COMPLICATIONS WITH OPEN MEETINGS

Common Glitches that Arise

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INTRODUCTION

For members of the public to participate in their democratic institutions, the Texas Open Meetings Act (TOMA) mandates the public be given access to the decision-making process. While TOMA specifies many requirements and procedures, municipal officials often find themselves advising clients on matters not addressed by the statute (or related jurisprudence). This paper provides practical means of addressing many common questions, glitches and challenges that arise regarding the mechanics of planning and running public meetings.

1. PREPARING THE AGENDA

While TOMA mandates agendas to be posted in order to conduct meetings, the statute is silent on how agendas are formulated. Thus, the governmental body as a whole has discretion to determine its own agenda. Tex. Att'y Gen. Op. Nos. DM-228 (1993) and JM-63 (1983). The governmental body can adopt *reasonable* rules consistent with relevant provisions of law—including, among other things, TOMA, a home-rule charter, enabling legislation or bylaws—to govern the conduct of its meetings. Tex. Att'y Gen. Op. No. DM-473 (1998) (upholding the rule of procedure of a home-rule municipality requiring items be placed on the agenda if requested by the mayor, five council members, or a majority of the council). The governmental body may designate an agenda clerk who is responsible for compiling the items to be placed on the agenda. The governmental body 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 governmental body member must be permitted to place on the agenda any item of the member's choosing. Tex. Att'y Gen. Op. No. JM-63 (1983). Agenda preparation procedures cannot involve substantive deliberations among a quorum of members of a governmental body except in a public meeting for which notice has been posted. Tex. Att'y Gen. Op. No. DM-473 (1998).

Local rules (i.e., policies) can specify the layout and format for the agenda because state law does not specify how the document looks. While it is common to have the municipal clerk (aka, city secretary) sign and date agendas upon posting them that is not a mandated requirement under state law. Cities with that practice might be following a local custom or policy.

2. AGENDA PACKETS

Texas law does not mandate that supporting documentation or backup materials related to a posted agenda be proactively shared with the public (before or after a meeting). Thus, government entities have a great deal of discretion to determine what they give the governmental bodies, what they provide to the public upfront, and what is withheld (subject to a possible Open Records Request).

In an effort to provide greater transparency, it has become common practice for cities to post not only an agenda of items to be discussed at a meeting, but also a full ***agenda packet*** of supporting materials for each agenda, such as copies of the proposed ordinances, resolutions, contracts, and relevant background materials for each item to be considered at the meeting.

When publicly posting an agenda packet, government entities are urged to take care to ***balance*** the goal of transparency with considerations of whether certain types of information in the agenda packet may need to be kept confidential and privileged. Government entities should also consider whether other sensitive information ought to be excluded from public agenda packets in order to protect against risks of malicious use of that information by others. With government entities being targets of internet fraud and cybersecurity attacks, limiting what types of data are included in publicly posted agenda packets is one approach to protect a government entity's data, positions, and interests (as well as those of third parties with whose data the government entity serves as records custodian).

If sensitive materials are needed for the governmental body's consideration of an agenda item, the government entity should consider providing such materials *separately* and *securely* to the governmental body ***without*** including the information in the publicly posted agenda packet. Not including materials in a publicly posted agenda packet does not necessarily deny citizens any access to the data. If a specific request for the information is received, the government entities must process that Open Records Request consistent with the Texas Public Information Act (PIA)(*see* Texas Government Code Chapter 552), and then the government entities may withhold or disclose the information accordingly.

The following is a list of examples of types of materials that government entities may wish to consider not including in publicly posted agenda packets.

A. Confidential, Privileged, Sensitive Materials.

Any information deemed confidential, privileged, or sensitive information by law should not be included in the agenda packet. Government entities have a duty to safeguard such materials, and failure to do so could impose liability on the government entity. Some examples of information that is likely confidential:

- Dates of Birth / Social Security Numbers
- Motor Vehicle Information (DL, LP, VIN)
- Personal Financial Information
- Personal Medical Information or Injury
- Certain Personnel Information (Home Address, Home Phone, Cell Phone, Family Member Information).

