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A Municipal Guide to Open Meetings & Open Records©

by:

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City of Port Arthur
MUNICIPAL LAW AND PROCECXURE WORKSHOP

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This paper has been approved by the Office of the Texas Attorney General as satisfying the criteria for state-mandated training on the Texas Open Meetings Act and Public Information Act, as required by Senate Bill 286 (79th Texas Legislature-2005, codified as Tex. Gov't Code §§ 551.005 and 552.012). The contents of this paper are current as of January 25, 2012.

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Notable Litigation:

- Village of Salado's victory at Tx Third Court of Appeals on annexation (*Lone Star, 2009*)
- City of Georgetown's Tx Supreme Court appeal of A.G.' ORD (*Russell v. Cornyn, 2001*)

Publications:

- *Texas Municipal Law & Procedure Manual,* Texas Municipal Clerks Association (5th Edition)
- *Religious Displays at City Hall,* Texas Town & City Magazine, 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

Presentations:

- *Foreign Nationals & Immigration,* Texas Municipal Prosecutors Conference, July 2009
- *Ethics: Challenges Unique to City Attorneys,* Texas City Attorney Association, October 2008
- *Blinded by the Light: Ethical Implications of "Sunshine Laws" for Governmental Attorneys,* State Bar of Texas Annual Meeting, Government Lawyers Section, June 2008
- *Give Me A Sign: Municipal Regulating of Signage*, UT Land Use Conference, March 2008
- *Development Agreements*, University of Texas Land Use Law Conference, March 2005
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Honors & Appointments:

- *Merit Certification in Municipal Law* by the Texas City Attorney Association (2009)
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I. INTRODUCTION

The public has a statutory right to observe government in action and to review data related to government business. Under the Texas Public Information Act (PIA)[1] and the Open Meetings Act (OMA)[2] the presumption is that all meetings are open and all information must be disclosed. Thus, the public has access to a large number of government gatherings and a wealth of government data.

This level of broad access enables citizens to keep an eye on their servants and to actively participate in the process, both of which are crucial to the functioning of a democracy. It is generally understood that we who serve in the public sector work with the consent of the governed, and that consent is meaningless without widespread access to government information and the decision-making process.

However, providing access is tricky. The "Sunshine Laws" establishing what gatherings constitute "***meetings***" and which documents are "***public***" is far from clear. Government officials are often confused by conflicting mandates to disclose what is "***open***" and withhold what is "***confidential***," particularly when civil and criminal penalties can be assessed for honest mistakes. Furthermore, it is sometimes difficult to conduct public affairs in a manner that benefits the citizenry as a whole when having to provide access to the few, particularly when the few consist of those with narrow special interests that are counter to good government.

Despite being a dynamic and evolving area of the law, the guidelines for Open Government lag far behind the constant advancements in communications technology. Social Networking and Smart Phones are changing the way information is transmitted and stored, and thus have implications on Open Meetings, Open Records and Records Retention. Government officials are then forced to accept the sharing of *Best Practices* to fill the void left by outdated statutes.

Nonetheless, we who accept public responsibility also accept the obligations imposed in the name of Open Government. The breadth and complexity of the laws ensuring public access warrant the development of internal procedures for handling these matters. Complying with the intricacies of Open Meetings and Open Records warrants expending valuable time and resources, particularly in the areas of policy development, training, and legal services.

[1] TEX. GOV'T ANN. Chapter 552 (Vernon 1994).
[2] TEX. GOV'T ANN. Chapter 551 (Vernon 1994).

II. PUBLIC INFORMATION ACT

The PIA covers data without regard to the form in which it exists. In 1995, the Texas Legislature changed the name of the "Open Records Act" to the "Public Information Act," thus signifying the broad application of the Act. The current version addresses the need to provide the public with information, generally, even if not in paper form. The determination of whether or not information qualifies as "public information" does not turn upon where the information is stored or kept.[3] Information covered includes that held by third parties, such as independent contractors.

Who is Subject to the Act?
As a general rule, government employees and officials should operate under the assumption that the entity, organization, or governmental body they are involved with is subject to the PIA. The PIA includes, and most often means, entities within the executive or legislative branches of state government – such as county commissioner's courts, municipalities, school districts, counties, and governmental and non-governmental entities that are supported by public funds.[4] It does not include the judicial branch of the government.[5] (Although the judiciary are not subject to the PIA – many court records are available for review by the public through the respective court clerk's office. As with the PIA, most court clerks request that record requests be in writing, and addressed to the court's custodian of records)

Formats

- Every form of information covered
- Audio, Video, Digital, Paper, Computer memory, Microfilm
- Only covers information *currently* in existence
- Compilation and manipulation of data may be necessary

The term "public information" covers almost everything. Generally, the term "public information" applies to information that is maintained, collected, or assembled under a law or ordinance or in connection with a transaction of official business by a governmental body. The term is expressly defined by the PIA as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it. Examples of media include: (1) paper; (2) film; (3) a magnetic, optical, or solid-state device that can store an electronic signal; (4) tape; (5) mylar; (6) linen; (7) silk; and (8) vellum. The general forms in which the media containing the public information exist, include a book, paper, letter, document, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map, and drawing and *voice, data, or video representation held in computer memory.*[6]

[3] TEX. GOV'T CODE ANN. § 552.002.
[4] *Id.*, §552.003.
[5] *Id.*, §552.0035.
[6] *Id.*

As technological capabilities expand, so does the broad application of the Public Information Act. Governmental entities are responsible for more than just paper "records". They now generate, transmit and store electronic images and digital blips.

Although the public may have access to certain computer files, the PIA does not give a member of the public a right to use a computer terminal to make his own computer search for public records, due primarily to the risk that confidential records will be inspected.[7]

Implicit in the PIA is that it only governs information already in existence. The PIA does not require a governmental body to conduct research, collect raw data, answer legal questions, or construct new records. Nor does the PIA require a governmental body to continually inform the public when information comes into existence. The statute does require that information on hand be compiled into a record, if so requested.

E-mail

Electronic mail regarding public business can be public information. The term "public information" is very broad and specifically includes a magnetic, optical, or a solid-state device that can store an electronic signal or held in computer memory.[8] The AG has specifically stated that Texas recognizes that work-related electronic mail is information that may be subject to public disclosure.[9] Thus, all government entities should have a strong policy about e-mail and internet usage. Even e-mail transmitted from ***home*** through a ***personal computer*** via a private internet account can be "public."[10] Even though it may only be in the possession of one person, information such as home e-mails can be considered "public information" if it relates to official business of a government body or is maintained by an official or employee in the performance of official duties. In one particular instance, the AG has reasoned that home e-mails are public records subject to the PIA because the councilmember solicited citizens to communicate with her as a councilmember on her personal computer by including the home e-mail address on her business card. Accordingly, given that the council member has made the decision to transact city business in this manner, the city was responsible for responding to a request for information the scope of which included the council member's home e-mail files.[11]

Note that the PIA applies only to public information ***in existence at the time*** of the request for information.[12] To the extent an e-mail responsive to the instant request has only been placed in the "trash bin" or "recycle bin" of a program, the e-mail is still being "maintained" by the city for purposes of the Act and is still considered "public information." However, to the extent an e-mail responsive to the instant request has been deleted from the trash bin, and thus the location of the file on the hard drive has been deleted, the e-mail is no longer being "maintained" by the city and therefore the e-mail is no longer public information.[13]

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[7] Tex. Att'y Gen. ORD 571 (1990).
[8] TEX. GOV'T CODE ANN. § 552.002.
[9] Tex. Att'y Gen. ORD-654 (1997).
[10] Tex. Att'y Gen. OR2001-1790.
[11] Tex. Att'y Gen. OR2001-1790.
[12] *See* TEX. GOV'T CODE ANN. § 552.021.
[13] Tex. Att'y Gen. OR2001-3366.

Drafts
A document, even if labeled "draft," might constitute public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained by or for a governmental body. The mere creation of a draft is not "transacting official business," thus many drafts may be withheld from the public. However, if the draft is used in the course of conducting public business, the government cannot protect the document simply by labeling it a "draft."[14]

Personal v. Official
The fact that a message is of a nature generally regarded as "personal" is not as dispositive as in the past. Personal notes, e-mail, and calendar entries can be subject to the PIA. Correspondence related to public business in the possession of a member of a governing body is subject to the PIA even if it was sent to the member's home address.[15]

Whether a particular piece of information is public is a fact specific inquiry that requires consideration of the following factors:

(1) who prepared the material;
(2) who had control / access;
(3) the nature of the material;
(4) whether it was used in the course of conducting government business;
(5) whether public funds were expended to create the material;
(6) the purpose of the material; and
(7) whether the government entity requires that the material be created.[16]

The AG has stated that "if information maintained on a privately-owned medium is actually used in connection with the transaction of official business, it is subject to the PIA."

Recently a state district court held that any responsive emails sent or received by privately-owned personal computers (or any other personal electronic device belonging to municipal officials were "public information." The Court's ruling disregarded whether the emails were processed by municipal email servers (i.e., the Court concluded that the emails related to official city business to or from the mayor were public even if they were transmitted through *private* email accounts on a *privately-owned* device). The district court was overturned on appeal, but the risk that private emails could become public information still remains.[17]

[14] *See City of Garland v. Dallas Morning News,* 22 S.W.3d 351 (Tex. 2000).
[15] Tex. Att'y Gen. ORD-425 (1985).
[16] *See* Tex. Att'y Gen. ORD-635 (1995).
[17] *See City of Dallas v. The Dallas Morning News*, 281 S.W.3d 708 (Tex.App.---Dallas 2009).

Requests for Information

- While the PIA is not triggered until a request is made in writing, a governmental body *can* choose to provide public information in response to an oral request – however, a governmental body must treat *all* requests uniformly, so as a general rule one should require that *all requests* be made in writing to avoid potential inconsistencies
- The public *can* request copies or to inspect information on-site, subject to the requirement that government bodies treat all requests in a uniform fashion
- Governmental bodies *must* display a sign giving basic PIA information
- Governmental bodies *can't* inquire into the requestor's motives
- Governmental bodies *should* date stamp the request, require that all requests be in writing, establish identification of requestor, and have a policy for handling all requests
- Questions or comments about requests for information should be directed to the Attorney General's "Open Government Hotline" at **1-877-673-6839**.

Requestor's Motives
Governmental bodies should never ask a member of the public why he/she is requesting the information. A requestor's motivation for requesting public information cannot be considered by the governmental body.[18]

Written Requests for Existing Information
While many times government officials will receive requests for public information over the telephone – it is important to note that the provisions of the PIA are not triggered until two events occur:

(1) A request is made to the governmental body "in writing." This often helps governments clarify the scope of the request so to identify the particular information being sought. A written request is required if the governmental body intends to seek an AG opinion regarding whether the information must be disclosed. Thus, governments should require that all requests for information be in writing and include the requestor's name, address, and phone number, and a detailed description of the information being sought. Remember, that if a governmental body does not request an AG ruling as to whether information is responsive to a particular request, than the information responsive to such request is ***presumed open***. Governments should immediately stamp the request indicating the date received. The clock begins to run the first business day *after* the day the governmental body receives the request.
(2) The request seeks information or records which are already in existence.

