANN. § 418.183(f) (Vernon Supp. 2004).

III. Governmental Bodies

A. Definition

Section 551.002 of the Government Code states the following requirement:

Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.²⁹

Section 551.001(3) defines “governmental body” 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;³⁰ and

²⁹An agency financed entirely by federal money is not required to conduct an open meeting. TEX. GOV'T CODE ANN. § 551.077 (Vernon 1994).

³⁰See 42 U.S.C. § 9901 *et. seq.* (2000) (Community Services Block Grant Program).

- (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.³¹

This definition establishes that some specific types of local governmental entities, such as a county commissioners court or a municipal governing body, are governmental bodies. Section 551.0015 provides that certain property owners' associations are subject to the Open Meetings Act in the same manner as a governmental body. This provision applies to a property owners' association that meets the following criteria: (1) 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; (2) the association has authority to make mandatory special assessments for capital improvements or mandatory regular assessments; and (3) the amount of the assessments is based in whole or in part on the value at which the property is assessed for purposes of ad valorem taxation under article VIII, section 20 of the Texas Constitution.³²

In addition to enumerating specific entities that are governmental bodies, section 551.001(3) also defines "governmental body" in terms of an entity's creation, composition or powers. For example, "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" is a governmental body.³³ It is necessary to know about an entity's powers and its place in the structure of the city or county government to determine whether it is a governmental body within this part of the definition.

B. State-Level Governmental Bodies

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 [the] state" and under the direction of "one or more elected or appointed members."³⁴ Moreover, it must have supervision or control over public business or policy.³⁵ 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.³⁶

³¹Subsection (K), formerly subsection (J), was renumbered by the 78th Legislature. *See* Act of May 20, 2003, 78th Leg., R.S., ch. 1276, § 9.012, 2003 Tex. Sess. Law Serv. 4158, 4217-18 (codified at TEX. GOV'T CODE ANN. § 551.001(3)(K)).

³²Article VIII, section 20 of the Texas Constitution addresses the valuation of property for ad valorem tax purposes.

³³TEX. GOV'T CODE ANN. § 551.001(3)(D) (Vernon Supp. 2004).

³⁴*Id.* § 551.001(3)(A); *see id.* § 551.003 (Vernon 1994).

³⁵*Id.* § 551.001(4) (Vernon Supp. 2004) (definition of "meeting"); *Beasley v. Molett*, 95 S.W.3d 590, 606 (Tex. App.—Beaumont 2002, no pet. h.); Tex. Att'y Gen. Op. No. GA-0019 (2003) at 5.

³⁶*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) (Athletic Council of The University of Texas, as governmental body that supervises public business, must comply with Open Meetings Act).

In contrast, the multidisciplinary team established to review offenders' records under the Commitment of Sexually Violent Predators Act was not subject to the Open Meetings Act.³⁷ 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.³⁸

The definition of "governmental body" includes only entities within the executive and legislative departments of the state. It therefore, excludes the judiciary from the Open Meetings Act.³⁹

C. Local Governmental Bodies

The part of the definition applicable to local entities lists several specific kinds of local governing bodies: commissioners courts; municipal governing bodies; the boards of trustees of school districts; county boards of school trustees; county boards of education; 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 certain nonprofit water supply or wastewater corporations. Also included are local-level entities that fall within the following description: "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."⁴⁰

In *City of Austin v. Evans*,⁴¹ the court analyzed the powers of a city grievance committee and determined it was not a governmental body within the latter 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 disciplinary actions or complaints.⁴² 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;

³⁷*Beasley*, 95 S.W.3d at 606.

³⁸*Id.*; see also Tex. Att'y Gen. Op. No. JM-331 (1985) (citizens advisory panel of Office of Public Utility Counsel, with no power to supervise or control public business, is not governmental body).

³⁹Tex. Att'y Gen. Op. No. JM-740 (1987) (meeting of district judges to choose county auditor is not subject to Open Meetings Act). *But see* Tex. Att'y Gen. Op. No. DM-395 (1996) (committee of judges meeting to participate in management of community supervision and corrections department was a special district subject to act); see also *State ex rel White v. Bradley*, 956 S.W.2d 725, 744 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 990 S.W.2d 245, 249 (Tex. 1999) (special court consisting of a majority of city alderman for mayor's removal trial, was not subject to the act).

⁴⁰TEX. GOV'T CODE ANN. § 551.001(3)(D) (Vernon Supp. 2004).

⁴¹794 S.W.2d 78, 83 (Tex. App.—Austin 1990, no writ).

⁴²*Id.* at 83.

- (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.⁴³

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.⁴⁴

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 Open Meetings Act. 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.⁴⁵

The act's definition of “governmental body” includes “the governing board of [every] special district created by law.”⁴⁶ In *Sierra Club v. Austin Transportation Study Policy Advisory Committee*,⁴⁷ the court decided that the Austin Transportation Study Policy Advisory Committee (ATSPAC) was a “special district” within the Open Meetings Act. The committee, whose seventeen members included state, county, regional and municipal public officials, was designated a metropolitan planning organization pursuant to federal law. 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 Open Meetings 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 Open Meetings Act should govern.⁴⁸ 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.⁴⁹

Relying on the *Sierra Club* case, this office has concluded that a committee of judges meeting to perform statutory functions with respect to the management of a community supervision and corrections department was subject to the act as a special district.⁵⁰

⁴³*Id.* at 83.

⁴⁴*Id.* at 83.

⁴⁵*See also* Tex. Att'y Gen. Op. Nos. JC-0327 (2001) at 4 (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) (city library board, a department or agency of the city, did not act in a quasi-judicial capacity or have rule-making power).

⁴⁶TEX. GOV'T CODE ANN. § 551.001(3)(H) (Vernon Supp. 2004).

⁴⁷746 S.W.2d 298 (Tex. App.—Austin 1988, writ denied).

⁴⁸*Id.*

⁴⁹*Id.* (quoting BLACK'S LAW DICTIONARY 1253 (5th ed. 1986)).

⁵⁰Tex. Att'y Gen. Op. No. DM-395 (1996); *see* Tex. Att'y Gen. Op. Nos. DM-426 (1996) at 4 (regional housing authority created under chapter 392 of Local Government Code is special district within the act); DM-7 (1991) (Parker County Committee on Aging is not a special district).

D. Public and Private Entities That Are Not Governmental Bodies

There are public entities that are not within the act's definition of "governmental body," for example, advisory bodies.⁵¹ See Part III.B. The legislature has, however, provided in other statutes that particular advisory committees are subject to the act, for example, a board or commission established by a municipality to assist it in developing a zoning plan or zoning regulations,⁵² and the historical representation advisory committee to the State Preservation Board.⁵³

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." 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.⁵⁴ A health maintenance organization established by a county hospital district under the Texas Nonprofit Corporation Act has been determined not to be a governmental body.⁵⁵

The legislature has, however, expressly provided that various types of nonprofit corporations are subject to the act, in addition to the nonprofit corporations defined by the act as governmental bodies.⁵⁶ Economic development corporations created under the Development Corporation Act of 1979,⁵⁷ are subject to the act.⁵⁸ The governing body of an open-enrollment charter school, which may be a private school or a nonprofit entity,⁵⁹ is considered to be a governmental body for purposes of the act.⁶⁰

A private entity does not become a governmental body within the Open Meetings Act merely because it receives public funds.⁶¹ A city chamber of commerce, a private entity, is not a governmental body within the act although it receives public funds.⁶² 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,⁶³ even if it controls public funds.

⁵¹*Beasley*, 95 S.W.3d at 606; *Evans*, 794 S.W.2d at 83.

⁵²TEX. LOC. GOV'T CODE ANN. § 211.0075 (Vernon 1999).

⁵³TEX. GOV'T CODE ANN. § 443.0081(i) (Vernon Supp. 2004).

⁵⁴Tex. Att'y Gen. Op. No. DM-7 (1991) at 3.

⁵⁵Tex. Att'y Gen. Op. No. JC-0407 (2001) at 8.

⁵⁶TEX. GOV'T CODE ANN. § 551.001(3)(J) (Vernon Supp. 2004); *see also* Act of May 20, 2003, 78th Leg., R.S., ch. 1276, § 9.012, 2003 Tex. Sess. Law Serv. 4158, 4217-18 (renumbering duplicate subsection 551.001(3)(J) to (J) and (K)).

⁵⁷TEX. REV. CIV. STAT. ANN. art. 5190.6 (Vernon 1987 & Supp. 2004).

⁵⁸*Id.* § 11(b); *see* Tex. Att'y Gen. Op. No. JC-0327 (2001) at 3 (Bryan College Station Economic Development Inc., which was not created under the Development Corporation Act of 1979, TEX. REV. CIV. STAT. ANN. art. 5190.6 (Vernon 1987 & Supp. 2003), is not subject to the Open Meetings Act).

⁵⁹TEX. EDUC. CODE ANN. § 12.1012 (Vernon Supp. 2004).

⁶⁰*Id.* § 12.1051.

⁶¹Tex. Att'y Gen. LO-98-040, at 2.

⁶²Tex. Att'y Gen. LO-93-055, at 3.

⁶³Tex. Att'y Gen. LO-98-061.

IV. Meetings

A. Definition

The Open Meetings Act applies to a governmental body, as defined by section 551.001(3), when it engages in a “regular, special, or called meeting [or session].”⁶⁴ Informal meetings of a quorum of members of a governmental body are also subject to the act.⁶⁵

The definitions of “governmental body,” “meeting,” and “deliberation” work together to establish which public bodies are subject to the Open Meetings Act and what actions must conform to its requirements. “Deliberation” is an essential element of a “meeting.” This term is defined as follows:

(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.⁶⁶

“Deliberation” and “discussion” are synonymous for purposes of the act.⁶⁷ A “verbal exchange” clearly includes an exchange of spoken words,⁶⁸ but it may also include an exchange of written or other nonspoken words.⁶⁹

(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

⁶⁴TEX. GOV'T CODE ANN. § 551.002 (Vernon 1994).

⁶⁵*Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990) (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 (Tex. App.—San Antonio 1999, pet. denied) (“informational gathering” of water district board with landowners in board member’s barn).

⁶⁶TEX. GOV'T CODE ANN. § 551.001(2) (Vernon Supp. 2004).

⁶⁷*Bexar Medina Atascosa Water Dist.*, 2 S.W.3d at 461.

⁶⁸*Gardner v. Herring*, 21 S.W.3d 767, 771 (Tex. App.—Amarillo 2000, no pet.).

⁶⁹Tex. Att’y Gen. Op. Nos. JC-0307 (2000) at 5, DM-95 (1992) at 5.