B. Bank Account Information.

Due to the risk of cybersecurity attacks or fraud related to banking information, information about the government entity's bank account(s) or routing number(s) should be removed or redacted for publicly posted agenda packets.

C. Vendor Payment Method Information.

Contracts with vendors are often included in agenda packets, but this is not a requirement under state law. If including a contract in an agenda packet, the contract documents should be reviewed for any sensitive financial information, including payment methods (i.e., bank account(s) and routing number(s) or other payment method instructions) which should be removed or redacted from the publicly posted packet.

D. Critical Infrastructure.

Information related to "critical infrastructure" can be withheld from public disclosure under the Texas Homeland Security Act. "Critical infrastructure" includes all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation. This usually includes:

- Electrical Grid Information;
- Water System Plans and Treatment Plant Information;
- Security Information (including physical security like location of cameras and IT security protocols).

E. Executive Session Materials.

TOMA provides certain exceptions for when government entities may deliberate in closed, executive sessions. In general, background materials and information related to executive sessions should not be included in a publicly posted agenda packet. In many cases, the justification for the closed session is also associated with matters that may involve confidential, privileged, and sensitive materials that may have other laws governing the government entity's duty to safeguard such information and may impose liability for inappropriate disclosures.

F. Attorney-Client Privileged Communications or Materials.

Only the governing body as a whole can waive privilege and release confidential communications to the public. Release of a confidential communication to one non-privileged party, may waive the privilege and require release to the public.

G. Pending Litigation, Settlement Negotiations or Agreements.

- TOMA allows the government entity to deliberate in closed meeting with its attorney regarding pending or contemplated litigation or a settlement offer. *See* Tex. Gov't Code § 551.071.
- PIA allows the government entity to withhold from public disclosure information related to anticipated or pending litigation. *See* Tex. Gov't Code § 552.103.

H. Pending Real Estate Transaction Documents.

- TOMA allows the government entity to deliberate in closed meetings regarding the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person. See Tex. Gov't Code § 551.072.
- PIA allows the government entity to withhold from public disclosure information related to the location of real or personal property for a public purpose prior to public announcement of the project; or appraisals or purchase price of property for a public

purpose prior to the formal award of contracts for the property. See Tex. Gov't Code § 552.105.

I. Pending Economic Development Negotiation Documents.

- TOMA allows the government entity to deliberate in closed meetings regarding commercial or financial information that the entity has received from business prospects. See Tex. Gov't Code § 551.087.
- PIA allows the government entity to withhold from public disclosure information related to economic development negotiations involving the entity and a business prospect. See Tex. Gov't Code § 552.131.

Regardless of whether the government entity adopts a formal policy or simply modifies its practice (tradition/custom), it would be wise to train all staff members involved in agenda preparation to ensure consistency and uniformity (and redundancy in case of absences, etc.).

Agenda packets, recordings of meetings, and any other records associated with an open or closed meeting are going to be local or state records. As such, they must be retained and managed by the local government or state agency as required by the respective retention schedule and may be destroyed only as permitted under the retention schedule. Tex. Loc. Gov't Code §§ 202.001–.009 ("Destruction and Alienation of Records"); Tex. Gov't Code § 441.187 (governing destruction of state records).

3. POSTING ONLINE

Many governmental bodies and economic development corporations are required to post notice and an agenda of the meeting on their internet websites, in addition to other postings required by the Act. The validity of a posted notice made in good faith to comply with TOMA is not affected by a failure to comply with its requirements due to a technical problem beyond the control of the entity. Tex. Gov't Code §551.056. However, for example, the municipal clerk going on vacation and their backfill simply forgetting to upload the agenda is probably not considered a technical difficulty excusing the lack of online posting.

4. BREAKING QUORUM

Also commonly referred to as Refusal to Attend, Quorum Busting, or a Legislative Walkout, Breaking Quorum occurs when members of the governmental body purposefully (intentionally, knowingly) leave a meeting or refuse to attend the meeting for the purpose of denying the group a quorum, effectively preventing the meeting from being convened, and thus precluding deliberations (discussions and/or actions). This is the use of an intentional absence for political purposes (i.e., as a means of obtaining a political objective).

