

# 2019

## OPEN MEETINGS ACT

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The  symbol indicates sections that have been updated since the previous publication.

# Open Meetings Act<sup>1</sup>

## The General Policy

### People are Entitled to Information About Governmental Action

The Open Meetings Act is a Texas statute codified as Chapter 551 of the Government Code.<sup>2</sup> The Act provides for public access to meetings of governmental bodies.<sup>3</sup> A federal court has held that “Transparency is furthered by allowing the public to have access to governmental decision making.”<sup>4</sup>

When a group of people takes action or makes a decision, some meeting of the minds has occurred to make that action possible. With respect to actions taken by governmental bodies, it is the process by which this meeting of the minds occurs that the Open Meetings Act intends to be open to public scrutiny.<sup>5</sup> To accomplish its end, the Open Meetings Act requires that every meeting of a governmental body, with certain narrowly drawn exceptions, be open to the public and that the public be given notice of the time and place of meetings and the subject matter to be discussed or acted on.<sup>6</sup> The Open Meetings Act explicitly lists a commissioners court as a governmental body.<sup>7</sup>

The Open Meetings Act does not set out all procedures applicable to meetings of governmental bodies.<sup>8</sup> However, any additional procedure that a governmental body adopts for the conduct of its meetings must be consistent with the Open Meetings Act.

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<sup>1</sup> This publication includes changes adopted by the 86<sup>th</sup> Legislature during the Regular Session (2019)

<sup>2</sup> The office of the Texas Attorney General publishes a comprehensive Open Meetings Handbook. You may obtain a copy from that office or access it through the Attorney General’s [website](#). Attorney General opinions are also available on that site.

<sup>3</sup> *Acker v. Texas Water Comm’n*, 790 S.W.2d 299, at 300 (Tex. 1990)

<sup>4</sup> *Asgeirsson v. Abbott*, 696 F.3d 454 (5<sup>th</sup> Cir. 2012)

<sup>5</sup> Tex. Att’y Gen. Op. No. DM-95-(1992); citing *Cox Enterprises Inc. v. Board of Trustees of Austin Indep. School Dist.*, 706 S.W.2d 956, 960 (Tex. 1986) (the act is intended to safeguard the public’s interest in knowing the workings of its governmental bodies)

<sup>6</sup> Tex. Gov’t Code §§551.002, 551.041

<sup>7</sup> Tex. Gov’t Code §551.001(3)(B)

<sup>8</sup> Appendix A is a sample of procedural rules for commissioners court meetings. The sample, as well as the sample notice of open meeting, public participation form, and certified agenda, was provided by the Texas County Judges and Commissioners Association through its General Counsel, Jim Allison.

## **Training Required**

The Open Meetings Act requires elected and appointed officers of governmental bodies to complete training on the Act.<sup>9</sup> The attorney general has developed a course and has made it available on the Internet free of charge to members of governmental bodies. An official must complete the training not later than 90 days after taking office. An official's failure to satisfy the training requirement does not affect the validity of an action taken by the governmental body.<sup>10</sup>

## **The Act's Requirements for Openness**

The three central requirements of the Open Meetings Act are that: (1) the public be permitted to attend meetings;<sup>11</sup> (2) the subject matter of meetings be posted prior to the meetings to give the public notice of the meeting;<sup>12</sup> and (3) minutes or recordings of meetings be kept.<sup>13</sup> Everything else is built around these main ideas.

The Open Meetings Act requires that a meeting must be "physically accessible to the public."<sup>14</sup> However, a governmental body may be able to hold a meeting at a location that requires the presentation of photo identification for admittance.<sup>15</sup>

## **Definition of a "Meeting"**

A meeting is a "**deliberation**" among a quorum of the commissioners court, or between a quorum of the commissioners court and another person, concerning an issue within the court's jurisdiction.<sup>16</sup> Deliberation is defined as a verbal or written exchange between a quorum of the commissioners court or between a quorum of the court and another person concerning an issue within the jurisdiction of the court.<sup>17</sup> Depending on the facts of a particular case, electronic communications constitute a deliberation and meeting for the purposes of the Open Meetings Act.<sup>18</sup>

Except as discussed below, a "meeting" is also a gathering called and conducted by a commissioners court, or for which it is responsible, at which a quorum of the court is present and receives information from, gives information to, asks questions of, or

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<sup>9</sup> Tex. Gov't Code §551.005

<sup>10</sup> Tex. Gov't Code §551.005(f)

<sup>11</sup> Tex. Gov't Code §551.002

<sup>12</sup> Tex. Gov't Code §551.041

<sup>13</sup> Tex. Gov't Code § 551.021

<sup>14</sup> Tex. Att'y Gen. Op. Nos. GA-1079 (2014), JC-0487 (2002), and JC-0053 (1999)

<sup>15</sup> Tex. Att'y Gen. Op. No. KP-0020 (2015)

<sup>16</sup> Tex. Gov't Code §551.001(4)(A)

<sup>17</sup> Tex. Gov't Code §551.001(2), amended by SB 1640, 86<sup>th</sup> Leg. 2019, effective Sept. 1, 2019.

<sup>18</sup> Tex. Att'y Gen. Op. No. GA-0896 (2011)

receives questions from any third person, including a county employee, about the public business or policy over which the court has supervision or control.<sup>19</sup>

The term “meeting” does not include the gathering of a quorum of the commissioners court at a social function unrelated to county business or the attendance of a quorum at a convention, workshop, ceremonial event, press conference, candidate forum, appearance or debate if no formal action is taken by the court and any discussion about county business is incidental to the event.<sup>20</sup> See also, *Special Circumstances: Reports About Items of Community Interest, Communication by Internet Message Board, and Attendance at Legislative Meetings* below.

### **A Quorum is Required for Commissioners Court Action**

A quorum of a commissioners court is three members.<sup>21</sup> Note that a special quorum of four is required when the court is levying a tax.<sup>22</sup>

### **Avoid Accidental Communication with a Quorum About Public Business**

It is possible for members of a governmental body to violate the Open Meetings Act even though they are not physically present in one place, for example, by discussing public business of the governmental body over the telephone.<sup>23</sup> By the same logic, exchanges among members of the court by such methods as e-mail and even memoranda may violate the Act.<sup>24</sup> Whether members of a governmental body have engaged in deliberations that violate the Act has been characterized as a fact question.<sup>25</sup>

The attorney general has considered a hypothetical situation in which a county commissioner made successive telephone calls to other members of the court to discuss public matters and to urge the other members to vote on those matters in a certain way. At no time was a quorum on the phone simultaneously. The attorney general reasoned that these successive discussions between two members at a time would nonetheless result in a quorum taken as a whole. These secret discussions on a public matter by officers who conspire together in numbers less than a quorum violate the Act.<sup>26</sup>

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<sup>19</sup> Tex. Gov't Code §551.001(4)(B)

<sup>20</sup> Tex. Gov't Code §551.001(4)

<sup>21</sup> Tex. Loc. Gov't Code §81.006(a)

<sup>22</sup> Tex. Loc. Gov't Code §81.006(b)

<sup>23</sup> Tex. Att'y Gen. Op. Nos. GA-0896 (2011), GA-0326 (2005), JC-0307 (2000), LO-95-055 (1995), DM-95 (1992); *Hitt v. Mabry*, 687 S.W. 2d 791 (Tex. App. - San Antonio 1985, no writ)

<sup>24</sup> A “verbal exchange” may occur through written words. See footnote 16, *supra*. *Esperanto Peace & Justice Ctr. v. City of San Antonio*, 316 F.Supp.2d 433 (W.D.Tex. 2001); *Willmann v. City of San Antonio*, 123 S.W.3d 469 (Tex. App. – San Antonio 2003, pet. denied)

<sup>25</sup> Tex. Att'y Gen. Op. No. JC-0053 (1999) at fn.3; Tex. Att'y Gen. Op. Nos. LO95-055 (1995)

<sup>26</sup> Tex. Att'y Gen. Op. No. GA-0326 (2005)



## Walking Quorum

In February 2019, the Texas Criminal Court of Appeals found the walking quorum provision in the Open Meetings Act to be unconstitutionally vague.<sup>27</sup> In an opinion following the ruling, the attorney general noted that although the court had struck down the criminal penalties for a walking quorum, civil penalties remained in that actions taken by a governmental body in violation of the Act are voidable.<sup>28</sup>

The Doyal decision was rendered while a legislative session was in progress. The Legislature amended the Act to preserve the concept of prohibiting deliberations of subsets of a governing body in a manner intended to avoid the meeting requirements of the Act. As amended, the Act provides that it is an offense if a member: (1) knowingly engages in at least one communication among a series of communications that (2) each occur outside of an meeting authorized under the Act (3) concerning a matter under the Commissioners Court's jurisdiction in which the members engaging in the individual communications constitute fewer than a quorum of the court and (4) the member knew at the time he or she engaged in the communications 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.<sup>29</sup>



## Committee Meetings

Unless its role is purely advisory, a committee chosen by a governmental body from its membership may be subject to the Open Meetings Act, even though it consists of less than a quorum of the parent body.<sup>30</sup> If a committee has the power to make final decisions or if its decisions are likely to be routinely adopted by the commissioners court, it must comply with the Open Meetings Act.<sup>31</sup> For example, the attorney general determined that a nine-member "evaluation committee" appointed by a commissioners court to recommend the selection of an architect, and including the county judge and one county commissioner, was subject to the Open Meetings Act because it was authorized to negotiate contract terms on behalf of the county, requiring only one additional vote to adopt the committee's recommendation.<sup>32</sup> The circumstances led the attorney general to conclude that the committee was more than advisory and that the commissioners court was more likely to act as a rubber-stamp.