Clarification/Scope of a Request
If the request for information is unclear, the municipality may in good faith ask the requestor to clarify the request.[19] The deadlines are tolled during the process of seeking clarification (as well as during the process of seeking to narrow the scope of the request) but resume on the day that

[18] *Indus. Found. of the South v. Texas Indus. Accident Bd*., 540 S.W.2d 668 (Tex. 1976, cert. den., 430 U.S. 931).
[19] TEX. GOV'T CODE § 552.222.

the clarification is received.[20] A written request from the municipality asking the requestor for clarification must included a statement of the consequences of failure by the requestor to respond in a timely manner. A request for information is request for information is deemed to have been automatically withdrawn by the requestor by operation of law if the:

(1) municipality does not receive a response from the requestor by the 61st day after the municipality sends its written request for clarification (or request for additional information); and
(2) request for clarification was mailed via certified mail; and
(3) request for clarification was sent to the requestor's physical or mailing address.[21]

Note that the AG has ordered governmental bodies to respond to some very broad, vague requests. For example, a County Judge was asked on a daily basis to provide "all letters, reports, directives, e-mail, telephone message slips, or other writings produced or received by the county judge or his staff" with regard to twenty-one listed subject areas. The AG concluded that the request, "while encompassing numerous facets of county business, is sufficiently clear and understandable to inform the county judge of the records being requested."[22] Additionally, a governmental body should not withhold or refrain from producing information responsive to a request based solely on a technical or typographical inconsistency in the request itself. For example, if a request asks for the calendar of City Secretary "Bob Thompson" – and the City Secretary's name is actually "Bob Thomas" – the governmental body should not allow a minor spelling or typographical error to serve as the basis for not providing the information.

Signage

Governmental bodies must display a sign, in a form prescribed by the Texas Building and Procurement Commission (formerly the "General Services Commission") containing plainly written basic information about the rights of requestors, responsibilities of the governmental body, and the procedures for inspecting or obtaining copies of public information. The sign(s) must be on display in the administrative offices of the governmental body where plainly visible to members of the public. Signs were required to be posted on or before January 3, 2000.[23]

[20] Tex. Att'y Gen ORD 663 (1999).
[21] TEX. GOV'T CODE §552.222.
[22] Tex. Att'y Gen. OR2000-1168 (2000).
[23] TEX. GOV'T CODE ANN. § 552.205; see also 1 TAC § 111.71.

Governmental Body Responses

- *must* treat all requests uniformly
- *must* make data available during normal business hours
- *must* provide within reasonable time (e.g., 10 business days)
- *can* charge reasonable fees for copies and staff time
- *should* carefully document expenses related to production
- *should* provide in the medium requested
- *can* refuse to process repetitious or redundant requests

Within ten business days of receiving a written request, the governmental body must:

- write the Attorney General, asking for a decision and state which exceptions apply to the requested information;
- provide the requestor with a written statement that the governmental body wishes to withhold the information and that it has asked the Attorney General for a decision;
- provide the requestor with a copy of the governmental body's correspondence to the Attorney General; and
- make a good faith attempt to notify, in the form prescribed by the Attorney General, any affected third parties of the request.

Within fifteen business days of receiving your request, the governmental body must:

- write the Attorney General and explain how the claimed exceptions apply;
- provide a copy of your written request to the Attorney General;
- provide a signed statement to the Attorney General stating the date the request was received by the governmental body or provide evidence sufficient to establish the date the request was received; and
- provide copies of the documents requested or a representative sample of the documents to the Attorney General and the documents must be labeled to show which exceptions apply to which parts of the documents.

Uniformity
Governmental bodies must treat all requests uniformly.[24] Governments should not treat requestors disparately because they are your friends or the local government watchdog. The PIA states that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.[25]

Timing
Governmental bodies must provide copies of the information promptly, which means within a ***reasonable time*** based on the circumstances. [26] As a general rule, a "reasonable time" should be

[24] *Id.* § 552.223.
[25] *Id.* §552.001.
[26] *Id.* § 552.221.

understood to mean within ***ten business days***. The Legislature has clarified that it is *business* days and not *calendar* days.[27] If governments are unable, unwilling, or in doubt to provide the information within ten business days, they must notify the requestor within ten days and establish a reasonable date for production, or seek a determination from the Attorney General.

The method for calculating the "ten business days" should be consistent regardless of the governmental body, although it is possible that different bodies will recognize different holidays, which may change the deadline with respect to the particular body. As a general rule, the clock begins to run on the first business day *after* the date which the request is received by the governmental body. From that point on, the body has up until the close of business on the tenth (business) day (those days where the governmental body was open and operating) from which to respond. If a governmental body recognizes a holiday which may not be recognized by the State or by the Office of the Attorney General, it is important that you specially reference this circumstance in any communications with the OAG which have a deadline.

Information that is not excepted from required disclosure must be released "as soon as possible under the circumstances, that is, within a reasonable time, without delay."[28] The AG has stated that the statute does not define "promptly" and that what constitutes a "reasonable time" depends on the facts in each case. The volume of information requested is "highly relevant" as is whether the requested information is in "active use." Thus, a *reasonable time* may be *less than or greater than* ten business days.

Public information must be made available to the public for inspection at a minimum during the normal business hours of the governmental entity.[29]

Presumed Open

If a governmental body fails to request a determination from the Attorney General, and the information is not in the limited class that can unilaterally be withheld based on language in the OMA, or on reliance on previous determination of the Attorney General, the information is automatically presumed to be open (i.e., subject to mandatory public disclosure). If presumed open, the information must be released unless there is a compelling reason to withhold it.[30]

Charges for Copies

Governmental bodies can charge fees for producing copies of the requested information. These fees can include the reasonable costs of copies, labor and overhead.[31] A fee schedule is published by the Texas Attorney General. A government may establish its own fee schedule, but such charges may not exceed those of the Attorney General by more than twenty-five (25%).[32] Governmental bodies should carefully document the costs they incur in responding to voluminous or intricate requests for information.

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[27] *Id.* § 552.221 (d).
[28] Tex. Att'y Gen. ORD 664 (2000).
[29] TEX. GOV'T CODE § 552.021.
[30] TEX. GOV'T CODE § 552.302.
[31] *Id.* § 552.261.
[32] *Id.* § 552.262.

If a request is for **50 or fewer** pages of paper records, the charge for providing the copy of the public information may ***not*** include costs of materials, labor, or overhead, but shall be limited to the photocopying costs, unless the pages to be photocopied are located in: (a) two or more separate buildings that are not physically connected with each other; or (b) a remote storage facility.[33]

If a request for copies or to inspect information will result in charges exceeding forty dollars ($40), the governmental body must provide a written itemized estimate and notify the requestor of less costly alternatives. If the requestor doesn't respond within ten (10) business days, the request may be deemed to have been withdrawn.[34]

Charges for Inspection Only

The general rule is that cities cannot charge requestors who seek only to view information that currently exists (but do not seek copies).[35] However, there is an exception to this general rule for those municipalities that have established a reasonable limit on the amount of time that municipal personnel are required to spend producing public information for inspection or duplication by a specific requestor without recovering its personnel costs. Such a time limit may not be less than thirty-six (36) hours during the municipality's twelve (12) month fiscal year. If information is request in the name of a minor child, and the information is requested by the child's parent or guardian (or another person with control of the child under a court order), the time spent preparing the information may be cumulative. If the municipality establishes a time limit, the municipality must notify the requestor in writing with a statement of the cumulative amount of time spent processing that requestor's information.[36]

Questions or comments regarding the procedures or provisions regarding chargebacks to requesting parties may be directed to either the AG's Open Government Hotline (1-877-673-6839) or, directly to the AG's Cost Rules Administrator, Ms. Hadassah Schloss, at (512) 475-2497.

Deposits

Governmental bodies may require a bond or deposit if the anticipated costs of preparing a <u>copy</u> of information will exceed $100 in governmental bodies with more than 16 full-time employees or $50 in smaller governmental bodies.[37]

Governmental bodies with 16 or more FTEs may require a bond or deposit for anticipated personnel costs for making information available for <u>inspection</u> if it will take the governmental body more than 5 hours to prepare the information and: (a) the information is more than 5 years old; or (b) the information completely fills 6 or more archival boxes.

Governmental bodies with 15 or less FTEs may require a bond or deposit for anticipated personnel costs for making information available for <u>inspection</u> if it will take the governmental

[33] TEX. GOV'T CODE § 552.261(a)(1).
[34] TEX. GOV'T CODE ANN. § 552.2615.
[35] TEX. GOV'T CODE ANN. §552.271.
[36] TEX. GOV'T CODE ANN. §552.275.
[37] *Id.* § 552.263.

body more than 2 hours to prepare the information for inspection and: (a) the information is more than 3 years old; or (b) the information completely fills 3 or more archival boxes. [38]

Formats
Governmental bodies should try to provide a copy of the requested information in the same medium requested and should try not to substitute formats. If the request is for information on a computer disk, the government may charge for the cost of the disk. The Office of the Attorney General has determined that members of the public have some degree of authority to copy records with their own equipment.[39] However, the same opinion also held that a government body can impose reasonable restrictions on this right if the presence of the requesting party would be unreasonably disruptive of working conditions, when the requesting party would have access to confidential information, or when it would interfere with other party's ability to access the information.[40] Each request should be assessed independently by the government body.

Repetitious Requests
If a governmental body determines that a requestor has made a request for information that it has previously furnished copies or made available, the governmental body can either: (a) furnish the information again; or (b) certify in writing when the information was previously provided and that no subsequent additions or corrections have been made.[41]

Request from an incarcerated person
Governmental bodies are not required to comply with requests from a person incarcerated in a correctional facility. In 2001, the Legislature clarified that this provision applies to those incarcerated in federal prisons and prisons in other states.[42]

Attorney General Rulings

- Must request a decision from the AG within 10 business days
- Submit arguments and sample materials within 15 business days
- Only governmental bodies can request AG opinions
- Must notify requestors that AG Opinion has been requested
- The AG must respond within 45 business days of the request for a decision, however this period may be extended by 10 days upon request of the AG
- A citizen may *not* request the AG reconsider a decision made pursuant to the PIA

A governmental body that receives a written request for information, but wants to withhold the information because it considers the information to be within one of the exceptions, must ask for a decision from the AG if there has not been a previous determination as to that specific item. Although they are not binding, courts tend to give great consideration to AG rulings, especially

[38] *Id.* § 552.271.
[39] Op. Tex. Att'y Gen. No. JM-757 (1987).
[40] *Id*.
[41] *Id.* § 552.232.
[42] *Id.* § 552.028.

in cases involving the PIA under which the AG has a legislative mandate to determine the applicability of exceptions to public disclosure.[43]

If a municipality receives a written request for information by mail but cannot determine the actual date of receipt, for purposes of calculating the municipalities response deadlines the written request is considered to have been received on the third business day after the date of the postmark of a properly-addressed request.[44]

The governmental body must ask for the AG ruling and state the exceptions that apply within a reasonable time but not later than the 10th *business* day after receiving the request. The governmental body must, within a reasonable time but not later than the 15th *business* day after receiving the request, submit to the AG:

(1) written arguments stating the reasons why the information should be withheld;
(2) a copy of the written request for information;
(3) a copy of the specific information requested, or representative samples of the information (if a voluminous amount of information was requested) making sure to label the information to indicate which exceptions apply to which parts of the copy; [45] and
(4) A signed statement from a government official indicating the precise date on which the governmental body received the request.

Only governmental bodies may request Attorney General rulings.[46] However, the governmental body *is required* to provide the requesting party with a copy of the notification to the AG's office, as well as any comments or briefing related to the particular request. Be sure to *redact any privileged or confidential information* contained in the brief or comments before providing a copy of the same to the requesting party.

