



# *Texas Open Meetings Act and Ethics Workshop*



Adolfo Ruiz, Partner

McKamie Krueger, LLP

[mckamiekrueger.com](http://mckamiekrueger.com)

# When Does The Open Meetings Act Apply?

## General Rule:

A governmental body's meetings **must** be open to the public unless a statute **expressly** permits an executive session.

# When Does The Open Meetings Act Apply?

The Act applies when a quorum of a governmental body discusses public business. **The mere presence of a quorum may invoke the Act.** But the quorum need not be present at same time or place for the Act to apply.

The Act does not apply to purely social gatherings that are unrelated to public business, nor does it apply to **regional, state or national** conventions or workshops, as long as no action is taken and the discussion of public business is only incidental to the event.

# What is a Quorum?

The Act defines “quorum” as a majority of the governing body, unless otherwise defined by applicable law (including home-rule charter).

Non-voting members of a governing body are counted for purposes of determining the presence of a quorum.

# What is a Quorum?

## City of Alpine Charter

### City Council

#### Sec. 3.07 (B). Meetings.

- . . . The Mayor shall, with three Councilmembers constitute a quorum, . . . In the absence of the Mayor, any four of the Councilmembers shall constitute a quorum.

# What is a Quorum?

The Act applies to a **gathering** of a quorum of the governing body if **public business** is **discussed**, regardless of whether there is any action or vote taken.

# Is a Gathering of Less Than a Quorum Subject to the Act?

Generally, no.

However if a standing committee or subgroup of the governing body meets and public business is discussed, the Attorney General advises to post notice and conduct an open meeting.

**\*\* State law also provides that if less than a quorum gather with the intent of circumventing the Act, criminal penalties can be imposed against the participating officials. Civil actions can also be brought to void future actions taken on subjects that are illegally discussed. “Walking quorum.”**

# What is a “Walking Quorum?”

It is important to note that the quorum of the governmental body need not be ‘present’ together at any time for a deliberation to occur. A “walking quorum” violates Act.

Walking Quorum: A quorum or more of a governmental body that attempts to avoid the purposes of the Act by meeting in groups of less than a quorum to discuss or deliberate public business.

# Definition Issues !!!

- The Act actually has **two definitions of a meeting**. Sections 551.001(4)(A) and (B) of the Texas Government Code are the statutory provisions that define whether a gathering of members of a governmental body constitutes a meeting. If the facts of a particular situation fall under ***either of the definitions***, the requirements of the Act will apply.

# Definition 1

- Section 551.001(4)(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.”
- A regular, special, or called meeting or hearing in which discussion or formal action will be taken will always be considered a “meeting.” **BUT ALSO >>>**

# Definition 2

- A meeting under **Section 551.001(4)(B)**:
- a **quorum** of the governmental body must be present;
- the governmental body **calls** the gathering;
- the governmental body is **responsible for or conducts the gathering**;
- members of the governmental body **receive information from, give information to, ask questions of, or receive questions from any third person**; and
- the information concerns **public business or policy** over which the governmental body has supervision or control.

# Definition Issues - Here it is!

- The Act has been interpreted to apply to situations in which members of a governmental body are **not in each other's physical presence**.
- For example, e-mail communications, telephone calls, and written correspondence (Texting) that ultimately involve a quorum may constitute a meeting, even if the quorum **is not physically present in the same location and the discussion does not take place at the same moment in time**.

# What is Public Business?

The term “public business” has been broadly interpreted, and can include virtually any subject area in which the governmental body has any type of interest.

(In the definition of “meeting,” the Act references “**public business or public policy** over which the governmental body has supervision or control,” or upon which “the governmental body takes formal action.” The definition of “**deliberation**” references “an issue within the jurisdiction of the governmental body or any public business.”)