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<sup>27</sup> *State v. Doyal*, No. PD0254-18 (Tex. Crim. App. 2019)

<sup>28</sup> Tex. Att'y Gen. Op. No. KP-0254 (2019)

<sup>29</sup> S.B. 1640, 86<sup>th</sup> Leg.(2019), effective June 10, 2019.

<sup>30</sup> Tex. Att'y Gen. Op. Nos. JC-0060 (1999), H-3 (1973), H-238 (1974)

<sup>31</sup> Tex. Att'y Gen. Op. Nos. GA-0999 (2013), JC-0060, (1999), H-994 (1977); *Willmann, supra*, at 474

<sup>32</sup> Tex. Att'y Gen. Op. No. JC-0060 (1999)

Additionally, even if a committee is purely advisory, attendance of a quorum of the commissioners court at a committee meeting triggers the requirements of the Open Meetings Act.<sup>33</sup> The visiting members of the court do not have to participate in the deliberation for the statute to apply, so long as any voting member of the committee participates in a verbal exchange about public business or policy.<sup>34</sup>

However, a group of district judges meeting to appoint the county auditor is not a governmental body under the Open Meetings Act and is not required to post notice of the group's meetings.<sup>35</sup> Similarly, a group of district and county judges meeting to appoint a community supervision and corrections department director is not a governmental body because of the statutory curtailment of the group's managerial role with respect to the department.<sup>36</sup>

### **Staff Briefing**

The commissioners court may not confer with one or more of its employees outside of an open meeting to receive information from the employees or to question the employees.<sup>37</sup> This is because the Act specifically includes in the definition of a "meeting" a gathering of a quorum of the court at which a county employee is present to give or receive information or to ask or answer questions about county business. However, a member of the commissioners court may leave an open meeting to confer privately with a county employee.<sup>38</sup> If a quorum attends department meetings at which the county budget and other county business is discussed, it would be a meeting subject to the Act.<sup>39</sup>



### **Open Meetings Act and Public Information Act**

Both the Open Meetings Act and the Public Information Act<sup>40</sup> are intended to make government more accessible. However, the requirements of the two laws do not overlap. The Public Information Act does not authorize a governmental body to hold an executive session to discuss particular information merely because the information falls within the exceptions to the Public Information Act.<sup>41</sup> The converse is also true – documents reviewed in an executive session may be subject to disclosure under the

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<sup>33</sup> Tex Att'y Gen. Op. Nos. GA-0957 (2012), JC-0313 (2000)

<sup>34</sup> See also Tex. Att'y Gen. Op. No. JC-0203 (2000)

<sup>35</sup> Tex. Att'y Gen. Op No. KP-0038 (2015)

<sup>36</sup> Id.

<sup>37</sup> Tex. Gov't Code §551.001(4)(B)(iv)

<sup>38</sup> Tex. Att'y Gen. Op. No. GA-0989 (2013)

<sup>39</sup> Tex. Att'y Gen. Op. No. KP-0172 (2017)

<sup>40</sup> Tex. Gov't Code Chap. 552

<sup>41</sup> Tex. Att'y Gen. Op No. GA-0019 (2003)



Public Information Act.

## **SPECIAL CIRCUMSTANCES**

### **Reports About Items of Community Interest**

At a regular meeting, the commissioners court may receive a report from staff or a member of the court concerning an item of community interest, such as expressions of thanks, congratulations or condolence, information on holiday schedules, recognition of an official, employee or citizen, a reminder of an upcoming county event, or an announcement involving an imminent threat to the public that arose after the posting of the agenda, without notice of the report being on the agenda.<sup>42</sup> However, no action or deliberation on the item may occur. In the case of an emergency requiring action by the commissioners court, the court would need to follow the posting requirements discussed below.<sup>43</sup>

### **Communication by Internet Message Board**

The commissioners court may communicate via an Internet message board under limited circumstances.<sup>44</sup> No vote or other action can be taken on the Internet site.

A county that maintains a website may operate a single message board or similar Internet application that allows members of the commissioners court and specifically authorized staff members to communicate in writing with one another. A staff member's posted communication must indicate the name and title of the staff member. The message board must also be prominently displayed on the county's Internet home page and be no more than 'one click away' from the home page. The site must be viewable and searchable by the public. All communication must be displayed in real time and retained on the Internet for no less than 30 days after it is first posted. The county must maintain any communication removed from the message board for six years. All posted communication is subject to the Public Information Act. No communication or posting permitted under Government Code §551.006 is to be construed to be an action of the commissioners court.

### **Attendance at Legislative Meeting**

Attendance of a quorum of the commissioners court at a legislative meeting to offer public testimony and comment and to publicly respond to questions asked by a

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<sup>42</sup> Tex. Gov't Code §551.0415

<sup>43</sup> Tex. Gov't Code §551.045

<sup>44</sup> Tex. Gov't Code §551.006

member of a legislative committee or agency is not considered a meeting of the court.<sup>45</sup> Under these circumstances, the commissioners court is not required to post a notice of the meeting.

## **TELEPHONE AND VIDEOCONFERENCE MEETINGS**

The Open Meetings Act permits a governmental body to conduct a meeting even though one or more members of the body are not physically present at the usual meeting location under certain limited circumstances.<sup>46</sup> However, all the general rules governing open and closed meetings apply. In addition, there are other procedural requirements that must be met.

### **Telephone Conference Calls**

A commissioners court may conduct a meeting in which one or more members of the court participate by telephone only if an emergency or public necessity exists and it is difficult or impossible for a quorum of the court to convene at one location.<sup>47</sup> Under the Open Meetings Act, an emergency or urgent public necessity exists only if immediate action is required by the court because of an imminent threat to public health and safety or because of a reasonably unforeseeable situation.<sup>48</sup> If a quorum of the commissioners court is able to meet at one location, the other members of the court are not authorized to participate from other locations by telephone conference call.<sup>49</sup>

The notice posted for a meeting including participation by telephone conference must specify the location that the court usually convenes as the meeting location. The notice does not need to state that the meeting will be held by telephone conference call. The portion of a telephone conference meeting that is open to the public must be audible to the public and must be recorded and made available to the public. Two-way communication during the telephone conference must be provided and the identity of each party to the call must be clearly stated before each person speaks.

### **Videoconference Calls**

A “videoconference call” is defined by the Open Meetings Act and may be conducted

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<sup>45</sup> Tex. Gov’t Code §551.0035

<sup>46</sup> Tex. Gov’t Code §§551.125, 551.127

<sup>47</sup> Tex. Gov’t Code §551.125. Note, an advisory board may hold a meeting by telephone conference call; but see Tex. Att’y Gen. Op. No. GA-0908 (2012)(telephone conference meeting may only be held under limited circumstances described in statute).

<sup>48</sup> Tex. Gov’t Code §551.045

<sup>49</sup> Tex. Att’y Gen. Op. No. JC-0352 (2001)

over a telephone network, a data network, or the Internet.<sup>50</sup> A videoconference meeting may be conducted by a commissioners court only if a quorum of the court is physically present at one location or if the requirements of Government Code §551.127(c) are complied with.<sup>51</sup> Videoconferencing is permitted as a substitute for in-person meetings only under very limited circumstances.<sup>52</sup> Section 551.127(c) requires that a governmental body make publically available at least one suitable physical space located in or within a reasonable distance of the geographic jurisdiction of the governmental body that is equipped with videoconference equipment that provides an audio and video display, as well as a camera and microphone by which a member of the public can provide testimony or otherwise actively participate in the meeting. The county judge or other presiding officer must be present at the designated physical location.<sup>53</sup> A member of the governmental body is considered absent, and may not be counted toward a quorum, if audio or video communication is lost or disconnected.<sup>54</sup> Participation by a member of the public must be allowed as if the person were physically present at a meeting not conducted by videoconference call.