Recent AG opinions have made it clear that 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. The burden is on the governmental body to make a ***convincing argument***.

Additionally, while certain representative samples of the information requested are often included in a request to the AG, there are circumstances in which it would not be appropriate to include samples; such as when the samples include third-party proprietary information, or when each document sought to be withheld contains different information.

A governmental body's general claim that an exception applies to an *entire* file or report, when the exception clearly is not applicable to *all* of the information in the file or report, does not satisfy the PIA, which requires the agency to determine which exception, if any, applies to which

[43] *Rainbow Group. v. Texas Employment Comm'n,* 897 S.W.2d 946, 949 (Tex.App.-Austin 1995).
[44] TEX. GOV'T CODE ANN. §552.301.
[45] TEX. GOV'T CODE ANN. § 552.301.
[46] Tex. Att'y Gen. ORD-542 (1990).

specific data, and then to present the claim of the applicability of that claim to the AG within a reasonable time.[47]

Appeals
The fact that the AG determined that information is not a public record does not preclude the requestor from seeking a trial court's determination as to whether the information sought is public under the PIA.[48] Cities that receive an adverse AG opinion compelling release of information may challenge that order by seeking declaratory judgment in district court in Travis County within 30 days from the date the ruling is received.[49] A citizen can request that a district court compel a government body's officials to make information available to the public in three situations: (1) if a governmental body refuses to provide clearly public information in response to a proper request; (2) if the governmental body refuses to seek an Attorney General ruling; or (3) when a governmental body refuses to release information pursuant to an unchallenged Attorney General ruling.[50] A citizen who does not wish to file suit themselves may also file a complaint with the Attorney General's office. It should be noted that a governmental body *may not file suit against a* citizen related to a citizen's exercise of the authority to request public information granted by the PIA.

Reconsideration
A municipality may ask for reconsideration of an Open Records Decision from the AG concerning the *precise* (same) information that was at issue in the prior AG decision if:

(1) a suit challenging the prior decision was timely filed against the AG; and
(2) the AG determines that the requestor has voluntarily withdrawn the request for the information; and
(3) the parties agree to dismiss the suit.

If these conditions are met, a court may dismiss the suit.[51]

Notification
Governmental bodies seeking AG decisions must provide the requestor with: (1) a written statement that the governmental body wants to withhold the information and request an AG decision; and (2) a copy of the governmental body's written communication to the AG asking for a decision (although you may redact confidential/privileged or excepted information).[52] Additionally, a governmental body seeking an AG decision that involves information involving third parties, the body must notify the third party of the public information request.

Previous Determinations
The AG has concluded that governmental entities can rely on a previous AG decision rather than file a new request for an AG opinion only under these narrow circumstances: (a) the previous

[47] Tex. Att'y Gen. ORD-150 (1977).
[48] *DPS v. Gilbreath,* 842 S.W.2d 408 (Tex.App.-Austin 1992).
[49] TEX. GOV'T CODE ANN. § 552.324.
[50] TEX. GOV'T CODE ANN. §552.325.
[51] TEX. GOV'T CODE ANN. §552.301.
[52] TEX. GOV'T CODE ANN. § 552.301(d).

AG decision addressed precisely the *same* information that is at issue in your instance and the facts / circumstances have not changed; or (b) the previous AG decision sets out a specific, clearly delineated category of information that is or is not excepted from disclosure and the opinion explicitly states that the governmental body or type of governmental body may rely upon the decision in response to future requests and is not required to seek a new decision from the AG.[53]

Disclosures

The following is an abbreviated list of information that the media has referred to as "Super" public information:

(1) completed report, audit, evaluation, or investigation;
(2) name, sex, ethnicity, salary, and dates of employment of each employee;
(3) information on the receipt or expenditure of public or other funds by a governmental body, if the information is not made confidential by law;
(4) the name of each official and the final record of voting;
(5) all research material used to estimate the need for expenditure of public funds or taxes by a governmental body, upon completion of the estimate;
(6) a description of an agency's central and field organizations;
(7) a substantive rule of general applicability adopted by an agency, and a statement of general policy or interpretation of general applicability;
(8) final opinions and orders issued in the adjudication of cases;
(9) staff manuals and instructions to staff that affect a member of the public;
(10) information that is also contained in a public court record; and
(11) a settlement agreement to which a governmental body is a party.[54]

Only certain, very limited exceptions apply. Pay close attention to section 552.022(a).

Other forms of information must be reviewed on a case-by-case basis to determine whether it must be released to the public upon request. Those officials processing public information requests should turn to statutory provisions, Attorney General decisions, and court cases for guidance.

When in doubt, seek the advice of an attorney.

Common Exceptions to Disclosure

Under the Public Information Act, all information generated through the normal operations of a governmental body is presumed to be open to the public unless there is a specific exception to disclosure. However, there are several exceptions to disclosure specifically noted in the PIA. Some are mandatory. Others are discretionary. This section highlights a few.

[53] Tex. Att'y Gen. ORD 673 (2001).
[54] TEX. GOV'T CODE ANN. § 552.022.

Security
In 2003, in response to the attacks of September 11, 2001 and concerns regarding the accessibility of written security plans which cities in Texas may adopt, the Texas Legislature passed a comprehensive security bill, which provided for the confidentiality of various critical infrastructure and homeland security information. The bill provides a new exception for requests made relating to the following types of information, (of which only a few examples are listed)[55]:

- Information relating to the staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;
- Information which consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers of certain emergency personnel;
- Information relating to an assessment by or for a governmental entity of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity;
- Information which is part of a report to an agency of the United States, relates to an act of terrorism or related criminal activity, and is specifically required to be kept confidential in order to participate in a state-federal information sharing agreement or to obtain federal funding;
- Information which identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism; and
- Information which indicates the specific location of a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon or unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

For more information on infrastructure and security-related exception to the Public Information Act, see Chapter 421 of the Texas Government Code.

Complaints
The identity of a person who reports a violation of law is exempted from disclosure.[56] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. Although the privilege ordinarily applies to the efforts of law enforcement agencies, it may apply to administrative officials with a duty of enforcing particular laws.[57]

[55] TEX. GOV'T CODE ANN. §§ 418.181-418.183.
[56] TEX. GOV'T CODE ANN. § 552.108; see Tex. Att'y Gen. No. OR94-185 (1994), citing Tex. Att'y Gen. No. ORD 279 at 2 (1981)(concluding that informer's privilege applies to identity of person who reports zoning violation, which is class C misdemeanor).
[57] Op. Tex. Att'y Gen. No. MW-575 (1982).

Litigation/Attorney-Related Information
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 party, or to which an officer or employee, as a consequence of his office or employment, is or may be a party.[58] For the exception to apply, the information must relate to litigation that is pending or reasonably anticipated on the date the requestor applies for access or duplication of the information. The hiring of an attorney and the assertion of that attorney of an intent to sue *might* establish that litigation is reasonably anticipated.[59] Settlement negotiations are no longer included in this exception.
Once information has been obtained by all parties to the litigation, (e.g., through the discovery or otherwise), no Section 552.103(a) interest exists with respect to that information.[60]

In 2000, the AG shocked government lawyers across the state by issuing opinions concluding that a "completed report, audit, evaluation or investigation" must be released to the public even if the document would otherwise fall under the protections of the attorney-client privilege or Litigation Exception.[61] In a case that was ultimately ruled upon by the Texas Supreme Court, the AG and the Austin American-Statesman urged that the 1999 changes to the PIA turned what had previously been "categories" and "examples" of public information into lists of "Super Public" information that are not subject to the exceptions contained in the statute or the civil discovery privileges, such as the attorney-client privilege.[62] Fortunately, a 5-3 majority on the Court ruled in the City of Georgetown's favor. The Court held that "privileged" does equal "confidential" for purposes of the PIA. Note, however, that the AG continues to define "privileged" extremely narrowly.

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. Unless the facts contained in the memo or notes were selected and ordered by the attorney for the purposes of determining and communicating the legal basis and strategy for the proposed action, the AG will probably conclude that the document is public.[63]

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 information reveals the attorney's legal advice, analysis, or the client's confidences. Otherwise, the AG is likely to compel disclosure.[64]

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[58] 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).
[59] Tex. Att'y Gen. ORD 555 (1990).
[60] Tex. Att'y Gen. ORD 349, 320 (1982).
[61] *See* Tex. Att'y Gen. OR2000-1038 and OR2000-1275.
[62] *In Re: The City of Georgetown and George Russell, In His Official Capacity as Acting City Manager and Officer For Public Information,* 53 S.W. 3d 328 (2001). Note that briefs of amici curiae were submitted in support of Georgetown by the Texas Municipal League, Texas City Attorney Association, Texas Association of School Boards, Texas Association of Counties, and Texas Water Conservation Association.
[63] Tex. Att'y Gen. OR 99-1376.
[64] *See* Tex. Att'y Gen. OR2000-0259 (2000).

Attorney Fee Bills
The AG is consistently holding that the exception for "privileged" information, for purposes of the PIA, does not apply to all client information held by a governmental body's attorney. A city attorney was recently ordered to release "purely factual" information contained in an attorney's fee bills (i.e., invoices), such as "phone calls and conferences regarding a particular matter…and indications that an attorney had reviewed documents relevant to the attorney's representation of the governmental body."[65] The fee bills involved pending litigation and were requested by opposing counsel. Thus, city officials should confer with their outside legal counsel regarding the specificity and descriptive nature of attorney fee bills.

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, for instance as an accountant, escrow agency, negotiator, or notary public.[66] However, if an attorney is retained to conduct an independent investigation in her capacity as attorney for purpose of providing legal services and advice, the attorney's entire report is protected by the attorney-client privilege and excepted from public disclosure to the newspaper under the PIA, even though the attorney detailed her factual findings in discrete portion of report apart from her legal analysis and recommendation.

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.[67]

Trade Secrets/Commercial Info
The PIA excepts from public disclosure trade secrets and certain commercial or financial information. As amended in 1999, the PIA says that governmental bodies may withhold:

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision; or
(b) Commercial or financial information for which it is determined based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.[68]

Note that city officials are obligated to contact third parties who have a trade secret interest or a commercial financial interest in the information that's been requested. When seeking an AG ruling as to whether information containing trade secrets and/or commercial information is excepted from disclosure – the governmental body *must* notify the interested third-party.

[65] Tex. Att'y Gen. OR2000-2114 (2000) and OR2000-2756 (2000).
[66] *Harlandale Independent School Dist. V. Cornyn,* 25 S.W. 3d 328 (Tex.App.-Austin 2000).
[67] *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).
[68] TEX. GOV'T CODE ANN. § 552.110 (Vernon Supp. 2001).

Agency Memoranda
An interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from disclosure. The Austin Court of Appeals recently held that the results of a city council's staff survey, compiled into a format of bar graphs and aggregate percentages, was "purely factual information"—not deliberative in nature—and thus did not fall within this exception.[69]

Audit Management Letter
Although the annual audit required by Texas Local Government Code Chapter 103 would constitute public information that probably must be released, the management letters that sometimes accompany the audits *might* not. The AG has ruled that an internal communication consisting of advice, recommendations, opinions, and other material reflecting the policymaking process of a city may be withheld under section 552.111. [70] This exception only applies if the document at issue is currently being considered in the municipality's deliberative process. The exception might not apply once the policy decision is made.

