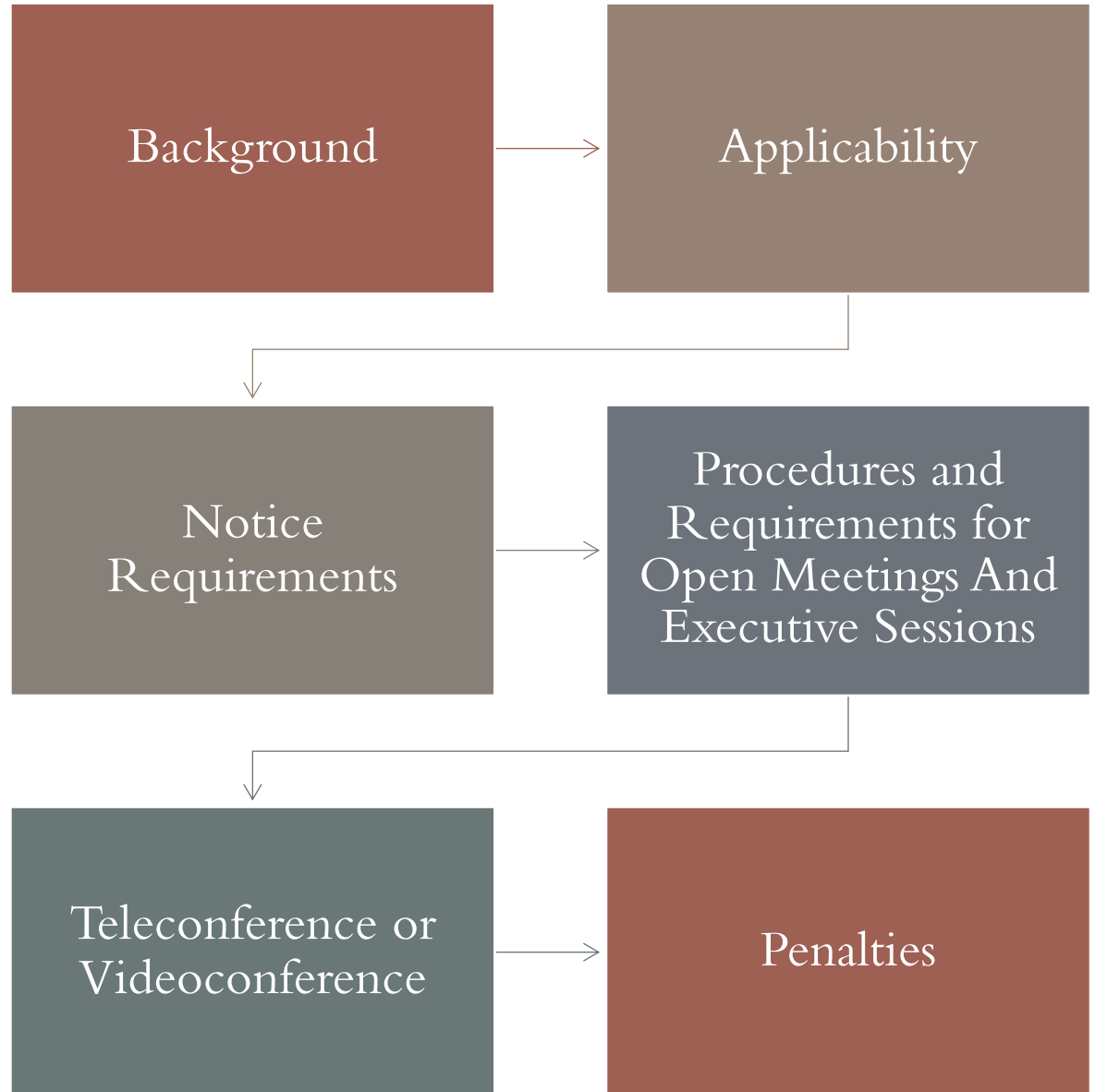




Presented by:
Denton Navarro Rodriguez Bernal Santee & Zech, P.C.