The notice of the meeting must specify as a location of the meeting the location where a quorum will be present. The notice must also specify each remote location at which a member of the commissioners court who will be participating in the meeting is physically present. Each location must be open to the public during the open parts of the meeting.

The Open Meeting Act sets additional technical requirements for a videoconference meeting.<sup>55</sup> Each part of the meeting that is required to be open to the public must be visible and audible to the public at each location. A recording of the meeting must be made. There must be two-way communication between and at the locations. While speaking, the face of each participant to the call must be visible and his or her voice audible to each other participant. During the open parts of the meeting, each speaker must also be visible and the speaker's comments must be audible to the public at each location.<sup>56</sup> If a problem occurs in the public audio or video signal, the meeting must be

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<sup>50</sup> Tex. Gov't Code §551.001(8)

<sup>51</sup> Tex. Gov't Code §551.127(b)

<sup>52</sup> Tex. Att'y Gen. Op. No. JC-0487 (2002). See also, Tex. Att'y Gen. Op. No. GA-1079 (2014)

<sup>53</sup> Tex. Local Gov't Code §81.001(b)

<sup>54</sup> Tex. Gov't Code §551.127(a-3)

<sup>55</sup> Tex. Gov't Code §551.127(f)-(h)

<sup>56</sup> The Texas Department of Information Resources has set minimum standards for audio and video signals for a videoconference call meeting and the quality of the signals at each location must meet these standards.

recessed until the problem is resolved or, if the problem persists for six hours or more, adjourned.<sup>57</sup>

### **Consultation With an Attorney by Telephone or Videoconference**

A commissioners court may use a telephone or video conference or an internet communication to consult with its attorney in an open or closed meeting, unless the attorney is a regular employee of the county (a person from whose salary the government body deducts employment taxes).<sup>58</sup> If the consultation occurs during an open meeting of the court, the communications with the attorney must be audible to the public at the location specified in the notice of the meeting as the physical location of the meeting.

## **NOTICE REQUIREMENTS**

### **Required Information**

The Open Meetings Act requires written notice of all meetings. As a practical matter, many counties post the commissioners court agenda as “notice” of the meeting. The notice must include the date, hour, place and subject of a meeting.<sup>59</sup> The notice must be sufficient to apprise the general public of the subjects to be considered during the meeting.<sup>60</sup> The notice must be more specific if the public has a special interest in the topic under discussion.<sup>61</sup> Unless it is otherwise required by law, a county is not required to post notice of an open meeting in a newspaper. For example, the county is required to post notice of the public hearing on the budget in at least one newspaper of general circulation in the county.<sup>62</sup>

There are three important considerations in creating a proper written notice of a meeting:

1. **The right balance of information.** The notice must describe the subject matter that will be discussed or acted on with enough specificity that a member of the general

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<sup>57</sup> Tex. Gov't Code §551.127(f); Tex. Att'y Gen. Op. No. DM-480 (1998)

<sup>58</sup> Tex. Gov't Code §551.129

<sup>59</sup> Tex. Gov't Code §551.041. See Appendix B for a sample of a notice.

<sup>60</sup> *Friends of Canyon Lake v. Guadalupe-Blanco River Authority*, 96 S.W.3d 519 (Tex. App. – Austin, 2002, pet. denied); *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762 (Tex. 1991). See also, Tex. Att'y Gen. Op. No. GA-0872 (2011)

<sup>61</sup> Tex. Att'y Gen. Op. No. GA-0668 (2008); *Cox, supra*, at 959; *Markowski v. City of Marlin*, 940 S.W.2d 720, 726 (Tex. App. -- Waco 1997 no writ); *Mayes v. City of De Leon*, 922 S.W.2d 200, 203 (Tex. App. – Eastland 1996, writ denied)

<sup>62</sup> Tex. Local Gov't Code §111.0075

public will know what is to be discussed.<sup>63</sup> It's never sufficient to use catch-all listings like "other business," "real estate matters," and the like.<sup>64</sup> Additionally, a posting of "staff briefing" or "employee briefing" does not provide adequate notice to the public of the subjects to be considered in the meeting.<sup>65</sup> A posting should have enough information to allow a reader to know the subject matter the court will consider, without overwhelming the reader with so much detail that the posting becomes meaningless.<sup>66</sup>

"Public comment" is a sufficient notice under the Act to advise that members of the general public will address the governmental body.<sup>67</sup> However, "public comment" or a similar term will not provide adequate notice if, before a meeting is posted, the governmental body is aware or reasonably should have been aware of specific topics to be raised.

2. **Flexibility for court action.** A notice shouldn't be so specific that it ties the commissioners court's hands. For instance, a posting that set out in intricate detail the terms of a contract that the court changes during approval of the item would be open to an accusation that the final action wasn't authorized by the notice.

Remember, the purpose of the Open Meetings Act is to open the decision-making process to the public. If the notice is tightly scripted, it implies that the decisions have already been made.

3. **Simple language.** A notice should use plain, concise English. A posting should avoid jargon, hyper-technical language, or idiosyncratic usage that only someone intimately involved with the subject matter could be expected to understand. The audience to which a notice should be aimed is the general public.<sup>68</sup>

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<sup>63</sup> *City of San Antonio, supra*, at 765. ("The intended beneficiaries of the Act are not individual citizens, such as the particular landowners affected by this condemnation, but members of the interested public.")

<sup>64</sup> *Cox, supra*, at 959. ("Selection of a new school superintendent is not in the same category as ordinary personnel matters – and a label like 'personnel' fails as a description of that subject.")

<sup>65</sup> Tex. Att'y Gen. Op. No. JC-0169 (2000)

<sup>66</sup> *City of San Antonio, supra*, at 766 ("Far from serving the purposes of the Act, this degree of specificity would so overwhelm readers that it would prove even less informative than the current notice.")

<sup>67</sup> Tex. Att'y Gen. Op. No. JC-0169 (2000)

<sup>68</sup> *City of San Antonio, supra*, at 765

### **Posting an Executive Session**

The Act does not require the notice to specify whether a matter will be considered in an open or closed session.<sup>69</sup> However, the attorney general has cautioned that a governmental body's abrupt departure from a practice of indicating which items will be taken up in open session and identifying those to be covered in an executive session may raise a question of whether the less specific notice adequately informs the public. A commissioners court may also include language in each of its agendas that any item may be considered in closed session as authorized by the Open Meetings Act. The notice of a closed meeting does not need to include the section number of the Open Meetings Act that authorizes the closed meeting.<sup>70</sup>

### **Posting a Committee Meeting**

As discussed above, the meetings of a committee that has authority to act or whose recommendations may be "rubber-stamped" by the commissioners court must be posted.<sup>71</sup> Additionally, if a quorum of the commissioners court is likely to attend the meeting of a committee of less than a quorum, it is sufficient for the posting to indicate that a quorum may be present.<sup>72</sup>

### **Place of Posting**

All meeting notices must be physically posted in a particular location. As of January 1, 2020 all counties are required to have a website and will be required to post a meeting notice or copy of its agenda electronically.<sup>73</sup>

### **Physical Posting**

All counties must comply with a "physical" notice requirement by posting a hard copy notice of its meetings on a bulletin board at a place in the county courthouse.<sup>74</sup> For a county that posts only physical notices, the notice must be readily accessible by the general public *at all times* for at least 72 hours before the scheduled time for the meeting.<sup>75</sup> This requirement demands strict compliance and is mandatory. If it's not followed to the letter, the posting is legally insufficient.<sup>76</sup> As discussed below, this requirement is relaxed

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<sup>69</sup> Tex. Att'y Gen. Op. No. JC-0057 (1999)

<sup>70</sup> Tex. Att'y Gen. Op. No. GA-0511 (2007)

<sup>71</sup> Tex. Att'y Gen. Op. Nos. GA-0999 (2013), JC-0060 (1999), H-994 (1977); *Willmann, supra*, at 473

<sup>72</sup> Tex. Att'y Gen. Op. GA-0957 (2012)

<sup>73</sup> Tex. Gov't Code §551.056

<sup>74</sup> Tex. Gov't Code §551.049

<sup>75</sup> Tex. Gov't Code §551.043. The Texas Supreme Court found a notice posted in a locked courthouse was not accessible to the public and failed to meet the posting requirement of 72 hours. *Smith County v. Thornton*, 726 S.W.2d (Tex. 1986).

<sup>76</sup> *City of San Antonio, supra*, at 768

if the county also posts its notice electronically. A practice of stamping the date and time of posting on the notice itself may avoid a challenge to the timeliness of the notice.