- (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, if formal action is not taken and any discussion of public business is incidental to the social function, convention, or workshop. The term includes a session of a governmental body.⁷⁰

According to this provision, governmental bodies that have supervision or control over public business or policy are subject to the Open Meetings Act.⁷¹ In contrast, a purely advisory body, which has no authority over public business or policy, is not subject to the act.⁷² However, if the parent board routinely adopts, or “rubber-stamps,” the recommendations of the advisory board, the advisory board probably will be considered to be a governmental body subject to the act.⁷³ Section 551.001(4)(B), through the end of the first sentence in subsection (iv), was added by the 76th Legislature to repeal the authorization for “employee briefing sessions.”⁷⁴ The repeal of this provision is discussed in Part IV.C. of this handbook.

B. 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 attorney general has stated that breakfast meetings of a commissioners court are subject to the requirements of the Open Meetings Act unless the breakfasts “are purely social in nature and do not *in any way* involve discussion or consideration of public business or public policy.”⁷⁵

⁷⁰TEX. GOV'T CODE ANN. § 551.001(4) (Vernon Supp. 2004).

⁷¹Tex. Att’y Gen. Op. Nos. H-772 (1976), H-438 (1974).

⁷²Tex. Att’y Gen. Op. Nos. H-994 (1977) (committee appointed to study process of choosing university president and to make recommendations to board of regents is not subject to Open Meetings Act); H-772 (1976) (meeting of group of employees, such as general faculty of university, is not subject to Open Meetings Act); H-467 (1974) (city library board, which is advisory only, is not subject to Open Meetings Act).

⁷³Tex. Att’y Gen. Op. Nos. H-467 (1974), H-438 (1974).

⁷⁴Act of May 22, 1999, 76th Leg., R.S., ch. 647, § 1, 1999 Tex. Gen. Laws 3218.

⁷⁵Tex. Att’y Gen. Op. No. H-785 (1976) at 2; *see* TEX. GOV'T CODE ANN. § 551.001(4) (Vernon Supp. 2004) (“meeting” does not include gathering of quorum at social function unrelated to governmental body’s public business or attendance of quorum at convention).

C. Deliberation Between a Quorum of a Governmental Body and a Third Party

When it was first enacted, the Open Meetings Act applied only to deliberations among a quorum of a governmental body.⁷⁶ Between 1987 and 1999, the act defined a meeting to include any deliberation “between a quorum of members of a governmental body and any other person” at which public business or policy was discussed or at which formal action was taken.⁷⁷ It also allowed governmental bodies to conduct “staff briefings” to receive information from and ask questions of staff members.⁷⁸ These sessions were not required to be open to the public if the board members did not discuss any public business among themselves.⁷⁹

In 1999, the legislature amended section 551.075,⁸⁰ repealing the authority to conduct staff briefings for all governmental bodies except the Board of Trustees of the Texas Growth Fund.⁸¹ The judicial decisions and attorney general opinions interpreting the “staff briefing” provision are now primarily of historical interest.⁸² The legislature also adopted a second definition of “meeting,”⁸³ codifying the prior definition as section 551.001(4)(A) and the new provision as section 551.001(4)(B) of the Government Code. 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

⁷⁶Act of May 8, 1967, 60th Leg., R.S., ch. 271, 1967 Tex. Gen. Laws 597, 598; see Tex. Att’y Gen. Op. No. JC-0169 (2000) at 2.

⁷⁷Act of May 31, 1987, 70th Leg., R.S., ch. 549, § 1, 1987 Tex. Gen. Laws 2211; see *Dallas Morning News Co. v. Bd. of Trs.*, 861 S.W.2d 532, 534-35 (Tex. App.—Dallas 1993, writ denied); see also *Bexar Medina Atascosa Water Dist.*, 2 S.W.3d at 462 (deliberations took place at informational gathering of water district board with landowners, where one board member asked question and another board member answered questions, even though board members did not discuss business among themselves).

⁷⁸Act of May 31, 1987, 70th Leg., R.S., ch. 549, § 2, 1987 Tex. Gen. Laws 2211, 2212 (codified as TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2(r)); see Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 590 (nonsubstantive recodification of Open Meetings Act; staff briefing provision codified at TEX. GOV’T CODE ANN. § 551.075).

⁷⁹Act of May 31, 1987, 70th Leg., R.S., ch. 549, § 2, 1987 Tex. Gen. Laws 2211, 2212.

⁸⁰Act of May 22, 1999, 76th Leg., R.S., ch. 647, § 2, 1999 Tex. Gen. Laws 3218.

⁸¹The Texas Growth Fund is a trust fund established by article XVI, section 70 of the Texas Constitution to apply certain state funds to venture capital investments.

⁸²See generally *Dallas Morning News Co.*, 861 S.W.2d 532; Tex. Att’y Gen. Op. Nos. DM-191 (1992) (overruling Attorney General Opinion DM-17 (1991)); JM-1058 (1989) at 5-6.

⁸³Act of May 22, 1999, 76th Leg., R.S., ch. 647, § 1, 1999 Tex. Gen. Laws 3218.

- (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.⁸⁴

Section 551.001(4)(A) applies when a quorum of the governmental body engages in deliberations, either among the members of the quorum or between the quorum and a third party.⁸⁵ 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. Under the circumstances described by section 551.001(4)(B), the governmental body may be subject to the Open Meetings Act when it merely listens to members of the public in a session commonly known as a “public comment” session, “public forum,” or “open mike” session.⁸⁶

D. Committees and Subcommittees of Governmental Bodies

Generally, meetings of less than a quorum of a governmental body are not subject to the act.⁸⁷ Under certain circumstances, however, an entity appointed by a governmental body and including less than a quorum of the parent body may be subject to the act.⁸⁸ A committee or subcommittee appointed by a governmental body and granted authority to supervise or control public business or public policy may itself fall within the definition of “governmental body.”⁸⁹ For example, a pricing committee appointed by the Texas Public Finance Authority Board of Directors pursuant to statute was a governmental body because it had authority to negotiate the terms of a bond sale and to execute bond purchase contracts without any further action by the board.⁹⁰ Such committees were governmental bodies whether they were composed of board members or staff because of the control over public business conferred upon them pursuant to statutory authority.⁹¹

⁸⁴TEX. GOV'T CODE ANN. § 551.001(4)(B) (Vernon Supp. 2004).

⁸⁵Tex. Att'y Gen. Op. Nos. JC-0248 (2000) (quorum of state agency board testify at public hearing conducted by another agency); JC-0203 (2000) at 5 (quorum of members of standing committee of hospital district attend public speech and comment on matters of hospital district business within supervision of committee).

⁸⁶Tex. Att'y Gen. Op. No. JC-0169 (2000) at 3-4.

⁸⁷See *Hays County Water Planning P'ship v. Hays County*, 106 S.W.3d 349, 356 (Tex. App.—Austin 2003, no pet.); Tex. Att'y Gen. Op. No. JC-0407 (2001) at 9.

⁸⁸Tex. Att'y Gen. Op. No. JC-0060 (1999) at 2.

⁸⁹Tex. Att'y Gen. Op. Nos. JC-0060 (1999) at 2, JC-0053 (1999) at 3; Tex. Att'y Gen. LO-97-058, at 2-3; LO-97-017, at 5.

⁹⁰Tex. Att'y Gen. Op. No. JC-0053 (1999) at 4 (subcommittee of board is subject to Open Meetings Act when acting to price and sell obligations in accordance with parameters set by board).

⁹¹Tex. Att'y Gen. Op. No. JC-0053 (1999) at 4.

Even a committee or subcommittee without formal control over public business or public policy may be deemed a governmental body subject to the act if its decisions are in fact “rubber stamped” by the parent body.⁹² Opinions of this office have also held that a standing subcommittee consisting of less than a quorum of the parent body is subject to the requirements of the act because of the danger that the full board might merely rubber stamp a subcommittee’s decisions and thereby deprive the public of access to the decision-making process.⁹³ 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.⁹⁴

E. Meetings Using Telephone, Videoconference and Internet

Absent express authority, governmental bodies may not conduct meetings under the act by telephone or videoconference.⁹⁵ 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.⁹⁶

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 [the act]; 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.⁹⁷

The emergency 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 that the location of the meeting shall be set up to provide two-way communication during the entire conference call and that the identity of each party to the conference call be clearly stated prior to speaking.

⁹²*Finlan v. City of Dallas*, 888 F. Supp. 779, 785 (N.D. Tex. 1995); Tex. Att’y Gen. Op. Nos. JC-0060 (1999), H-438 (1974) at 3.

⁹³Tex. Att’y Gen. Op. No. H-3 (1973) at 5; *see* Tex. Att’y Gen. Op. Nos. JM-1072 (1989) at 3, H-824 (1976), H-238 (1974).

⁹⁴Tex. Att’y Gen. Op. No. H-994 (1977).

⁹⁵*See Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App.–San Antonio 1985, no writ); *Elizondo v. Williams*, 643 S.W.2d 765 (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 County Emergency Serv. Dist. No. 1 v. Harris County Emergency Corps*, 999 S.W.2d 163, 169 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (telephone discussion by fewer than a quorum of board members about placing items on the agenda did not violate act).

⁹⁶TEX. GOV’T CODE ANN. §§ 551.121-.126 (Vernon 1994 & Supp. 2003).

⁹⁷TEX. GOV’T CODE ANN. § 551.125(b) (Vernon Supp. 2003).

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Section 551.127 addresses meetings by videoconference call.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

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.¹⁰³ If the governmental body deducts employment taxes from the attorney's compensation, the attorney is an employee of the governmental body.¹⁰⁴

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.¹⁰⁵ The broadcast does not substitute for conducting an in-person meeting but provides an additional way of disseminating the meeting.

The governing board of an institution of higher education or the Board for Lease of University Lands¹⁰⁶ may 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.¹⁰⁷ The Texas Board of Criminal Justice may hold an emergency meeting by telephone conference call,¹⁰⁸ 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.¹⁰⁹

Statutes other than the Open Meetings Act authorize some governing bodies to meet by telephone conference call under limited circumstances.¹¹⁰

⁹⁸*Id.* § 551.127 (Vernon Supp. 2004).

⁹⁹*Id.* § 551.127(c).

¹⁰⁰*Id.* § 551.127(b).

¹⁰¹*Id.* § 551.127(d)-(h).

¹⁰²*Id.* § 551.127(k).

¹⁰³*Id.* § 551.129.

¹⁰⁴*Id.* § 551.129(e).

¹⁰⁵*Id.* § 551.128(b).

¹⁰⁶TEX. EDUC. CODE ANN §§ 66.61-.84 (Vernon 2002).