THE TEXAS OPEN MEETINGS ACT

PRESENTATION OUTLINE



GENERAL BACKGROUND

Governed by Chapter 551 of the Texas Government Code

Senator John Cornyn: “It is only natural that elected officials and government leaders want recognition for their successes, but not for their failures...but we as a healthy democracy need to know the good, the bad, and the ugly.”

General rule: A governmental body’s meetings must be open to the public, unless a statute expressly permits an executive session

The Act was passed on the premise that “citizens are entitled . . . not only to know what government decides but to observe how and why every decision is reached.” *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 300 (Tex. 1990)

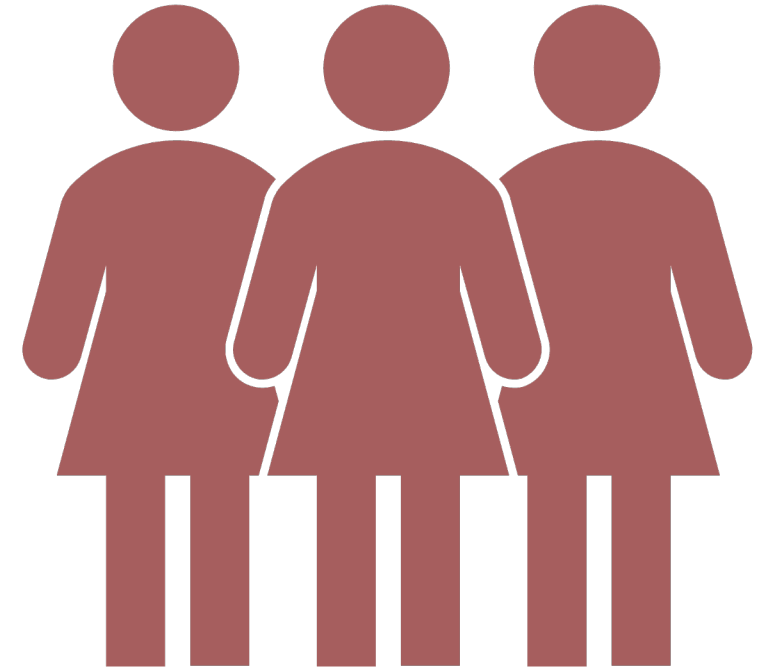


APPLICABILITY OF THE ACT – WHO IS SUBJECT
TO THE ACT?

APPLICABILITY OF THE ACT – WHO IS SUBJECT TO THE ACT? – §551.001

(3) Governmental Body

- 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 body 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;
- 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;
- L. a joint board created under Section 22.074, Transportation Code; and
- M. a board of directors of a reinvestment zone created under Chapter 311, Tax Code.



WHEN DOES THE ACT APPLY?

“Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.”

Tex. Gov't Code
§ 551.002.

APPLICABILITY OF THE ACT – WHAT IS A QUORUM?

General rule: The Act applies to a gathering of a quorum of a governmental body's members if public business is deliberated or discussed.

Cities

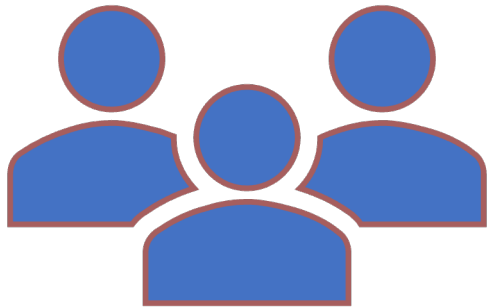
- Home rule: Charter provision may expressly state the quorum requirement
- Type A:
 - Regular meeting – majority of the councilmembers (3)
 - Special meeting or meeting to impose taxes – two-thirds of the councilmembers (4)
- Type B: The mayor and three aldermen or four aldermen
- Type C: A majority of the board of commissioners (2)
- Boards and commissions: Look to statute or ordinance/resolution creating

General quorum rule: a majority of a governmental body unless otherwise defined by applicable law or rule. Example – city charter.