Juvenile Justice Information System
A specific exception protects from disclosure information that is part of a local juvenile justice system as defined by the Texas Family Code.[71] Information within such a system is designed for use by partner agencies and authorized employees of those agencies.

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.[72]

Selective Disclosure
A governmental body that seeks to withhold certain information from the public at-large can not selectively disclose that information to particular members of the public.[73] However, this prohibition against selective disclosure does not apply to the intra-agency transfer of information to members of the governing body or certain members of particular types of volunteer citizen advisory boards.[74]

Non-Public Information
As explained above, sometimes members of the public request information that is "public," but is not subject to disclosure because it is privileged or confidential or subject to a discretionary exception. There are also situations in which the requestor requests information that is not "public" and is not in any way subject to the PIA ***at all***. For example, requestors sometimes seek data that has never been maintained by the city or at the direction of the city, and therefore is not public information.[75] The Attorney General has previously concluded that raw data maintained

[69] See *Arlington Indep. Sch. Dist. v. Texas Atty. Gen.*, 37 S.W.3d 152, 160-61 (Tex. App.—Austin 2001, no pet. h.).
[70] Tex. Att'y Gen. OR2002-2775.
[71] TEX. FAMILY CODE ANN. § 58.307.
[72] TEX. GOV'T CODE ANN. § 552.131.
[73] See TEX. GOV'T CODE ANN. § 552.007(b).
[74] *See* Tex. Att'y Gen. ORD-666 (2000).
[75] *See* Tex. Att'y Gen. OR2001-3366.

by a private consultant and provided to the governmental body only on an as-needed basis through a direct telephone link to the consultant's computers is not subject to the PIA when collection of the data is not dependent on the authority of the governmental body. Only the raw data that is actually accessed and stored or used by the governmental body is subject to the Act.[76]

If you receive a request for material that you have no control over or access to, consider seeking an AG ruling and raise these arguments.[77]

New Exceptions

Certain Personal Information of Peace & Security Officers
Addresses, phone numbers, social security numbers, and personal family information of peace officers, county jailers, security officers, and employees of TDCJ are excepted from disclosure. Section 552.1175 of the Government Code allows these officers to elect in writing that their information be excepted from disclosure. If no such election is made, however, it is unclear whether the governmental body must request an AG opinion to protect the information.[78]

Social Security Numbers of Living Persons
The social security number of a living person is excepted from disclosure under the PIA (but is not considered "confidential") without the necessity of requesting a decision from the Attorney General.[79]

Credit Card Numbers, E-mail Addresses, & Related Information
Credit card, debit card, charge card, and access device numbers collected, assembled, or maintained for a governmental body are not subject to disclosure. E-mail addresses of public citizens are not subject to disclosure without the citizen's consent.[80]

Computer Security Information
In the 2001 session, the Legislature made information related to computer network security or design, operation, or defense of a computer network confidential under the PIA.[81]

Motor Vehicle Records

(1) Information relating to the following motor vehicle records is excepted from disclosure:

(A) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
(B) a motor vehicle title or registration issued by an agency of this state; or
(C) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

[76] *See* Tex. Att'y Gen. ORD-492 (1988).
[77] *See* Tex. Att'y Gen. OR2002-1728.
[78] TEX. GOV'T CODE ANN. §§ 552.024, 552.117, and 552.1175.
[79] TEX. GOV'T CODE ANN. § 552.147.
[80] *See Id.* §§ 552.136, and 552.137.
[81] See *Id.* §§ 552.136, and 552.131(d).

Information of this description may be released only if, and in the manner, authorized by Transportation Code, Chapter 730. Items (A), (B) and (C) above may be redacted by the municipality without first having to receive an Attorney Generals ruling. If a municipality redacts or withholds Items (A), (B) and (C) without seeking a ruling from the Attorney General, the municipality must provide the following information to the requestor on a form prescribed by the Attorney General:

(1) a description of the redacted or withheld information;
(2) a citation to this section; and
(3) instructions regarding how the requestor may seek a decision from the Attorney General regarding whether the redacted or withheld information is excepted from required disclosure.[82]

Personal Information About Employee
Each present and former employee or official of a governmental body (except certain peace officers set out in paragraph (c) below) shall choose whether to allow public access to information that relates to the person's home address, home telephone number, or social security number, or that reveals whether the person has family members, and emergency contact information.[83]

Violations

- Criminal Penalties:
  - *Refusing to provide public data*: 6 months in jail and/or $1000
  - *Providing confidential data*: 6 months in jail and/or $1000
  - *Destroying governmental data*: 3 months in jail and/or $4000
- Civil Remedies
- Requestor or AG can file suit for writ of mandamus
- Winner can recover attorney fees and court costs

A public official commits a criminal violation under the PIA if the public official, with criminal negligence, fails or refuses to give access to or provide copying of, public information to a requestor as provided by the Act. Such a violation is punishable by the jail term and fines described above, in addition to such a violation constituting an act of official misconduct.[84] However, it is an affirmative defense to prosecution under this section if the official reasonably believed that public access to the information was not required, and that the official:

(1) acted in reasonable reliance on a court order or AG decision;
(2) properly requested a decision from the AG and such a decision is pending; or
(3) not later than ten days after the receipt of an AG decision which held that the information is public, filed a petition or cause against the AG with the appropriate official seeking relief from compliance with the AG's decision, and such petition or cause is pending.

[82] TEX. GOV'T CODE ANN.§552.130.
[83] See TEX. GOV'T CODE ANN. §552.024.
[84] See TEX. GOV'T CODE ANN. § 552.353.

(4) Additionally, it is a defense to prosecution if an agent of the official responsible for public information relies upon a written instruction from said official instructing the agent not to disclose the information requested.[85]

Public officials who willfully destroy, remove, or alter public information which may be responsive to future public information requests also commit a criminal violation under the PIA, possibly subjecting that official to the penalties described above.[86]

Enforcement

The Public Information Act authorizes the Office of the Attorney General to enforce certain provisions of the Act. While the OAG generally attempts to resolve any disputes between governmental bodies and citizens through informal means, the Office has exercised their authority to pursue legal action on the State's behalf when warranted and authorized. For the first time in many years, the AG has recently sued a public entity to enforce the PIA. The AG sued the Stephenville Independent School District alleging that, contrary to the AG's ruling, the district had released only edited (i.e. redacted) copies of its attorney fee bills when full disclosure was warranted.[87] In 2003, the office of the Attorney General obtained it's first conviction related to abuse of the Public Information Act, with the superintendent of the Llano Independent School District being convicted of two counts of violating the Public Information Act related to his failure to provide a local weekly newspaper with access to public expense records being sought in an investigation of local school officials' spending habits.

Declaratory Judgment/Injunctive Relief

The PIA does provide a mechanism whereby an action for declaratory judgment or injunctive relief may be brought against a governmental body accused of violating the PIA. If the governmental body is a state agency, than the suit may only by filed by the Travis County district attorney or the Attorney General; if the governmental body is not a state agency, then such an action may be brought by the district or county attorney for the county where the governmental body operates.[88] If a governmental body extends into two or more counties, than the suit must be brought in that county where the body's administrative offices are located.[89]

To institute such a proceeding, a complaint must be filed with the appropriate official described above, which must (1) be in writing and signed by the complainant, (2) state the name of the governmental body which allegedly committed the violation, (3) state the time and place of the alleged violation, and (4) describe the alleged violation to the best of the complainant's abilities. Before the 31st date after the complaint is filed with the appropriate official, that official must (1) determine whether or not the violation alleged in the complaint was committed, (2) determine whether an action will be brought against the governmental body, and (3) notify the complainant in writing of these determinations.[90] Upon notice to the governmental body of the official's determination, the body is given four days to cure the alleged violation of the PIA, and it is only

[85] *Id*.
[86] *Id*.
[87] Tex. Att'y Gen. OR2000-0024.
[88] *See* TEX. GOV'T CODE ANN. § 552.3215.
[89] *Id*.
[90] *Id*.

after the expiration of this time period that the official may proceed with an action under this Chapter.

Legal Defense Funds

Although it is not required to do so, a city council may decide in advance to spend public funds to reimburse a member of the council for the legal expenses of defending against an unjustified prosecution for Open Meetings Act violations. It may not actually pay for such legal expenses until it knows the outcome of the criminal prosecution. The city may not pay the expenses of a member who is found guilty of criminal violations.[91]

PIA Policy

All cities should develop a policy detailing how PIA requests will be handled. When posed with a hypothetical, an attorney with the AG's office concluded that if a requestor walked into city hall at 11:00 p.m. and handed a request for information to an employee of the city's janitorial services vendor, the clock would begin to run the next day just as though the requestor had handed the request to a central office clerk at 3:00 p.m. Thus, it is wise to have a policy and procedures for handling all PIA requests. You policy should address these issues:

(1) Who handles requests?
(2) Where must fax and e-mail requests be sent?
(3) Must requests be in writing?
(4) When are the government's attorneys involved?

[91] Op. Tex. Att'y Gen. No. JC-0294 (2000).

III. OPEN MEETINGS ACT

- Public business should be conducted in public
- Citizens have the right to observe their government in action, which means deliberations *and* votes.
- The general rule is that *every* meeting is open to the public.

The state of the law in Texas makes it clear that citizens have the right to observe their government in action. The general rule is that every regular, special, or called meeting of all boards and commissions that have *rule making authority* or *quasi-judicial authority* must be open to the public. It is important to scrutinize gatherings of members of the governing body because the OMA is being applied to assemblies of government officials that take place outside the "traditional meeting" context.

Location
There is no state law requirement that meetings be held within the territory of the city. However, in order to be accessible to the public, the meetings must be held within the state.[92]

Secret Ballots
Even when used at a properly noticed public meeting in order to spare a citizen's feelings or avoid embarrassing a private party, governing bodies cannot use secret ballots. They have been declared to be the "antithesis" of the OMA because they are used to conceal a public official's vote and, thus, violate the fundamental tenet of an elected or appointed official's ultimate accountability to the electorate.[93]

"Quorum" Defined
The Open Meetings Act defines a "quorum" as a majority of the governing body unless otherwise defined by applicable law, rule, or charter.[94] A quorum of a governmental body's members must be present in order for the governmental body to exercise the authority delegated to it. A quorum of any governmental body *must be present* to convene an open meeting of that body under the Act. Given that any actions taken in violation of the Texas Open Meetings Act may be voidable, it is vital to ensure that a governing body has a quorum present before taking any actions covered by the Act.

"Governing Body" Defined
The TOMA lists those "governmental bodies" subject to the act in Section 551.001(3). While this list is not intended to be exhaustive, it provides public officials with examples of governmental bodies found across the State which are currently subject to the Act's provisions. In the event your group or body does not appear on this list, yet you have questions as to the applicability of the Act – it would be reasonable to take actions under the assumption that your group is covered by the Act, until such time as your Attorney or the Office of the Attorney General is able to weigh in on the matter..

[92] Op. Tex. Att'y Gen. No. JC-0053 (1999).
[93] Op. Tex. Att'y Gen. No. H-1163 (1978).
[94] See TEX. GOV'T CODE ANN. § 551.001(6).

A "governmental body" includes the following:

(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; 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.