A key concern that arises is whether the intentionally absent member's action should be considered protected expressive conduct under the First Amendment to the U.S. Constitution. This is an important question because many government entities enact procedural or parliamentary rules that compel attendance. It is unlikely that such local rules would be deemed unconstitutional because it is doubtful that the member's decision not to show up would be construed as protected activity.

To be protected, conduct must clearly convey a particularized message understood by the public (*Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). Absence alone, without accompanying speech or context, generally fails this test. Courts do not recognize non-attendance as inherently expressive. In *In re Abbott*, 628 S.W.3d 288 (Tex. 2021), the Texas Supreme Court upheld the Texas House's power to compel attendance. The Court emphasized that disruption of legislative function—through tactics like quorum busting—justifies state intervention without violating the First Amendment. Under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), the state's interest in efficiency and functionality may outweigh the official's speech interest when acting within their role.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court held that public employees do not speak as citizens when acting within their official duties—thus, their speech is not protected under the First Amendment in that context. While elected officials are not employees, courts extend similar logic to uphold regulatory authority when their conduct obstructs core functions. Even assuming quorum busting is expressive conduct, compelling attendance would likely survive strict scrutiny due to the compelling government interest in maintaining operational continuity and avoiding governance paralysis.

5. ABSTENTIONS, RECUSALS & ROLL CALL VOTES

In common usage, the terms abstention (to abstain) and recusal (to recuse) are often used interchangeably. However, in legal and ethical contexts, abstain and recuse have distinct meanings. Abstaining means not participating in a vote or decision, frequently due to unstated personal reasons or a lack of a clear position on the matter. Recusing means withdrawing from participating in a specific matter, often due to a conflict of interest or identified biased position.

Some governmental bodies are subject to local procedural rules (i.e., charters, ordinances or policies) mandating that members of governmental bodies vote on all matters before the body unless they are required to recuse themselves due to a Conflict of Interest under state law or a local Code of Ethics. In these entities, voluntary recusal without explanation is not allowed. A common objection to such rules compelling voting (with narrow, limited exceptions) is that there is a First Amendment Right under the U.S. Constitution to decline the opportunity to vote and that compelling such actions is a violation of Free Speech.

Abstaining or recusing oneself from deliberations or voting without identifying a basis is not clearly protected expressive conduct and may be regulated to ensure government functionality. In *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117 (2011), the Supreme Court held that a legislator's vote is not personal speech under the First Amendment and can be subject to ethics regulations.

Like in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), where public employee speech pursuant to official duties was not protected, similar principles apply to elected officials when abstention occurs within their legislative role (i.e., Speech in Official Capacity). TOMA does not directly address recusals or abstentions, but it presumes participation by defining meetings around deliberation by a quorum (*see* Tex. Gov't Code § 551.001(2)). Local governments may adopt procedural rules requiring participation, provided they are content-neutral and allow alternative forms of expression. Mandating participation must be done carefully. If a recusal is motivated by deeply held beliefs or political protest, forced

participation could implicate expressive conduct. However, absent a clear communicative element, silent abstention is unlikely to trigger First Amendment protection.

Roll Call Votes are seldom required by state law. Also known as a Record Vote, these are required when ratifying certain budget actions or property tax increases. Tex. Loc. Gov't Code §102.007.

6. SHIFTING MAJORITY THRESHOLDS

Pursuant to Roberts Rules of Order – Frequently Asked Questions:

> The word "majority" in the context of governmental body meetings means, simply, *more than half*. The use of any other definition, such as 50 percent plus one, can cause problems. Suppose in voting on a motion 17 votes are cast, 9 in favor and 8 opposed. Fifty percent of the votes cast is 8½ so that 50 percent plus one would be 9½. Under such an erroneous definition of a majority, one might say that the motion was not adopted because it did not receive 50 percent plus one of the votes cast, although it was, quite clearly, passed by a majority vote. (Robert's Rules of Order, n.d.). FAQs. https://robertsrules.com/frequently-asked-questions/.