APPLICABILITY OF THE ACT – WHAT
CONSTITUTES A MEETING?

APPLICABILITY OF THE ACT – WHAT CONSTITUTES A MEETING?



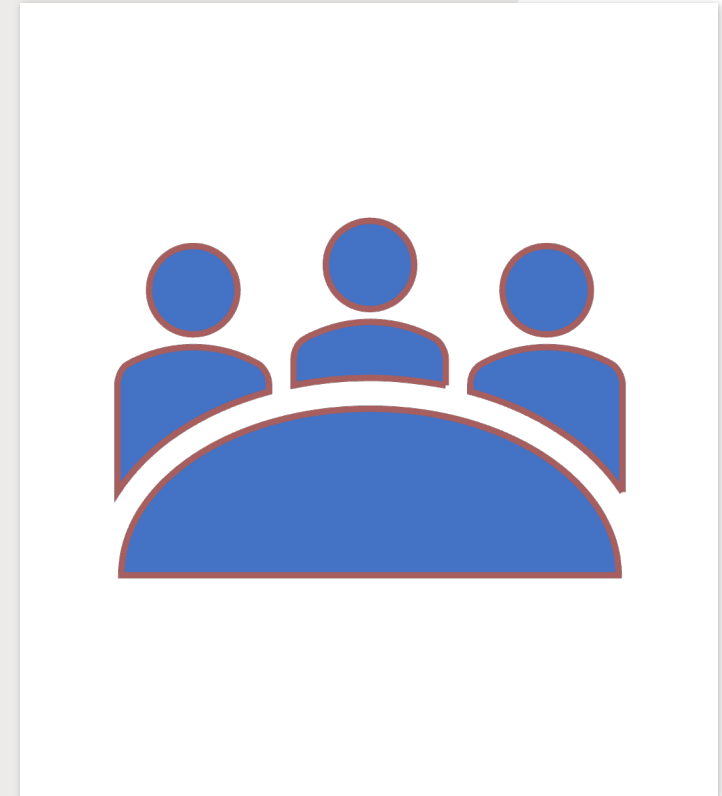
Definition One

- A meeting occurs when:
 1. A quorum of a governmental body gathers; and either:
 1. the public business that the governmental body has authority to supervise or oversee is discussed; and
 2. a member of the governmental body participates in the discussion.
- Simply stated: A quorum of members exchange information about public business or public policy over which the body has supervision or control.
- Examples: formal meeting, attendance at another entity's meeting, using the restroom, "walking quorum," circulating an invoice or letter for signature outside of a meeting, e-mail, videoconferencing
- Develop a habit of asking yourself, "is this a meeting?"

APPLICABILITY OF THE ACT – WHAT CONSTITUTES A MEETING?

Definition Two

- If the gathering is called by the governmental body, or the governmental body is responsible for the gathering, a meeting occurs when:
 1. A quorum of a governmental body gathers;
 2. the public business that the governmental body has authority to supervise or oversee is discussed; and
 3. the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body.
- Simply stated: The governmental body calls a gathering of a quorum of members to receive or give information to or from a third person about public business or public policy over which the governmental body has supervision or control.
- Examples: attendance at a city's board or committee meeting, "staff briefings"



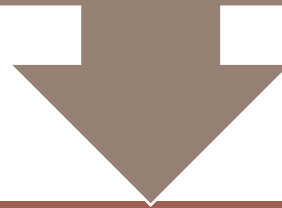
APPLICABILITY OF THE ACT – WHAT CONSTITUTES A MEETING?

- The Act does not apply to social functions or regional, state, or national workshops if the governmental body's public business is not discussed and no formal action is taken.