Quorum & Subcommittees

Generally, a quorum must be present for a gathering to be considered a "meeting" and thus fall under the OMA. However, there have been (AG) opinions and court opinions that have applied the OMA to meetings of committees comprised of members of a governing body even though a quorum of the full governing body was not present.[95]

When applying the OMA so broadly, courts and the AG have closely analyzed two key factors: (a) the committee's authority; and (b) the committee's membership. The committee may fall under the OMA if it exercises substantial delegated control over public business that is not contingent on subsequent action by the entire board.[96]

If the composition of the committee weighs the debate in favor of whatever recommendation the committee renders, the committee may have to comply with the OMA. For example, if five of the twelve city councilmembers serve on the committee (less than a quorum of the board) were in favor of the committee's recommendation, only two more votes are needed from the remaining councilmembers to go along with whatever action the committee recommends.[97] Also, while a committee consisting of three of twelve members may not be a quorum of the council, that committee of three may constitute a "governing body" in and of itself if the council

[95] Op. Tex. Att'y Gen. Nos. JC-0060 (1999), JM-1072 (1989), and H-238 (1974).

[96] Op. Tex. Att'y Gen. No. JC-0060 (An "evaluation committee" including the county judge, one commissioner and seven other individuals appointed by the commissioners court to recommend an architect and negotiate a contract was determined to be a "governmental body" subject to the OMA).

[97] See *Finlan v. City of Dallas,* 888 F.Supp. 779, 785-786 (N.D. Tex. 1995), (involving a "Ad Hoc Committee--Downtown Sports Development Project" appointed by the mayor to negotiate with the owners of professional basketball and hockey teams regarding their proposed move from a city-owned arena); see also Op. Tex. Att'y Gen. No. JC-0060 (1999).

has delegated to the committee authority over city business or the council frequently rubber stamps the committee's recommendations regarding city business.[98]

Conversations of Less Than a Quorum
In a civil case where the plaintiffs sought injunctions preventing members of the governing body from discussing business outside of properly noticed meetings, the court required evidence that the members of the governing body were attempting to circumvent the OMA. Evidence that one (1) board member of a five-member (5) district occasionally used the telephone to discuss the agenda for future meetings with one other board member did not amount to an OMA violation. Nor did evidence that one board member occasionally questioned another member about an agenda while preparing for meeting amount to an OMA violation.[99] The court concluded that when two members meet together, they do not constitute a quorum. Without the presence of a quorum, they have not had a meeting as defined by the Act, and they have not violated the OMA. Because there was no "meeting", there was also no violation of the OMA.[100]

Factors Determining Applicability of the Act
Under the Texas Open Meetings Act, the presence of the following factors together qualify as an open meeting and therefore subject the meeting to the provisions of the Act: a quorum of a governmental body, or a quorum of a governmental body and another person, meets to deliberate or take formal action on the public business or public policy which that governmental body has supervision over or control over.[101]

First Amendment Protections
A recent decision of the US Court of Appeals for the Fifth Circuit held that the First Amendment's protection of elected officials' speech, even when made pursuant to their official duties, is analogous to that afforded to regular citizens. Therefore, if a state seeks to restrict the speech of elected officials on the basis of content (i.e., whether the speech refers to public business/policy or not), it must show that the regulation: (a) furthers a compelling state interest, *and* (b) is narrowly tailored to serve that interest. The case arose from alleged violations of TOMA by certain members of the Alpine City Council for their discussion of public matters via email by a quorum of public officials outside of an open meeting.[102]

Advisory Board & Commissions
If the board is purely advisory, the OMA doesn't apply. However, if the governing body is likely to simply "rubber stamp" the "advisory" board's action or choice, then it may be more than advisory and subject to the OMA.[103]

Some boards, such as Planning and Zoning Commissions, are required by the statute to comply with the OMA regardless of their powers or functions.[104] Some governmental bodies, such as

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[98] See Op. Tex. Att'y Gen. No. JC-0407 (2001).
[99] *Harris County Emergency Services Dist. No. 1 v. Harris County Emergency Corps,* 999 S.W.2d 163, (Tex.App-Hous. (14 Dist.) 1999).
[100] *Id.* at 170.
[101] TEX. GOV'T CODE ANN. § 551.0035.
[102] *See Rangra, et al. v. Brown, et al.*, 566 F.3d 515 (5th Cir. 2009). This case has been appealed and is currently scheduled to be reheard by the full panel of the federal Fifth Circuit Court of Appeals in New Orleans.
[103] Op. Tex. Att'y Gen. No. JC-0060 (1999).

the Austin City Council, have enacted ethics ordinances that require their boards and commissions to comply with the OMA.

The federal Ninth Circuit Court of Appeals recently interpreted the State of Washington's "Open Public Meetings Act" to include a Task Force created by a city's Planning Advisory Board as a "governing body," and thus subject to the statute. [105]The court came to this conclusion because the Task Force "was created as a committee of the Planning Advisory Board [which the court also deemed a "governing body"] and it took testimony and public comments, conducted hearings and acted on behalf of the Board and the City Council." Because the Task Force held unauthorized closed meetings, and because of other issues, the court struck down the city's adult business ordinance. Thus, ***the lesson to be learned*** is that even though boards and commissions that are "purely advisory" are exempt from the OMA, those groups can quickly become more than just advisory if they start to take on certain functions. It is possible that a city council action can be voided because a task force of an "advisory" committee failed to comply with the OMA.

If a quorum of a governmental body attends a meeting of a subcommittee or of an advisory board, that meeting probably must be conducted in compliance with the OMA (e.g., notice and minutes) even it is an "informational" meeting and no "deliberations" are scheduled.[106]

Social, Ceremonial, or Educational Gatherings

The OMA doesn't apply to purely social gatherings, conventions, and educational seminars, such as Texas Municipal League events.[107] The OMA also does not restrict ceremonial events, or press conferences. These functions are excluded under the Act so long as any discussion of specific municipal business is purely incidental. Recent legislation also provides that a quorum of the city council may receive from municipal staff, and a member of the governing body may make, a report regarding items of community interest during a council meeting without having given notice of the subject of the report, provided no action is taken or discussed. An "item of community interest" includes expressions of thanks, congratulations, or condolence; information regarding holiday schedules; honorary recognitions of city officials, employees, or other citizens; reminders about upcoming events sponsored by the city or other entity that is scheduled to be attended by a city official or city employee; and announcements involving imminent threats to the public health and safety of the city.[108]

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. This is true *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.[109] The OMA might apply even if the only

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[104] TEX. LOC. GOV'T CODE ANN. § 211.0075 (Vernon 1998).
[105] *Clark v. City of Lakewood*, 2001 WL 877062 (9th Cir. (Wash.).
[106] See Op. Tex. Att'y Gen. No. JC-0313 (2000).
[107] Tex. Gov't Code §551.001(4); see also Op. Tex. Att'y Gen. No. JM-1072 (1989).
[108] Act of June 16, 2009, 81st Leg., R.S., S.B. 1182, § 1 (to be codified at Tex. Gov't Code Ann. § 551.0415).
[109] *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n,* 2 S.W.3d 459 (Tex.App.—San Antonio 1999, no pet.).

"deliberation" consists of one member of the governing body asking a question of the audience or answering a question posed by an audience member.

Legislative Agency Meetings
If a quorum of a city council is going to attend a meeting or hearing conducted by another governing body (e.g., the Legislature or a state agency) and a member of the board of trustees provides only testimony, commentary, or answers to questions by a member of the agency or committee, then the quorum's attendance at the meeting is not subject to the OMA.

Staff Committees
A committee comprised of a city council's staff members is not a "governmental body" subject to the OMA if the committee does not have the power to make binding, enforceable decisions, and makes only recommendations.[110] Thus, the Open Meetings Act does not apply to staff committee meetings.

Action without Meetings
If a quorum of a governmental body agrees on a joint statement on a matter of governmental business or policy, the deliberative process through which that agreement is reached is probably subject to the requirements of the Open Meetings Act, and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time.[111] Telephone conferencing can also be considered a violation of the OMA, depending on the facts.[112]

The City of San Antonio violated the OMA when its city council, via several small meetings in the City Manager's office, each containing less than a quorum, agreed to strip a pro-gay/lesbian group of its funding from the city's budget. The Court held that if a quorum of a governmental body agrees on a joint statement on a matter of governmental business or policy, the deliberation by which that agreement is reached is subject to the requirements of the Open Meetings Act, and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time. In other words, if city council members are holding their discussion of public business in numbers less than a quorum in order to avoid having to meet the requirements of the OMA, criminal prosecution can be pursued against such officials for such discussions.[113]

E-mail
Members of governing bodies must be particularly careful to avoid deliberating through *e-mail*. The term "deliberation" is not limited to "spoken communications." Discussing public business via written notes or electronic mail may constitute a "deliberation" that is subject to the OMA.[114] A Washington court held that e-mail communications among a majority of the members of a school board constituted a "meeting" under the state's open meetings law.[115]

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[110] *City of Austin v. Evans,* 794 S.W.2d 78 (Tex.App.-Austin 1990, writ denied).
[111] Op. Tex. Att'y Gen. No. DM-95 (1992).
[112] See *Hitt v. Mabry,* 687 S.W.2d 791 (Tex. App. – San Antonio 1985, no writ).
[113] *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 474 (W.D. Tex. 2001) , citing as authority a previous version of this paper by Bojorquez.
[114] See Op. Tex. Att'y Gen. No. JC-0307 (2000).
[115] *Wood v. Battle Ground School District* (25332-1II), June 27, 2001.

Lobbying
A person who acts independently to urge individual members of a governing board 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 he or she informs board members of other members' views on the matter. Although a person who is not a member of the governing body may be charged with violation of section 551.143 or 551.144 of the Open Meetings Act, under sections 7.01 and 7.02 of the Penal Code, that person does not commit an offense under these provisions unless, acting with intent, he or she aids or assists a member or members who knowingly act to violate the OMA.[116]

Executive Sessions

- Real Property Deliberations
- Security Measures
- Receipt of Gifts
- Consultation with Attorney
- Personnel Matters
- Economic Development
- Competitive Matters involving Electric Utilities

The exceptions pursuant to which the executive sessions (aka, "closed meetings") can be held are narrow and few. Various entities have exceptions unique to them. If it wishes to hold an executive session, the governing body must first: (1) convene in open session; (2) identify which issues will be discussed in executive session; and (3) cite the applicable exception.[117] All final actions, decisions, or votes must be made in an open meeting.[118] Before a governmental body can go into closed session to discuss matters covered by the Act, the governing body must identify and state in open session the specific authority under which the closed session is authorized by the Open Meetings Act. The seven (7) exceptions authorizing a governmental body to go into closed or executive session are as follows:

(1) Real Property Deliberations
To discuss the purchase, exchange, lease, or value of real property if an open meeting would be detrimental to negotiations.[119]

(2) Deliberation Regarding Security Measures
To discuss the implementation of security personnel, devices, or procedures.[120]

[116] Op. Tex. Att'y Gen. No. JC-0307 (2000).
[117] TEX. GOV'T CODE ANN. § 551.202.
[118] *Id.* § 551.102.
[119] *Id.* § 551.072.
[120] *Id.* § 551.076.