# A Common Question --

- *“Can I talk about public business with other members of my governmental body outside of a properly posted meeting?”*
- “The answer that I and virtually all other Texas municipal lawyers have to give, being a conservative lawyer who doesn’t want elected officials indicted or sent to jail based on my advice:
  - “No.”

# A Common Question --

- “The issue is not intentionally-planned, secret meetings to make decisions outside of the public view; **but elected officials communicating with one another to learn about an issue or to discuss whether an issue warrants consideration by the entire governmental body.** Those types of discussions are essential for good and efficient government. The answer to the question is more than just “**no.**” But a drawn out explanation yields no useful guidance.”

# Procedures and Requirements

## *Open Meetings*

- A meeting *may not be convened* unless a *quorum is present* in the meeting room
- The *Americans with Disabilities Act* requires a meeting to be held in a room that is *physically accessible* to those with disabilities
- Members of the public (including the media) *have a right to record* the meeting by audio or video tape or other comparable means
- A governmental body may adopt **reasonable rules** to maintain order in a meeting, including those relating to the location of recording equipment

# Notice Requirements

- Individual notice is not required.
- **Accessibility:** A governmental body must post its notice in a place that is “*readily accessible to the general public for all times for at least 72 hours*” before the meeting is scheduled to start (e.g., bulletin board/kiosk outside of city hall or on the door of city hall)
- **Internet posting:** Cities are **now required** to post notice on the city’s Internet Web site, and cities over 48,000 have to post agenda.
- When a city *posts notice on its Internet Web site*, the physical notice has to be readily accessible to general public *only during normal business hours* instead of at “all times.”

# Notice Requirements

- **Emergency meeting or supplemental posting:** Where there is an *imminent threat to public health and safety* or a *reasonably unforeseeable situation*, a meeting on an emergency matter may be held after only **two hours notice**
  - The notice must *describe the emergency*
  - What if we “forgot to post” an item? Not an emergency
  - What if it’s going to cost a lot of money to act later? Not an emergency.
- **Recess:** May recess to *following business day* if the action is taken in *good faith* and not to circumvent the Act’s requirements

# Procedures and Requirements

## *Open Meetings*

- The Act *does not entitle members of the public to speak at open meetings*
- If a governmental body allows public comment, it may set *reasonable rules* regarding the number, frequency, and length of presentations, but it should not discriminate against speakers
- If a member of the public asks a question about an item that is *not on the agenda*, the members of the governmental body *may not deliberate the item*, and are *limited to*:
  - A statement of *fact* regarding the issue
  - A statement of *policy* regarding the issue
  - A *proposal* to place the item on a future agenda for deliberation

# Record Keeping

- A governmental body must *prepare and keep minutes* of a meeting *or a tape recording* of each open meeting.
- The *minutes must*:
  - State the subject of each deliberation
  - Indicate each vote, order, decision, or other action taken
- A brief summary is all that is required (**Minutes**)- A verbatim transcript is not necessary.

# Record Keeping

- The *minutes or tape recording* of the meeting are *public records*, and must be made available pursuant to a request
- Under the **Records Retention Act**, a governmental body must have a Texas State Library-approved *retention schedule* for its records (for more information, please visit [www.tsl.state.tx.us](http://www.tsl.state.tx.us))
- Generally, if minutes are *transcribed from a tape*, the tape must be kept for **90 days** after the written minutes are approved

# Procedures and Requirements *Executive Sessions*

- A governmental body may hold a **closed meeting only when a statute expressly authorizes** it to do so
- To conduct an executive session, a governmental body must:
  1. have a **quorum**;
  2. properly **convene** in an open meeting;
  3. **announce** that a closed meeting will be held;
  4. **identify** in the open meeting the **section of the law** that allows the closed meeting; and
  5. keep a **certified agenda or a tape recording** of the closed meeting:
    - a. the certified agenda must include a **statement of the subject of each deliberation and a record of any further action taken**
    - b. The certified agenda or tape recording is **confidential** and may not be released absent court action
    - c. A **sitting member** of the governmental body may review the certified agenda or tape recording.