NOTICE REQUIREMENTS – TEX. GOV'T CODE § 551.041

The Act requires written notice of the date, hour, place, and subject of each meeting held by the governmental body – both open meetings and closed sessions.



Specificity: The notice must be sufficient to apprise the general public of the subject matter to be discussed – legal sufficiency depends on and can vary based on the facts:

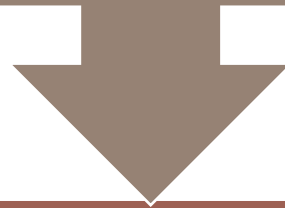
Listings like “personnel” or “new business/old business” generally insufficient

More important the issue is to the public, the more specific the notice should be

“Public forum” or “public comment” is sufficient to hear from citizens

NOTICE REQUIREMENTS – TEX. GOV'T CODE § 551.056

Legislative Update: Effective September 1, 2023. In addition to the meeting notice, the meeting agenda must be concurrently posted on the Internet of the governmental entity or economic development corporation.



a district or authority created under Section 52, Article III, or Section 59, Article XVI, Texas Constitution. Generally, these are special districts such as conservation districts and reclamation districts.

TIMING OF NOTICE

Political subdivisions must post at least 72 hours before the scheduled time of the meeting.

Most governmental bodies with statewide jurisdiction must post notice at least seven days before the date of the meeting.

All governmental bodies must post notice at least 1 hour before a meeting to address an emergency.

Practice Tip: Individual notice is not required

Practice Tip: Certify the time of posting



NOTICE REQUIREMENTS-INTERNET



the governmental body satisfies the requirement that the notice be posted in a place readily accessible to the general public at all times by making a good faith attempt to continuously post the notice on the Internet during the prescribed period;



the governmental body must still comply with any duty imposed by this chapter to physically post the notice at a particular location; and



if the governmental body makes a good-faith attempt to continuously post the notice on the Internet during the prescribed period, the notice physically posted at the location prescribed by this chapter must be readily accessible to the general public during normal business hours. 551.043(b)



when a city posts notice on its Internet Web site, the physical notice must be readily accessible to general public only during normal business hours instead of at “all times.”

NOTICE REQUIREMENTS-ADDITIONAL INTERNET REQUIREMENT



H.B. 3440 – Effective September 1, 2023.



A governmental body will be required to post the meeting agenda in addition to the meeting notice.



Practice Tip: For those entities that were already concurrently posting meeting notice and meeting agenda, no change in processes required.



The new provision will apply to all entities with an Internet website that are subject to the act, regardless of size.



NOTICE REQUIREMENTS - LOCATION

Notice and agenda must be posted in a place readily accessible to the general public at all times during the required posted period

Local governmental bodies are generally required to post notice and agenda on a bulletin board with convenient public access as well as on their Internet sites

Counties – on a bulletin board at a place convenient to the public in the county courthouse

School districts – on a bulletin board at a place convenient to the public in the central administrative office of the district

Municipal governmental bodies – on a bulletin board at a place convenient to the public in city hall

Special districts extending into fewer than 4 counties – (1) at a place convenient to the public in the administrative office of the district, and (2) either on a bulletin board at the courthouse of each county in the district or on the district's website

State governmental bodies – shall provide notice of each meeting to the Secretary of State, who shall post notice on the Internet

NOTICE REQUIREMENTS – EMERGENCIES



- Emergency meeting or supplemental posting: Where there is an imminent threat to public health and safety or a reasonably unforeseeable situation, a meeting on an emergency matter may be held after only one hour notice or supplemental notice before meeting convened.
- Notice must be posted for at least 1 hour before the meeting.
- Clearly identify the emergency or urgent public necessity.
- Notify media if they requested notice & agreed to reimburse the governmental body for providing the notice.
- What if we “forgot to post” an item? Not an emergency
- Recess: May recess to following business day if the action is taken in good faith and not to circumvent the Act’s requirements

IMPROPER NOTICE

01

Actions taken without proper notice are voidable

02

An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of the Act.