(3) Deliberation on Gifts

To negotiate a contract for a prospective gift or donation to the governmental body if an open meeting would be detrimental on negotiations.[121]

(4) Consultation with Attorneys

To confer with the city's attorney 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).[122] This exception applies strictly to legal matters and not to other issues such as financial considerations or the policy merits of a particular project.[123] The governmental body's attorney *must be present* at executive sessions held under the attorney-consultation exception to the OMA.[124]

This consultation is considered a "meeting" which must be properly posted and otherwise comply with the requirements of the OMA.[125] 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.[126]

Long Distance Consultations

The OMA includes several provisions that authorize members of a governmental body to participate in meetings using telephones or video-conference connections.[127] Before these provisions were adopted, the Act did not permit governmental bodies to meet by telephone or video-conference call, nor did it authorize any board member to participate from a remote location using telephonic or video-conference connections.[128]

Until recently, it was unclear whether attorneys may confer with their governmental body clients in open or executive session if the attorney is participating over the telephone, internet, or through video-conferencing.[129] Senate Bill 170 (2001) makes it clear that governing bodies can convene meetings (open or closed) for the purpose of consulting their attorney by telephone, internet or video conference. However, this section does not apply to consultations between a

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[121] *Id.* § 551.073.
[122] *Id.* § 551.071.
[123] Op. Tex. Att'y Gen. No. JC-0233 (2000).
[124] TEX. GOV'T CODE ANN. § 551.071.
[125] Op. Tex. Att'y Gen. No. JC-0057 (1999).
[126] *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").
[127] See TEX. GOV'T CODE ANN. §§ 551.121-551.127.
[128] Op. Tex. Atty. Gen No. JC-0194 (2000).
[129] See Op. Tex. Att'y Gen. No. H 484 (1974).

board and its "in-house" attorney. During open sessions, the consultation must be audible to the public.[130]

Joint Meetings (Open or Closed)
It is not uncommon for separate government entities to hold joint meetings to discuss such issues as regional planning. These meetings are permissible, but must comply with the OMA. If the relationship between the two entities is adversarial, then the Attorney Consultation exception may not be used to call an Executive Session (closed meeting). For example, the AG has considered the case of a joint meeting held by the governing bodies of a navigation district and a city to discuss the formation of an industrial district, and the annexation of certain land. The AG opined that the meeting was allowable, but had to be open to the public.[131]

(5) Personnel Matters

To discuss the appointment, employment, evaluation, reassignment, discipline or dismissal of a public officer or employee; or to hear a complaint or charge against a public officer or employee.[132]

Hiring Employees
A governmental body may meet in executive session to conduct interviews and deliberate about the hiring of a public employee.[133] Although deliberations may take place in an executive session, the board must take action to hire an employee in an open session for which proper notice has been given in accordance with the OMA.[134]

Independent Contractors
The personnel exception does *not* apply to matters regarding the hiring or firing of independent contractors unless, perhaps, they are also "officers."[135]

Public Employment Hearings
Government bodies are not allowed to meet in executive session to discuss an employee if the employee requests a public hearing.[136] When an employee makes an appropriate request for a public hearing, the governing body must grant such request.[137] However, when a pending lawsuit against a governmental body involves unresolved charges or complaints about an officer or employee, it is permissible under OMA for the body to discuss those charges with its attorney in private as long as the discussion relates to the lawsuit.[138]

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[130] See TEX. GOV'T CODE ANN. § 551.129.
[131] See Op. Tex. Att'y Gen. No. MW-417 (1981).
[132] TEX. GOV'T CODE ANN. § 551.074.
[133] Op. Tex. Att'y Gen No. H-1045 (1977), H-1045 (1977), and ORD 605 (1992).
[134] Op. Tex. Att'y Gen. Nos. H-1047 (1977), H-1045 (1977), and ORD 605 (1992).
[135] Op. Tex. Att'y Gen. No. MW-129 (1980); see also *Austin ISD v. Cox,* 679 S.W.2d 86, 90-91 (Tex. App--Texarkana 84).
[136] TEX. GOV'T CODE ANN. § 551.074(b).
[137] *James v. Hitchcock I.S.D.,* 742 S.W.2d 701 (Tex.App.--Houston [1st Dist..] 1987, writ denied); Op. Tex. Att'y Gen. No. DM-251.
[138] *Markowski v. City of Marlin,* 940 S.W.2d 720, (Tex.App.-Waco 1997), *citing* TEX GOV'T CODE ANN. § 551.074.

Appointments to Advisory Bodies
Volunteer members of commissions and task forces are generally not considered public officers or employees; thus, deliberations regarding the tenure of these individuals may not take place in executive session under the personnel matters exception. For example, the AG has determined that members of the Volunteer Fire Fighter Advisory Committee appointed by the Texas Commission on Fire Protection are not public officers or employees. Accordingly, the Texas Commission on Fire Protection may not meet in executive session to discuss the qualifications of persons under consideration for appointment to either of these advisory committees.[139]

Some cities have carefully documented their treatment of members of bodies such as Planning and Zoning Commissions as "*officers"*. Thus, these cities may arguably invoke the Personnel Matters exception when deliberating behind closed doors regarding these individuals.

(6) Economic Development
To discuss: (a) commercial or financial information received from a business prospect with which the city is conducting negotiations; or (b) financial or other incentives to the business project.[140]

Employee Conference
Commonly known as a "staff briefing", the only purpose of this type of meeting was to receive information from the employees or question the employees. Members of the governing body were not permitted to deliberate among themselves.[141] In 1999, the 76th Texas Legislature passed H.B. 156, which repealed this exception. However, the legislative intent makes clear that members of governing bodies may continue to confer with staff members individually to receive information.

(7) Homeland Security-Related Deliberations
In 2003, the Legislature's comprehensive Homeland Security Act provided that public officials may meet in Executive session to deliberate or discuss information related to critical infrastructure and security-related topics.[142]

Ratification
Generally, a governmental body may not ratify its prior illegal acts.[143] However, an action taken at an invalid meeting can be ratified at a later valid meeting as long as there is no retroactive effect.[144] An example includes the case of a city council that violated the OMA when it suspended its fire chief without pay at a meeting for which the city had failed to provide adequate notice. The city was found to have cured this violation by later modifying its decision at a subsequent, properly posted council meeting where it suspended the chief with pay.[145]

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[139] Op. Tex. Att'y Gen. No. DM-149 (1992); *See also* Tex. Gen. No. LO 94-063 (1994) (City Council may convene in executive session to discuss the appointment of members to a governing board).
[140] TEX. GOV'T CODE ANN. § 551.086.
[141] *Id.* § 551.075.
[142] TEX. GOV'T CODE ANN. §§ 418.181-418.183 .
[143] *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).
[144] *LCRA* at 646-47 (concluding that ratification of an invalid action cannot have retroactive effect).
[145] *Markowski,* 940 S.W.2d 720.

However, an employee who is initially terminated in violation of OMA, but is later properly terminated, may be entitled to injunctive relief allowing reinstatement, back pay, and benefits for the period of time between the illegal and legal terminations.[146] While some technical problems regarding "actions" can often be cured, OMA violations regarding "deliberations" are more difficult to fix.[147]

Excluding/Admitting Certain Persons

Only the members of the governmental body—such as the mayor and City councilmembers—have the right to convene in executive session. The fact that an individual is *ex officio* clerk of the commission does not make him/her a member of the commission. Thus, the commission may exclude staff members from executive sessions.[148]

A governmental body may admit its agents, representatives or third parties into executive session meetings if: (1) the interest is aligned with the governmental body; and (2) his/her presence is necessary.[149] Whether a particular person may be admitted must be decided by a case-by-case analysis of all relevant facts.[150] For example, the attorney-client privilege permits the six members of a city council who have been sued by another council member to exclude the plaintiff member from executive session held to consult with the city's attorney about that lawsuit.[151]

Information Received in Executive Session

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. [152]

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[146] *Ferris v. Texas Bd. Of Chiropractic Examiners.* 808 S.W.2d 514 (Tex.App.-Austin 1991).
[147] Tex. Att'y Gen. LO-95-055.
[148] Op. Tex. Att'y Gen. No. JM-6 (1983).
[149] Op. Tex. Att'y Gen. No. JC-375 (2001) (contractual requirement that a superintendent of schools attend executive sessions of board of trustees does not violate Open Meetings Act as long as superintendent has only duty, and not right, to attend executive sessions).
[150] Op. Tex. Att'y Gen. No. JM-238 (1984).
[151] Op. Tex. Att'y Gen. No. JM-1004 (1989).
[152] Tex. Att'y Gen. No. ORD 485 (1987).

Agendas

- Before a governmental body can have a meeting, it must tell the public who, what, where, when and why.
- Notice must be given 72 hours in advance (or 2 hours in advance for Emergency Meetings)
- Notice must be in a place readily accessible to the general public (bulletin board and website)
- Use caution when characterizing items as "action" or "discussion" items

Notice of Meeting
A governmental body must give written notice of the date, hour, place and subject of each meeting held by the governmental body.[153] Generally, notice is adequate for purposes of the Open Meetings Act if it alerts or informs the public that some action will be taken on a particular topic. In disclosing that some action will be taken, notice that is adequate for purposes of the OMA need not mention all possible results which may arise; yet, a higher degree of specificity is needed when the subject to be debated is of *special or significant* interest to the public.[154] For example, a court held that a violation of the OMA probably occurred, warranting preliminary injunction, when the posted agenda for meeting of a school board gave notice that the superintendent's "performance, job duties, evaluation and contract" would be discussed, but the meeting resulted in award of $500,000 in severance pay to superintendent.[155]

Open Meetings:

Post the agenda on a bulletin board or electronic bulletin board at a place convenient to the public in City Hall, . An electronic bulletin board is an electronic communication system that includes a perpetually illuminated screen on which the city council can post message or notices viewable without manipulation by the public. [156]

If at a meeting of a governmental body, a member of the public or a member of the governmental body inquires about a subject for which notice has not been given, any deliberation or decision about the subject of the inquiry shall be limited to: (a) a proposal to place the subject on the agenda for a subsequent meeting; (b) a statement of factual information; or (c) a recitation of existing policy.[157]

The purpose behind the OMA's notice requirement is to ensure that the public has the opportunity to be informed about governmental decisions involving public business.[158] The idea

[153] TEX. GOV'T CODE ANN. § 551.041.
[154] *Gardner v. Herring,* 21 S.W.3d 767 (Tex.App.-Amarillo 2000, no pet. h.).
[155] *Salazar v. Gallardo,* 57 S.W.3d 629, 634 (Tex.App.-Corpus Christi 2001)
[156] .TEX. GOV'T CODE ANN. §551.050.
[157] TEX. GOV'T CODE. § 551.042.
[158] *City of San Antonio v. Fourth Court of Appeals,* 820 S.W.2d 762, 765 (Tex. 1991), and *Acker v. Texas Water Comm'n,* 790 S.W.2d 299, 300 (Tex. 1990).

is that citizens are entitled to know not only what a government body decides, but how and why every decision is reached.[159]

Inadequate notice can be the basis for challenging governmental decisions.[160]

Time & Accessibility
The notice 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 for emergency meetings.[161] Notice of emergency meetings must be posted at least two hours in advance.[162] Cities must post notices on a bulletin board at a place convenient to the public at city hall.[163] If a city posts on the internet, they must still physically post the notice at city hall.[164]

Internet Postings

In addition to posting agendas on the municipality's bulletin board, the OMA has certain additional **online** posting requirements. Municipalities that have websites are required to publish meeting "notices" online on the city website. This online posting requirement extends to every ***regular, special or called governmental meeting*** subject to OMA. Only municipalities with populations greater than 48,000 are required to post the actual meeting agenda on the city website. An online notice of the meeting date, time, place and subject is sufficient for other municipalities. A PDF of the same agenda posted at city hall easily satisfies this. A visible link on the city's homepage that directs the user to "Notices and Agendas" will also satisfy the internet posting requirements. Note that a good faith effort to comply with the online posting requirement will not be affected by a failure caused by a technical problem beyond the municipality's control. *See* Tex. Gov't Code § 551.056 (a), (b) and (d); and § 551.043 (b)(3).