¹⁰⁷TEX. GOV'T CODE ANN § 551.121(c) (Vernon 1994).

¹⁰⁸TEX. GOV'T CODE ANN § 551.123 (Vernon Supp. 2004).

¹⁰⁹TEX. GOV'T CODE ANN § 551.124 (Vernon 1994).

¹¹⁰TEX. AGRIC. CODE ANN § 62.0021 (Vernon Supp. 2004) (State Seed and Plant Board); TEX. FIN. CODE ANN. § 11.106 (c) (Vernon 1998) (Finance Commission); TEX. GOV'T CODE ANN. § 501.139(b) (Vernon Supp. 2004) (Correctional Managed Health Care Committee).

V. Notice Requirements

A. Content

The Open Meetings 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.¹¹¹

A governmental body must give the public advance notice of the subjects it will consider in an open meeting or a closed executive session.¹¹² Although 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,¹¹³ 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.¹¹⁴

Governmental actions taken in violation of the notice requirements of the Open Meetings Act are voidable.¹¹⁵ 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.¹¹⁶ (For a discussion of the voidability of the governmental body's actions, refer to Part IX.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*,¹¹⁷ the Texas Supreme Court addressed the sufficiency of the following description in the agenda for a city meeting:

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.¹¹⁸

A property owner argued that this notice 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.¹¹⁹ The Texas Supreme Court rejected the

¹¹¹TEX. GOV'T CODE ANN. § 551.041 (Vernon 1994).

¹¹²*Cox Enters., Inc.*, 706 S.W.2d at 958; *Porth v. Morgan*, 622 S.W.2d 470 (Tex. App.—Tyler 1981, writ ref'd n.r.e.).

¹¹³Tex. Att'y Gen. Op. No. JC-0057 (1999) at 6.

¹¹⁴*Id.*

¹¹⁵TEX. GOV'T CODE ANN. § 551.141 (Vernon 1994); *Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 699 (Tex. App.—San Antonio 1998, pet. denied).

¹¹⁶*Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 182-83 (Tex. App.—Corpus Christi 1990, writ denied).

¹¹⁷820 S.W.2d 762 (Tex. 1991).

¹¹⁸*Id.* at 764.

¹¹⁹*Id.*

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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.”¹²⁰ Its purpose was to give the general public access to governmental decision making.

The Texas Supreme Court held the condemnation notice valid, 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.

In *City of San Antonio*, the Texas Supreme Court cited favorably its earlier decision in *Cox Enterprises, Inc. v. Board of Trustees*.¹²¹ In the *Cox Enterprises* case, the court had held insufficient the notice of a school board’s executive session that listed only general topics such as “litigation” and “personnel.”¹²² 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.¹²³

Two earlier decisions of the Texas Supreme Court, *Lower Colorado River Authority v. City of San Marcos*¹²⁴ and *Texas Turnpike Authority v. City of Fort Worth*,¹²⁵ also focused on whether the general public was given adequate notice of the matter to be considered. In *Texas Turnpike Authority*, the Texas Supreme Court 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].”¹²⁶ Prior resolutions of the board had reflected the board’s intent to make the turnpike a free road once existing bonds were paid.

¹²⁰*Id.* at 765 (quoting *Acker*, 790 S.W.2d at 300; see *Rettberg v. Tex. Dep’t of Health*, 873 S.W.2d 408 (Tex. App.—Austin 1994, no writ) (holding that Open Meetings Act does not entitle executive secretary of a state agency to special notice of meeting where his employment was terminated); *Stockdale v. Meno*, 867 S.W.2d 123 (Tex. App.—Austin 1993, writ denied) (holding that Open Meetings Act does not entitle teacher whose contract was terminated to more specific notice than notice that would inform public at large).

¹²¹706 S.W.2d 956 (Tex. 1986).

¹²²*Id.* at 959.

¹²³*Id.*; see *Mayes v. City of De Leon*, 922 S.W.2d 200 (Tex. App.—Eastland 1996, writ denied) (“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 Government Code); *Point Isabel Indep. Sch. Dist.*, 797 S.W.2d 176 (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) (holding “discussion of personnel changes” insufficient to describe selection of university system chancellor or university president).

¹²⁴523 S.W.2d 641 (Tex. 1975).

¹²⁵554 S.W.2d 675 (Tex. 1977).

¹²⁶*Id.* at 676.

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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.¹²⁷

In *Lower Colorado River Authority*, 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.”¹²⁸ Although the notice did not state that the board was considering an increase in rates, the Texas Supreme Court upheld the validity of the rate increases adopted at the meeting because the notice was sufficient to notify the reader “that some action would be considered with respect to charges for electric power sold in San Marcos.”¹²⁹

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.¹³⁰ 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.¹³¹ 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.¹³² 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.¹³³ The term “presentation” was vague; moreover, it was noticed for the “Proclamations & Presentations” portion of the meeting, which otherwise consisted of formalities.¹³⁴

¹²⁷See also *Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc.*, 912 S.W.2d 271, 274 (Tex. App.—Austin 1995, writ dismissed) (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).

¹²⁸*Lower Colorado River Auth.*, 523 S.W.2d at 646.

¹²⁹*Id.*; see also *Rettberg*, 873 S.W.2d at 412 (holding that notice of meeting to “discuss the evaluation, designation, and duties of the board's executive secretary” would alert public that some action could occur relating to executive secretary's job); *cf. Parr v. State*, 743 S.W.2d 268 (Tex. App.—San Antonio 1987, writ denied) (posted agenda for water district describing “budget” is insufficient to notify taxpayers of proposed increase in district taxes).

¹³⁰Tex. Att'y Gen. Op. No. H-662 (1975) at 3.

¹³¹Tex. Att'y Gen. Op. No. JC-0169 (2000) at 4; see TEX. GOV'T CODE ANN. § 551.042 (Vernon 1994) (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).

¹³²Tex. Att'y Gen. Op. No. JC-0169 (2000) at 4.

¹³³*Hays County Water Planning P'ship*, 41 S.W.3d at 180.

¹³⁴*Id.* at 180 (citing Tex. Att'y Gen. Op. No. JC-0169 (2000)).

Whether a particular notice is sufficient for purposes of the Open Meetings Act generally involves the resolution of disputed fact questions. The courts carefully 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.¹³⁵ Consequently, counsel for the governing body should be consulted if any doubt exists concerning the specificity of notice required for a particular matter.

B. Time of Posting

Notice must be posted for a minimum length of time before each meeting. Section 551.043 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 551.044-551.046.¹³⁶

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 Workers' Compensation Commission; or
 - (2) the governing board of an institution of higher education.¹³⁷

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.¹³⁸

¹³⁵*River Rd. Neighborhood Ass'n v. S. Tex. Sports*, 720 S.W.2d 551 (Tex. App.—San Antonio 1986, writ dismissed w.o.j.) (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).

¹³⁶TEX. GOV'T CODE ANN. § 551.043 (Vernon 1994).

¹³⁷*Id.* § 551.044 (Vernon Supp. 2004).

¹³⁸*Id.* § 551.046 (Vernon 1994).

Notice Requirements

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.

In *City of San Antonio*, the Texas Supreme Court addressed this problem. 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. The court relied on the literal language of the statutory predecessor to section 551.043, which did not expressly refer to the requirement that notice be posted in the city hall, and concluded that the notices described in the statutory predecessors to sections 551.043 and 551.150 could be separate notices. In particular, the court noted that the statutory predecessor to section 551.043 required notice “‘*in a place readily accessible to the general public at all times*’” and not in any particular place as required in the statutory predecessors to sections 551.048 through 551.054.¹³⁹ The court also noted that the statutory predecessor to section 551.050 did not have a 72-hour requirement, but that “‘any notice posted under this subsection must be posted for a sufficient period of time to ensure that the public has the opportunity to read it.’”¹⁴⁰

The Texas Supreme Court’s decision in *City of San Antonio* took a literal approach to the time and place requirements for posting notice under the statutory predecessors to sections 551.043 and 551.050.¹⁴¹ The test that the Texas Supreme Court applied in *City of San Antonio* to determine the sufficiency of the notice pursuant to the statutory predecessor to section 551.043 cannot be readily described as one of substantial or literal compliance. The test the court used was: *Does the notice apprise the general public of the subject to be considered?* If not, it is insufficient; if yes, it is sufficient. Regardless of the words used to describe the approach the Texas Supreme Court took in *City of San Antonio* or earlier in *Cox Enterprises* with regard to the act’s provisions, the court indicated in both cases that compliance with the act’s provisions is mandatory, not discretionary, and that actions taken in violation thereof will be voidable.

¹³⁹*City of San Antonio*, 820 S.W.2d at 768 (quoting former article 6252-17, § 3A(h), Revised Civil Statutes, now TEX. GOV’T CODE ANN. § 551.043 (Vernon 1994) (emphasis in original)).

¹⁴⁰*Id.*; *Smith County v. Thornton*, 726 S.W.2d 2 (Tex. 1986); *City of Fort Worth v. Groves*, 746 S.W.2d 907 (Tex. App.—Fort Worth 1988, no writ) (en banc) (addressing sufficiency of posting single notice); *see also Fielding*, 911 S.W.2d at 863 (notice for meeting of transit authority complied with act, where copy posted in administrative office was accessible to public for full 72 hours of notice period, even though copy posted in courthouse was not accessible during entire 72 hours).

¹⁴¹*City of San Antonio*, 820 S.W.2d at 768.

Notice Requirements

State agencies have generally had little difficulty providing seven days notice of their meetings, but difficulties arose when a quorum of a state agency's governing body wished to meet with a legislative committee.¹⁴² 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.¹⁴³ Legislative committees, however, post notice "as provided by the rules of the house of representatives or of the senate,"¹⁴⁴ and these generally require shorter time periods than the seven-day notice required for state agencies.¹⁴⁵ 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.
- (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.¹⁴⁶

C. Place of Posting

The Open Meetings 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.¹⁴⁷

¹⁴²Tex. Att'y Gen. Op. No. JC-0308 (2000).

¹⁴³*Id.* at 2; *see also* Tex. Att'y Gen. Op. No. JC-0248 (2000) at 2.

¹⁴⁴TEX. GOV'T CODE ANN. § 551.046 (Vernon 1994).

¹⁴⁵Tex. Att'y Gen. Op. No. JC-0308 (2000) at 2.

¹⁴⁶TEX. GOV'T CODE ANN. § 551.0035 (Vernon Supp. 2004).

¹⁴⁷Notices of open meetings filed in the office of the secretary of state as provided by law are published in the Texas Register. TEX. GOV'T CODE ANN. § 2002.011(3) (Vernon 2000). Any insufficiency in timing or contents of notice as published in the Texas Register does not give rise to private rights under the Open Meetings Act. *Charlie Thomas Ford, Inc.*, 912 S.W.2d at 274.

