



The Open Meeting Act Basic Training for Commission Members

Public Safety Commission December 5, 2011

Part One - The Basics

What is the Open Meetings Act?

The Open Meetings Act (the Act) is a Texas statute that provides for public access to meetings of governmental bodies. It is codified as chapter 551 of the Government Code.

When a group of people takes action or makes a decision, some meeting of the minds has occurred to make that action possible. With respect to actions taken by governmental bodies, it is the process by which this meeting of the minds occurs that the Act is intended to open to public scrutiny.¹ To accomplish its end, the Act requires that every meeting of a governmental body, with certain narrowly drawn exceptions, be open to the public and that the public be given notice of the time and place of meetings and the subject matter to be discussed or acted on.²

¹Attorney General Opinion DM - 95 (1992).

²Gov't Code, §§ 551.002, 551.041.

The Act does not set out all procedures applicable to meetings of governmental bodies. However, an additional procedure that a governmental body adopts for the conduct of its meetings must be consistent with the Act.

Does the Open Meetings Act apply to City Boards and Commissions?

Not always, but all City boards and commissions have to comply with the Act anyway. The City Code provides that “[e]ach board shall comply with Government Code Chapter 551 (*Open Meetings Act*).”³ In other words, the City Council has required all of its boards and commissions to follow the requirements of the Act whether or not the Act actually applies to them.

So what difference does it make? Whether the Act applies to a City board may make a difference in the possible consequences for a violation of the Act. The Act provides criminal penalties under state law. It would be unlikely that a prosecution could be maintained unless the board in question was actually covered by the Act.

The Act also provides civil remedies that on their face are applicable only to bodies actually covered by the Act. However, a federal court entered an injunction against a board of the City of Dallas that was required to comply with the Open Meetings Act only by the charter and rules of the city of Dallas.⁴

The penalties for a violation are discussed below.

Generally speaking, City boards and commissions with only advisory authority are required to comply with the Act because of the City ordinance, and not because of the Act itself.

What does the Open Meetings Act require?

³City Code, §2-1-43.

⁴*Finlan v. Dallas*, 888 F. Supp. 779 (N.D. Dallas 1995). See also *Shackelford v. City of Abilene*, 585 S.W.2d 665, 668 (Tex. 1979).

The three central features of the Act are (1) the requirement that the public be permitted to attend meetings, (2) the requirement that the subject matter of meetings be posted to give the public notice of the meeting, and (3) the requirement that minutes or tape recordings of meetings be kept. Everything else is built around these main ideas.

What is a "meeting?"

The Act uses the term "deliberation" in its definition of "meeting." Thus, "deliberation" is also defined: "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."⁵ "Meeting" is then defined as: "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."⁶

While the Act refers to a meeting as a verbal exchange among a quorum of the committee, the Attorney General and courts have added that a meeting can occur if the conversation happens via other forms of communication, for example email or text message.

The term "meeting" does not include the gathering of a quorum of a board at a social function unrelated to the public business that is conducted by the board if the members don't engage in a verbal exchange about public business or policy.⁷

What is a quorum?

Unless otherwise defined, a quorum is a majority of the board.⁸ So, for example, for a seven-member board, a quorum is four members.

⁵Gov't Code §551.001(2)

⁶Gov't Code §551.001(4)(A)

⁷ Gov't Code §551.001(4)(B)

⁸Gov't Code. §551.001(6).

If two of three members discuss a matter in private, then one of them discusses the matter with two or three more members, this can become a “walking quorum.” More about walking quorums is included in Part Three, below.

What about subcommittees?

According to the Attorney General, a subcommittee chosen by a governmental body from its membership may be subject to the Act, even though it consists of less than a quorum of the parent body.⁹

For example, in one opinion, the Attorney General considered the proposal of a state agency board to divide its membership into several committees that would study matters destined for board attention and recommend board action on those matters. The committees, consisting of less than a quorum of the full board, would be unable to bind the board. However, the Attorney general found that "a real danger exists that the full Board might become merely the 'rubber stamp' of one or more of its committees and thereby deprive the public of access to the effective decision-making process." The opinion concluded that the committees of board members are subject to the requirements of the Act.

The City Code allows boards and commissions to create “working groups” to work on a defined matter or matters. A working group must be less than a quorum, they may not make final decisions, and they may only be temporary.¹⁰ A working group is not required to comply with the Act or to keep minutes of its meetings.¹¹

⁹Attorney General Opinions H-3 (1973), H-238 (1974).

¹⁰ City Code §2-1-2

¹¹ City Code §2-1-42

What must be posted?