# Procedures and Requirements

## *Executive Sessions*

- Who may attend an executive session?

Only a governmental body's members have a right to attend a closed meeting.

Although a governmental body may include others in a closed meeting if necessary to the matter under consideration, it may not admit a person whose presence is against the interests of the governmental body that the closed meeting is designed to protect.

# Common Executive Sessions

- **Real Property Deliberations**

- 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

- **Personnel Matters**

- to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a **public officer or employee**

- to hear a complaint or charge against an officer or employee

- If the officer or employee requests a public hearing it must be conducted in open session. (**Issue** -Name of person).

# Common Executive Sessions

- **Economic Development**
  - 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
  - to deliberate the **offer** of a **financial or other incentive** to a business prospect that meets the above requirements
- **Consultation with Attorney**
  - to seek advice about legal matters, pending or contemplated litigation, or settlement offers
  - Governmental body's attorney must be present if employee (-If contract attorney, may be present by conference call, videoconference, or Internet communications)
  - General discussion of policy not permitted
- **Security/Homeland Security Measures**

# Items of Community Interest

- The Act was amended in 2009 with Sec. 551.041 to allow the City Council to receive a report from staff or a member of the Council on items of community interest **without having given notice**, including:
  - expressions of thanks, congratulations, condolence;
  - recognition of public official or employee;
  - reminders about upcoming events sponsored by the City;
  - information regarding social, ceremonial or community events;
  - announcements about imminent threat to public health and safety that arose after posting of the agenda.

# Violations

- The Act provides for ***civil remedies*** and ***criminal penalties*** for noncompliance
- Criminal provisions are enforced by:
  - District attorneys
  - County attorneys
  - Criminal district attorneys
- Attorney general is not directly authorized to enforce the Open Meetings Act, ***but may assist local prosecutors.***

# Violations - Civil Penalties

- An action taken in violation of the Act is *voidable*
  - An voidable action may be redone at a later meeting, but that action will not be given retroactive effect
  - Termination of employee example.
- **Civil actions**
  - Any interested person may bring a *civil lawsuit* to force officials to comply with the Act, to *enjoin* officials from acting, or to **void actions taken in an illegal meeting**
  - A **person injured by the unlawful disclosure of a certified agenda or tape recording of a lawfully closed meeting may sue for damages, attorney fees, and exemplary damages**

# Violations - Criminal Penalties

- Participating in a closed meeting “knowing that a certified agenda . . . or . . . a tape recording . . . is not being made” **Misdemeanor (up to \$500 fine)**
- In general, knowingly disclosing a certified agenda or tape recording of a closed meeting to a member of the public.  
**Misdemeanor (fine and up to 6 months in jail)**
- \*\* Not a crime to discuss what went on in executive session, but may subject you to a civil lawsuit

# Violations - Criminal Penalties

- **Knowingly** conspiring to circumvent the Act “by meeting in numbers less than a quorum for the purpose of secret deliberations”
  - Knowingly: **reasonably certain** that the action would violate the law
  - **Walking quorum**: where a quorum is not present in one place at the same time and secretly discusses public business with the goal of avoiding a public meeting - may subject members to criminal and civil liability
  - **Misdemeanor (fine and up to 6 months in jail)**
- **Knowingly calling, aiding in calling, organizing, or participating in an unlawful closed meeting**
  - Affirmative defense: member acted in reasonable reliance on a court order, attorney general opinion, or the written opinion of the governmental body’s attorney
  - **Misdemeanor (fine and up to 6 months in jail)**

# Violations - Criminal Penalties

- **Tovar v. State**, Tex. Crim. App. 1998
- Knowingly participating in a closed meeting even not knowing it a violation of the Act can subject the offender to criminal penalties.
- Ignorance of the law is **not** a defense.