Individual Notice Not Required
It is irrelevant under the OMA whether the individuals most likely to be affected are given notice of a meeting. The purpose of the OMA is fulfilled as long as the general public is informed.[165] The intended beneficiary of the notice requirement is not the individual citizen who may be affected by the discussion or action at the meeting, but members of the interested public.[166] The OMA is not a legislative scheme for service of process; it has no due process implications.[167]

Specificity of Notice
The notice (a.k.a. "agenda") must be sufficient to inform the general public of the subject(s) to be addressed at the meeting. For example, notice of a meeting where a city council or Planning and Zoning Commission will consider whether to change the zoning of a particular area must

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[159] *Acker,* 790 S.W.2d at 300.
[160] *Id*.
[161] *See LaidlawWaste System (Dallas), Inc. v. City of Wilmer,* 904 S.W.2d 656, 661 (Tex. 1995) (raised posting error regarding date of the public hearings).
[162] TEX. GOV'T CODE ANN. § 551.045.
[163] *Id.* § 550.050.
[164] *Id.* § 551.043(b).
[165] *Markowski,* 940 S.W.2d 720.
[166] *City of San Antonio,* 820 S.W.2d at 765.
[167] *Rettburg v. Texas Dept. of Health,* 873 S.W.2d 408 (Tex. App.--Austin 1994).

describe the area. The notice of a meeting at which a board will hear the appeal of an employee grievance in executive session should fully disclose the subject matter of the meeting. The notice about the grievance ordinarily should include the name of the employee who is pursuing the grievance.[168] For example, a notice stating only that city council would discuss action to be taken on a firefighter's grievance is inadequate to inform the public that some action will be taken with regard to the fire chief or a captain of the fire department.[169]

Frequently, meetings include "Public Comment" periods. If so, those periods must be listed on the agenda.[170] An agenda item such as "Presentation by Trustee Smith" is not sufficiently descriptive and fails to alert the public to the particular issue the board will address.[171]

When a decision is one of special interest to the public and cannot be categorized as an ordinary personnel matter, a label like "personnel" fails as a description of that subject and does not constitute substantial compliance with the notice requirements of the OMA.[172] For example, the selection of a superintendent is not an ordinary personnel matter. The public has a special interest in matters relating to the employment of these type of officials because of: (1) the duties related to their offices, (2) the importance of their duties to the citizens, and (3) the broad contact with the public that those duties involve regardless if the size of the city's workforce or the size of the department's budget.[173]

Under the OMA the agenda must fully disclose the subject matter of a meeting to the members of the interested public.[174] More specific notice is required for subjects of special interest to the public than for routine matters.[175] The governmental body's usual *custom and practice* in formulating notice may also be relevant to its adequacy in a particular case, depending on whether it establishes particular expectations in the public about the subject matter of the meeting.[176]

The public must be informed as to the subject matter to be discussed. As long as the public is alerted to the topic for consideration, it is not necessary to state all of the consequences which may flow from consideration of the topic.[177]

Notice of Executive Sessions

The OMA does not specifically require governmental bodies to specify on their agendas that particular topics will be discussed in executive session instead of open session.[178] However, if it

[168] Op. Tex. Att'y Gen. No. JM-1112 (1989).
[169] *Markowski,* 940 S.W.2d 720.
[170] Op. Tex. Att'y Gen. No. JC-169 (2000).
[171] *Hays County Water Planning Partnership v. Hays County*, 41 S.W.3d 174, 180-81 (Tex. App.--Austin 2001, pet. filed).
[172] *Point Isabel ISD v. Hinojosa*, 797 S.W.2d 176 (Tex.App.—Corpus Christi 1990, *writ denied*).
[173] *Mayes v. City of De Leon,* 922 S.W.2d 200, 203 (Tex. App.-Eastland 1996).
[174] *City of San Antonio v. Fourth Court of Appeals,* 820 S.W.2d 762, 765 (Tex. 1991); *Cox Enterprises,* 706 S.W.2d at 960.
[175] *Cox Enterprises,* at 959; see also *Port Isabel I.S.D. v. Hinojosa,* 797 S.W.2d 176 (Tex. App--Corpus Christi 1990, writ denied.
[176] *River Road Neighborhood Ass'n South Texas Sports,* 720 S.W.2d 551, 557 (Tex.App.--San Antonio 1986).
[177] *Cox Enterprises, Inc. v. Board of Trustees of Austin I.S.D.,*706 S.W.2d 956, 958 (Tex. 1986).
[178] See Op. Tex. Att'y Gen. No. JC-0057 (1999), citing LO-90-27 (1990).

is the city's *custom and practice* to designate executive sessions on the notice, it may have an obligation to do so consistently. An abrupt departure from this practice may constitute insufficient notice.

In other words, when 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 deceive the public and thereby render the notice inadequate.[179]

Staff or Council Reports

Although the AG has consented to such general, generic agenda items as "Citizen Comment," the AG has declined to permit general topics such as "Staff Report."[180] Because employees are under the control and supervision of the governmental body, the body has the opportunity to list the specific items staff will be disclosing in advance. Posting general topics such as "City Manager's Report," "Mayor's Update," and "Council and Other Reports" without more information about the subjects of the update and reports does not sufficiently notify a reader as to what is going to be discussed and is therefore inadequate.[181] Note that the Government Code has been amended to add a section which allows non-substantive civic announcements to be made without having to give notice of the subject of the announcement, provided no action is taken or discussed.[182]

Emergency Meetings

Meetings that are called to address an imminent threat to public health and safety or urgent public necessity may be called after posting notice for two hours.[183] This includes the sudden relocation of a large number of residents from the area of a declared disaster to a municipality for a reasonable period immediately following the relocation. Notice of the meeting must be given to the media at least one hour before the meeting. The notice must clearly identify the nature of the emergency or urgent public necessity. The mere necessity for quick action does not constitute and emergency where the situation calling for such action is one which reasonably should have been anticipated.[184] The Texas Supreme Court has said that an emergency is a condition arising suddenly and unexpectedly, not caused by any neglect or omission of the person in question, which calls for immediate action.[185]

Recess

Separate notice is required in order for a governmental body to reconvene a meeting after an extended recess.[186] The governmental body can reconvene the next day without additional notice if it is done in good faith and not as an evasion of the Act.[187]

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[179] Op. Tex. Att'y Gen. No. JC-0057 (1999).
[180] Op. Tex. Att'y Gen. No. JC-0169 (2000).
[181] *See* Op. Tex. Att'y Gen. No. GA-0668 (2008).
[182] Act of June 16, 2009, 81st Leg., R.S., S.B. 1182, § 1 (to be codified at Tex. Gov't Code Ann. § 551.0415).
[180] TEX. GOV'T CODE ANN. § 551.045.
[181] *River Road Neighborhood Ass'n South Texas Sports,* 720 S.W.2d 551, 557 (Tex.App.--San Antonio 1986).
[182] *Goolsbee v. Texas & N.O.R. Co.,* 243 S.W.2d 386, 388 (1951).
[183] *Rivera v. City of Laredo,* 784 S.W.2d 787, 793 (Tex.App.--San Antonio 1997, writ denied).
[187] Op. Tex. Att'y Gen. No. H-1000 (1997).

Minutes

- Must keep certified copy of written minutes *or* a tape recording for all meetings (both open and closed).
- A brief summary is all that is required.
- A verbatim transcript is not necessary.

A governmental body must preserve the written certified agendas (a.k.a. "minutes") or an audio tape recording of all meetings (open and closed), except for closed consultations with the body's attorney. If written minutes are kept instead of a tape recording, the minutes must include every action taken by the governmental body.[188]

Specificity
The minutes must state the date and time of the meeting, the names of those present, the subject of each deliberation and indicate each vote, order, decision or other actions taken.[189] Although minutes do not have to be a verbatim transcript of the meeting, they must provide a brief summary of each deliberation.[190]

Retention
Minutes of executive sessions must be kept for at least two years after the date of the meeting, and longer if litigation is pending.[191] Minutes of open sessions must be kept in compliance with the entity's records retention schedule.

Individual Notes & Recordings
A member of a governing body may not copy for his/her own use a tape recording of an executive session of a meeting in which he participated, nor may the governmental body permit him to do so.[192] However, a member of a governing body may review the certified agenda or tape recording of a closed meeting regardless of whether the member attended the meeting.[193]

Violations

- Conspiracy to circumvent the OMA
- Calling / participating in an illegal closed session
- Closed meeting without agenda or tape recording
- Disclosure of certified agenda or tape recording of closed meeting
- Punishment can include fines and/or jail
- Might create liability for civil damages
- Actions taken in violation of the OMA are ***voidable***
- ***Affirmative Defense***

[188] Op. Tex. Att'y Gen. No. H-1163 (1978).
[189] TEX. GOV'T CODE ANN. § 551.021.
[190] Op. Tex. Att'y Gen. No. JM-840 (1988).
[191] TEX. GOV'T CODE ANN. §§ 551.103-551.104.
[192] Tex. Att'y Gen. LO 98-033 (1998).
[193] Op. Tex. Att'y Gen. No. JC-0120 (1999).

Enforcement
Members of a governing body who knowingly take actions in violation of the Act may subject themselves to prosecution by county or district attorneys.[194] District courts have jurisdiction over criminal violations of the Act as misdemeanors involving official misconduct.[195] Thus, complaints should be presented to the district attorney or criminal district attorney. The Office of the Attorney General has no independent enforcement authority, but local prosecutors may request assistance from the Attorney General in prosecuting criminal cases, including those arising under the Open Meetings Act.[196]

Conspiracy
A member of a governmental body commits an offense if the member knowingly conspires to circumvent the OMA by meeting in numbers less than a quorum for the purpose of secret deliberations (fine of not less than $100 or more than $500; and/or jail for not less than one month or more than six months).[197]

Closed Meeting Without Authorized Exception
A member of a governmental body commits an offense if the member knowingly calls or aids in calling, or participates in an unauthorized closed meeting (fine of not less than $100 or more than $500; and/or jail for not less than one month or more than six months).[198]

Closed Meeting Without Minutes
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 (Class C misdemeanor).[199]

Disclosure of Closed Meeting Minutes
A member of a governmental body who, 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 is liable for: (a) actual damages; (b) reasonable attorney fees and court costs; and possibly (c) exemplary damages. An offense is a Class B misdemeanor.[200]

Note that nothing in the statute prevents those participating in an executive session from ***orally*** divulging the details of the meeting to outside parties. The OMA has no bearing upon what members of that body may choose to say in public.[201] Some cities have attempted to enact ethics rules that prohibit members of the city council from orally making the contents of any executive session known to the public. The First Amendment to the U.S. Constitution may make it difficult to enforce such rules.

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[194] TEX. GOV'T CODE ANN. § 551.144.
[195] *ID.*
[196] *See Tovar v. State,* 978 S.W.2d 584 (Tex. Crim. App. 1998)
[197] TEX. GOV'T CODE ANN. § 551.143.
[198] *Id.* § 551.144.
[199] *Id.* § 551.145.
[200] *Id.* § 551.146.
[201] Op. Tex. Att'y Gen. Nos. JM-1071 (1989) and MW-563 (1982).