> The requirement of a two-thirds vote means *at least two-thirds*. As a consequence, nothing less than two-thirds will do. If 101 votes are cast, 67 affirmative votes are not at least two-thirds. They are less than two-thirds, and will not suffice. A simple method of determining whether a motion has attained a two-thirds vote is to observe whether the affirmative votes are at least double all the other votes. This means—except in the rare instance when a vote other than "yes" or "no" is counted in the total, such as an illegible ballot—they must be at least double the negative votes. So, if there are 34 in the negative, a two-thirds vote is attained only if there are 68 (which is 34 × 2) or more in the affirmative. (Robert's Rules of Order, n.d.). FAQs. https://robertsrules.com/frequently-asked-questions/.

Although common to track (i.e., record) "abstention votes," the phrase can be confusing because in actuality an abstention is a refusal to vote.

> To abstain means to refrain from voting, and, as a consequence, there can be no such thing as an "abstention vote." In a typical situation, if the rules require either a "majority vote" or a "two-thirds vote," abstentions have no effect on the outcome of the vote because what is required is either a majority or two-thirds of the votes cast. On the other hand, *if* the rules explicitly require a majority or two-thirds *of the members present*, or a majority or two-thirds *of the entire membership*, an abstention will have the same effect as a "no" vote. Even in such a case, however, an abstention is not a vote and is not counted as a vote. (Robert's Rules of Order, n.d.). FAQs. https://robertsrules.com/frequently-asked-questions/.

Some local rules or charter provisions (e.g., City of Fulshear, Texas) provide that abstentions from voting on a particular matter are required by law to abstain and will be excluded for purposes of determining the majority. Tex. Att'y Gen. Op. No. KP-0231 (2019).

In addition to local charters or ordinances, how an abstention is treated may depend on an organization's bylaws and parliamentary procedures, such as Robert's Rules of Order or Rosenberg's Rules of Order.

On the question of whether abstentions count as votes cast, under Robert's Rules abstentions are not counted as votes at all. They are simply recorded as present but not voting. They neither contribute to the "yes" or "no" vote totals, nor do they affect whether a motion passes or fails.

7. DISRUPTING A MEETING

A person commits a criminal 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. Tex. Pen. Code § 42.05. With narrowing construction, this section prohibits only speech that is not protected by First Amendment to the U.S. Constitution. *Morehead v. State*, 746 S.W.2d 830 (Tex. App.—Dallas 1988, pet. granted) (reversed on other grounds), 807 S.W.2d 577, rehearing on p.d.r. denied. 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. *Morehead*, 807 S.W.2d at 581 [emphasis in original]. Texas Penal Code § 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 behavior that is likely to cause impairment to the typical conduct of a meeting. *State v. Markovich*, No. 179-00 (Tex. Crim. App. May 29, 2002) (A University of Texas student was arrested by DPS troopers for heckling former President George Bush from the upper gallery of the House Chamber.) A federal appellate court has ruled that it is constitutionally permissible to exclude a person from a public meeting because of the person's refusal to address the topic for which the meeting was convened, and because of his disruptive manner, so long as the expulsion was not because of any viewpoint the person expressed. *Steinburg v. Chesterfield County Planning Commission (Virginia)*, No. 07-1181 (4th Cir. 2008).

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. Tex. Pen. Code § 38.13.

Because TOMA specifically allows governmental entities to adopt reasonable rules, it is suggested that entities enact policies proactively specifying where members of the audience can hold signage (e.g., rear of the room, or off to the side so as not to obstruct views or distract speakers). It is also suggested that presiding officers (e.g., mayors, county judges, chairs of boards or commissions) meet with their chief law enforcement officers periodically to collaborate on how outbursts and overly-vigorous participants will be handled (should the issue arise).

8. PARTICIPANTS IN EXECUTIVE SESSION

The issue of who is allowed behind closed doors to participate in executive session is not answered in TOMA. Generally, all meetings of governmental bodies must be conducted in open session so that the public may observe and listen to explanations and deliberations. Closed meetings (i.e., executive sessions) are authorized in certain limited circumstances.