03

A court may assess costs and attorney fees to the prevailing party.

PROCEDURES AND REQUIREMENTS – OPEN MEETINGS

A meeting may not be convened unless a quorum is present in the meeting room

The Americans with Disabilities Act requires a meeting to be held in a room that is physically accessible to those with disabilities

Members of the public (including the media) have a right to attend, observe, and record the meeting by audio or video tape or other comparable means

A governmental body may adopt reasonable rules to maintain order in a meeting, including those relating to the location of recording equipment

PROCEDURES AND REQUIREMENTS – OPEN MEETINGS

The Act requires political subdivisions to allow members of the public interested in speaking on an item on the agenda to do so before or during the governmental body's discussion of the item.

A governmental body may set reasonable rules regarding the public's right to address the body, including rules that limit the total amount of time to speak. May not discriminate based on position taken or prohibit criticism of the governmental body.

If a member of the public asks a question about an item that is not on the agenda, the members of the governmental body may not deliberate the item, and are limited to:

- A statement of fact regarding the issue
- A statement of policy regarding the issue
- A proposal to place the item on a future agenda for deliberation

BROADCASTING OPEN MEETINGS

All governmental bodies may broadcast their meetings over the Internet, and certain higher educational institutions (general academic teaching institutions, university systems, and junior college districts) are required to do so.

Some governmental bodies are required to record and post on the Internet recordings of their regularly scheduled open meetings, including:

- Governing body of a home-rule municipality with a population of 50,000 or more
- Transit authority or department
- Board of trustees for a school district with 10,000 or more students
- County commissioners court where population is over 125,000


RECORDING OF MEETINGS

- A governmental body required to broadcast its meetings, under §551.128 (b-1), must make:
 - A video and audio recording of reasonable quality of each regularly scheduled open meeting;
 - The recording available not later than 7 days after the date of the meeting; and
 - Maintain the archived recording on the Internet for not less than 2 years after the date the recording was first made available.
- There are additional requirements for some school boards.



PROCEDURES AND REQUIREMENTS – CLOSED MEETINGS (EXECUTIVE SESSIONS)

Who may attend a closed session?



Only a governmental body's members have a right to attend a closed meeting. Although a governmental body may include others in a closed meeting if necessary to the matter under consideration, it may not admit a person whose presence is against the interests of the governmental body that the closed meeting is designed to protect.

PROCEDURES AND REQUIREMENTS – COMMON CLOSED SESSIONS

Real Property Deliberations

to deliberate 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

Personnel Matters

to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee
to hear a complaint or charge against an officer or employee
must be conducted in open session if the officer or employee requests a public hearing

PROCEDURES AND REQUIREMENTS – COMMON CLOSED SESSIONS

Economic Development

- to discuss or deliberate regarding commercial or financial information that the governmental body has received from a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and with which the governmental body is conducting economic development negotiations
- to deliberate the offer of a financial or other incentive to a business prospect that meets the above requirements

Consultation with Attorney

- to seek advice about legal matters, pending or contemplated litigation, or settlement offers
- Governmental body's attorney must be present if employee, unless the meeting is held in compliance with §551.127 (may be present by conference call, videoconference, or Internet communications if a contract attorney)
- General discussion of policy not permitted

Security/Homeland Security Measures

PROCEDURES AND REQUIREMENTS – CLOSED SESSIONS

- A governmental body may hold a closed meeting only when a statute expressly authorizes it to do so & notice is posted.
- To conduct a closed session, a governmental body must:
 1. have a quorum;
 2. properly convene in an open meeting;
 3. announce that a closed meeting will be held;
 4. identify in the open meeting the section of the law that allows the closed meeting; and
 5. keep a certified agenda or a recording of the closed meeting:
 - a) the certified agenda must include a statement of the subject of each deliberation and a record of any further action taken
 - b) The certified agenda or recording is confidential and may not be released absent court action
 - c) A sitting member of the governmental body may review the certified agenda or recording.
- 6. No final action or vote may be taken in a closed meeting.