The Act requires written notice of all meetings.¹² The notice must be sufficient to apprise the general public of the subjects to be considered during the meeting.¹³

As a practical matter, here are three things that are important considerations in creating a posting:

1. The right balance of information. A posting must describe the subject matter that will be discussed or acted on with enough specificity that a member of the general public will understand it.

It's never sufficient to use catch-all listings like "other business." We're looking for enough information to allow a reader to know the subject matter that the board will consider, without overwhelming the reader with so much detail that the posting becomes meaningless.

2. Flexibility for the board. A posting should not be so specific that it ties the board's hands. For instance, a posting should not set out in such intricate detail that the board would be open to an accusation that they deviated from the posting because the action they took deviated in some minor way from that described in the posting. In other words, an agenda should not be a script. Remember that the purpose of the Act is to open the decision-making process to the public. If the agenda is tightly scripted, it implies that the decisions have already been made.

3. Simple language. We want to use plain, concise English. Avoid jargon or idiosyncratic usages that only someone intimately involved with the subject matter could be expected to understand. Remember that your audience is the general public. Under the City Code, the chair of each board has final say over the content of final meeting agendas prior to posting.¹⁴

¹²Gov't Code, §551.041.

¹³Id.; *City of San Antonio v. Fourth Court of Appeals*, 820 S.W. 2d 762 (Tex. 1991).

¹⁴ City Code §2-1-43.

Where and when must an agenda be posted?

The Act requires a municipal governmental body to post notice of each meeting on a bulletin board at a place in the city hall that is readily accessible to the general public at all times for **at least 72 hours before the scheduled time of the meeting.**¹⁵ The City Clerk maintains a bulletin board for this purpose.

This posting requirement is mandatory. If it's not followed **to the letter**, the posting is no good.¹⁶

The Act also requires that certain cities, including Austin, post meeting notices on their websites.¹⁷ By ordinance, the City of Austin also requires all boards and commissions to post meeting notices on the City's website.¹⁸

Can we do a supplemental posting?

As noted, a posting must be continuously available to the public for 72 hours before the scheduled time of the meeting. A board adding a non-emergency item to its meeting agenda must satisfy the usual 72-hour notice requirement.

What minutes must be kept?

The City must keep minutes, or make a tape recording, of every board or commission meeting.¹⁹ The minutes, or the recording, is a public record.²⁰ If minutes are kept, they must state the subject of each discussion, and record each vote, order, decision, or other action taken.²¹

¹⁵Gov't Code, §551.043.

¹⁶*Acker v. Texas Water Com'n*, 790 S.W.2d 299, at 300 (Tex. 1990); *Fourth Court of Appeals, supra*.

¹⁷ Gov't Code §551.056.

¹⁸ City Code §2-1-43

¹⁹Gov't Code, §551.021; City Code, §2-1-43.

²⁰Gov't Code, §551.022; City Code, §2-1-43.

²¹Gov't Code, §551.021.

The City requires that its boards and commissions keep minutes of each meeting.²²

Secret ballots by boards are not permitted.²³

Can the board discuss something that wasn't posted?

No. If a member of the public (or, for that matter, a member of the board) raises a subject that has not been included in the notice for the meeting, any discussion of the subject, other than merely providing a factual answer to a question, must be limited to a proposal to place the subject on the agenda for a future meeting.²⁴

What are the rights of the public?

The Act gives the public the right to have timely notice of the time and place of the meeting and of the matters to be discussed or acted on.²⁵

The Act gives the public the right to attend the meeting.²⁶

The Act gives a member of the public the right to record open meetings with a tape recorder or a camera. A board may adopt reasonable rules to maintain order at a meeting. For example, the board may restrict where a camera may be set up, so long as the rules don't prevent the person from exercising this right.

The Act does not entitle the public to choose the items to be discussed or to speak about items on the agenda. A governmental body may, however, give members of the public an opportunity to speak at a public meeting. If this is done, the opportunity must be made available in an evenhanded manner.

²² City Code §2-1-43

²³Id., Attorney General Opinion H-1163(1978).

²⁴Gov't Code, §551.042.

²⁵Gov't Code, §551.041.

²⁶Gov't Code, §551.002.

For example, reasonable restrictions on the number of speakers and the time allowed to them are permissible. Most important, the opportunity of a person to address the body may not be restricted because of what the person may have to say.²⁷

The City requires that its boards and commissions allow citizens to speak at each meeting during “citizen communication.”²⁸

If a law requires a public hearing, that law may impose additional requirements for members of the public to be heard.

Part Two - Rare events

What are executive sessions?