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- (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.

Section 551.048 formerly required the secretary of state to post the notice on a bulletin board in the main office of the secretary of state. Posting on the Internet is now required.

§ 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 municipal governmental body shall post notice of each meeting on a bulletin board at a place convenient to the public in the 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 or telegraph.

§ 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;

Notice Requirements

- (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.

Notice Requirements

These posting requirements are mandatory, and actions taken at a meeting for which notice was posted incorrectly will be voidable.¹⁴⁸ In *Sierra Club*, the court held that the committee was a special district covering four or more counties for purposes of the Open Meetings Act and, as such, was required to submit notice to the secretary of state pursuant to the statutory predecessor to section 551.053.¹⁴⁹ The committee had posted notice only in the city hall, the county courthouse and its administrative offices.¹⁵⁰ 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.

D. Emergency and Supplemental Posting

Special rules exist for providing notice of emergency meetings and for providing supplemental notice of subjects added to a meeting after the initial posting. These rules pertain to the timing and content of the notice to the public and not to 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.¹⁵¹

In accordance with section 551.045, the public notice of an emergency meeting must be posted at least two hours before the meeting is scheduled to begin. Instead of calling a separate meeting to handle an emergency item, a governmental body may decide to consider the item during a previously scheduled 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 to avoid violating the act.

¹⁴⁸TEX. GOV'T CODE ANN. § 551.141 (Vernon 1994); *Thornton*, 726 S.W.2d 2.

¹⁴⁹*Sierra Club*, 746 S.W.2d at 301.

¹⁵⁰*See* Tex. Att'y Gen. Op. No. JM-120 (1983) (industrial development corporation must post notice in same manner and location as political subdivision on whose behalf it was created).

¹⁵¹TEX. GOV'T CODE ANN. § 551.045 (Vernon 1994).

Notice Requirements

In addition to posting the public notice of an emergency meeting, 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.¹⁵² The notice to members of the news media is to be given by telephone or telegraph.¹⁵³

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.

Since 1987, the act has required that the public notice of an emergency meeting or an emergency item “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.¹⁵⁴ It also defines “emergency” for purposes of emergency meetings or emergency items.¹⁵⁵

A governmental body’s determination that an emergency exists is subject to judicial review.¹⁵⁶ The existence of an emergency depends on the facts in a given case.¹⁵⁷

E. Recess in a Meeting

In *Rivera v. City of Laredo*,¹⁵⁸ the city council met on May 6th after an alleged recess from a May 4th meeting without first posting notice of the May 6th meeting. The court determined that the city was required to post notice of its May 6th meeting before convening, regardless of whether it considered the meeting a continuation from a recessed meeting held two days previously.¹⁵⁹ On the basis of *Rivera*, this office has concluded that a commissioners court may continue a meeting from day to day without reposting notice, but that notice must be reposted if a meeting is continued to any day other than the one immediately following the meeting day.¹⁶⁰

¹⁵²*Id.* § 551.047(b).

¹⁵³*Id.* § 551.047(c).

¹⁵⁴*Id.* § 551.045(c); see Act of May 31, 1987, 70th Leg., R.S., ch. 549, § 5, 1987 Tex. Gen. Laws 2211, 2213.

¹⁵⁵*Id.* § 551.045(b); see *River Rd. Neighborhood Ass’n*, 720 S.W.2d at 557 (court construed “emergency” consistently with definition later adopted by legislature).

¹⁵⁶*Id.* at 557-58 (trial court could not conclude as matter of law that emergency existed when school board knew action would be required and delayed taking action until immediate action was required); *Garcia v. City of Kingsville*, 641 S.W.2d 339, 341-42 (Tex. App.—Corpus Christi 1982, no writ) (dismissal of city manager was not matter of urgent public necessity); *Cameron County Good Gov’t League v. Ramon*, 619 S.W.2d 224 (Tex. App.—Beaumont 1981, writ ref’d n.r.e.). See also *Markowski v. City of Marlin*, 940 S.W.2d 720, 724 (Tex. App.—Waco 1997, writ denied) (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, 532 (Tex. App.—Austin 1995, no writ) (notice stating city council’s “lack of confidence” in police officer did not identify emergency).

¹⁵⁷*Common Cause v. Metro. Transit Auth.*, 666 S.W.2d 610 (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.

¹⁵⁸948 S.W.2d 787 (Tex. App.—San Antonio 1997, writ denied).

¹⁵⁹*Id.* at 793.

¹⁶⁰Tex. Att’y Gen. Op. No. DM-482 (1998); see also Tex. Att’y Gen. Op. No. JC-0285 (2000) (continuing executive session until the following day).

VI. 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.¹⁶¹ This requirement applies even if the governmental body plans to go into an executive session immediately after convening.¹⁶² The public is entitled to know which members are present for the executive session and whether there is a quorum.¹⁶³

B. Location of the Meeting

The act requires a meeting of a governmental body to be held in a location accessible to the public. 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.¹⁶⁴ Nor could an entity subject to the act meet in an underwriter's office in another state.¹⁶⁵ 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 X.C. of this handbook.

C. Rights of the Public

A meeting that is “open to the public” under the Open Meetings Act is one that the public is permitted to attend.¹⁶⁶ The act does not entitle the public to choose the items to be discussed or to speak about items on the agenda.¹⁶⁷ A governmental body may, however, give members of the public an opportunity to speak at a public meeting.¹⁶⁸ 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.¹⁶⁹

¹⁶¹TEX. GOV'T CODE ANN. § 551.001(2), (4) (Vernon Supp. 2004) (defining “deliberation” and “meeting”); *Cox Enters., Inc.*, 706 S.W.2d at 959.

¹⁶²TEX. GOV'T CODE ANN. § 551.101 (Vernon 1994); *Martinez v. State*, 879 S.W.2d 54, 56 (Tex. Crim. App. 1994); *Cox Enters., Inc.*, 706 S.W.2d at 959.

¹⁶³*Martinez*, 879 S.W.2d at 56; *Cox Enters., Inc.*, 706 S.W.2d at 959.

¹⁶⁴Tex. Att'y Gen. Op. No. JC-0487 (2002).

¹⁶⁵Tex. Att'y Gen. Op. No. JC-0053 (1999) at 5-6 (state agency committee that is subject to act may not meet in an inaccessible location such as an underwriter's office in another state).

¹⁶⁶Tex. Att'y Gen. Op. No. M-220 (1968) at 5.

¹⁶⁷*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.); *Eudaly v. City of Colleyville*, 642 S.W.2d 75, 77 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.); Tex. Att'y Gen. Op. Nos. JC-0169 (2000) at 1, H-188 (1973) at 2.

¹⁶⁸Tex. Att'y Gen. Op. Nos. JC-0169 (2000), H-188 (1973).

¹⁶⁹Tex. Att'y Gen. LO-96-111.

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.¹⁷⁰ A 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.”¹⁷¹ Accordingly, the governmental body must give notice of a public comment session. *See supra* Part V.A. of this handbook.

The Open Meetings 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.¹⁷²

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).¹⁷³

¹⁷⁰Tex. Att’y Gen. Op. No. JC-0169 (2000).

¹⁷¹TEX. GOV’T CODE ANN. § 551.001(4)(B)(iv) (Vernon Supp. 2004); *see* Tex. Att’y Gen. Op. No. JC-0169 (2000).

¹⁷²TEX. GOV’T CODE ANN. § 551.042 (Vernon 1994).

¹⁷³*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.¹⁷⁴

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.¹⁷⁵ Furthermore, a governmental body may not take action by written agreement without a meeting.¹⁷⁶

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.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹

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.¹⁸⁰ The board's superfluous approval of the firings was irrelevant to their validity.¹⁸¹

¹⁷⁴*Id.* § 551.102.

¹⁷⁵Tex. Att'y Gen. Op. No. H-1163 (1978).

¹⁷⁶*Webster*, 166 S.W.2d 75; Tex. Att'y Gen. Op. No. JM-120 (1983); *see also* Tex. Att'y Gen. Op. No. DM-95 (1992) (considering letter concerning matter of governmental business or policy that was circulated and signed by individual members of governmental body outside of open meeting).

¹⁷⁷*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. dismiss'd w.o.j.)).

¹⁷⁸*City of San Benito*, 109 S.W.3d at 758.

¹⁷⁹*City of San Antonio v. Aguilar*, 670 S.W.2d 681 (Tex. App.—San Antonio 1984, writ dismiss'd); *see also* Tex. Att'y Gen. Op. No. MW-32 (1979) (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 Open Meetings Act).

¹⁸⁰*Spiller v. Tex. Dep't of Ins.*, 949 S.W.2d 548, 551 (Tex. App.—Austin 1997, writ denied); *see also Swate*, 966 S.W.2d at 698 (hospital board's alleged violation of act did not render termination void where hospital administrator had independent power to hire and fire).

¹⁸¹*Spiller*, 949 S.W.2d at 551.

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 School District v. Pecos-Barstow Independent School District*,¹⁸² 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. 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.¹⁸³ The court determined that the board of trustees' action violated the Open Meetings Act and held that the order of annexation was ineffective.¹⁸⁴ The *Toyah Independent School District* court thus developed the remedy of judicial invalidation of actions taken by a governmental body in violation of the Open Meetings 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 IX.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.¹⁸⁵ In *Board of Trustees v. Cox Enterprises, Inc.*,¹⁸⁶ 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.¹⁸⁷ 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 551.102.¹⁸⁸ 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."¹⁸⁹

¹⁸²466 S.W.2d 377 (Tex. Civ. App.–San Antonio 1971, no writ).

¹⁸³*Id.* at 378 n.1.

¹⁸⁴*Id.* at 380; *see also City of Stephenville v. Tex. Parks & Wildlife Dep't*, 940 S.W.2d 667 (Tex. App.–Austin 1996 writ denied) (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*, 746 S.W.2d 803 (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) (Open Meetings Act does not permit governmental body to enter into agreement and authorize expenditure of funds in closed session).

¹⁸⁵*Nash v. Civil Serv. Comm'n*, 864 S.W.2d 163, 166 (Tex. App.–Tyler 1993, no writ).

¹⁸⁶679 S.W.2d 86 (Tex. App.–Texarkana 1984), *aff'd in part, rev'd in part on other grounds*, 706 S.W.2d 956 (Tex. 1986).

¹⁸⁷*Id.* at 90.

¹⁸⁸*Id.*

¹⁸⁹*Id.* (footnote omitted); *see also Nash*, 864 S.W.2d at 166 (holding 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 (Tex. App.–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).