A governmental body may exclude a member from an executive (closed) session when the member has a legal interest that is contrary to the government entity. It is clear that a governmental body may

exclude a member from an executive session held to discuss the defense of a lawsuit that was filed by that member against the government entity or governmental body. Whether a member can be excluded in any other circumstance will depend on the nature of the contrary legal interest.

The Office of the Attorney General ("OAG") has issued few opinions addressing the circumstances in which a governmental body can exclude a board member from an executive session. The authority to exclude the member will depend on the specific nature of that member's legal interest. A 2005 OAG opinion addressing this issue suggests that a board cannot exclude another board member from an executive session that is closed under § 551.071 of the Texas Government Code unless the purpose of the meeting is to discuss litigation that has been filed against the board or board members and in which the board member's interest is adverse. Tex. Att'y Gen. Op. No. GA-334 (2005). The OAG was asked whether a board member of a groundwater conservation district could be excluded from the district's executive session to discuss a threat made by the member to sue the district if the district declined to issue a permit sought by the member's employer. The OAG refused to answer the question, on the basis of mootness and "novel issues," but stated that "there is virtually no legal authority relevant to this inquiry" and that "[w]e find no authority on excluding a board member who merely contemplates litigation against his board."[1] *Id.* at 11. Additionally, the OAG declined to answer whether the governmental body's attorney-client privilege would be waived if the member attended an executive session to discuss the proposed suit. *Id.* at 11.[2]

However, the OAG has opined that the board of trustees of a school district may exclude a trustee from an executive session that was held to consult the board's attorney regarding a lawsuit that the member filed against the other six board members. Tex. Att'y Gen. Op. No. JM-1004 (1989). The OAG explained that each board member would ordinarily be entitled to attend all board meetings, but that the statutory authority to meet in executive session for consultation with an attorney was based on the policy that the board has a right to communicate privately with their attorney outside the presence of the opposing party in the lawsuit, and that requiring the opposing board member to attend the meeting would "undermine the common law and statutory protection given attorney-client communications and compromise the efficacy of the adversary system of justice." *Id.* at 4. The board could therefore exclude the opposing board member from the meeting during which the only agenda topic was the defense of the lawsuit. *Id.* at 4.

There are no other OAG opinions or caselaw on point regarding a governmental body's general authority to exclude a board member from an executive session on the basis that the member has an adverse legal interest. However, OAG opinions have considered whether officers or employees of a

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[1] The opinion leaves unresolved whether a board member can be excluded on the basis of contemplated litigation by the board member. Section 551.071 of the Texas Government Code authorizes a governing body to meet in executive session to consult with its attorney regarding "pending or contemplated litigation." The purpose of allowing private consultation with an attorney would likely be frustrated if a board member who threatens litigation against the governmental body is allowed to attend an executive session to listen to discussion of defense strategies. Other statutory exceptions that authorize an executive session may also provide a basis to exclude a board member, such as the authority to conduct a closed meeting to deliberate regarding real property, but there are no opinions addressing the exclusion of board members. *See* § 551.072, Tex. Gov't Code (authorizing governmental body to conduct closed meeting to deliberate purchase, exchange, lease, or value of real property if open deliberation would have detrimental effect on governmental body in negotiations with a third person).

[2] The opinion suggested that a public officer who is suing or planning to sue their governmental body voluntarily refrain from attending executive session regarding the litigation and from accepting confidential documents related to the litigation. *Id.* at 12.

governmental body, other than board members, may attend or be excluded from an executive session. The general rule is that a governmental body has discretion to allow officers or employees to attend if their participation is necessary to the matter under consideration. *See* Tex. Att'y Gen. Op. No. JC-375 (2001). For purposes of the statutory exception to meet in executive session to consult with an attorney, a governmental body "may not admit to its closed discussion of litigation those third parties who are adversaries or whose presence would otherwise prevent privileged communication from taking place." Tex. Att'y Gen. Op. No. JM-238 (1984) at 5. The purpose of the exception is to give a governmental body "the opportunity for full communication with its attorney without disclosing its side in litigation to its opponents." *Id*. at 4. *See also* Tex. Att'y Gen. Op. No. GA-334 (2005) at 6 (merely attending an executive session and remaining silent during deliberation is not "participation" for purposes of § 171.004, Local Government Code).

