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**Open Meetings / Open Records:  
Practical Pointers from a Municipal Lawyer**

*presented by:*

**Alan J. Bojorquez**

*presented to:*

**Open Government Seminar**

State Bar of Texas

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## AUTHOR'S BIO

### Overview:

Alan J. Bojorquez is a partner with the Austin law firm of Bovey, Akers & Bojorquez, LLP. His practice focuses exclusively on municipal law. Alan and his two partners (Cary Bovey and Monte Akers) previously served as in-house legal counsel for the Texas Municipal League. The firm serves as City Attorney and Special Counsel for cities across the state.

### Education:

Texas Tech University (JD, MPA, BA)

### Professional Memberships:

- American Planning Association (Member)
- American Society for Public Administration (past National Council Member)
- International Municipal Lawyers Association (Member & Conference Presenter)
- State Bar of Texas – Government Lawyers Section (past Council Member)
- Texas City Attorneys Association (Member & Conference Presenter)

### Notable Litigation:

Lead counsel in the City of Georgetown's successful Texas Supreme Court challenge of an adverse Attorney General's Open Records decision (*Russell v. Cornyn, 2001*)

### Publications:

- TEXAS MUNICIPAL LAW & PROCEDURE MANUAL (5<sup>th</sup> Edition)
- *Religious Displays at City Hall*, TEXAS TOWN & CITY magazine, co-authored with Scott Houston, Fall 2005
- *U.S. Supreme Court Validates Moratoriums*, TEXAS CITY ATTORNEY ASSOCIATION NEWSLETTER, Summer 2002
- *Sand Dollars: The Need for Coastal Erosion Prevention & Response in Texas*, STATE BAR OF TEXAS ENVIRONMENTAL LAW JOURNAL, Winter 1999

### Honors & Appointments:

- *Outstanding Alumnus*, Public Administration Program, Texas Tech University (2005)
- *Adjunct Professor*, Department of Political Science, Texas State University-San Marcos (1999-2003)
- *McGrew Research Award*, American Society for Public Administration, CenTex Chapter (2003 & 2001)
- *Distinguished Alumnus Award*, Socorro High School (2001)

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## MEETINGS

- 1. Staff Meetings:** The OMA does not apply to gatherings of staff and/or consultants if a quorum is not present.<sup>1</sup>
- 2. Ad-Hoc Committees:** Technically, the OMA only applies to gatherings at which a quorum of the governing body is present. However, beware of standing subcommittees.<sup>2</sup>
- 3. Advisory Boards:** If a citizen commission is purely advisory, the OMA does not apply. Be sure to determine if the OMA is made applicable by a specific enabling statute or ordinance creating or authorizing the commission.<sup>3</sup>
- 4. Socials & Seminars:** The OMA doesn't apply to purely social gatherings and conventions and workshops, such as TML events.<sup>4</sup>
- 5. Civic Gatherings:** A gathering can constitute a "meeting" under the OMA if a quorum of the governing body is present and public business regarding the governing body is discussed, *even if* the gathering is conducted by someone other than the governing body and members of the governing body do not speak directly to one another.<sup>5</sup>
- 6. Locations:** The only limitation on the whereabouts of meetings is the requirement that they be conducted within the state.<sup>6</sup> Nothing requires that meetings be held within the jurisdictional boundaries of the governmental body.
- 7. Agendas:** All that is required is a statement of the subject matter to be addressed.
- 8. Secret Ballots:** Voting by anonymous ballot is not allowed.<sup>7</sup>
- 9. Action without Meetings:** Telephone conferencing or signing documents (e.g., letters) reflecting a consensus of opinion among governing body members without going conducting an open meeting might constitute a violation of the OMA.<sup>8</sup>
- 10. Email:** Discussing public business via electronic mail may constitute a "deliberation" that is subject to the OMA.<sup>9</sup>

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<sup>1</sup> *City of Austin v. Evans*, 794 S.W.2d 78 (Tex.App.-Austin 1990, writ denied).

<sup>2</sup> Op. Tex. Att'y Gen. Nos. JC-0060 (1999), JM-1072 (1989), and H-238 (1974).

<sup>3</sup> Op. Tex. Att'y Gen. No. JC-0060 (1999).

<sup>4</sup> Op. Tex. Att'y Gen. No. JM-1072 (1989).