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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.”¹⁹⁰

¹⁹⁰*Cox Enters., Inc.*, 679 S.W.2d at 89-90 (affirmed in *Cox Enters., Inc.*, 706 S.W.2d at 959).

VII. Executive Sessions

A. Overview of Subchapter D of the Open Meetings Act

The Open Meetings Act provides certain narrowly drawn exceptions to the requirement that meetings of a governmental body be open to the public.¹⁹¹ 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.¹⁹²

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.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵

¹⁹¹*Cox Enters., Inc.*, 706 S.W.2d at 958.

¹⁹²TEX. GOV'T CODE ANN. § 551.101 (Vernon 1994).

¹⁹³*Martinez*, 879 S.W.2d 54.

¹⁹⁴*Lone Star Greyhound Park, Inc.*, 863 S.W.2d 742.

¹⁹⁵*Id.* at 747-48.

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

Section 551.003 provides that the legislature, in the Open Meetings Act,

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.¹⁹⁶

The Texas Supreme Court addressed this provision in a case challenging the Senate's election by secret ballot of a senator to perform the duties of lieutenant governor. *See In re The Texas Senate*, 36 S.W.3d 119 (Tex. 2000). Members of the media contended that the Open Meetings Act prohibited the Senate from conducting the election except by *viva voce* vote in open session.¹⁹⁷ The court determined that section 551.003 of the Government Code "clearly covers the Committee of the Whole Senate," and that the Senate's meeting and votes could not be secret except as specifically provided by the Texas Constitution.¹⁹⁸ The court then considered article III, section 41 of the Texas Constitution, which authorizes the Senate to elect its officers by secret ballot, and concluded that this authorization applies to the election of a senator to serve as lieutenant governor.¹⁹⁹

C. Provisions Authorizing Deliberations in Executive 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.²⁰⁰

¹⁹⁶TEX. GOV'T CODE ANN. § 551.003 (Vernon 1994).

¹⁹⁷*In re The Texas Senate*, 36 S.W.3d 119 (Tex. 2000).

¹⁹⁸*Id.* at 120.

¹⁹⁹*Id.*

²⁰⁰TEX. GOV'T CODE ANN. § 551.071 (Vernon 1994).

This provision implements the attorney-client privilege, an attorney's duty to preserve the confidences of a client.²⁰¹ 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,²⁰² including pending or contemplated administrative proceedings governed by the Administrative Procedure Act.²⁰³

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 governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts" with the Open Meetings Act.²⁰⁴ 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.²⁰⁵ A governmental body may not invoke section 551.071 to convene a closed session and then discuss matters outside of that provision.²⁰⁶ "General discussion of policy, unrelated to legal matters, is not permitted under the language of [this exception] merely because an attorney is present."²⁰⁷ 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.²⁰⁸

The attorney-client privilege can be waived by communicating privileged matters in the presence of persons who are not within the privilege.²⁰⁹ 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."²¹⁰ 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.²¹¹

²⁰¹Tex. Att'y Gen. Op. Nos. JC-0506 (2002) at 4, JC-0233 (2000) at 3, JM-238 (1984) (as modified by Tex. Att'y Gen. Op. No. JC-0506 (2002), H-816 (1976), M-1261 (1972)).

²⁰²*Lone Star Greyhound Park, Inc.*, 863 S.W.2d at 748.

²⁰³Tex. Att'y Gen. LO-96-116.

²⁰⁴TEX. GOV'T CODE ANN. § 551.071(2) (Vernon 1994).

²⁰⁵Tex. Att'y Gen. Op. Nos. JC-0233 (2000) at 3, JM-100 (1983); *see also Cox Enters., Inc.*, 679 S.W.2d at 90.

²⁰⁶*Gardner*, 21 S.W.3d at 776.

²⁰⁷Tex. Att'y Gen. Op. No. JM-100 (1983) at 2; *see Finlan*, 888 F. Supp. at 782 n.9; Tex. Att'y Gen. Op. No. JC-0233 (2000) at 3.

²⁰⁸Tex. Att'y Gen. Op. No. JC-0233 (2000) at 3.

²⁰⁹Tex. Att'y Gen. Op. Nos. JC0506 (2002) at 6; JM-100 (1983) at 2.

²¹⁰Tex. Att'y Gen. Op. No. MW-417 (1981) at 2-3; *accord* Tex. Att'y Gen. Op. No. H-816 (1976) at 4; *see also* Tex. Att'y Gen. Op. No. JM-1004 (1989) (school board member who has sued other board members may be excluded from executive session held to discuss litigation).

²¹¹Tex. Att'y Gen. Op. No. JC-0506 (2002) at 6; *see also* Tex. Att'y Gen. Op. No. JM-238 (1984).

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.²¹²

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 party.²¹³ It does not allow a governmental body to "cut a deal in private, devoid of public input or debate."²¹⁴ 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.²¹⁵

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 with a population of 400,000 or more 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.

²¹²TEX. GOV'T CODE ANN. § 551.072 (Vernon 1994).

²¹³Tex. Att'y Gen. Op. No. MW-417 (1981) (construing statutory predecessor to Government Code section 551.072).

²¹⁴*Finlan*, 888 F. Supp. at 787.

²¹⁵*Save Our Springs Alliance, Inc. v. Austin Indep. Sch. Dist.*, 973 S.W.2d 378, 382 (Tex. App.—Austin 1998, no pet.).

4. Section 551.073: Deliberations about 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.²¹⁶

The statutory predecessor to section 551.073 was part of the same section of the act as the statutory predecessor to section 551.072.²¹⁷ Therefore, reference to the authorities construing the statutory predecessor to section 551.072 may be helpful in understanding section 551.073.²¹⁸

5. 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.²¹⁹

This section permits executive session deliberations concerning an individual officer or employee. Deliberations about a *class* of employees must, however, be held in an open session.²²⁰ For example, when a governmental body discusses salary scales without referring to a specific employee, it must meet in an open session.²²¹ 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.²²²

²¹⁶TEX. GOV'T CODE ANN. § 551.073 (Vernon 1994).

²¹⁷Act 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).

²¹⁸See, e.g., *Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 282-83 (Tex. App.—Dallas 1991, writ denied).

²¹⁹TEX. GOV'T CODE ANN. § 551.074 (Vernon 1994).

²²⁰*Gardner*, 21 S.W.3d at 777; Tex. Att'y Gen. Op. No. H-496 (1975) (construing predecessor to Government Code, section 551.074).

²²¹Tex. Att'y Gen. Op. No. H-496 (1975).

²²²*Swate*, 966 S.W.2d at 699; *Cox Enters., Inc.*, 679 S.W.2d at 90; Tex. Att'y Gen. Op. No. MW-129 (1980); see also Tex. Att'y Gen. Op. No. DM-149 (1992) (members of advisory committee are not public officers or employees within personnel exception).

Section 551.074 authorizes the public officer or employee under consideration to request a public hearing.²²³ In *Bowen v. Calallen Independent School District*,²²⁴ 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 Open Meetings Act.²²⁵ Similarly, in *James v. Hitchcock Independent School District*,²²⁶ 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."²²⁷ However, silence may not be deemed a waiver if the employee has no opportunity to object.²²⁸ 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.²²⁹

6. 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. However, this provision does not apply if the person who is the subject of the deliberation requests a public hearing.

7. Section 551.076: Deliberations about Security Devices

Section 551.076 provides as follows:

This chapter does not require a governmental body to conduct an open meeting to deliberate the deployment, or specific occasions for implementation, of security personnel or devices.²³⁰

8. Sections 551.078 and 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, adopted in 1973,²³¹ is the narrower provision, applying to a medical board or medical committee when discussing the records of an applicant for a

²²³*Parker*, 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).

²²⁴603 S.W.2d 229 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

²²⁵*Id.* at 236; *accord Thompson v. City of Austin*, 979 S.W.2d 676, 684 (Tex. App.—Austin 1998, no pet.).

²²⁶742 S.W.2d 701 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

²²⁷*Id.* at 707 (citing *Bowen*, 603 S.W.2d at 236).

²²⁸*Gardner*, 21 S.W.3d at 775.

²²⁹*Id.*

²³⁰TEX. GOV'T CODE ANN. § 551.076 (Vernon 1994).

²³¹Act of Apr. 3, 1973, 63d Leg., R.S., ch. 31 § 1, 1973 Tex. Gen. Laws 45, 47.

disability benefit from a public retirement system.²³² Section 551.0785, adopted in 2003,²³³ is much broader than section 551.078. The newer provision allows 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.²³⁴

§ 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:

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

9. Sections 551.079 through 551.0812: Exceptions Applicable to Specific Entities

Sections 551.079 through 551.0812 are set out below. The judicial decisions and attorney general opinions construing the Open Meetings Act have had little to say about these provisions.

§ 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 Article 9.48, 21.28-C, 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:

²³²Tex. Att'y Gen. Op. No. DM-340 (1995) (section 551.078 authorizes board of trustees of a public retirement system to consider medical and psychiatric records in closed session).

²³³TEX. GOV'T CODE ANN. § 551.0785 (Vernon Supp. 2004).

²³⁴*Id.*

- (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 Article 9.48, 21.28-C, 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 a facility of the institutional division 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.

§ 551.0812. State Banking Board

This chapter does not require the State Banking Board to conduct an open meeting to deliberate a matter made confidential by law.

10. Sections 551.082, 551.0821, and 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.²³⁵

A student who makes a written request for an open hearing on his disciplinary matter, but does not object to an executive session when announced, waives his or her right to an open hearing.²³⁶

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 in them.²³⁷ 20 U.S.C.A. § 1232g (2000); 34 C.F.R. § 99.3 (2002). Section 551.0821 enables school boards to deliberate in closed session to avoid revealing personally identifiable information about a student.

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.²³⁸

²³⁵TEX. GOV'T CODE ANN. § 551.082 (Vernon 1994).

²³⁶*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) (per curiam).

²³⁷*See generally Axtell v. Univ. of Tex.*, 69 S.W.3d 261, 267 (Tex. App.—Austin 2002, no pet.) (student did not have cause of action under Tort Claims Act for release of his grades to radio station).

²³⁸TEX. GOV'T CODE ANN. § 551.083 (Vernon 1994).

A school board meeting in executive session under the statutory predecessor to this section could discuss salary schedules for a class of employees to the extent that the discussion related to terms it would follow in the consultations.²³⁹

11. Section 551.085: Deliberations 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, hospital district created under general or special law, or nonprofit health maintenance organization created under Section 534.101, Health and Safety Code,²⁴⁰ 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,²⁴¹ that is subject to this chapter is not required to conduct an open meeting to deliberate information described by Subsection (a).