Based on an OAG opinion regarding the exclusion of a school district trustee from the school district board's executive session, a governmental body may exclude a member of the governmental body from an executive session held to discuss the defense of a lawsuit that was filed by that member against the government entity (or its officials). There may be other grounds to exclude a governmental body member from an executive session, such as to discuss litigation that is contemplated by the member against the governmental body. Whether a member can be excluded in any other circumstance will depend on the nature of the contrary legal interest.

9. LOCATIONAL REQUIREMENTS FOR PUBLIC MEETINGS

TOMA requires that a meeting of a governmental body be held in a location accessible to the public. Thus, TOMA precludes a governmental body from meeting in an inaccessible location. The OAG has opined that a court would unlikely conclude as a matter of law that TOMA prohibits a governmental body from holding a meeting held in a location that requires the presentation of photo identification for admittance. The OAG has determined that the Board of Regents of a state university system could not meet in Mexico, regardless of whether the board broadcast the meeting by videoconferencing technology to areas in Texas where component institutions were located. Nor could an entity subject to the Act meet in an underwriter's office in another state. In addition, pursuant to the Americans with Disabilities Act, a meeting room in which a public meeting is held must be physically accessible to individuals with disabilities. *See* Texas Open Meetings Handbook, Office of the Texas Attorney General (2024), p. 43, § VIII.B.

As a practical matter, some governmental entities do not have publicly-owned facilities within their jurisdiction that are accessible to people living with disabilities. Even if the government entity has an office in its boundaries, that location may not have ADA-accessible restrooms, adequate heating/cooling systems, or a paved parking lot. Thus, it is often necessary to conduct public meetings outside of their jurisdiction (e.g., outside the city limits).

On occasion government lawyers are confronted with the challenge of advising government entities regarding public meetings that are scheduled to take place on private property. This often occurs when forums or other gatherings are planned to occur at restaurants, country clubs, etc. As long as members of the public are granted admittance the author is unaware of restrictions on these locations.

10. LEGAL QUESTIONS IN OPEN SESSION

Because members of governmental bodies are given advance notice of the items to be discussed at meetings, they are provided the opportunity to consider the materials ahead of time. By considering the upcoming topics members of governmental bodies can identify any questions they have and pose those questions to the entity's lawyers before the meeting convenes. Obviously, lawyers would prefer to receive questions discretely in a manner that allows them to evaluate the situation, conduct necessary research, and render their legal answers candidly and confidentially. That is usually preferable to having to provide legal advice in open session.

That being said, not all questions are anticipated before deliberations begin, and sometimes, individual members of governing bodies ask legal question in open session on purpose (intending to put the lawyer on the spot or wanting the audience to hear the legal answer live, in real time).

Depending on the details of the situation, it is generally suggested that governmental attorneys avoid disclosing Confidential / Privileged information without their client's informed consent and use caution not to publicly make statements that might undercut their client's legal positions. Possible responses may include a general statement of the law without specifically applying the law to the particular facts. Another option may include asking the presiding officer if it is possible to postpone that agenda item until later in the meeting (to allow time to research during the meeting) or by stating that a proper response can be prepared and presented at a future meeting.

11. NOTICES OF POSSIBLE QUORUMS

What happens when a quorum of one governmental body shows up at another governmental body's meeting? Ideally, agendas were timely and properly posted for both groups, but often staff is unaware of the potential for this situation to arise. This is not an official, formal meeting of the governmental body but it may constitute a meeting for which TOMA may apply nonetheless. Sometimes, the event is neither organized nor conducted by a governmental body, but orchestrated by private parties.

A gathering might constitute a "meeting" under TOMA even if the gathering is conducted by someone other than the governmental body and members of the governmental body neither sit with nor directly speak to each other. This could be the result if a quorum of the governmental body is present and public business regarding the governmental body is discussed. *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n*, 2 S.W.3d 459 (Tex. App.—San Antonio 1999, no pet.). TOMA might apply even if the only "deliberation" consists of one member of the governmental body asking a question of the audience or answering a question posed by an audience member. Instances that may arise include campaign functions during elections, civic events coordinated by the chamber of commerce or economic development corporation, or meetings of governmental boards, commissions, committees or task forces that may inadvertently draw attendance from governmental bodies that unknowingly add up to a quorum.