RECORDKEEPING

The Act requires a governmental body to make and keep a certified agenda or recording of most closed meetings.

The minutes must:

A brief summary is all that is required – a verbatim transcript is not necessary.

The presiding officer announced the date and time at both the beginning and end of the meeting

State the subject of each deliberation

Indicate each vote, order, decision, or other action taken

Certification that the agenda is a true and correct record

RECORDKEEPING



The minutes or recording of the meeting are public records, and must be made available pursuant to a request



Certified agendas or recordings of a closed meeting are confidential, shall be preserved for at least 2 years



Under the Records Retention Act, a governmental body must have a Texas State Library-approved retention schedule for its records (for more information, please visit www.tsl.state.tx.us)



Generally, if minutes are transcribed from a recording, the recording must be kept for 90 days after the written minutes are approved

TELECONFERENCING

- A governmental body may hold a meeting by telephone conference:
 - in consultation with its attorney; and
 - if an emergency or urgent public necessity exists and convening a quorum at one location is difficult or impossible.
- Some specific governmental bodies are authorized to meet by telephone conference in other circumstances.
- Each part of the open meeting must be audible to the public at the location specified in the notice of the meeting.

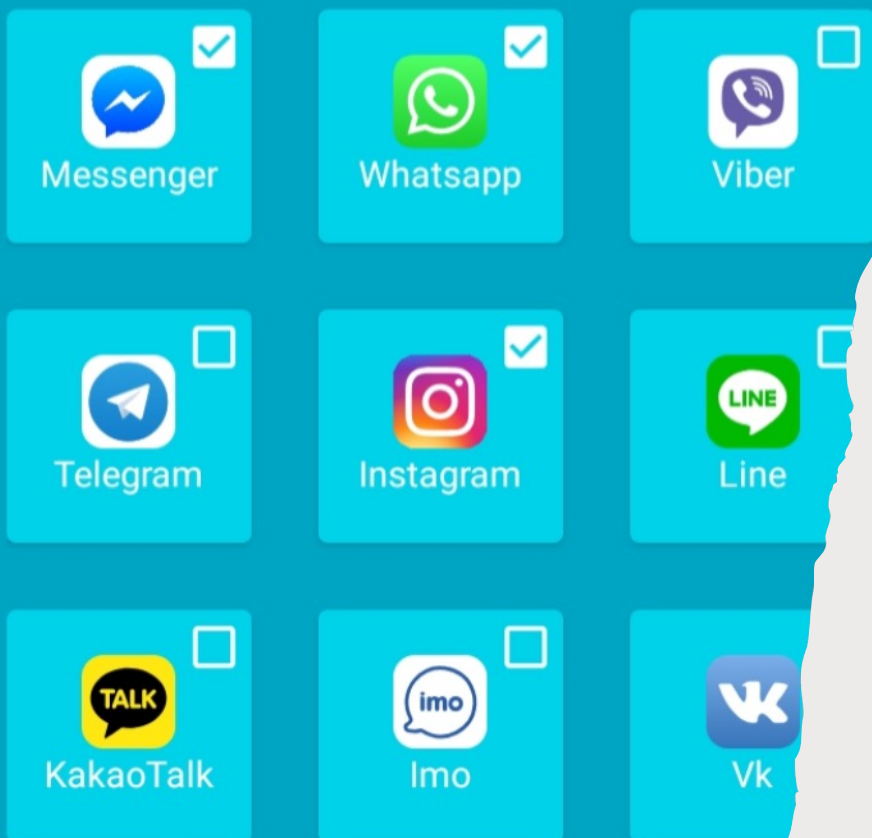


VIDEOCONFERENCING



- Members of a governmental body may participate remotely in a meeting by videoconference call when certain requirements are met, including, among others:
 - The video and audio feed of the remote member's participation in the meeting must be broadcast live.
 - The member of the governmental body presiding over the meeting must be present in a physical space that is open to the public.
 - A quorum of the governmental body is physical present at one location of the meeting, except for a state governmental body or a governmental body that extends into three or more counties.
 - Notice must specify meeting location as well as intent to have a quorum present at the location.

