

Texas Open Meetings Act

Application of the Open Meetings Act

The Open Meetings Act (Act) usually applies when a quorum of a governmental body is in attendance and that body discusses public business. It does not apply to social gatherings that are unrelated to the body's public business. It also does not apply when public officials attend regional, state, or national workshops, as long as there are no formal actions taken and any discussion of public business is only incidental to the event. In the City of Austin, all board and commission meetings must comply with the Open Meetings Act, with the exception of meetings of a Working Group.

Whenever, a governmental body receives a briefing from staff, a notice of an open meeting must be posted. Only with prior approval from the City Attorney for an executive session is the posting requirement excepted.

Committees that are appointed by the governing body that are truly advisory only, do not have to post public notice of its gatherings as open meetings. If the committee has the power to make final decisions or if the committee's advice or recommendations are usually approved in subject full, these meetings must comply with the Act's posting requirements. Also, another factor may be the presence of members of the governing body on the committee. Even if a quorum of members is not on the committee, they may only be short of one more member of the governing body to favorably pass the committee's decision. To avoid this issue, the governing body may appoint only staff or no more than one member to the committee.

For boards in the City of Austin, posting notice is usually required for all meetings or gatherings of the governmental body when

public business is to be discussed. While the Act may not impose certain requirements, the City Charter, ordinance, or bylaws may, in which case the City rules take precedence. However, while a city can require more compliance, it may not waive any requirements in the Act.

Open Meetings and Public Information

Both the Open Meetings Act and the Public Information Act are intended to make government more transparent and accessible to the public. They are not however, the same; the two are separate statutes and operate independently. For example, just because a local entity may be able to hold back a document under the Public Information Act does not mean that the governing body has the right to meet in executive session regarding the subject that is covered in the document. Similarly, although the Open Meetings Act allows executive sessions about a particular topic, the documents reviewed in the executive session can not automatically be withheld from the public.

Notice Provisions Under the Act

The Act requires that the notice for each meeting be posted on a bulletin board at a place that is convenient for the public. The City of Austin posts meeting notices on the official bulletin board at City Hall. Notices must be posted and accessible to the public for at least 72 hours prior to the meeting. The Act also requires a city, county, school district, or sales tax economic development corporations publish a notice of its meetings on its Internet website. The posting on the Internet must also be accessible to the public for at least 72 hours prior to the meeting. The validity of an internet posting made in good faith is not affected by failure to provide

notice due to technical problems beyond the control of the local entity.

The Act requires that posted notices include the date, the hour and the place of the meeting. A description of each subject to be discussed must also be included in the notice. This means that the notice must be enough to alert the public, in general terms, the subjects that will be considered. "Old business," "new business," "other business," "personnel" and "litigation matters" are usually not considered detailed enough to comply with the Act. Texas courts have ruled that the more important a particular item on the agenda is to the community, the more the description on the posted notice must be. Also, it is important that the posted notice is not misleading. In summary, always include the date, the hour, the place, and a sufficient description of items to be considered so that the public is clear what the meeting will discuss.

In the meetings, the Act requires that only the subjects listed on the posted agenda be considered for that meeting. If an unposted subject is brought up by the public or a member of the board there are four options:

- an official may respond with a statement of specific factual information,
- an official may direct the person making the inquiry to visit staff about the issue,
- the governing body may choose to place the item on a future agenda, or
- the governing body may offer to post the matter as an emergency item if it meets the criteria for an emergency posting.

The Act requires literal compliance

Therefore, a local body normally does not have authority to change the date of its meeting without posting the new date at least 72 hours prior to the new meeting date. However, if an emergency becomes present, the body could utilize its power to

call an emergency meeting with two hours notice. Also, if a catastrophe prevents the body from holding an open meeting that was posted properly, the body may convene in a convenient location within 72 hours as long as this action is taken in good faith and not used to circumvent the Act. A catastrophe includes anything that interferes physically with the ability to conduct the meeting, such as natural disasters, power failures, public riot or similar occurrences.

A local body normally does not have authority to change the time of its meeting without posting the new time at least 72 hours prior to the meeting. It is not however, necessarily a violation if the meeting starts a little later than scheduled. At what point the change in time would present a legal problem would be a fact issue. If a meeting needs to be changed, consult with legal counsel.

A local body normally does not have authority to change the location of its meeting without posting the new location at least 72 hours prior to the meeting. Sometimes, a meeting is changed the day of the meeting to a larger room within the same building to accommodate a large crowd. It is unclear if such a change would constitute literal compliance with the Act. Consult with legal counsel before changing the meeting location.

A posted meeting notice is not required for a continued meeting if recessed to the following regular business day as long as the action is taken in good faith and not to circumvent the Act. If a meeting continued to the following regular business day is again continued to another day, the governmental body must give notice of the meetings' continuance to the other day.