In examining the definition of "meeting" and the definition of "deliberation," the OAG has ruled that "the requirements of TOMA do not apply when a quorum of a governmental body merely assembles in the same room without engaging in deliberations." A quorum may assemble as an audience at the meeting of another entity without being subject to the requirements of the Act. Tex. Att'y Gen. Op. No.

JM-ll27 (l989). However, if a member of the governmental body is going to speak at the meeting, or ask questions at the meeting, or participate in the meeting, and a quorum of that person's governmental body is present, the OAG has concluded that TOMA applies, and it is necessary to post an agenda for the meeting at least 72 hours[3] in advance. Tex. Att'y Gen. Op. No. JC-0203 (2000). In 2001 the Legislature enacted an exception to this general rule enabling a quorum of a government entity to attend a meeting or hearing conducted by another Legislature or a state agency, if a member of the governmental body provides only testimony, commentary, or answers to questions by a member of the agency or committee. Tex. S.B. 170, 77th Lg., R.S. (2001)

If the government entity has reason to think a quorum might assemble outside of a posted public meeting and business under their jurisdiction might be discussed, it might be appropriate to post a Notice of Possible Quorum in lieu of an agenda signaling to the public that the event is not a meeting, no votes will occur, and no public business will be conducted. TOMA does not provide for such notifications but such a posting could constitute a good faith effort to be transparent and serve the spirit of TOMA if not the letter of the law.

12. REQUIRING SPEAKERS' ADDRESSES

Can a governmental body condition allowing a member of the public to speak during a meeting on the speaker disclosing their address? Under Tex. Gov't Code § 551.007 (c), "a governmental body may adopt reasonable rules regarding the public's right to address the body under this section, including rules that limit the total amount of time that a member of the public may address the body on a given item." While requiring any speaker to state their name and address is a reasonable rule to apply, the governmental body may want to allow speakers to comment even if they choose not to voluntarily provide that information.

Given the lack of statutory provisions or case law on this particular issue, most resources point to more substantive issues with public comment such as criticizing the acts of the governmental body. Prohibiting a speaker from addressing Council due to their lack of stating an address may present legal challenges under the First Amendment. Confidentiality concerns may be involved as well to protect a speaker's disclosure of certain information. Rather than prohibiting a speaker from addressing Council due to their lack of stating an address, it would be better to encourage the speaker to provide some indicia of information that relates to their residence for the purpose of identifying an interest in the governing body's actions.

13. RULES OF PROCEDURE & PUBLIC COMMENT

Parliamentary Rules of Procedure (e.g., Robert's and Rosenberg's) are examples of rules that municipalities may choose to follow as guidelines for running meetings, but they are not prescribed by law. They are optional. City councils have the ability to regulate their own proceedings, but those procedures are not set by statute. If a city adopts procedural rules the failure to abide by those voluntary rules does not necessarily invalidate actions taken. *See* Tex. Loc. Gov't Code § 22.038, Tex. Gov't Code § 551.023, Tex. Att'y Gen. Op. DM-228 (1993), and *Legal Q&A*, Texas Town & City, Texas Municipal League (Monte Akers, September 1997).

[3] HB 1522 (2025) amends Tex. Gov't Code § 551.043 to provide notice must be given three business days before the date of the meeting. Effective September 1, 2025.

A municipality may set reasonable limits on the number, frequency, and length of presentations before it. A member of the public who addresses the body through a translator must be given at least twice the amount of time as a member of the public who does not require the assistance of a translator. The municipality may not unreasonably discriminate in deciding what matters to consider, or which speakers to hear. Tex. Att'y Gen. LO-96-111 (1996). The city council cannot prohibit public criticism of the city council, including criticism of any act, omission, policy, procedure, program, or service. Tex. Gov't Code § 551.007.