### **Electronic Posting**

Counties that maintain an Internet website or for which an Internet website is maintained must concurrently post notice of a meeting on the Internet website.<sup>77</sup> An electronic notice that fails to comply with the requirements is not invalid if the county makes a good faith attempt to comply and the failure is due to a technical problem beyond the commissioners court's control.<sup>78</sup> The commissioners court in a county with a population of 65,000 or more that maintains a website is also required to post the "agenda" for the meeting on its Internet website along with the meeting notice.<sup>79</sup>

For a county that posts both physically and electronically, the physical posting accessibility requirement is less stringent. In that circumstance, the statute is satisfied by making the physical notice readily accessible to the general public during normal business hours, rather than at all times during the 72-hour period.<sup>80</sup>

### **Time of Posting**

The notice of an open meeting must be posted for at least 72 hours before the scheduled meeting.<sup>81</sup> This requirement demands strict compliance and is mandatory. However, as more fully discussed below, in the case of an emergency, notice is only required to be posted two hours before the scheduled meeting.<sup>82</sup>

### **Responsibility for Preparing Agenda and Notice**

The constitution vests responsibility in the commissioners court, acting as a whole, to exercise the power and jurisdiction over all county business prescribed by the constitution or by statute.<sup>83</sup> The commissioners court may adopt procedures related to preparation of the agenda. The commissioners court is charged to issue notices necessary for the proper execution of its powers and duties.<sup>84</sup> According to the attorney general, the court's agenda is a "notice" which is made "necessary" by the Open

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<sup>77</sup> Tex. Gov't Code §551.056

<sup>78</sup> Tex. Gov't Code §551.056(d); *Argyle ISD v. Wolf*, 234 S.W.3d 229 (Tex. App. – Fort Worth 2007, rehearing overruled)

<sup>79</sup> Because the two terms are used interchangeably in the statute and in common parlance, it is not clear what additional information should be included under this provision.

<sup>80</sup> Tex. Gov't Code §551.043(b)

<sup>81</sup> Tex. Gov't Code §551.043(a)

<sup>82</sup> Tex. Gov't Code §551.045

<sup>83</sup> Tex. Const., art. V, § 18(b)

<sup>84</sup> Tex. Loc. Gov't Code, §81.022

Meetings Act for the court's proper execution of its duties.<sup>85</sup> The court may designate an agenda clerk to compile items to be placed on the agenda, and the court may prescribe the manner in which items are to be submitted for inclusion. The court may appoint a person to post the notice of a meeting on behalf of the court. However, each member of the court *must* be permitted to place on the agenda any item of his or her choosing.<sup>86</sup> The county judge or three county commissioners may call a special meeting of the commissioners court.<sup>87</sup>

### **Additional Posting for a Recessed Meeting**

The commissioners court is authorized to recess a properly posted meeting and continue it on the next regular business day.<sup>88</sup> There is no additional posting required for this continuation so long as the body's action is taken in good faith and not to circumvent the Act. However, the statute does not allow the governing body to recess the continued meeting to yet another day without posting the proper notice.

### **Supplemental Posting**

Except in an emergency or urgent public necessity, nothing may be added to an agenda after the 72-hour deadline for posting the notice.<sup>89</sup> As noted, a posting must be continuously available to the public for 72 hours before the scheduled time of the meeting. If a non-emergency item is to be added to the agenda, it must satisfy the usual 72-hour notice requirement.

### **Emergency Posting**

In an emergency or when there is an urgent public necessity, the notice of a meeting to deliberate or take action on the emergency or public necessity (or supplemental notice to add the deliberation as an item to the agenda of a previously called meeting) may be posted as late as one hour before the meeting is scheduled to begin.<sup>90</sup> However, the meeting must be required to respond to a real emergency or urgent public necessity.<sup>91</sup> An emergency exists only if immediate action is required of a governmental body because of an imminent threat to public health and safety or a reasonably unforeseeable



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<sup>85</sup> Tex. Att'y Gen. Op. Nos. DM-0228 (1993), JM-63 (1983)

<sup>86</sup> Tex. Att'y Gen. Op. No. JM-63 (1983)

<sup>87</sup> Tex. Local Gov't Code §81.005(b). Whether the three commissioners calling a special meeting constitute a quorum in violation of the Open Meeting Act is not addressed.

<sup>88</sup> Tex. Gov't Code §551.0411

<sup>89</sup> Tex. Gov't Code §§551.043, 551.045

<sup>90</sup> Tex. Gov't Code §551.045, amended by SB 494, 86<sup>th</sup> Leg. (2019), effective Sept. 1, 2019.

<sup>91</sup> *Piazza v. City of Granger*, 909 S.W.2d 529, 535, n.3 (Tex. App. – Austin 1995, no writ). (“Even if the meeting notice clearly identified an emergency, the actions taken at the emergency meeting will be void if an emergency did not in fact exist.”).



situation. A reasonably unforeseeable situation includes fire, flood, earthquake, tornado, or wind, rain, or snow storm. It also includes power failure, transportation failure, or interruption of communication facilities. It also includes epidemics, riots, civil disturbances, enemy attack, or other actual or threatened acts of lawlessness or violence. The Act includes “the sudden relocation of a large number of residents from the area of a declared disaster to a governmental body’s jurisdiction” within the scope of reasonably unforeseeable situations.<sup>92</sup> The posting must clearly identify the emergency.<sup>93</sup> The need for quick action, without more, is not an emergency.<sup>94</sup>

### **Meeting Prevented by Catastrophe**

If the commissioners court is prevented from convening a properly posted meeting because of a catastrophe, the court may convene in a convenient location within 72 hours if the court complies with the posting requirements for an emergency meeting.<sup>95</sup> If it is not possible to convene within that 72-hour period, the court must post a new notice before it may meet.

## **REGULAR MEETINGS**

### **Minutes or Recording**

The Open Meetings Act requires a governmental body to keep minutes, or make a recording, of every meeting.<sup>96</sup> “Recording” is defined to mean a tangible medium on which audio or a combination of audio and video is recorded, including a disc, tape, wire, film, electronic storage device or other medium.<sup>97</sup> The minutes, or the recording, are a public record.<sup>98</sup> If minutes are kept, they must state the subject of each discussion, and record each vote, order, decision, or other action taken.<sup>99</sup> Another statute requires the county clerk to keep the minutes of the commissioners court meetings.<sup>100</sup> Keeping the minutes of the commissioners court’s meetings is a core duty of the county clerk and

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<sup>92</sup> Tex. Gov’t Code § 551.045(e)

<sup>93</sup> *Piazza, supra*, at 533. (“[E]ven if an emergency...exists, notice of an emergency meeting is nevertheless defective if it fails to clearly identify the existing emergency.”)

<sup>94</sup> *Id.* at 534. (“[T]he development of a ‘lack of confidence’ in a police officer by a governing body is a foreseeable situation...”)

<sup>95</sup> Tex. Gov’t Code §551.0411, “Catastrophe” is defined as a condition or occurrence that interfered physically with the ability of a governmental body to conduct a meeting, including a fire, flood, earthquake, power failure, or civil disturbance.

<sup>96</sup> Tex. Gov’t Code §551.021. See also, Tex. Att’y Gen. Op. No. GA-0727 (2009) (Rule requiring a state agency to create and maintain written minutes of an open meeting inconsistent with §551.021.)

<sup>97</sup> Tex. Gov’t Code §551.001(7)

<sup>98</sup> Tex. Gov’t Code §551.022

<sup>99</sup> Tex. Gov’t Code §551.021

<sup>100</sup> Tex. Loc. Gov’t Code §81.003

may not be assigned to another person.<sup>101</sup>

### **Votes Must be Taken in Public**

The commissioners court's votes must be taken in public and recorded in the minutes. Secret ballots are not permitted.<sup>102</sup>

### **Posting Required for Discussion**

The commissioners court may not deliberate or take action on an item that is not posted. However, if a member of the public (or, for that matter, a member of the court) raises a subject that has not been included in the notice for the meeting, any discussion of the subject must be limited to providing specific factual information or reciting existing policy or a proposal to place the subject on the agenda for a future meeting.<sup>103</sup>

### **Internet Broadcast of Open Meeting**

A commissioners court for a county that has a population of less than 125,000 may broadcast its meetings over the Internet if it establishes an Internet website and provides access to the broadcast from that site.<sup>104</sup> Additionally, the court must provide notice of the meeting on the Internet site that meets all the regular requirements for posting notice.

A commissioners court for a county that has a population of 125,000 or more is required to make a video and audio recording of each regularly scheduled open meeting that is not a work session or special called meeting and make available an archived copy of the recording on the Internet not later than seven days after the date of the recording.<sup>105</sup> The county's Internet website must make conspicuously available either the archived recording or an accessible link to the archived recording. Archived recordings on the Internet must be maintained for not less than two years after the date the recording was first made available. The county may also broadcast a regularly scheduled open meeting on television.