12. Section 551.086: Certain Public Power Utilities: Competitive Matters

This section was adopted as part of an act relating to electric utility restructuring,²⁴² and is briefly summarized here. Anyone wishing to know when and how it applies should read it in its entirety. 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 in subsection (b)(3), section 551.086 of the Government Code.²⁴³ Subsection (b)(3) defines “competitive matter” as “a utility-related matter that the public power utility governing body in good faith determines by a vote under this section is related to the public power utility’s competitive activity, including commercial information, and would, if

²³⁹Tex. Att’y Gen. Op. No. H-651 (1975). Attorney General Opinion H-496 (1975) had determined that the statutory predecessor to section 551.074 did not permit a similar discussion in executive session, but that opinion was distinguished as addressing only the predecessor to section 551.074 and not the predecessor to section 551.083.

²⁴⁰Section 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 (Vernon Supp. 2004).

²⁴¹This provision authorizes certain hospital districts to establish HMO’s.

²⁴²TEX. GOV’T CODE ANN. § 551.086 (Vernon Supp. 2004).

²⁴³*Id.* § 551.086(c).

disclosed, give advantage to competitors or prospective competitors but may not be deemed to include” several categories of information specifically set out.²⁴⁴ “Public power utility” is defined as “an entity providing electric or gas utility services” that is subject to the provisions of the Open Meetings Act.²⁴⁵ 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.²⁴⁶

13. Section 551.087: Deliberations Regarding Economic Development Negotiations

This provisions 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).²⁴⁷

14. Section 551.088: Deliberations 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.²⁴⁸

²⁴⁴*Id.* § 551.086(b)(3).

²⁴⁵*Id.* § 551.086(b)(1).

²⁴⁶*Id.* § 551.086(d).

²⁴⁷Act of May 22, 2001, 77th Leg., ch. 1420, § 21.001(49), 2001 Tex. Gen. Laws 4210, 4562.

²⁴⁸*Id.*

Because an executive session may be held only when expressly authorized by law, this office previously determined that no provision of the Open Meetings Act authorized a governmental body to meet in executive session to discuss the contents of a licensing examination.²⁴⁹ Section 551.088 now expressly authorizes an executive session for the purpose of deliberating a test item or information related to a test item if the governmental body believes that the test item may be included in a licensing or certification examination that the governmental body will administer.

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 Open Meetings Act.²⁵⁰ Chapter 418 of the Government Code, the Texas Disaster Act, which relates to managing emergencies and disasters, including those caused by terroristic acts, provides as follows in section 418.183(f):

- (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.²⁵¹

Section 418.183 states that “[t]his section applies only to information that is confidential under Sections [enumerating specific sections of chapter 418].”²⁵²

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 Open Meetings Act provision authorizing a closed session applied to the deliberations.²⁵³ 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.²⁵⁴

²⁴⁹See Tex. Att’y Gen. LO-96-058, at 2.

²⁵⁰See, e.g., TEX. FAM. CODE ANN. § 264.005(g) (Vernon 2002) (County Child Welfare Boards); TEX. LAB. CODE ANN. § 401.021(3) (Vernon 1996) (certain proceedings of Workers’ Compensation Commission); TEX. OCC. CODE ANN. § 152.009(c) (Vernon 2001) (Board of Medical Examiners; deliberation about license applications and disciplinary actions).

²⁵¹TEX. GOV’T CODE ANN. § 418.183(f) (Vernon Supp. 2004).

²⁵²*Id.* § 418.183(a).

²⁵³Tex. Att’y Gen. Op. Nos. H-1154 (1978) (county child welfare board may meet in executive session to discuss case files made confidential by statute); H-780 (1976) (Medical Advisory Board must meet in closed session to consider confidential reports about medical condition of applicants for driver’s license); H-484 (1974) (licensing board may discuss confidential information from applicant’s file and may prepare examination questions in closed session); H-223 (1974) (*dicta*) (administrative hearings in comptroller’s office concerning confidential tax information may be closed).

²⁵⁴Tex. Att’y Gen. Op. Nos. H-1154 (1978), H-484 (1974).

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.²⁵⁵ It disapproved the language in earlier opinions that suggest otherwise, but stated that the commission could protect privacy rights by avoiding discussion of private information.²⁵⁶ Thus, the disapproved opinions should no longer be relied on as a source of authority for a closed session.

Significantly, the legislature has added to the Open Meetings Act the kind of provision that Attorney General Opinion MW-578 (1982) said could not be implied from the act. Section 551.081 of the act provides that “[t]his chapter does not require the Credit Union Commission to conduct an open meeting to deliberate a matter made confidential by law.” Thus, the Credit Union Commission has express authority to deliberate in closed session about a “matter made confidential by law.” Sections 551.0811 and 551.0812 similarly authorize the Finance Commission and the State Banking Board to deliberate in closed session about matters made confidential by law.

F. Who May Attend an Executive Session

Only the members of a governmental body have a right to attend an executive session,²⁵⁷ 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 officers and employees of the governmental body whose participation is necessary to the matter under consideration.²⁵⁸ Thus, a school board could require its superintendent of schools to attend all executive sessions of the board without violating the act.²⁵⁹ 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.²⁶⁰

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 (3) the county auditor’s presence will not waive the attorney-client privilege.²⁶¹ 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.²⁶²

²⁵⁵See Tex. Att’y Gen. Op. No. MW-578 (1982) at 4.

²⁵⁶*Id.*

²⁵⁷Tex. Att’y Gen. Op. No. JM-6 (1983) at 2 (commissioners court may exclude county clerk from executive sessions).

²⁵⁸Tex. Att’y Gen. Op. No. JC-0375 (2001) at 2.

²⁵⁹*Id.*

²⁶⁰*Id.*

²⁶¹Tex. Att’y Gen. Op. No. JC-506 (2002) at 6; *see* Tex. Att’y Gen. Op. No. JM-238 (1984) (county officers and employees attending closed session of commissioners court to discuss litigation against sheriff and commissioners court about county jail conditions).

²⁶²See Tex. Att’y Gen. Op. No. JC-506 (2002) at 6.

Executive Sessions

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.²⁶³ Nor may a governmental body admit the opposing party in litigation to an executive session under section 551.071.²⁶⁴

²⁶³*Finlan*, 888 F. Supp. at 787.

²⁶⁴*See* Tex. Att'y Gen. Op. No. JM-1004 (1989) (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 (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).

VIII. Records of Meetings

A. Minutes or Tape Recording 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.²⁶⁵

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.²⁶⁶

If minutes are kept instead of a tape recording, the minutes must record every action taken by the governmental body.²⁶⁷ If open sessions of a commissioners court meeting are taped, the tape recordings are available to the public under the Open Records Act.²⁶⁸

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.²⁶⁹ *But see* Act of May 29, 2003, 78th Leg., R.S., ch. 1287, § 1, 2003 Tex. Sess. Law Serv. 4683 (to be codified at TEX. GOV'T CODE ANN. § 551.0725) (commissioners court must make tape recording of meeting under section 551.0725).

²⁶⁵TEX. GOV'T CODE ANN. § 551.021 (Vernon 1994).

²⁶⁶*Id.* § 551.022.

²⁶⁷Tex. Att'y Gen. Op. No. H-1163 (1978).

²⁶⁸Tex. Att'y Gen. Op. No. JM-1143 (1990) (tape recording open session of commissioners court meeting); *see* Tex. Att'y Gen. ORD-225 (1979) (handwritten notes of open meetings made by secretary of governmental body are subject to disclosure under Open Records Act); ORD-32 (1974) (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).

²⁶⁹TEX. GOV'T CODE ANN. § 551.103(a) (Vernon 1994); *see* Tex. Att'y Gen. Op. Nos. JM-1071 (1989), JM-840 (1988).

If a certified agenda is kept, the presiding officer must certify that the agenda is a true and correct record of the executive session.²⁷⁰ 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.²⁷¹ While the agenda does not have to be a verbatim transcript of the meeting, it must at least provide a brief summary of each deliberation.²⁷² 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.²⁷³ 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.²⁷⁴

The certified agenda or tape recording of an executive session must be kept a minimum of two years after the date of the session. However, 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.²⁷⁵

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.²⁷⁶ (Criminal penalties for violating the act are discussed in Part IX.D. of this handbook.)

Section 551.104 provides for court-ordered access to the certified agenda or tape recording under specific circumstances:

- (a) 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.

²⁷⁰TEX. GOV'T CODE ANN. § 551.103(b) (Vernon 1994).

²⁷¹*Id.* § 551.103(c).

²⁷²Tex. Att'y Gen. Op. No. JM-840 (1988) at 4-7.

²⁷³*Id.* at 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).

²⁷⁴TEX. GOV'T CODE ANN. § 551.145 (Vernon 1994).

²⁷⁵*Id.* § 551.104(a).

²⁷⁶*Id.* § 551.146.

- (b) 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).²⁷⁷

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.²⁷⁸ The Office of the Attorney General has recognized that it lacks authority under the Open Records Act²⁷⁹ to review certified agendas or recordings of closed sessions for compliance with the Open Meetings Act.²⁸⁰ However, the confidentiality provision may be preempted by federal law.²⁸¹ 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.²⁸²

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.²⁸³ This is not a release to the public in violation of the confidentiality provisions of the Open Meetings 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.²⁸⁴

²⁷⁷TEX. GOV'T CODE ANN. § 551.104 (Vernon 1994).

²⁷⁸Tex. Att'y Gen. Op. No. JM-995 (1988).

²⁷⁹TEX. GOV'T CODE ANN. ch. 552 (Vernon 1994 & Supp. 2004).

²⁸⁰See Tex. Att'y Gen. ORD-495 (1988).

²⁸¹*Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995).

²⁸²*Id.*

²⁸³Tex. Att'y Gen. Op. No. JC-0120 (1999) at 4, 7 (overruling Tex. Att'y Gen. Op. No. DM-227 (1993) in part).

²⁸⁴Tex. Att'y Gen. LO-98-033, at 2-3.

IX. Penalties and Remedies

A. Introduction

The Open Meetings Act provides civil remedies and criminal penalties for violations of its provisions. District courts have original jurisdiction over criminal violations of the Open Meetings Act as misdemeanors involving official misconduct.²⁸⁵ The act does not authorize the attorney general to enforce its provisions. *See infra* Part X.D. of this handbook.