Choose your favorite Chat Apps



ONLINE MESSAGE BOARDS

Communication between councilmembers about public business or public policy over which the council has supervision or control *does not* constitute a meeting if certain conditions are met.

- THE COMMUNICATION MUST BE:
 - in writing;
 - posted to an online message board that is viewable and searchable by the public; and
 - displayed in real time and displayed on the message board for no less than 30 days after the communication is first posted.
 - archiving requirements – 6 years.
- THE MESSAGE BOARD:
 - must be prominently displayed on the city’s primary website and no more than one click away from the city’s website;
 - may only be used by city councilmembers (or city employees who post their name and title and that have received authorization from the council); and
 - the council may not vote or take action by posting on the city’s online message board, and if the city removes a posted message, the city must retain the posting for six years.

CRIMINAL PENALTIES

Criminal penalties exist for knowingly violating the Act in four circumstances:

- Participating in a closed meeting knowing that a certified agenda is not being kept or a recording is not being made (class C misdemeanor);
- Unlawfully disclosing a certified agenda or recording of a closed meeting (class B misdemeanor);
- Holding or participating in a closed meeting that is not permitted under the Act (punishable by fine, confinement or both); and
- Circumventing the Act by a prohibited series of communications (punishable by fine, confinement or both).

VIOLATIONS

The Act provides for civil remedies and criminal penalties for noncompliance.

Criminal provisions are enforced by:

- District attorneys
- County attorneys
- Criminal district attorneys

Attorney general is not directly authorized to enforce the Open Meetings Act but may assist local prosecutors.

VIOLATIONS – CIVIL PENALTIES

An action taken in violation of the Act is voidable

- A voidable action may be ratified at a later meeting, but that action will not be given retroactive effect.
- Example: Decision to terminate employee

Civil actions

- Any interested person may bring a civil lawsuit to force officials to comply with the Act, to enjoin officials from acting, or to void actions taken in an illegal meeting; court may assess costs & attorney fees to prevailing party.
- A person injured by the unlawful disclosure of a certified agenda or recording of a lawfully closed meeting may sue for damages, attorney fees, and exemplary damages

VIOLATIONS – CRIMINAL PENALTIES

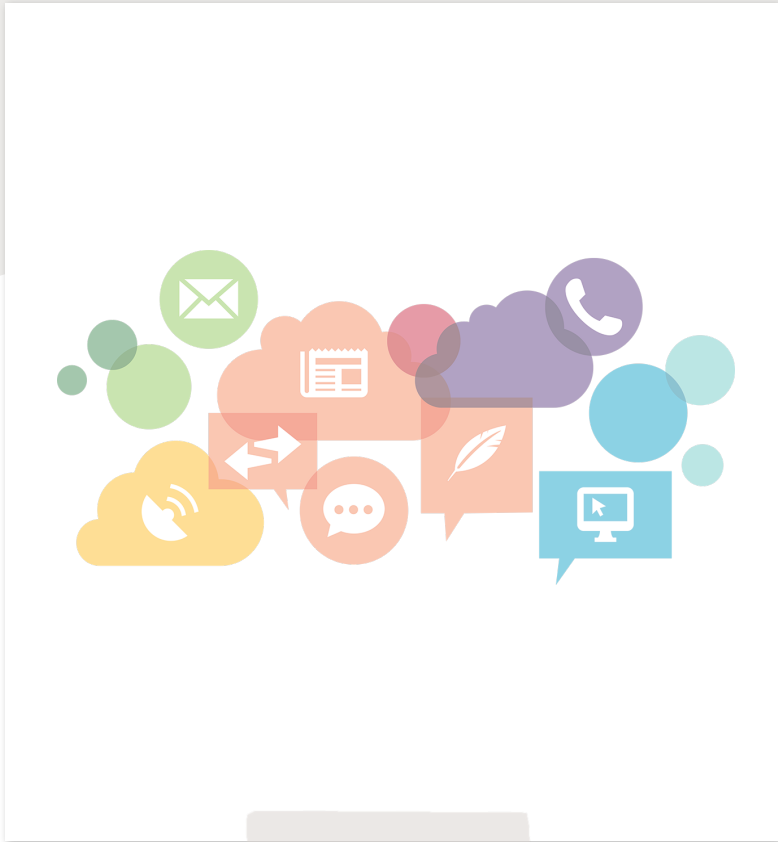
Attempts to Avoid The Act's Requirements