Ignorance is no Excuse
There is no room for mistakes. The Texas Court of Criminal Appeals (the highest criminal court in the state) has held that under the plain language of the OMA, a government official can be found guilty of violating the OMA by calling or participating in an impermissible closed meeting, ***even when the official is unaware*** of the illegality of the meeting.[202] According to the court, the OMA "is not concerned with whether the actor knows the meeting is prohibited". The court found no good faith exception in the statute.

Affirmative Defense
There is an affirmative defense to prosecution if the member of the governing body acted in reasonable reliance on: (a) a court order; (b) a written interpretation contained in an opinion of a court of record; (c) the attorney general; or (d) the written advise of the attorney for the governing body.[203]

Actions are Voidable
An action taken by a governmental body in violation of the OMA is voidable. For example, a single challenge to a city's alleged failure to comply with the OMA could invalidate an ***entire*** annexation.[204]

Other Meeting-Related Issues

Preparing the Agenda
The governmental body as a whole has the authority to determine its own agenda.[205] The board may adopt *reasonable* rules consistent with relevant provisions of law--including, among other things, the OMA--to govern the conduct of its meetings.[206] The board may designate an agenda clerk who is responsible for compiling the items to be to be placed on the agenda. The board may also prescribe the manner in which items are to be submitted for such inclusion. Absent the presence of reasonable rules adopted by the board, each board member must be permitted to place on the agenda any item of his/her choosing.[207] The OMA does not provide the public with any control over the governing body's agenda. Nonetheless, cities may voluntarily enact local rules that establish a process for citizens to request that items be placed on the agenda.

Agenda preparation procedures may not involve substantive deliberations among a quorum of members of a governmental body except in a public meeting for which notice has been posted.[208]

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[202] *Tovar v. State,* 978 S.W.2d 548 (Tex. Crim. App.[en banc] 1998.
[203] H.B 156, 76th Texas Legislature (Regular Session 1999).
[204] *City of San Antonio v. Hardee,* 70 S.W.3d 207, 212, and 213 (Tex.App.-San Antonio 2001, no pet. h.) (plaintiffs claimed that the annexation was accomplished by written memorandum rather than an authorized action of the City Council meeting in conformity with the OMA).
[205] Op. Tex. Att'y Gen. Nos. DM-228 (1993) and JM-62 (1983).
[206] Op. Tex. Att'y Gen. No. DM-473 (1998) (upholding a home-rule city rule of procedure requiring items be placed on the agenda if requested by the mayor, five council members, or a majority of the council).
[207] Op. Tex. Att'y Gen. No. JM-63 (1983).
[208] Op. Tex. Att'y Gen. No. DM-473 (1998).

Establishing a Quorum
In a Type A general-law municipality the governing body consists of a mayor and five aldermen.[209] For a regular meeting[210] of the Board of Aldermen a majority of the "aldermen" constitutes a quorum.[211] For a special (i.e., "called") meeting,[212] or a meeting to consider the imposition of taxes, a quorum consists of two-thirds (2/3) of the aldermen.[213] Thus, three of the five aldermen constitute a quorum under ordinary circumstances, while a quorum for a special meeting or a meeting to consider the imposition of taxes will be four aldermen.[214]

Based on the plain language of the statute and the Attorney General opinions interpreting these provisions, the presence of the ***mayor*** of a Type A city is ***not*** counted toward the establishment of a quorum. If the mayor is absent, the mayor pro-tem or the alderman serving as presiding officer at the meeting are counted toward the quorum.

> In a ***Type B*** city, the mayor and three councilmembers constitute a quorum.[215] If the mayor is absent, four aldermen are required in order to conduct business.
>
> In a ***Type C*** city, a quorum consists of the mayor and one commissioner or two commissioners.
>
> In a ***Home Rule*** city, the number of persons constituting a quorum will be defined within the city's charter.

Frequency of Meetings
There is no statutory requirement mandating that Type A or Type B cities meet with any particular frequency (e.g., once a month). The Local Government Code provides that the city council of a Type A city "shall meet at the time and place determined by a resolution" and shall determine the rules of its proceedings.[216] Accordingly, city councils in Type A and Type B[217] cities are authorized to determine their own meeting times by adopting an ordinance, resolution, or procedural rules.[218]

However, Type C cities must hold at least meetings at least once a month.[219]

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[209] *See* Tex. Loc. Gov't Code §§ 6.001 (authority to incorporate as a Type A general-law municipality); 22.031 (composition of governing body).
[210] A "regular meeting" is commonly defined as a meeting conducted at a regularly scheduled date and time.
[211] Tex. Loc. Gov't Code §22.039.
[212] A "special meeting" is commonly defined as a meeting conducted at an unusual date or time.
[213] Tex. Loc. Gov't Code § 22.039.
[214] *See* Op. Tex. Att'y Gen. No. JC-0028 (1999).
[215] Tex. Loc. Gov't Code Ann. § 23.028.
[216] §22.038.
[217] Type B cities have the same "authority, duties, and privileges" as Type A cities unless it would conflict with state law. See Tex. Loc. Gov't Code §51.035.
[218] See Tex. Atty. Gen. Op. JC-0028 (1999).
[219] Tex. Loc. Gov't Code §24.025.

Regulating Public Comment

The OMA does not itself give the public a right to speak at government meetings. However, courts have recognized a general Constitutional right to address and petition a governing body.[220] Also, a home-rule city's charter might require public comment sessions. Thus, governments often set aside time for public comment at regular meetings. Governmental bodies may limit the number of persons who may speak on a topic and the length and frequency of their presentations. In imposing limitations, the board must act reasonably and may not discriminate on the basis of the particular views expressed, nor arbitrarily deny citizens their right to apply to the government for redress of grievances as guaranteed by the Texas Constitution.[221] Any limitations must be administered in an even-handed fashion.

Procedural Rules

Once an item is on the agenda, the manner in which deliberations are conducted is determined by the parliamentary rules (if any) that the governmental body has adopted, such as Robert's Rules of Order.[222] Governmental bodies have the right to regulate their own proceedings and may adopt reasonable rules in order to maintain order at a meeting. Rules may govern the making of motions, adjournment, the tabling or reconsideration of matters, and similar issues. The enactment of rules and the effect of their violations are not prescribed by state statute, and their violation will not invalidate the action of a government body unless a majority of that body has adopted a rule specifically providing for such invalidation.[223]

Disrupting a Meeting / Disorderly Conduct

A person commits an offense if, with intent to prevent or disrupt a lawful meeting, procession, or gathering, the person obstructs or interferes with the meeting, procession, or gathering by physical action or verbal utterance. Such an offense is a Class B misdemeanor.[224] With narrowing construction, this section prohibits only speech that is not protected by First Amendment to the U.S. Constitution.[225] Given the competing First Amendment freedoms at stake, Texas Penal Code §42.05 can be rendered constitutional if it is construed to criminalize only physical acts or verbal utterances that ***substantially impair*** the ordinary conduct of lawful meetings, and thereby curtail the exercise of others' First Amendment rights.[226] Section 42.05 reaches only the disorderly physical or verbal conduct of individuals who are acting with the ***specific intent*** to prevent or disrupt a meeting. A person of ordinary intelligence knows the type of conduct that is likely to cause an impairment to the ordinary conduct of a meeting.[227]

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[220] *Prof. Assn. Of College Educators v. El Paso County Community Dist.,* 678 S.W.2d 94 (El Paso Civ.App. 1984, writ ref'd n.r.e.): Op. Tex. Att'y Gen. No. H-188.

[221] Tex. Att'y Gen. LO 96-111.

[222] This portion borrows heavily from the article by Monte Akers, Legal Director of TML, which appeared in "Legal Q&A," Texas Town & City, 1997 Number 9, p.10.

[223] *See* TEX. LOC. GOV'T CODE ANN. § 22.038 (1996), TEX. GOV'T CODE ANN. § (1994), and Op. Tex. Att'y Gen. No. DM-228 (1993).

[224] TEX. PEN. CODE ANN. § 42.05.

[225] *Morehead v. State* 746 S.W.2d 830 (App. 5 Dist. 1988 review granted, reversed), 807 S.W.2d 577, rehearing on p.d.r. denied.

[226] *Morehead,* 807 S.W.2d at 581 [emphasis in original].

[227] *State v. Markovich*, No. 179-00(Tex. Crim. App. May 29, 2002) (UT student was arrested by DPS troopers for heckling former President George Bush from the upper gallery of the House Chamber).

A person also commits an offense if the person intentionally hinders an official proceeding by noise or violent behavior and continues after explicit official request to desist. Such an offense is a Class A misdemeanor.[228]

IV. MANDATORY TRAINING

The Open Meetings Act (Government Code section 551.005) and the Public Information Act (Government Code section 552.012) impose mandatory open government educational requirements on elected and appointed officials who are subject to the those laws. The requirement for open government training took effect on January 1, 2006, and requires at least two hours of open government training; consisting of a one-hour educational course on the Open Meetings Act and one-hour educational course on the Texas Public Information Act.[229] Training is not to exceed a maximum of four hours.

Who is Subject to the Training Requirement?
Each elected or appointed official who is a member of a governmental body subject to the Open Meetings Act or the Public Information Act must attend training. Additionally, employees who serve as a governmental body's designated public information coordinator are required to complete the Public Information Act training course. Officials who are in office ***before January 1, 2006*** have one year until ***January 1, 2007*** to complete the required training. Officials who are elected or appointed ***after January 1, 2006*** have ***90 days*** within which to complete the required training.[230] The entity providing the training is required to give the participant a certificate of course completion. The public official or public information coordinator is then required to keep the certificate on file with their governmental body and make it available for public inspection upon request.[231]

Judicial Officials/Judicial Employees
Judicial officials and judicial employees do not need to attend Public Information Act training, but may be responsible for completing Open Meetings Act training. Judicial officials and employees do not need to obtain training regarding the Public Information Act because public access to information maintained by the court system is governed by Rule 12 of the Judicial Administration Rules of the Texas Supreme Court and by other applicable laws and rules.[232] However, if a judge or judicial employee serves as a member of a governmental body subject to the Open Meetings Act, we advise that they should comply with the Open Meetings Act training requirements.

Failure to Obtain Training
The law imposes no specific penalty on officials who fail to attend open government training. The purpose of the new law is not to punish public officials, but to foster open government by making open government education a recognized obligation of public service. Despite this lack of a penalty provision, officials should be cautioned that a deliberate failure to comply with the

[228] TEX. PEN. CODE ANN. § 38.13.
[229] TEX. GOV'T CODE ANN. §§ 551.005, 552.012.
[230] TEX. GOV'T CODE ANN. §§ 551.005, 552.012.
[231] *Id*.
[232] TEX. GOV'T CODE ANN. § 552.0035.

training requirements could result in an increased risk of criminal prosecution should they ever be accused of violating the Open Meetings Act or the Public Information Act.

V. CONCLUSION

Requiring that government decision-making be conducted out in the open furthers the ideal of a participatory democracy and discourages graft and corruption. However, the mandates of Open Government also have the consequence of imposing additional costs and burdens on well-meaning public servants.

Administering your agency's provision of public access to data and meetings is a very important service you provide. Thus, it is worthwhile to budget appropriately and train your personnel adequately, and to develop policies and procedures to help ensure efficiency and compliance.

This paper and any accompanying presentations are intended for general educational purposes only, and do not constitute legal advice.