Municipalities are increasingly requiring that members of the public wishing to speak at city council meetings complete a comment card or sign-in sheet prior to being recognized. These documents can be used to regulate the flow of public speakers and educate potential speakers on the rules applicable to public comment.

City officials are not required to read written public statements aloud during meetings. During the COVID pandemic, Governor Greg Abbott temporarily suspended various parts of TOMA, and as part of the suspensions required that "alternate methods of communicating" be offered for members of the public who were not allowed to attend meetings in-person. Reading statements aloud was one of the methods that some governmental bodies opted to implement. This suspension is no longer in effect, so as long as standard avenues for public comment are provided, there is no obligation to read written communications aloud.

Whether to allow members of the public, applicants, vendors, etc., to use the city's audio-visual equipment (e.g., multi-media projectors, computer systems, etc.) is a matter of local preference. Thus, as an example, municipalities may adopt policies providing that, because of cyber-security concerns, citizens are not allowed to utilize the city's audio-visual equipment for electronic multi-media presentations unless permission is granted by the City Secretary at least 24 hours in advance (at the City Secretary's sole discretion). Further, you can provide by local rule that hard copies must be provided to the City Secretary to be included in the official records of the meeting.

14. INVOCATIONS & BENEDICTIONS

A prayer used to open the session of a city council is known as "legislative prayer." Legislative prayer is treated as a special issue under the United States Constitution's "Establishment Clause." The Establishment Clause is the part of the First Amendment that reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Usually, the U.S. Supreme Court uses a three-part test, known as the Lemon test, to determine whether a governmental action is a violation of the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). However, in the case of legislative prayer, the Supreme Court has not used the Lemon test but rather studied the place of legislative prayer in U.S. history. In *Marsh v. Chambers*, the Supreme Court upheld the State of Nebraska's practice of opening each day during the legislative session with a prayer. 463 U.S. 783 (1983). In *Rubin v. Lancaster, CA*, the Supreme Court declined to review a court of appeals decision holding that a municipality's practice of opening its city council meetings with privately led prayers does not constitute the unconstitutional establishment of religion. 710 F.3d 1087 (9th Cir. 2013), cert. denied. In *Town of Greece (New York) v. Galloway*, the Supreme Court held that the municipality's practice of beginning legislative sessions with prayers does not violate the Establishment Clause of the

First Amendment to the U.S. Constitution. 572 U.S. (2014). The Court recognized the historic tradition of legislative prayer, without requiring that cities become supervisors or censors of religious speech in order to achieve non-sectarian prayer.

Under the Town of Greece case, a constitutional prayer policy provides that prayer:

- is given at the session opening (invocations);
- lends gravity to the occasion;
- encourages reflection on values of the community;
- invites city council members to reflect on shared ideals and common ends; and
- does not discriminate among faiths.

The following pattern of activity could render a policy unconstitutional under Town of Greece:

- denigration or disparagement of any religion;
- threatened damnation;
- preaching conversion;
- proselytizing or advancing any faith or belief.

To lessen the likelihood of allegations of imposing specific religious values in the municipal setting, municipal officials should consider substituting a moment of silence and alternating the persons offering the prayer among numerous faiths or denominations. See Allison E. Burns, "Legislative Prayer Policies in the Wake of *Town of Greece v. Galloway*," presentation at Texas City Attorney Association (June 2014).

15. PLEDGE OF ALLEGIANCE

It's very common to commence public meetings with a recitation of the Pledge of Allegiance, but such an activity must be voluntary. Government officials cannot compel participation. The "action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943).

16. PHYSICAL ALTERCATIONS

What is the role of a particular city official in preventing or coping with violence during meetings of the governmental body? Protect yourself and those around you. It is not clear that city managers or government attorneys have a role in preventing altercations beyond helping clients with updated standard procedures. Best practices may suggest that it is wise to have periodic meetings between chairpersons, law enforcement, and the government attorney in an effort to ensure everyone has similar expectations of how to respond to an outbreak of violence. Obviously, a scuffle between irate citizens is one thing and an active shooter another.

This paper and the accompanying presentation are provided for educational purposes, only. Nothing herein should be construed as legal advice. Those with questions about this material are urged to confer with their city attorney.