### **The Rights of the Public**

The Open Meetings Act gives the public the right to have timely notice of the time and

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<sup>101</sup> Tex. Const. art. V, §20; Tex. Att'y Gen. Op. No. GA-0277 (2004)

<sup>102</sup> Tex. Att'y Gen. Op. No. H-1163 (1978)

<sup>103</sup> Tex. Gov't Code §551.042. Tex. Att'y Gen Op. No. GA-0668 (2008); *Hays County Water Planning P'ship v. Hays County*, 41 S.W.3d 174 (Tex. App. – Austin 2001, pet. denied)

<sup>104</sup> Tex. Gov't Code §551.128(b)

<sup>105</sup> Tex. Gov't Code §551.128. Thirty-one counties meet this population bracket according to the 2010 census.

place of the meeting and of the matters to be discussed or acted on;<sup>106</sup> the right to attend the meeting;<sup>107</sup> and the right to record open meetings with a recorder or a camera.<sup>108</sup> The court's authority to adopt reasonable rules to maintain order at a meeting may reasonably limit the right to record. For example, the court may restrict where a camera may be set up, so long as the rules do not prevent the person from exercising that right.



### **Public Testimony**

The Act requires the commissioners court to allow each member of the public who desires to address the court regarding an item on the agenda for an open meeting to address the court regarding the item at the meeting before or during the court's consideration of the item.<sup>109</sup> The court may adopt reasonable rules regarding the public's right to address the court, including restricting the amount of time a member of the public may address the court on a given item.<sup>110</sup> A time restriction rule must provide that if the court does not use simultaneous translation equipment, a member of the public who addresses the court through a translator have at least twice the amount of time as a member of the public who does not require a translator.<sup>111</sup> The commissioners court may not prohibit public criticism of the court, including criticism of any act, omission, policy, procedure, program or service.<sup>112</sup>

If the court provides general public comment sessions i.e., an opportunity for a member of the public to address the commissioners court about matters not appearing on the agenda, the opportunity must be made available in an evenhanded manner. For example, reasonable restrictions on the number of speakers and the time allowed to them are permissible.<sup>113</sup> Most importantly, the opportunity of a person to address the body may not be restricted because of what the person may have to say.<sup>114</sup> If a law requires a public hearing, that law may impose additional requirements for members of the public to be heard.

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<sup>106</sup> Tex. Gov't Code §551.041

<sup>107</sup> Tex. Gov't Code §551.002

<sup>108</sup> Tex. Gov't Code §551.023

<sup>109</sup> Tex. Gov't Code 551.007(b), HB 2840, 86<sup>th</sup> Leg. 2019, effective Sept. 1, 2019

<sup>110</sup> Tex. Gov't Code 551.007(c), HB 2840, 86<sup>th</sup> Leg. 2019, effective Sept. 1, 2019.

<sup>111</sup> Tex. Gov't Code 551.007(d), HB 2840, 86<sup>th</sup> Leg. 2019, effective Sept. 1, 2019. See Appendix C for a sample public participation form

<sup>112</sup> Tex. Gov't Code 551.007(e), HB 2840, 86<sup>th</sup> Leg. 2019, effective Sept. 1, 2019.

<sup>113</sup> Tex. Att'y Gen. Op. Nos. JC-0169 (2000), LO-96-111

<sup>114</sup> These are basic First Amendment concepts

## CLOSED MEETINGS/EXECUTIVE SESSIONS

### Definition of a Closed or “Executive” Sessions

Closed meetings or executive sessions are meetings that are permitted to be conducted in private. The Open Meetings Act refers to these as “closed meetings,” but the term “executive session” is frequently used. In this publication, the terms are used interchangeably.

The most common reasons a commissioners court would convene a closed session are: consideration of specific personnel matters, including those related to an advisory body;<sup>115</sup> consultation with its attorney;<sup>116</sup> discussion about the value or transfer of real property;<sup>117</sup> discussion of a contract being negotiated;<sup>118</sup> discussion about security personnel, devices or a security audit;<sup>119</sup> discussions about a prospective gift or donation;<sup>120</sup> and discussion of an economic development matter.<sup>121</sup>

While the Act permits executive sessions in specific circumstances, it *never* permits a body to meet without posting the subject matter to be discussed.<sup>122</sup> An executive session may be held on any posted matter if an executive session is permitted under the Act. So long as the posting for an item identifies the subject matter that will be discussed, the Act does not require that the fact that the item will be discussed in a closed meeting be specified in the posting. However, as discussed earlier, if the commissioners court is in the practice of indicating which items will be covered in an executive session if this information is known in advance, the attorney general has cautioned against an abrupt departure from this practice.<sup>123</sup>

### Procedural Requirements for Holding a Closed Meeting

Before the commissioners court goes into a closed meeting, it must first convene publicly.<sup>124</sup> The presiding officer, the county judge if present, must publicly announce the section of the Open Meetings Act that permits the session to be closed to the

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<sup>115</sup> Tex. Gov’t Code §§551.074, 551.0745

<sup>116</sup> Tex. Gov’t Code §551.071

<sup>117</sup> Tex. Gov’t Code §551.072

<sup>118</sup> Tex. Gov’t Code §551.0725

<sup>119</sup> Tex. Gov’t Code §551.076

<sup>120</sup> Tex. Gov’t Code §551.073

<sup>121</sup> Tex. Gov’t Code §551.087

<sup>122</sup> *Cox, supra*, at 958

<sup>123</sup> Tex. Att’y Gen. Op. No. JC-0057 (1999)

<sup>124</sup> Tex. Gov’t Code §551.101

public.<sup>125</sup> No vote or final action may be taken in a closed meeting.<sup>126</sup>

### **Record of a Closed Meeting**

Except in the case of a closed meeting held to receive legal advice, the executive session must be recorded or a “certified agenda” kept.<sup>127</sup> The recording or certified agenda must include an announcement by the presiding officer of the date and time that the closed meeting began and ended.<sup>128</sup> The certified agenda or recording of an executive session must be kept a minimum of two years after the date of the session.<sup>129</sup> A member of the commissioners court may review a certified agenda or recording of a closed meeting, even if the member did not attend the meeting.<sup>130</sup>

The commissioners court may turn off the recorder during the portion of a closed meeting that involves consultation with an attorney. The commissioners court as a governmental body is the proper custodian of the certified agenda or recording of a closed meeting. Acting as a body, the commissioners court may designate any appropriate county official as the custodian of the certified agenda or recording.<sup>131</sup> The recording or the certified agenda is confidential, but a judge in a lawsuit challenging compliance with the Open Meetings Act may review it.<sup>132</sup> As discussed below, there are criminal penalties for releasing a copy of a certified agenda to the public.<sup>133</sup>

### **Personnel Matters**

The commissioners court may discuss personnel matters in a closed meeting under certain circumstances. The discussion may include the appointment, employment, evaluation, reassignment, duties, discipline or dismissal of a county officer or employee or a member of a county advisory board.<sup>134</sup> The purpose of the exception is to permit a governmental body to preserve the reputation of a public officer or employee.<sup>135</sup> The exception does not necessarily require that the commissioners court have final authority to appoint, employ, evaluate, reassign, discipline, or dismiss the particular county

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<sup>125</sup> *Cox supra*, at 958; Open Records Letter No. 2003-2361 (2003)

<sup>126</sup> Tex. Gov’t Code §551.102; *Cox supra*, at 958; *Weatherford v. The City of San Marcos*, 157 S.W.3d 473 (Tex. App. – Third Court of Appeals (2004))

<sup>127</sup> Tex. Gov’t Code §551.103

<sup>128</sup> Tex. Gov’t Code §551.103

<sup>129</sup> Tex. Gov’t Code §551.104. A sample certified agenda is included as Appendix D.

<sup>130</sup> Tex. Att’y Gen. Op. Nos. JC-120 (1999), DM-227 (1993)

<sup>131</sup> Tex. Att’y Gen. Op. No. GA-0277 (2004)

<sup>132</sup> Tex. Gov’t Code §551.104

<sup>133</sup> Tex. Gov’t Code §551.146

<sup>134</sup> Tex. Gov’t Code §§551.074, 551.0745

<sup>135</sup> Tex. Att’y Gen. Op. No. JC-0167 (2000); *Cox, supra*, at 958

officer or employee discussed in a closed meeting.<sup>136</sup> However, if the officer, employee, or advisory board member who is the subject of the deliberation requests that the item be heard in a public meeting, the commissioners court must do so. Any final action by the court on a personnel matter must be taken in an open meeting.<sup>137</sup>

### **Consultation with Attorney**

A closed session related to legal advice may only be held if the attorney is physically present or participating by telephone as authorized by Open Meetings Act §551.129.<sup>138</sup> Additionally, the private consultation must be to seek advice about pending or contemplated litigation, a settlement offer, or a matter subject to attorney-client confidentiality. General discussions of policy, unrelated to legal matters, are not permitted under the attorney consultation exception.<sup>139</sup> Except as discussed below, the commissioners court may consult with its attorney in an executive session to discuss legal issues raised by a proposed contract, but may not, under this provision, discuss the merits of the proposed contract, financial considerations, or other non-legal matters related to the contract.<sup>140</sup>

### **Real Property**

If the discussion of real property in open meeting would have a detrimental effect on the county's ability to negotiate with a third party, the commissioners court may discuss the purchase, exchange, lease, or value of the real property in a closed meeting.<sup>141</sup> Action related to a real property transaction must be taken in an open session.