There are no particular requirements under the Act for canceling a posted meeting. While the Act requires meetings to be properly posted, it does not require that a meeting actually be held once it is posted.

Therefore, a local body may cancel a posted meeting at any time unless doing so would violate another provision of law. If a meeting is canceled or the posted agenda is taken down, all posting requirements must be adhered to for a rescheduled meeting.

Effect of Quorum on Act Issues

The Act defines a quorum as a simple majority of the members of the governmental body. Certain issues however, may have specific quorum requirements. Local units should check with their legal counsel.

Any meeting subject to the Act may not be convened unless a quorum is present in the meeting room. Texas case law and Attorney General opinions have not addressed whether a properly convened meeting can continue if a quorum is lost because of the departure of temporary absence of a member. Nonetheless, no action can be taken unless a quorum is present.

The Act applies to a gathering of a quorum of a governing body if it discusses public business. It does not matter if there is any action taken or any vote taken. All of the Act's requirements must be followed for such gatherings unless otherwise provided under state law. As stated earlier, state law does provide for a limited exception for gatherings at social events unrelated to the body's public business as well as regional, state, or national conventions or workshops, as long as there are no formal actions taken and any discussion of public business is only incidental to the event.

Application of the Act to Gatherings of Less than a Quorum

If there is less than a quorum, a governing body is generally not subject to the Act. It is advisable however, for gatherings of a standing committee or subgroup that meets to discuss public business to post and

conduct meetings as open meetings. Also, if the city council regularly approves decisions of a subcommittee consisting of less than a quorum of the city council, the subcommittee must comply with the Act. State law provides that if less than a quorum gather with the intent to circumvent the Act, criminal penalties can be imposed against the participating officials.

It is not uncommon for several members to be at the same private or public gathering put on by another entity and the Act does not require the gathering to be treated as an open meeting if less than a quorum is present. However, if such gatherings are used with the intent of circumventing a discussion of public business at an open meeting, criminal penalties can be pursued.

While two members visiting over the phone does not in itself constitute a violation of the Act, if members are using individual phone conversation to poll all members on an issue or conducting their deliberations about public business, there may be a potential criminal violation. Physical presence in one place is not necessary to violate the Act. Such communications could amount to meeting in numbers less than a quorum to circumvent the Act.

Procedural Guidelines to Administer the Act

There are few procedural rules contained in the Act for meetings of a governmental body. All meetings must be properly posted, discussion is limited to posted agenda items, minutes must be kept, and certain rules must be followed when holding an executive session.

A member must be present at a meeting in order to deliberate and to vote. The member may not vote by proxy.

A local entity must make its meetings accessible to persons with disabilities and comply with the Americans with Disabilities

Act. Entities must also be ready to provide an accessible meeting site and provide alternate forms of communications that address the needs of individuals with disabilities. This may involve providing sign language interpreters, readers, or large print or Braille documents upon request.

Managing Discussions at an Open Meeting

The public may observe the open portion of a meeting. However, the Attorney General has concluded that the Act does not entitle the public to speak on items considered at an open meeting. That right only exists if a specific state law that requires a public hearing or requires public comment be allowed on an issue. A local unit may allow members of the public to speak on an item as long as that entity has adopted reasonable rules regulating the number of speakers on a particular subject and the length of time allowed for each presentation. If a local entity does allow public input, the rules must be applied equally to all members of the public.

If member or members of the public cause a disturbance, the presiding officer or the governing body as a whole may ask that individual members be removed. What conduct can be considered disorderly is a fact issue for the body to consider. The body's attorney may be able to provide guidance on what actions may constitute "disorderly conduct."

The Act does not speak to whether a governing body may set time limits on the remarks of its members at an open meeting. The governing body however, may adopt procedural rules that are consistent with the state or federal constitution, state or federal statutes, or with local city charter provisions. Therefore, following these parameters, a body may set reasonable time limits for its members' remarks in an open meeting.

Keeping a Record of Open Meetings

A governing body is required under the Act to either keep minutes or make a tape recording of every open meeting. If minutes rather than a tape are kept, the minutes must indicate the subject of each deliberation and indicate every action that is taken.

The minutes or tape of an open meeting are open to the public and must be available for inspection and/or copying. The exceptions to required public disclosure in the Public Information Act do not apply to the minutes or recording of an open meeting. Minutes must be permanently retained but they do not have to be publicly posted.

The Act also gives any member of the public the right to make a video or audio recording of an open meeting. The governing body maintains the right to adopt reasonable rules that are necessary to keep order at the meeting.