<sup>5</sup> *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n*, 2 S.W.3d 459 (Tex.App.—San Antonio 1999, no pet.).

<sup>6</sup> Op. Tex. Att'y Gen. No. JC-0053 (1999).

<sup>7</sup> Op. Tex. Att'y Gen. No. H-1163 (1978).

<sup>8</sup> See Op. Tex. Att'y Gen. No. DM-95 (1992); and *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. – San Antonio 1985, no writ).

<sup>9</sup> See Op. Tex. Att'y Gen. No. JC-0307 (2000).

- 11. Ratification:** Generally, a governmental body may not ratify its prior illegal acts;<sup>10</sup> however, an action taken at an invalid meeting can be ratified at a later valid meeting as long as there is no retroactive effect.<sup>11</sup>
- 12. Lobbying:** A person who acts independently to urge individual members of a governing body to place an item in the board's agenda or vote a certain way on an item on the agenda does not necessarily commit an offense under the OMA, even if the person informs board members of other members' views on the matter.<sup>12</sup>
- 13. Consultation with Attorneys:** Governing bodies can meet with their legal advisors behind closed doors for the purposes of receiving advice about: (a) pending or contemplated litigation; (b) a settlement offer; (c) administrative hearings; or (d) matters in which the duty of the attorney to the governmental body under the Texas Rules of Professional Conduct of the State Bar of Texas clearly conflicts with the Open Meetings Act (i.e., when necessary to protect the attorney-client privilege).<sup>13</sup> This exception applies strictly to legal matters and not to other issues such as financial considerations or the policy merits of a particular project.<sup>14</sup>
- This consultation is considered a "meeting" which must be properly posted and otherwise comply with the requirements of the OMA.<sup>15</sup> Although the government is not required to disclose its litigation strategy, it cannot totally conceal the subject matter of a major lawsuit that is pending. Accordingly, the OMA requires a governmental body to give notice of the subject of its meetings, including a consultation with its attorney in executive session.<sup>16</sup>
- 14. Long Distance Consultations:** Governing bodies can convene meetings (open or closed) for the purpose of consulting their non-employee attorney by telephone, internet or video conference. During open sessions, the consultation must be audible to the public.<sup>17</sup>
- 15. Executive Session Information:** The fact that reports or other information was presented to the governmental body in an executive session does not necessarily enable the government to deny public requests for that information. The information remains subject to the Public Information Act and must be evaluated accordingly.<sup>18</sup>

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<sup>10</sup> *LCRA v. City of San Marcos*, 523 S.W.2d 641 (Tex.1975), and *Mayes v. City of De Leon*, 922 S.W.2d 200 (Tex.App.-Eastland 1996).

<sup>11</sup> *LCRA* at 646-47 (concluding that ratification of an invalid action cannot have retroactive effect).

<sup>12</sup> Op. Tex. Att'y Gen. No. JC-0307 (2000).

<sup>13</sup> *Id.* § 551.071.

<sup>14</sup> Op. Tex. Att'y Gen. No. JC-0233 (2000).

<sup>15</sup> Op. Tex. Att'y Gen. No. JC-0057 (1999).

<sup>16</sup> *Cox Enterprises, Inc. v. Board of trustees of Austin I.S.D.*, 706 S.W.2d 956 (Tex. 1986) (school board was required to post adequate notice that it would discuss "a major desegregation lawsuit").

<sup>17</sup> See TEX. GOV'T CODE ANN. § 551.129.

<sup>18</sup> Tex. Att'y Gen. No. ORD 485 (1987).