### **Economic Development Negotiations**

Economic development negotiations are a permitted topic for an executive session.<sup>142</sup> Under this exception, the commissioners court may discuss or deliberate commercial or financial information that the county received from a business prospect that the county seeks to have locate, stay, or expand in or near the county and with which the county is conducting economic development negotiations, or to deliberate an offer of a financial or other incentive to such a business prospect. The governing board of a county hospital or county hospital authority can have closed meetings to discuss pricing or financial planning information related to a bid for provision of services to another

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<sup>136</sup> Tex. Att'y Gen. Op. No. JC-0167 (2000)

<sup>137</sup> Tex. Gov't Code §551.102

<sup>138</sup> Tex. Gov't Code §§551.071, 551.129

<sup>139</sup> *Texas State Bd. Of Public Accountancy v. Bass*, 366 S.W.3d, 751 (Tex.App. - Austin, 2012); *Finlan v. City of Dallas*, 888 F.Supp. 779 (N.D.Tex. 1995)

<sup>140</sup> Tex. Att'y Gen Op. No. JC-0233 (2000)

<sup>141</sup> Tex. Gov't Code §551.072

<sup>142</sup> Tex. Gov't Code §551.087

person, if disclosure would give advantage to the hospital's competitors and also to deliberate proposed new services before publically announcing new service.<sup>143</sup>

### **Security Matters**

Governmental bodies may conduct closed meetings to deliberate on matters relating to acts of terrorism and related criminal activity including discussions of security systems, vulnerability of critical infrastructure, and details about communications systems used to prevent, detect, or investigate terrorist acts or related criminal activity.<sup>144</sup> A governmental body that meets in executive session on homeland security matters must make a recording of the proceedings.<sup>145</sup>

### **Contract Under Negotiation**

The commissioners court may conduct a closed meeting to deliberate business and financial issues relating to a contract being negotiated by the county. However, before the commissioners court may meet in such an executive session, the court must vote unanimously that deliberation in an open meeting would have a detrimental effect on the court's position in negotiations with a third person, and the attorney advising the court must issue a written determination that an open meeting would be detrimental to the court's negotiations on the matter. The commissioners court must make a recording of the proceedings of a closed meeting to deliberate the information.<sup>146</sup>

### **People Authorized to Attend an Executive Session**

Attendance at an executive session is not limited to the commissioners court. Generally, a governmental body may include in a closed meeting a person whose interests are not adverse to the governmental body's interests and whose participation is necessary to the matter under discussion.<sup>147</sup> The commissioners court may exclude the county clerk from its executive sessions notwithstanding the clerk's statutory duty to record and keep the commissioners court's minutes and records.<sup>148</sup> The commissioner's court may not admit selected members of the public to a closed meeting.<sup>149</sup>

When the basis of a closed meeting is consultation with its attorney regarding pending litigation or settlement options, the governmental body must take other factors into consideration as well, including whether a person's presence will waive the attorney-

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<sup>143</sup> Tex. Gov't Code §551.085

<sup>144</sup> Tex. Gov't Code §418.181; Tex. Gov't Code §551.076; Tex. Gov't Code §551.089.

<sup>145</sup> Tex. Gov't Code §418.183

<sup>146</sup> Tex. Gov't Code §551.0725

<sup>147</sup> Tex. Att'y Gen. Op. No. JC-0375 (2001)

<sup>148</sup> Tex. Att'y. Gen. Op. Nos. GA-0277 (2004), JM-006 (1983)

<sup>149</sup> Tex. Att'y Gen. Op. No. GA-0511 (2007)

client privilege.<sup>150</sup> For example, the commissioners court could exclude one of its members if the person had sued the county.<sup>151</sup> The attorney general has opined that the Smith County commissioners court was authorized to include the county auditor in a closed meeting with the county's attorney, if the auditor's interests were not adverse to the county's, her participation was necessary to the issues to be discussed, and her presence did not waive the attorney-client privilege.<sup>152</sup>

### **Confidentiality**

The Open Meetings Act does not prohibit a member of the commissioners court from discussing or making statements about what occurred in a closed meeting.<sup>153</sup>

Additionally, notes made by an official during a closed meeting may be subject to disclosure under the Public Information Act, depending on their content and creation. For example, documents containing attorney-client privileged information may be withheld.

## **Violations and Penalties**

### **Criminal Violations**

Four acts are criminalized by the Open Meetings Act: meeting in a number less than a quorum with the intent to violate the act (commonly called a "walking quorum");<sup>154</sup> participating in an illegal closed meeting;<sup>155</sup> participating in a closed meeting knowing that a certified agenda or recording is not being made;<sup>156</sup> and disclosing a certified agenda or recording of a closed meeting without authority.<sup>157</sup> The Texas Court of Criminal Appeals upheld the conviction of a local official for violating the Open Meetings Act.<sup>158</sup> A federal court has upheld the Act's criminal violations, ruling that they are not unconstitutionally overbroad or vague nor a violation of the First

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<sup>150</sup> Tex. Att'y Gen. Op. Nos. KP-0006 (2015) and JC-0506 (2002)

<sup>151</sup> Tex. Att'y Gen. Op. No. JM-1004 (1989)

<sup>152</sup> Tex. Att'y Gen. Op. No. JC-0506 (2002)

<sup>153</sup> Tex. Att'y Gen. Op. No. JM-1071 (1989)

<sup>154</sup> Tex. Gov't Code §551.143

<sup>155</sup> Tex. Gov't Code §551.144

<sup>156</sup> Tex. Gov't Code §551.145

<sup>157</sup> Tex. Gov't Code §551.146

<sup>158</sup> *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App., 1998). The defendant, Mr. Tovar, was convicted of having knowingly participated in a closed meeting of the school board that was not permitted under the Act, and of having called or aided in calling and organizing a closed meeting of the school board that was not permitted under the Act. See Gov't Code §551.144.



Amendment free speech of elected officials.<sup>159</sup>

The Court of Criminal Appeals also held that a criminal prosecution under the Open Meetings Act is appropriate for either a procedural or substantive violation. The court held that if a closed meeting is authorized (i.e. an exception applies), the governing body must comply with the procedural steps enumerated in the Act. On the other hand, if one of the exceptions does not apply, then the closed meeting is violative of the Act regardless of whether the governing body complied with the procedural steps.<sup>160</sup>

### **Criminal Penalties**

All violations of the Open Meetings Act are misdemeanors. Meeting in numbers less than a quorum with the intent to violate the law and participating in an illegal closed meeting are misdemeanors punishable by a fine between \$100 and \$500 confinement between one month and six months, or both a fine and confinement.<sup>161</sup> Meeting in an executive session knowing that a certified agenda or a recording is not being kept is a Class C misdemeanor punishable by a fine not to exceed \$500.<sup>162</sup> Improperly disclosing the recording or certified agenda of an executive session is a Class B misdemeanor punishable by a fine not to exceed \$2,000, confinement for up to 180 days, or both a fine and confinement.<sup>163</sup>

### **Affirmative Defenses**

It is an affirmative defense to prosecution for participating in an illegal closed meeting if the member of the governmental body reasonably relied on a court order or a written interpretation of the Act in an opinion issued by a court, the attorney general, or the governmental body's attorney.<sup>164</sup> If a county official has any reservations about the legality of a closed meeting, the official would be well advised to seek a written opinion from the county attorney.