B. Mandamus, Injunction, or Declaratory Judgment

Section 551.142 of the Open Meetings 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.²⁸⁶

The four-year residual limitations period in section 16.051 of the Civil Practices and Remedies Code applies to an action under this provision.²⁸⁷

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.²⁸⁸ The Open Meetings 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.²⁸⁹ Absent such a pleading, jurisdiction in original mandamus and original injunction proceedings lies in the district court.²⁹⁰

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.²⁹¹ In keeping with the purpose of the Open Meetings Act, standing under the act is interpreted broadly.²⁹² The courts have construed the

²⁸⁵*See State v. Williams*, 780 S.W.2d 891, 892-93 (Tex. App.–San Antonio 1989, no writ).

²⁸⁶TEX. GOV'T CODE ANN. § 551.142 (Vernon 1994).

²⁸⁷*Rivera*, 948 S.W.2d at 792.

²⁸⁸*Boston v. Garrison*, 256 S.W.2d 67, 70 (Tex. 1953). *See also Forney Messenger, Inc. v. Tennon*, 959 F. Supp. 389 (N.D. Texas 1997) (remote possibility that former city council members might in future be in a position to violate Open Meetings Act did not support injunction against them in their individual capacities).

²⁸⁹*Martin v. Victoria Indep. Sch. Dist.*, 972 S.W.2d 815, 818 (Tex. App.–Corpus Christi 1998, pet. denied).

²⁹⁰*Id.*

²⁹¹*See Cameron County Good Gov't League*, 619 S.W.2d at 230-31.

²⁹²*See Hays County Water Planning P'ship*, 41 S.W.3d at 177.

phrase “any interested person” to include a government league,²⁹³ an environmental group,²⁹⁴ the president of a local homeowners group,²⁹⁵ and a city challenging the closure of a hospital by the county hospital district.²⁹⁶ 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 Open Meetings Act in selecting a police chief.²⁹⁷ One court of appeals has rejected claims that an individual lacks standing if he or she fails to show how he or she was affected differently from other citizens, “because ‘the interest protected by the Open Meetings Act is the interest of the general public.’”²⁹⁸

The courts in Texas have also recognized that an individual authorized to seek a writ of mandamus or an injunction under the Open Meetings 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.²⁹⁹ 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 the court may determine the validity of a governmental body’s actions under the Open Meetings Act in an action for declaratory relief.³⁰⁰

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 Open Meetings Act.³⁰¹ This relief, however, is discretionary. The Uniform Declaratory Judgments Act also authorizes a court to award reasonable attorney fees.³⁰²

Depending on the nature of the violation, additional monetary damages may be assessed against a governmental body violating the Open Meetings Act. In *Ferris v. Texas Board of Chiropractic Examiners*,³⁰³ 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 period between the initial unlawful firing and the third meeting at which the director’s employment was lawfully terminated.³⁰⁴

²⁹³*See id.*

²⁹⁴*Springs Alliance, Inc., v. Lowry*, 934 S.W.2d 161 (Tex. App.–Austin 1996, orig. proceeding [leave denied]).

²⁹⁵*Id.*

²⁹⁶*Matagorda County Hosp. Dist. v. City of Palacios*, 47 S.W.3d 96, 102 (Tex. App.–Corpus Christi 2001, no pet.).

²⁹⁷*Rivera*, 948 S.W.2d at 792.

²⁹⁸*See Hays County Water Planning P’ship*, 41 S.W.3d at 177-78 (quoting *Save our Springs Alliance, Inc.*, 934 S.W.2d at 163).

²⁹⁹*Cox Enters., Inc.*, 679 S.W.2d 86 (recognizing news media’s right to bring declaratory judgment action to determine if board had violated Open Meetings Act); *see also Groves*, 746 S.W.2d 907 (resident of Arlington had standing to bring suit for declaratory judgment and injunction against city for violation of Open Meetings Act).

³⁰⁰TEX. CIV. PRAC. & REM. CODE ANN. § 37.003 (Vernon 1997).

³⁰¹*See Austin Transp. Study Policy Advisory Comm’n v. Sierra Club*, 843 S.W.2d 683 (Tex. App.–Austin 1992, writ denied) (upholding award of attorney fees).

³⁰²TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997); *Groves*, 746 S.W.2d at 911, 917-18 (affirming trial court’s award in excess of \$40,000 in attorney fees to prevailing plaintiff in action pursuant to Uniform Declaratory Judgments Act).

³⁰³808 S.W.2d 514 (Tex. App.–Austin 1991, writ denied).

³⁰⁴*Id.* at 518-19 (also awarding executive director attorney fees of \$7,500).

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:

- (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.³⁰⁵

C. Voidability of 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.” This section codifies Texas cases previously holding, as a matter of common law, that a governmental body’s actions that are in violation of the Open Meetings Act are subject to judicial invalidation.³⁰⁶

In *Point Isabel Independent School District v. Hinojosa*,³⁰⁷ 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 Open Meetings 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.³⁰⁸ (For further discussion of required content of notice under the act, see *supra* Part V.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 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.³⁰⁹

³⁰⁵TEX. GOV’T CODE ANN. § 551.146(a)(2) (Vernon 1994).

³⁰⁶See *Lower Colorado River Auth.*, 523 S.W.2d at 646; *Toyah Indep. Sch. Dist.*, 466 S.W.2d 377; see also *Ferris*, 808 S.W.2d at 517; Tex. Att’y Gen. Op. No. H-594 (1975) (commissioners court must first determine action invalid; governmental body cannot independently assert its prior action is invalid when it is to governmental body’s advantage to do so).

³⁰⁷797 S.W.2d 176 (Tex. App.–Corpus Christi 1990, writ denied).

³⁰⁸*Id.* at 182.

³⁰⁹*Id.* at 182-83 (also noting that previous decisions did not expressly address whether invalidation was limited to specific actions violating act).

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Section 551.141 authorizes a court to invalidate an action that violates any of the Open Meetings Act's requirements, not only actions that violate the act's notice requirements.³¹⁰ A court is not required to invalidate an action taken in violation of the Open Meetings Act and it may choose not to do so given the facts of a specific case.³¹¹

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.³¹² The ratification will be effective only from the date of the meeting at which the valid action is taken.³¹³

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 Open Meetings Act.³¹⁴ 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.

Reauthorization or ratification of an action previously taken in violation of the Open Meetings Act must comply with all applicable provisions of the act.³¹⁵ In *Porth v. Morgan*³¹⁶ the Houston County Hospital Authority Board's attempt to reauthorize the appointment of an individual to the board failed to comply fully with the act. The original appointment of the individual to the board had been made during a closed meeting, violating the requirement that final action take place in an open meeting. The original appointment violated the notice requirement as well, because the posted notice had not included 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 include the board's appointing a new member or ratifying its prior invalid appointment. Accordingly, the board's subsequent selection of the individual as vice-chairman did not ratify the board's initial appointment of the individual.

³¹⁰*Compare Coates v. Windham*, 613 S.W.2d 572 (Tex. Civ. App.—Austin 1981, no writ) (holding that act permitted courts to hold void only actions violating act's notice requirements), *with Toyah Indep. Sch. Dist.*, 466 S.W.2d 377 (holding void governmental action taken at closed meeting in violation of act's open meetings requirements).

³¹¹*See Collin County, 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 authorized in violation of Open Meetings 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 Open Meetings Act's notice requirements).

³¹²*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. Cross*, 815 S.W.2d at 284 (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).

³¹³*River City Cabaret, Ltd.*, 32 S.W.3d at 293.

³¹⁴*Ferris*, 808 S.W.2d at 518-19.

³¹⁵*See id.*

³¹⁶622 S.W.2d at 473.

D. Criminal Provisions

Certain violations of the Open Meetings Act's requirements concerning certified agendas or tape recordings of executive sessions are punishable as Class C or Class B misdemeanors. (For a discussion of these violations, refer to Part VIII.B. of this handbook.) Section 551.145 provides as follows:

- (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.³¹⁷

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.³¹⁸

³¹⁷TEX. GOV'T CODE ANN. § 551.145 (Vernon 1994).

³¹⁸*Id.* § 551.146.

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.³¹⁹

Sections 551.143 and 551.144 of the Government Code establish criminal sanctions for certain conduct in violation of the provisions making meetings of governmental bodies accessible to the public. 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.³²⁰

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.

³¹⁹TEX. PEN. CODE ANN. § 6.03(b) (Vernon 2003).

³²⁰TEX. GOV'T CODE ANN. § 551.143 (Vernon 1994).

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- (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.³²¹

- (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.³²²

Section 551.144(c) was adopted by the 76th Legislature in 1999.³²³ In 1998, the Texas Court of Criminal Appeals determined in *Tovar v. State*³²⁴ 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.³²⁵ 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).

³²¹See *Martinez*, 879 S.W.2d at 55-56 (upholding validity of information which charged county commissioners with violating Open Meetings Act by failing to comply with procedural prerequisites for holding closed session).

³²²TEX. GOV'T CODE ANN. § 551.144 (Vernon Supp. 2004).

³²³Act of May 22, 1999, 76th Leg., R.S., ch. 647, 1999 Tex. Gen. Laws 3218, 3219.

³²⁴978 S.W.2d 584 (Tex. Crim. App. 1998).

³²⁵949 S.W.2d 370, 374 (Tex. App.—San Antonio 1997), *aff'd*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

X. Open Meetings Act and Other Statutes

A. Other Statutes May Apply to a Public Meeting

The Open Meetings Act is not the only provision of law relevant to a public meeting of a particular governmental entity. 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.³²⁶

In *Shackelford v. City of Abilene*,³²⁷ the Texas Supreme Court held that a resident of Abilene had a right under the Abilene City Charter to require public meetings. The city charter included the following provision:

All meetings of the Council and all Boards or Commissions appointed by the Council shall be open to the public.³²⁸

The act does not reference other provisions of law applicable to public meetings of a particular entity. The statute, charter provisions, ordinances and rules that apply to a specific governmental body should be consulted for provisions affecting its public meetings. Laws other than the Open Meetings Act govern preparing the agenda for a meeting.³²⁹ The procedures for agenda preparation must be consistent with the “openness” requirements of the act.³³⁰

Even though a particular entity is not a “governmental body” within the act, another statute may require it to comply with the act’s provisions.³³¹ 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.³³² Certain governmental actions may be subject to a special notice provision³³³ or may require a two-thirds majority vote of the board, rather than a simple majority.³³⁴

³²⁶TEX. GOV’T CODE ANN. § 551.004 (Vernon 1994).

³²⁷585 S.W.2d 665, 667 (Tex. 1979).

³²⁸*Id.* at 667 (emphasis omitted).

³²⁹Tex. Att’y Gen. Op. Nos. DM-473 (1998), DM-228 (1993), JM-63 (1983), MW-32 (1979).

³³⁰Tex. Att’y Gen. Op. Nos. DM-473 (1998), DM-228 (1993).