# Alpine II - First Amendment challenge

- The First Amendment Challenge to Texas Open Meetings Act **Penalty**

- Final ruling by 5<sup>th</sup> Circuit:

‘The Act is a disclosure statute, is content-neutral, and is not constitutionally overbroad.’

Not designed to chill speech, but to address negative secondary effects of private decision-making by public officials.

# Adopted State Laws

- SB 1368: Declares that **electronic messages on public or private accounts** are available through open records requests.
- SB 1297: Allows governments to create an **Internet message board** for public officials to deliberate away from public meetings. (Facebook ok if public)
- HB 2414: Permits **video conferencing** by officials unable to be physically present at a publicly called meeting.

# Adopted State Laws con't

- Section 551.128 Recordings and Internet Archive of Open Meetings:
- Amended to require an elected governing body of a home-rule municipality with a population of **50,000 or more** to make available an archived copy of the recorded open meeting on the Internet, not later than seven days after the recording was made and must maintain the recording on the Internet site for not less than two years.

# TOMA Resources

- \* City Attorney
- \* Texas Open Meetings Act Made Easy, Office of the Attorney General
  - Open Meetings Handbook, Office of the Attorney General  
[www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov)
  - (877-OPEN TEX)
- \* Open Meetings Training\* Texas Municipal League Legal Counsel's Office [www.tml.org](http://www.tml.org)  
(512-231-7400)

# TOMA -- Examples & Questions

Scenario 1: Zoning case; at P&Z and at Council

Scenario 2: City Manager speech to community group

Scenario 3: Candidate forum; quorum attends

Scenario 4: One-on-one meetings with councilmembers

# ETHICS –GOVERNMENT OFFICIALS

Conflict of Interest Statute

Sections 171.001 - 171.009, Texas Local Government Code

# Definitions

- 171.001 "Business entity" means a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law.

# Substantial Interest in Business Entity

- § 171.002. Substantial Interest in Business Entity

(a) For purposes of this chapter, a person has a substantial interest in a business entity if:

(1) the person owns **10 percent or more** of the voting stock or shares of the business entity or owns either 10 percent or more or \$ 15,000 or more of the fair market value of the business entity; or

(2) funds received by the person from the business entity **exceed 10 percent** of the person's gross income for the previous year.

(b) A person has a substantial interest in real property if the interest is an **equitable or legal ownership with a fair market value of \$ 2,500 or more.**

(c) A local public official is considered to have a substantial interest under this section if a person **related to the official in the first degree** by consanguinity or affinity, as determined under Chapter 573, Government Code, has a substantial interest under this section.

# OTHER IMPORTANT STATUTES

## Consanguinity (Blood) Relationships

1st Degree	2nd Degree	3rd Degree
Father	Grandfather	Great-Grandfather
Mother	Grandmother	Great-Grandmother
Son	Brother	Nephew
Daughter	Sister	Niece
	Grandson	Great-Grandson
	Granddaughter	Great-Granddaughter
		Uncle
		Aunt

# OTHER IMPORTANT STATUTES

## Affinity Kinship (Marriage) Relationships

1st Degree	2nd Degree
Father-in-Law	Spouse's Grandfather
Mother-in-Law	Spouse's Grandmother
Son-in-Law	Spouse's Brother (Brother-in-Law)
Daughter-in-Law	Spouse's Sister (Sister-in-Law)
Spouse	Spouse's Grandson
	Spouse's Granddaughter
	Brother's Spouse (Sister-in-Law)
	Sister's Spouse (Brother-in-Law)

# Affidavit and Abstention from Voting Requirement

- § 171.004. Affidavit and Abstention from Voting Required

(a) If a local public official has a **substantial interest** in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, **an affidavit stating the nature and extent of the interest** and **shall** abstain from further participation in the matter if:

(1) in the case of a substantial interest in a **business entity** the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or

(2) in the case of a substantial interest in **real property**, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.