It is also a defense to prosecution for unlawful disclosure of a certified agenda or recording of a closed meeting if the member had good reason to believe the disclosure was lawful or the disclosure was the result of a mistake of fact concerning the nature or content of the certified agenda or recording.<sup>165</sup>

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<sup>159</sup> *Asgeirsson, supra*, at 458

<sup>160</sup> *Martinez v. State*, 879 S.W.2d 54 (Tex. Crim. App. 1994)

<sup>161</sup> Tex. Gov't Code §§551.143, 551.144

<sup>162</sup> Tex. Gov't Code §551.145; Tex. Penal Code §12.23

<sup>163</sup> Tex. Gov't Code §551.146; Tex. Penal Code §12.22

<sup>164</sup> Tex. Gov't Code §551.144(c)

<sup>165</sup> Tex. Gov't Code §551.146(c)

## **Prosecution and Defense of a Criminal Offense Under the Open Meetings Act**

District courts and criminal district courts have original jurisdiction over all misdemeanors involving official misconduct.<sup>166</sup> Official misconduct is an offense that is an intentional or knowing violation of a law committed by a public servant while acting in an official capacity.<sup>167</sup> A criminal violation of the Open Meetings Act is, therefore, a misdemeanor involving official misconduct.<sup>168</sup>

In criminal prosecutions in district court, the district attorney represents the state.<sup>169</sup> When requested, the county attorney may aid the district attorney in a prosecution in district court.<sup>170</sup> The attorney general may prosecute alleged violations of the Act at the request of the local prosecutor.<sup>171</sup>

The county does not have a duty to provide legal counsel to defend a county judge or commissioner accused of a criminal violation of the Act.<sup>172</sup> The commissioners court may not authorize the expenditure of public funds to reimburse the legal expenses of a county judge or commissioner who is found guilty of a violation.<sup>173</sup> However, a governmental body that determines that a public purpose will be served by paying the expenses of an officer after an acquittal may do so.<sup>174</sup> The attorney general has opined that a county has the authority to pay attorney's fees for a member of the commissioners court who sought legal representation for a criminal investigation that did not result in any criminal charges being filed, provided that the commissioners court determines, subject to judicial review, that the payment will serve a public purpose and not merely the member's private interest. A member of the commissioners court is precluded by public policy from voting on county payment of the member's criminal defense fees.<sup>175</sup>

## **Removal From Office**

A county judge or commissioner may be removed from office for official misconduct.<sup>176</sup> Conviction of a county judge or commissioner for a misdemeanor involving official

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<sup>166</sup> Tex. Code Crim. Pro. Art. 4.05

<sup>167</sup> Tex. Code Crim. Pro., Art. 3.04

<sup>168</sup> *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998)

<sup>169</sup> Tex. Code Crim. Pro. Art. 2.01

<sup>170</sup> Tex. Code Crim. Pro. Art. 2.02

<sup>171</sup> Tex. Gov't Code §402.028

<sup>172</sup> *White v. Eastland County*, 12 S.W.3d 97 (Tex. App – Eastland 1999, no pet.)

<sup>173</sup> Tex. Att'y Gen. Op. JC-0294 (2000) at 8

<sup>174</sup> Tex. Att'y Gen. Op. Nos. GA-0523 (2007), JC-0294 (2000) and KP-0037 (2015)

<sup>175</sup> Tex. Att'y Gen. Op. No. KP-0016 (2015)

<sup>176</sup> Tex. Loc. Gov't Code §87.013

misconduct operates as an immediate removal from office of that officer.<sup>177</sup> Therefore, a county judge or commissioner convicted for a violation of the Open Meetings Act is automatically removed from office.

### **Civil Sanctions**

The Open Meetings Act provides mandamus or injunction (writs used to compel or prevent action by an agency of the government) as civil remedies to stop, prevent, or reverse violations of the Act.<sup>178</sup> Actions taken by a governmental body in violation of the Act are voidable.<sup>179</sup>

### **Right to Bring Suit**

The Open Meetings Act grants broad standing to citizens to sue to prevent or reverse actions taken in violation of the Act. Accordingly, Texas courts have liberally granted standing to challenge an action under the Act.<sup>180</sup> In addition, a federal district court found that taxpayer citizens who had a “keen interest (although such an interest is not necessary) in the workings of their government” were entitled to bring an action under the Act to seek an injunction.<sup>181</sup> The courts have also held that that “the intended beneficiaries of the Open Meetings Act are ‘members of the interested public’.”<sup>182</sup> It is not necessary to be a taxpayer or person entitled to vote in a particular jurisdiction to qualify to bring suit under the Act.<sup>183</sup> The risk that a governmental body’s action will adversely affect a person’s neighborhood was sufficient to confer standing, without the person being required to prove the extent of future harm to proceed.<sup>184</sup>

### **Retroactive Ratification of Action Taken in Violation of the Open Meetings Act Prohibited**

An action taken in violation of the Open Meetings Act may not be retroactively ratified.<sup>185</sup> Assuming proper notice under the Act, the governing body may, of course, vote to take the same action as it originally intended at the previous meetings.

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<sup>177</sup> Tex. Loc. Gov’t Code §87.031

<sup>178</sup> Tex. Gov’t Code §551.142

<sup>179</sup> Tex. Gov’t Code §551.141

<sup>180</sup> *Save Our Springs Alliance, Inc. v. Lowry*, 934 S.W.2d 161, 162 (Tex. App. – Austin 1996)

<sup>181</sup> *Finlan, supra* at 784

<sup>182</sup> *Save Our Springs, supra*, at 164

<sup>183</sup> *Id.* at 163; *cf. Laidlaw Waste Sys. (Dallas), Inc. v. Wilmer*, 904 S.W.2d 656, 660 (Tex.1995) (assuming without deciding that company holding permit to construct and operate municipal solid waste landfill on site annexed by city had standing under the Open Meetings Act).

<sup>184</sup> *Save Our Springs, supra*, at 162

<sup>185</sup> *Mayes v. City of De Leon*, 922 S.W.2d 200, 204 (Tex.App. – Eastland 1996, writ den’d); *Lower Colorado River Authority v. City of San Marcos*, 523 S.W.2d 641 (Tex. 1975); *Dallas County Flood Control District No. 1 v. Cross*, 815 S.W.2d 271, 283 (Tex. App. – Dallas 1991, writ den’d).

However, that subsequent vote may not be given retroactive effect.<sup>186</sup> There is no “cure” for a criminal violation.

## **BEST PRACTICES**

The best way to avoid adverse consequences concerning your participation in meetings of the commissioners court is to familiarize yourself with the basic requirements of the Open Meetings Act. Review the agenda posted for each meeting to assure yourself that your court is not attempting to deliberate on a matter not properly posted.

Before participating in a closed meeting, make sure that the presiding officer announces the exception that allows the meeting to be closed to the public. See that a recording or certified agenda is kept of any closed meeting you attend.

In short, conscientiously follow the letter and spirit of the law. Finally, if you are in doubt about the propriety of the commissioners court’s proposed actions under the Open Meetings Act, obtain prompt written legal advice from your county attorney or a private attorney you retain to represent you as to that issue.

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<sup>186</sup> *Lower Colorado River Authority, supra*, at 647; Tex. Att’y Gen. Op. No. GA-0477 (2006)

## Appendix A

### RULES OF PROCEDURE

#### \_\_\_\_\_ County Commissioners Court Rules of Procedure, Conduct and Decorum

1. All Regular, Special, Emergency and Executive Session Meetings of the \_\_\_\_\_ County Commissioners Court will be called and conducted in accordance with the provisions of the Texas Open Meetings Act, Chapter 551, Government Code.
2. Regular, Special and Emergency Meetings of the \_\_\_\_\_ County Commissioners Court are open to the public and to representatives of the press and media. Executive Sessions of the Commissioners Court are not open to the public, the press or the media and only those individuals expressly requested or ordered to be present are allowed to attend Executive Sessions.
3. The \_\_\_\_\_ County Commissioners Court meets in Regular Session on the second and fourth Mondays of each month. In order for a matter or issue to appear as an agenda item on the Agenda of any Regular Meeting of the Commissioners Court, a request must be filed with and approved by at least one member of the Commissioners Court and/or the County Judge by 12:00 p.m. (noon) on the Wednesday immediately preceding the next Regular Meeting of the Commissioners Court.
4. The business of \_\_\_\_\_ County is conducted by and between the members of the \_\_\_\_\_ County Commissioners Court and by those members of the county staff, elected officials, department heads, consultants, experts and members of the public requested to be present and participate. While the public is invited to attend all meetings of the Commissioners Court (except Executive Sessions) the public's participation therein is limited to that of observees unless a member (or members) of the public is requested to address the Commissioners Court on a particular issue (or issues) or unless the member (or members) of the public completes a Public Participation Form and submits same to the County Clerk prior to the time the agenda item (or items) is addressed by the Court. A sample of the \_\_\_\_\_ County Commissioners Court Public Participation Form is attached hereto as Exhibit "A".
  - A. Each member of the public who appears before the Commissioners Court shall be limited to a maximum of five minutes to make his/her remarks. Time for

each speaker shall be maintained by the County Clerk or such other designated representative of the Commissioners Court.