³³¹*See* TEX. EDUC. CODE ANN. § 12.105(b) (Vernon Supp. 2004) (governmental body of open enrollment charter school).

³³²*See* TEX. LOC. GOV’T CODE ANN. § 211.006 (Vernon 1999).

³³³*See id.* § 152.013(b).

³³⁴*See* TEX. GOV’T CODE ANN. § 311.013(a) (Vernon 1998) (grant of authority to three or more persons as a public body confers the authority of a majority of number fixed by statute); *see, e.g.*, TEX. LOC. GOV’T CODE ANN. § 363.105 (Vernon 1999) (two-thirds majority vote required of board of crime control and prevention district to reject application for funding).

The Open Meetings Act does not answer all questions about conducting a public meeting. The people responsible for a particular governmental body's meetings must know about other law applicable to the entity's meetings. This handbook cannot address all potentially relevant provisions, but we will address three important statutes in more detail.

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.³³⁵ The state agencies subject to the APA are as a rule also subject to the Open Meetings Act.³³⁶ The decision-making process under the APA is not excepted from the requirements of the Open Meetings Act.³³⁷

However, this office has concluded that the APA creates an exception to the requirements of the Open Meetings Act with regard to contested cases.³³⁸ 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.³³⁹ Although the Open Meetings 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.³⁴⁰

The APA does not, on the other hand, create exceptions to the requirements of the Open Meetings Act when the two statutes can be harmonized. In *Acker v. Texas Water Commission*,³⁴¹ 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. Section 2001.061(b) provides in pertinent part: "A state agency member may communicate *ex parte* with another member of the agency." The court concluded that, when harmonized with the provisions of the Open Meetings Act, this section permits a state agency's members to confer *ex parte*, but only when less than a quorum is present.³⁴²

C. The Americans with Disabilities Act

Title II of the Americans with Disabilities Act of 1990 (the "ADA")³⁴³ prohibits discrimination against disabled individuals in the activities, services and programs of public entities. All the activities of state and local governmental bodies are covered by the ADA, including meetings. Governmental bodies

³³⁵TEX. GOV'T CODE ANN. § 2001.001(1) (Vernon 2000); *see also id.* § 2001.003(1), (6).

³³⁶*See id.* § 2001.003(7) (definition of "state agency").

³³⁷Tex. Att'y Gen. Op. No. H-1269 (1978) (considering statutory predecessor to APA).

³³⁸Tex. Att'y Gen. Op. No. JM-645 (1987) at 6.

³³⁹*Id.*

³⁴⁰*Id.* at 4-5; *see* TEX. GOV'T CODE ANN. § 2001.081 (Vernon 2000).

³⁴¹790 S.W.2d 299 (Tex. 1990).

³⁴²*Id.* at 301.

³⁴³42 U.S.C. §§ 12101-12213 (2000).

subject to the Open Meetings Act must also ensure that their meetings comply with the ADA.³⁴⁴ 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.³⁴⁵

A governmental body may not exclude a disabled individual from participation in the activities of the governmental body because the facilities are physically inaccessible.³⁴⁶ The room in which a public meeting is held must be physically accessible to individuals with disabilities.³⁴⁷ A governmental body must also ensure that communications with disabled individuals are as effective as communications with others.³⁴⁸ 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.³⁴⁹

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

Although the Open Meetings Act and the Public Information Act³⁵⁰ 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,³⁵¹ while the Open Meetings Act does not.³⁵² Each statute contains a different set of exceptions.³⁵³ 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.³⁵⁴ The Open Meetings Act has no comparable provisions. Chapter 402, subchapter C of the Government Code authorizes the attorney general to issue legal opinions on 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.³⁵⁵ Because questions of fact cannot be resolved in the opinion process, an attorney general opinion will not determine whether a particular conduct of a governmental body violated the Open Meetings Act.³⁵⁶

³⁴⁴*See id.* § 12132 (2000); 28 C.F.R. §§ 35.130, .149, .160 (2002). *See generally Tyler v. City of Manhattan*, 849 F. Supp. 1429 (D. Kan. 1994).

³⁴⁵42 U.S.C. § 12102(2) (2000); 28 C.F.R. § 35.104 (2002).

³⁴⁶28 C.F.R. §§ 35.149, .150 (2002).

³⁴⁷*See Dees v. Austin Travis County Mental Health & Mental Retardation*, 860 F. Supp. 1186 (W.D. Tex. 1994); *see generally Tyler*, 849 F. Supp. at 1442.

³⁴⁸28 C.F.R. § 35.160 (2002).

³⁴⁹*Id.* § 35.160(b)(1).

³⁵⁰TEX. GOV'T CODE ANN. ch. 552 (Vernon 1994 & Supp. 2004).

³⁵¹*Id.* § 552.003(1)(A) (Vernon Supp. 2004).

³⁵²*See* Tex. Att'y Gen. LO-98-040, at 2.

³⁵³*See* Tex. Att'y Gen. ORD-491 (1988).

³⁵⁴*See* TEX. GOV'T CODE ANN. §§ 552.301-.306, 552.321-.323 (Vernon 1994 & Supp. 2004).

³⁵⁵*Id.* §§ 402.041-.045 (Vernon 1998).

³⁵⁶*See* Tex. Att'y Gen. Op. Nos. DM-95 (1992) at 1, JM-840 (1988) at 6, H-772 (1976) at 6; *see also Bexar Medina Atascosa Water Dist.*, 2 S.W.3d 459, 461 (whether any specific conduct violates the Open Meetings Act is generally a question of fact).

In addition, the exceptions in one statute are not impliedly 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.³⁵⁷ 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.³⁵⁸ 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.³⁵⁹ *See supra* Part VII.E. of this handbook.

³⁵⁷*See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 366-67 (Tex. 2000); Tex. Att’y Gen. ORD-605 (1992) (names of applicants); ORD-485 (1987) (investigative report). *See also* Tex. Att’y Gen. ORD-491 (1988) (fact that meeting was not subject to Open Meetings Act does not make minutes of meeting confidential under Open Records Act).

³⁵⁸Tex. Att’y Gen. Op. Nos. JM-595 (1986) at 4-5 (Open Records Act does not authorize executive session discussion of written evaluations on selection of consultants and bidders); MW-578 (1982) (no implied authority under Open Meetings Act to hold closed session to review private information in unemployment benefit case files).

³⁵⁹*See, e.g.*, Tex. Att’y Gen. Op. No. H-1154 (1978) (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 Government Code).

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;

Appendix A: Text of the Texas Open Meetings Act

- (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, if formal action is not taken and any discussion of public business is incidental to the social function, convention, or workshop. 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 if:
 - (1) 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;
 - (2) the property owners' association has the power to make mandatory special assessments for capital improvements or mandatory regular assessments; and
 - (3) 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.
- (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.

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.
- (b) 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.

§ 551.042. 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

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.

§ 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 Workers' Compensation Commission; 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.

§ 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 or telegraph.

§ 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 municipal governmental body shall post notice of each meeting on a bulletin board at a place convenient to the public in the 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 or telegraph.

§ 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:

- (a) shall post notice of each meeting at the county courthouse of the county in which the meeting will be held;

- (b) 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
- (c) may post notice of a meeting at another place convenient to the public.

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:

- (a) when the governmental body seeks the advice of its attorney about:
 - (1) pending or contemplated litigation; or
 - (2) a settlement offer; or
- (b) 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 with a population of 400,000 or more 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.

§ 551.073. 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 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; Closed Meeting

This chapter does not require a governmental body to conduct an open meeting to deliberate the deployment, or specific occasions for implementation, of security personnel or devices.

§ 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:

- (a) the medical records or psychiatric records of an individual applicant for a benefit from the plan; or
- (b) 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 Article 9.48, 21.28-C, 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 Article 9.48, 21.28-C, 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 a facility of the institutional division 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.

§ 551.0812. State Banking Board

This chapter does not require the State Banking Board 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, 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.
 - (3) “Competitive matter” means a utility-related matter that the public power utility governing body in good faith determines by a vote under this section is related to the public power utility’s competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors but may not be deemed to include the following categories of information:
 - (A) information relating to the provision of distribution access service, including the terms and conditions of the service and the rates charged for the service but not including information concerning utility-related services or products that are competitive;

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- (B) information relating to the provision of transmission service that is required to be filed with the Public Utility Commission of Texas, subject to any confidentiality provided for under the rules of the commission;
- (C) information for the distribution system pertaining to reliability and continuity of service, to the extent not security-sensitive, that relates to emergency management, identification of critical loads such as hospitals and police, records of interruption, and distribution feeder standards;
- (D) any substantive rule of general applicability regarding service offerings, service regulation, customer protections, or customer service adopted by the public power utility as authorized by law;
- (E) aggregate information reflecting receipts or expenditures of funds of the public power utility, of the type that would be included in audited financial statements;
- (F) information relating to equal employment opportunities for minority groups, as filed with local, state, or federal agencies;
- (G) information relating to the public power utility's performance in contracting with minority business entities;
- (H) information relating to nuclear decommissioning trust agreements, of the type required to be included in audited financial statements;
- (I) information relating to the amount and timing of any transfer to an owning city's general fund;
- (J) information relating to environmental compliance as required to be filed with any local, state, or national environmental authority, subject to any confidentiality provided under the rules of those authorities;
- (K) names of public officers of the public power utility and the voting records of those officers for all matters other than those within the scope of a competitive resolution provided for by this section;
- (L) a description of the public power utility's central and field organization, including the established places at which the public may obtain information, submit information and requests, or obtain decisions and the identification of employees from whom the public may obtain information, submit information or requests, or obtain decisions; or
- (M) information identifying the general course and method by which the public power utility's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures.

- (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 in Subsection (b)(3). Before a public power utility governing body may deliberate, vote, or take final action on any competitive matter in a closed meeting, the public power utility governing body must first make a good faith determination, by majority vote of its members, that the matter is a competitive matter that satisfies the requirements of Subsection (b)(3). The vote shall be taken during the closed meeting and be included in the certified agenda or tape recording of the closed meeting. If a public power utility governing body fails to determine by that vote that the matter satisfies the requirements of Subsection (b)(3), the public power utility governing body may not deliberate or take any further action on the matter in the closed meeting. 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.

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:

- (a) announces that a closed meeting will be held; and
- (b) 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

- (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 or the Board for Lease of University Lands from holding an open or closed meeting by telephone conference call.
- (c) A meeting held by telephone conference call 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 or Board for Lease of University Lands 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.
- (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.

§ 551.123. 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 videoconference 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 videoconference call is subject to the notice requirements applicable to other meetings. In addition, a meeting held by videoconference 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).

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- (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, videoconference 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, videoconference 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.

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

- (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.

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- (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.

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