(b) The affidavit must be filed with the official record keeper of the governmental entity.

(c) If a local public official is required to file and does file an affidavit under Subsection (a), the official is not required to abstain from further participation in the matter requiring the affidavit **if** a majority of the members of the governmental entity of which the official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action.

# Prohibited Acts; Penalty

- § 171.003. Prohibited Acts; Penalty
  - (a) A local public official commits an offense if the official knowingly:
    - (1) violates Section 171.004;
    - (2) acts as surety for a business entity that has work, business, or a contract with the governmental entity; or
    - (3) acts as surety on any official bond required of an officer of the governmental entity.
  - (b) An offense under this section is a Class A misdemeanor.

# Effect of Violation of Chapter

- §171.006.

The finding by a court of a violation under this chapter does not render an action of the governing body **voidable** unless the measure that was the subject of an action involving a conflict of interest would not have passed the governing body without the vote of the person who violated the chapter.

# OTHER IMPORTANT STATUTES

## Bribery, Abuse of Power

### § 36.001 - 36.006 and § 36.010, Texas Penal Code

Sec. 36.02. BRIBERY. (a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:

- (1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion **as a public servant**, party official, or voter;
- (2) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a **judicial or administrative** proceeding;
- (3) any benefit as consideration for a **violation of a duty** imposed by law on a public servant or party official; or
- (4) any benefit that is a political contribution as defined by Title 15, Election Code,

# OTHER IMPORTANT STATUTES

## Statement of Officer and Oath of Office

Tex. Const. Art. 16, §1

"I, \_\_\_\_\_, do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God."

# OTHER IMPORTANT STATUTES

## Acceptance of Honorarium (Gifts for Services)

### Section 36.07, Texas Penal Code

- State law generally prohibits a public servant from soliciting, accepting, or agreeing to an honorarium in exchange for providing a speech or other service.
- A public servant commits an offense if the public servant accepts, or agrees to accept an honorarium in consideration for services that the public servant would not have been requested to provide **but for** the public servant's official position or duties.
- In other words, acceptance of an honorarium by a city official or employee is prohibited if the public servant was asked to provide the speech or the service **because of his official position or knowledge that was gained in his official position.**

# OTHER IMPORTANT STATUTES

## Gift to a Public Servant

### Sections 36.08 and 36.09, Texas Penal Code

Generally prohibits a public official from ever accepting a gift or benefit valued at \$50 or more from a person subject to his jurisdiction with whom the city official interacts in his official capacity, regardless of whether it was in recognition of superior service or a token of gratitude or friendship. Penal Code § 36.08

A gift or benefit would be considered anything that would have a monetary value of \$50 or more. Whether an item has such a value is a fact question that must be determined on a case by case basis by the local prosecutor. Even if the item is under \$50, it cannot be accepted in exchange for an act of discretion, as this would violate the bribery statute, section 36.02.

# OTHER IMPORTANT STATUTES

## Nepotism

### Chapter 573, Texas Government Code

- Nepotism means the hiring of family or relatives within a prohibited degree by consanguinity (relationship by blood) or a prohibited degree by affinity (relationship by marriage).
- The nepotism statutes prohibit a public official from appointing, confirming the appointment of, or voting on the appointment of a “close relative” to a paid public position.
- The nepotism statutes apply to any public official who is the **“final hiring authority”** or is a member of the governing body that has final hiring authority. If the governing body is the hiring authority, then nepotism limitations would apply to “close relatives” of any members of the governing body.



# McKamie Krueger, LLP

[mckamiekrueger.com](http://mckamiekrueger.com)

## **SAN ANTONIO**

941 Proton Rd.  
San Antonio, Texas 78258  
(210) 546-2122  
Fax (210) 546-2130

## **DALLAS**

500 W. Lookout Dr.  
Richardson, Texas 75080  
(214) 253-2600  
Fax (214) 253-2626