- B. In matters of exceptional interest, the Commissioners Court may, by the majority vote of the members of the Court in attendance at the meeting, either shorten or lengthen the time allocated for a particular member of the public, all members of the public or the amount of time allocated for all agenda items or a specific agenda item.
- C. It is the intention of the Commissioners Court to provide open access to the citizens of \_\_\_\_\_ County to address the Commissioners Court and to express themselves on issues of county government. Members of the public are reminded that the \_\_\_\_\_ County Commissioners Court is a Constitutional Court, with both judicial and legislative powers, created under Article V, Section 1 and Section 18 of the Texas Constitution. As a Constitutional Court, the \_\_\_\_\_ County Commissioners Court also possesses the power to issue a Contempt of Court Citation under Local Government Code §81.023. Accordingly, all members of the public in attendance at any Regular, Special or Emergency meeting of the Commissioners Court shall conduct themselves with proper respect and decorum in speaking to, or addressing the Court; in participating in public discussions before the Court; and in all actions in the presence of the Court. Proper attire for men, women and children is mandatory. Those members of the public who are inappropriately attired or who do not conduct themselves in an orderly and appropriate manner will be ordered to leave the meeting. Refusal to abide by the Commissioners Court's order or continued disruption of the meeting may result in a Contempt of Court Citation.
- D. It is not the intention of the \_\_\_\_\_ County Commissioners Court to provide a public forum for the demeaning of any individual or group. Neither is it the intention of the Court to allow a member (or members) of the public to insult the honesty and integrity of the Court, as a body, or any member or members of the Court, individually or collectively. Accordingly, profane, insulting or threatening language directed toward the Commissioners Court or any person in the Court's presence or racial, ethnic, or gender slurs or epithets will not be tolerated. Violation of these rules may result in the following sanctions:
1. cancellation of a speaker's remaining time;

2. removal from the Commissioners Courtroom;
  3. a Contempt Citation; and
  4. such other civil and criminal sanctions as may be authorized under the Constitution, Statutes and Codes of the State of Texas.
5. The County Judge is the presiding officer of the \_\_\_\_\_ County Commissioners Court and is a fully participating member thereof. In the event of the absence of the County Judge, the senior member of the Commissioners Court (in terms of total number of years as an elected representative) present at the Regular, Special, Emergency meeting or Executive Session, shall serve as the Judge Pro-Tem of the Court. However, nothing shall prevent the senior member of this Commissioners Court from delegating this duty to another member of the Commissioners Court.
6. The County Judge (or the designated Judge Pro-Tem of the Commissioners Court), as presiding officer of the Commissioners Court, is responsible for conducting all meetings and members of the public who have properly completed a Public Participation Form and submitted it to the County Clerk must wait to be recognized before they will be allowed to address the Court.
7. Special rules for the press and media:
  - A. No media personnel or equipment, including lights, cameras or microphones will be located on the Commissioners Court bench nor closer than five feet in front of the Commissioners Court bench.
  - B. Reporters and media technicians are required to structure their movements, equipment set-up and take-down and adjustments, etc., in such a manner as to not disrupt the Commissioners Court deliberations or the ability of the public to see, hear, and participate in the proceedings.
  - C. Interview shall not be conducted inside the Commissioners Courtroom during the time the Court is in session.
  - D. Media interviews which are conducted outside the Commissioners Courtroom should be conducted in such a manner that the interview does not disturb, impede or disrupt the proceedings of any regular, special, emergency or executive session of the court.
8. The Sheriff of \_\_\_\_\_ County, Texas, or his designated deputy, shall serve as the bailiff at all regular, special, and emergency meetings of the Commissioners Court.

However, if: the Sheriff is absent; there is a conflict of interest between the Sheriff, any member of the Sheriff's department, and the Commissioners Court; or there is an executive session of the Court in which the Sheriff is not an authorized participant, then the Court shall appoint another commissioned peace officer to serve as bailiff.

9. From time to time, the Commissioners Court may conduct town meetings and public hearings. These rules of procedure, conduct and decorum shall also apply to town meetings and public hearings; however, the Commissioners Court may adopt additional and supplemental rules for a town meeting or public hearing as may be necessary and appropriate to conduct the meeting or hearing in an orderly, efficient and proper manner.
10. These Rules of Procedure, Conduct and Decorum at Meetings of the \_\_\_\_\_ County Commissioners Court shall be effective immediately upon adoption by the Court and shall remain in full force and effect until amended or repealed by a majority vote of the Commissioners Court.

ADOPTED BY THE UNANIMOUS VOTE OF THE \_\_\_\_\_ COUNTY COMMISSIONERS COURT on this the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
County Judge

\_\_\_\_\_  
Commissioner, Pct. 1

\_\_\_\_\_  
Commissioner, Pct. 2

\_\_\_\_\_  
Commissioner, Pct. 3

\_\_\_\_\_  
Commissioner, Pct. 4

Attest:

\_\_\_\_\_  
County Clerk



## Appendix B

### NOTICE OF OPEN MEETING

**DISCLAIMER: This document is provided as a guideline only.  
Legal advice should be sought on the proper posting of specific items of county  
business.**

\_\_\_\_\_ County Commissioners Court

#### Notice of Open Meeting

DATE OF MEETING: *(Include day/time)*

STREET LOCATION:

CITY LOCATION:

COMPLETE AGENDA:

[REVISED AGENDA: *If necessary*]

Call to Order – *(Include day/time)*

#### **DELIBERATE AND CONSIDER ACTION ON THE FOLLOWING ITEMS:**

Minutes of *(date)* Commissioners Court meeting

Open and consider/award bids received for purchase of *(equipment)* for *(specific precinct or department)*.

#### **Departmental reports:\***

Treasurer

County Clerk

Commissioner Pct. 1

Commissioner Pct. 2

Commissioner Pct. 3

Commissioner Pct. 4

Sheriff

Auditor

\*Include detailed description of any item in report that may be of public interest.

Proposed Budget Draft

Request for Budget Amendment from *(department)*

Appoint members of the \_\_\_\_\_ Committee

Bid specifications to be published for purchase of *(equipment)* for *(specific precinct or department)*

Interlocal cooperation agreement with *(other political subdivision)* relating to *(describe project or purchase)*

Construction/repair of road/bridge located at *(specific address or location, including precinct)*

Procure easement necessary to widen County Road \_\_\_ in Precinct \_\_\_\_

Employee Grievance by *(describe position or name employee)*

Report from consultant on *(ex. Year 2000 computer compliance procedures for all county departments)*

Public Comment (NO DISCUSSION OR ACTION) (5 minutes per speaker)

Adjourn.

Pursuant to the authority granted under Government Code, Chap. 551, the Commissioners Court may convene a closed session to discuss any of the above agenda items. Immediately before any closed session, the specific section or sections of Government Code, Chap. 551 that provides statutory authority will be announced.

#### CERTIFICATION

ATTEST:

NAME: *(County Clerk or other authorized official)*

TITLE:

SIGNATURE OF CERTIFYING OFFICIAL: \_\_\_\_\_

DATE:

TELEPHONE NUMBER: 000-000-0000

FAX NUMBER: 000-000-0000

**Appendix C**

**PUBLIC PARTICIPATION FORM**

NOTE: This Public Participation Form must be presented to the County Clerk prior to the time the agenda item (or items) you wish to address are discussed before the Court.

\_\_\_\_\_ **County Commissioners Court**  
**Public Participation Form**

Instructions: Fill out all appropriate blanks. Please print or write legibly.

NAME: \_\_\_\_\_

HOME ADDRESS:  
\_\_\_\_\_

HOME TELEPHONE:  
\_\_\_\_\_

PLACE OF EMPLOYMENT:  
\_\_\_\_\_

EMPLOYMENT TELEPHONE:  
\_\_\_\_\_

Do you represent any particular group or organization? Yes No (circle one)  
If you do represent a group or organization, please state the name, address and telephone number of such group or organization.

\_\_\_\_\_  
\_\_\_\_\_

Which agenda item (or items) do you wish to address? \_\_\_\_\_  
\_\_\_\_\_

In general, are you for or against such agenda item (or items)? \_\_\_\_\_  
\_\_\_\_\_

Signature: \_\_\_\_\_

## Appendix D

### CERTIFIED AGENDA

\_\_\_\_\_ County Commissioners Court

#### Certified Agenda of Closed Meeting

I, \_\_\_\_\_, THE PRESIDING OFFICER OF THE \_\_\_\_\_ COUNTY COMMISSIONERS COURT, CERTIFY THAT THIS DOCUMENT ACCURATELY REFLECTS ALL SUBJECTS CONSIDERED IN AN EXECUTIVE SESSION OF THE COURT CONDUCTED ON \_\_\_\_\_ (date).

1. The executive session began with the following announcement by the presiding officer: "The \_\_\_\_\_ County Commissioners Court is now in executive session on (date) at (time)."

2. SUBJECT MATTER OF EACH DELIBERATION

Agenda Item #: (insert basis for closed session and general description of the deliberation.).

Agenda Item #: (insert basis for closed session and general description of the deliberation.).

3. No further action was taken.

4. The executive session ended with the following announcement by the presiding officer: "This executive session ended on (date) at (time)."

\_\_\_\_\_  
Presiding Officer