## INFORMATION

1. **Think before Creating:** The scope of the PIA should be taken into consideration before information is created and transmitted.
2. **Open Records Policy:** Governing bodies should have local policies and guidelines that help staff/officials comply with the statute, and guide citizens through the local procedures (such as the designated email and fax address for requests).
3. **Date Stamp:** It is wise to document when requests are received by the governing body.
4. **Log:** It is wise for governing bodies to keep a log of requests received and administered.
5. **Written Requests:** Governing bodies can mandate that all requests be in writing.
6. **Specificity:** Casting an overly broad net may yield a bunch of trash.
7. **Vagueness:** Unclear requests are subject to the need for clarification.<sup>19</sup>
8. **Purpose:** A requestor's motivation for requesting public information cannot be considered by the governmental body.<sup>20</sup>
9. **E-mail:** Electronic mail regarding public business can be public information. The AG has specifically stated that Texas recognizes that work-related electronic mail is information that may be subject to public disclosure.<sup>21</sup>
10. **Home E-mail:** Messages transmitted from *home* through a *personal computer* via a private internet account might be "public."<sup>22</sup>
11. **Third Parties:** The burden is often on those who provide information to the government to defend against public disclosure of trade secrets for sensitive financial information.
12. **Open Records Decisions:** Only governmental bodies may request AG decisions.<sup>23</sup>
13. **Comments:** The AG expects briefs. It is not sufficient to merely raise applicable exceptions. You must brief your arguments thoroughly so as to *persuade* the AG of the merits of your claim, and provide evidence, when possible. The burden is on the governmental body to make a *convincing argument*.
14. **Litigation/Attorney-Related Info:** The PIA excepts from disclosure information relating to litigation of a criminal or civil nature, to which the government entity is, or may be, a

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<sup>19</sup> TEX. LOC. GOV'T CODE § 552.222.

<sup>20</sup> *Indus. Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976, cert. den., 430 U.S. 931).

<sup>21</sup> Tex. Att'y Gen. ORD-654 (1997).

<sup>22</sup> Tex. Att'y Gen. OR2001-1790.

<sup>23</sup> Tex. Att'y Gen. ORD-542 (1990).

party, or to which an officer or employee, as a consequence of his office or employment, is or may be a party.<sup>24</sup>

- 15. Privileged / Confidential:** The Texas Supreme Court has held that “privileged” equals “confidential” for purposes of the PIA. However, the AG continues to define “privileged” narrowly and requires that the privilege be established with specificity.
- 16. Factual Data from Attorney:** The AG has stated that the attorney-related privileges do not protect memoranda prepared by an attorney that contain only a “neutral recital” of facts.<sup>25</sup> When requesting an Open Records ruling from the AG on the basis of attorney-client privilege (or another attorney-related privilege), be prepared to specifically demonstrate to the AG how the otherwise factual info reveals the attorney’s legal advice, analysis, or the client’s confidences. Otherwise, the AG is likely to compel disclosure.<sup>26</sup>
- 17. Attorney Fee Bills:** Invoices submitted to governing bodies by outside legal counsel might be public; thus, city officials should confer with their outside legal counsel regarding the specificity and descriptive nature of attorney fee bills.<sup>27</sup>
- 18. Attorney In Non-Legal Capacity:** The attorney-client privilege does not apply to communications between a client and an attorney where the attorney is employed in a non-legal capacity (accountant, escrow agency, negotiator, or notary public).<sup>28</sup>
- 19. Private/Confidential Information:** The Texas Supreme Court has held that information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public.<sup>29</sup>
- 20. Trade Secrets/Commercial Info:** The PIA excepts from public disclosure trade secrets and certain commercial or financial information.<sup>30</sup>
- 21. Agency Memoranda:** An interagency or intra-agency memo or letter that would not be available by law to a party in litigation with the agency is excepted from disclosure.<sup>31</sup>
- 22. Economic Development:** A specific exception protects from disclosure certain information relating economic development negotiations involving a governmental body and a business prospect that the government body wants to locate, stay, or expand in or near its territory.<sup>32</sup>

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<sup>24</sup>TEX. GOV’T CODE ANN. § 552.103. See Tex. Att’y Gen. No. OR94-226 (1994) (city was able to deny open records request for certain records relating to annexation of an area).

<sup>25</sup> Tex. Att’y Gen. OR 99-1376, and Tex. Att’y Gen. OR2000-0259 (2000).

<sup>26</sup> See Tex. Att’y Gen. OR2000-0259 (2000).

<sup>27</sup> Tex. Att’y Gen. OR2000-2114 (2000) and OR2000-2756 (2000).

<sup>28</sup> *Harlandale Independent School Dist. v. Cornyn*, 25 S.W. 3d 328 (Tex.App.-Austin 2000).

<sup>29</sup> *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

<sup>30</sup> TEX. GOV’T CODE ANN. § 552.110 (Vernon Supp. 2001).

<sup>31</sup> See *Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160-61 (Tex. App.—Austin 2001, no pet. h.).

<sup>32</sup> TEX. GOV’T CODE ANN. § 552.131.