Executive Sessions

Under the Act, a governing body may by and large hold an executive session for one or more of the following nine reasons:

1. consideration of specific personnel matters;
2. certain consultations with its attorney;
3. discussions about the value or transfer of real property;
4. discussions about security personnel or devices;
5. discussions about a prospective gift or donation to the City;
6. discussion by a governing body of potential items on tests that the body conducts for purposes of licensing individuals to engage in an activity;
7. discussions of certain economic development matters;
8. discussions of certain competitive matters relating to a city-owned electric or gas utility for which the city council is the governing body' and

9. certain information relating to the subject of emergencies and disasters.

It does not matter whether a governing body refers to a gathering as a workshop or as a retreat; the requirements of the Act apply to such meetings if a quorum is present and deliberates about public business. One of the nine statutory categories must be shown to apply. Also, documents that may be confidential under the Public Information Act may not be discussed in executive session unless one of the Open Meetings Act exceptions apply.

Enforcement of the Act's Requirements

Civil Enforcement

An individual may sue to prevent, to stop, or to reverse a violation of the Act. If a court finds that there will be or that there is a violation of the Act, the court has at least four options.

1. The court may order an official or a governmental body to stop violations of the Act, to avoid any future violations of the Act, or to perform a duty required by the Act.
2. A court may invalidate any action taken in violation of the Act.
3. Cases where the Act was violated in the course of firing an employee, the courts may instruct the governmental body to give back pay to the employee.
4. A court may make the losing side pay the costs of litigation and reasonable attorney fees.

Actions that are not in compliance with the Act may be invalidated by a court. However, that does not mean that the actions are automatically void; that is left to the discretion of the court. It is possible for a court to not invalidate an action even if the court finds that the action was not in compliance with the Act. The prudent course is to always try to achieve full compliance

with the Act to avoid the likelihood of later court challenges.

If a governing body takes an action that does not fully comply with the requirements of the Act, it may meet at a later time to re-authorize the same action. If the second meeting is in full compliance with the law and the Act, then the action under certain circumstances may be considered valid from the date of the second meeting.

Criminal Enforcement

There are four provisions of the Act that provide criminal penalties for violation:

1. **Unauthorized Executive Sessions.**

If a closed meeting is not approved by law, a member commits a crime if he or she calls or aids in calling, closes or aids in closing, or participates in such a meeting. This type of violation is a misdemeanor and punishable by a fine of between \$100 and \$500, one to six months in jail, or both. If a member of the governing body has a formal written interpretation from a court, the Attorney General, or the entity's attorney, which indicates that a particular meeting is legal, the member may use that written interpretation as a defense if he or she acted in reasonable reliance on the written interpretation and is later prosecuted for participating in an illegal closed session. It is a good idea to ask the entity's local legal counsel to provide in advance a written opinion noting the legal authority for an executive session before holding the closed meeting.

2. **Meeting in Numbers Less than a Quorum with Intent to Circumvent the Act.**

It is a misdemeanor for a member of a governing body to conspire to circumvent the Act by meeting in numbers of less than a quorum for the purpose of secret deliberations. It

is punishable by a fine of between \$100 and \$500, one to six months in jail, or both.

3. **Failure to Keep a Certified Agenda.**

A member of a governing body commits a crime if he or she participates in a closed meeting if they know that a certified agenda or tape recording of the closed meeting is not being made. This is a Class C misdemeanor punishable by a fine up to \$500.

4. **Disclosure of Copy of Certified Agenda.**

An individual, corporation, or partnership commits a crime if it releases to the public a copy of the tape or certified agenda of a lawfully closed meeting. This is a Class B misdemeanor and is punishable by a fine of up to \$2,000, a jail term of up to 180 days, or both.

government hotline at (877) 673-6839 (OPEN-TEX).

All information was taken from the Attorney General's handbook: The 2006 Open Meetings Act Made Easy.

This is a general discussion of the Texas Open Meetings Act. For information on how it applies to City of Austin Boards and Commissions, go to the City's Board and Commission on-line training.

Additional Information on the Act

Elected or appointed governmental officials must have a minimum of one hour but no more than two hours of training. Officials have 90 days to complete the required training. The official should receive a certificate of course completion. The governmental body will maintain the official's certificate and make it available for public inspection.

For more discussion of the Open Meetings Act, local officials or employees may contact the Municipal Affairs section of the Office of the Attorney General at (512) 475-4683 or the County Affairs Section of the Office of the Attorney General at (512) 463-2060. The Office of the Attorney General produces the *Open Meetings Handbook* which is an in-depth look at the Act and its interpretation in Attorney General Opinions and court cases. It can be ordered by calling (512) 964-1730 or downloaded in PDF format on the Attorney General's Web site at www.oag.state.tx.us. The Office of the Attorney General sponsors an open