- **Knowingly:** A person actions knowingly, or with knowledge, with respect to his conduct when he is aware that his conduct is reasonably certain to cause the result. Penal Code § 6.03(b)

Defense to Prosecution of a §551.144 Violation

- **Affirmative defense:** member acted in reasonable reliance on a court order, attorney general opinion, or the written opinion of the governmental body's attorney

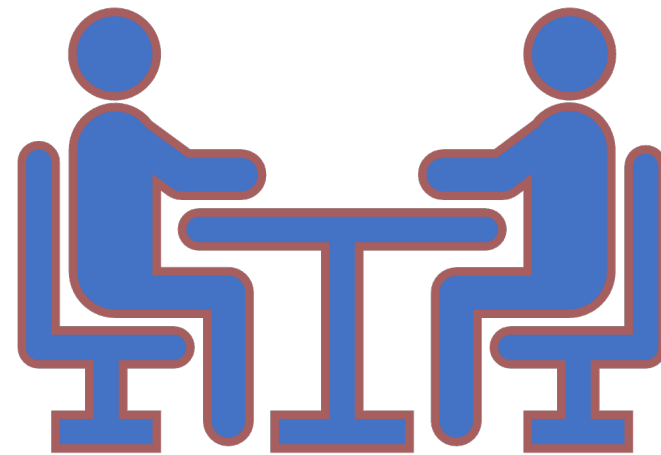
VIOLATION – PROHIBITED SERIES OF COMMUNICATIONS PART I



- ***Prohibited Series of Communications***
 - A member of a governmental body commits an offense if the member:
 - Knowingly engages in at least one communication among a series of communications that each occur outside of a meeting authorized by the Act and that concern an issue within the jurisdiction of the governmental body in which the members engaging in the individual communications constitute fewer than a quorum of members but the members engaging in the series of communications constitute a quorum of members; and

VIOLATION – PROHIBITED SERIES OF COMMUNICATIONS PART II

- knew at the time the member engaged in the communication that the series of communications:
 - involved or would involve a quorum; and
 - would constitute a deliberation once a quorum of members engaged in the series of communications.



DELIBERATIONS – STATE LAW DEFINITION

- "Deliberation" means a verbal or written exchange between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body.



TOMA LEGISLATIVE UPDATE (2023)

LEGISLATIVE UPDATE

- H.B. 3440 amends § 551.056. provides that certain governmental bodies, including a city or economic development corporation, must concurrently post an agenda and notice of the meeting of the body on the website of the governmental body. A district or authority created under Section 52, Article III or Section 59, Article XVI, Texas Constitution are included as entities subject to the Act. Section 551.056(c), which established required by population, is repealed in its entirety. Effective September 1, 2023.

RESOURCES



Keep current by using these resources:



www.tml.org (512-231-7400)



<https://www.texasattorneygeneral.gov/> (877-OPEN TEX)

https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/openmeetings_hb.pdf



www.tsl.state.tx.us (for records retention)

QUESTIONS?

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