Executive sessions are meetings that are permitted to be conducted in private. The City Code says: “A board may not conduct a closed meeting without the approval of the city attorney.”²⁹ Accordingly, executive sessions for City boards and commissions should be very rare events. If a board believes a closed session is appropriate, consult your contact in the Law Department.

While the Act sometimes permits executive sessions, it never permits a body to meet without posting the subject matter to be discussed.³⁰

What's the procedure for holding an executive session?

First obtain the advice and consent of the Law Department.³¹

²⁷These are basic First Amendment concepts.

²⁸ City Code §2-1-43

²⁹City Code, §2-1-43.

³⁰*Cox Enters. v. Board of Trustees*, 706 S.W. 2d 956, 958 (Tex. 1986).

³¹City Code, §2-1-43.

When a board goes into an executive session, the board must first convene publicly.³² The presiding officer must publicly announce the provision of the Act that permits the session to be closed to the public.³³

No vote or action may be taken in an executive session.³⁴

Except in the case of an executive session held to receive legal advice from the board's attorney, the executive session must be taped, or a "certified agenda" kept. The certified agenda or tape recording of an executive session must be kept a minimum of two years after the date of the session.³⁵ The tape or the certified agenda is confidential, but a judge in a lawsuit challenging compliance with the Act may review it.³⁶

What are the permissible reasons for an executive session?

Again, always obtain the advice and consent of the Law Department with respect to an executive session.³⁷

The most likely reason for an executive session that might be applicable to a City board or commission is to receive advice of counsel.³⁸

What are emergency postings?

In an emergency, the notice of a meeting may be posted as late as two hours before the meeting is scheduled to begin.³⁹ However, it must be a real emergency. An emergency exists only if immediate action is required of a governmental body because of an imminent threat to public health and safety

³²Gov't Code, §551.101.

³³Id.

³⁴Gov't Code, 551.102; *Cox Enters. v. Board of Trustees*, 679 S.W. 2d 86 (Tex. App. - Texarkana 1984), *aff'd in part, rev'd in part on other grounds*, 706 S.W. 2d 956, 958 (Tex. 1986).

³⁵Gov't Code, §551.104.

³⁶Id.

³⁷City Code, §2-1-2.

³⁸Exceptions permitting executive sessions are enumerated at Gov't Code, §§551.071 through 551.085.

³⁹Gov't Code, §551.045.

or a reasonably unforeseeable situation. The posting must clearly identify the emergency.⁴⁰

The need for quick action is not an emergency.

It should be exceedingly rare that the need for board or commission action would constitute an emergency. Always get legal advice before relying on an emergency posting.

Part Three – Penalties for failure to comply with the Act

What are the penalties for a violation?

The Act provides criminal penalties for a member of a governing body who knowingly calls or aids in calling an improper closed meeting.⁴¹ The Act also criminally sanctions a member of a governing body who knowingly conspires to circumvent the Act by meeting with other members in numbers less than a quorum for secret deliberations.⁴² (In either case, a fine between \$100 and \$500, inclusive, confinement between one month and six months, or both the fine and the confinement).

Meeting in an executive session knowing that a certified agenda or a tape recording isn't being kept is a Class C misdemeanor (\$500 maximum fine).⁴³ Improperly disclosing the tape or certified agenda of an executive session is a Class B misdemeanor (maximum fine of \$2,000, maximum confinement of 180 days, or both).⁴⁴

The Act provides mandamus or injunction (writs used to compel or prevent action by an agency of the government) as civil remedies to stop, prevent, or

⁴⁰Id.

⁴¹Gov't Code, §551.144.

⁴²Gov't Code, §551.143. This section of the statute makes it an offense for members of a governmental body to utilize a "walking quorum" to circumvent the Act.

⁴³Gov't Code, §551.145; Penal Code, §12.23.

⁴⁴Gov't Code, §551.146; Penal Code, §12.22.

reverse violations of the Act.⁴⁵ Actions taken by a governmental body in violation of the Act are voidable.⁴⁶

The City Code, on the other hand, provides no civil remedies for failure of a board or commission to comply with the Act. That doesn't necessarily mean that court wouldn't entertain a suit or fashion a remedy.⁴⁷ The City Code has a catch-all criminal penalty provision that makes a failure to perform an act required by the Code a Class C misdemeanor (\$500 maximum fine).⁴⁸

⁴⁵Gov't Code, §551.142.

⁴⁶Gov't Code, §551.141.

⁴⁷See the discussion of whether the Act applies to City boards and footnote 4.

⁴⁸City Code, §1-1-99.

