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Feature Publication

UPDATE ON THE TEXAS OPEN MEETINGS ACT

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I. Introduction

The Texas Open Meetings Act ("Act") was enacted during a period when there was a national trend toward "open government." During the past thirty years of open government in Texas, the Act has been amended many times. Nonetheless, there are still those who believe that we need to make government more accessible. Editorials in the major

papers lobby for fewer issues being excepted from the Act so they can be deliberated in closed sessions. In particular, staff briefings have come under fire. Last session legislation was introduced to make staff briefings open to the public. Although that legislation did not become law, it is anticipated that this issue will be resurrected next year. Senator Jeff Wentworth is particularly interested in open government and is working on several issues relating to both the Open Meetings and the Open Records Acts during the interim. As noted above, the Act is reviewed and revised, every legislative session. Last session was no exception. This paper will address changes made by the 75th Legislature in 1997 and will also cover issues addressed by the courts and Attorney General Opinions over the past year.

II. Amendments to the Act

There were two amendments which are of particular interest to local governments, §§551.0745 and 551.126⁽¹⁾. Section 551.0745 provides that the commissioners court of a county can deliberate various personnel matters affecting a member of an advisory body appointed by the county in executive session. The statute includes a provision that the commissioners court can hear complaints and charges against the members of an advisory body in executive session also.

Section 551.126⁽²⁾ gives governmental bodies the ability to hold videoconference call meetings. As you know, telephone conference call meetings are permissible if a public emergency exists and the convening at one location of a quorum of the governmental body is difficult or impossible. The videoconference call meeting may be held without there being an emergency, but the circumstances are so proscribed that few governmental bodies utilize the process. To hold such a meeting, a quorum must be physically present at one location of the meeting. In addition to the usual requirements, the notice of the meeting must specify all locations where members will be present and each of the locations must be open to the public during the open parts of the meeting. All parts of the meeting have to be visible and audible to the public at each location and the quality of the audio and video signals must permit the public to observe the demeanor and hear the voice of each participant.

III. Recent Case Law

A. Validity of actions of an administrator when a governmental body violates the Act.

In recent cases, two Texas courts of appeal considered the issue of whether a governmental body's violations of the Open Meetings Act would void the subsequent independent action of an administrator to terminate the employment of personnel. In both instances the courts held that the governmental body's violations do not render void the subsequent independent actions tied to those deliberations.

In *Spiller v. Texas Department of Insurance*, 949 S.W.2d 548 (Tex.App.--Austin 1997, writ denied), decided on summary judgment, the court addressed the above mentioned issue, of whether a governmental body's deliberation on employment matters in violation of the Texas Open Meetings Act rendered void subsequent independent actions tied to those deliberations. Under the statute in effect at the time of the reduction, the State Board of Insurance ("State Board") was the policy-making body of the Department of Insurance. *Id.* at 549. The State Board was required to act through the commissioner, whom it appointed to act as the chief executive and administrative officer of the Department. *Id.* The commissioner was charged with appointing deputies, assistants, and other personnel necessary to carry out the duties and functions devolving upon the commissioner and the department. *Id.* The State Board with the Commissioner discussed the reduction in force of department employees at a January 1992 meeting. *Id.* at 550. The trial court found that the State Board violated the Open Meetings Act by posting a generic, overly broad, and imprecise notice of the subject of the meetings; discussing personnel matters in a way not excepted from the Act; and failing to keep a tape recording or certified agenda. *Id.* The court held as a matter of law that the commissioner had the independent power to fire the employees. *Id.* at 551. The court further held that the commissioner's independent power to fire employees made the validity of the Board's approval irrelevant to the validity of the reduction. *Id.* Although the State Board of Insurance violated the Texas Open Meetings Act, the court held that the subsequent reduction in force of the Department of Insurance employees was not a voidable action taken by the State Board at an improper meeting because the reduction was ordered and effected under the independent authority of the Insurance Commissioner. *Id.*

In *Swate, M.D. v. Medina Community Hospital* ⁽³⁾, 1998 WL 121816 (Tex.App.--San Antonio 1998), the Medina Community Hospital, under the independent action of Hospital Administrator Richard Arnold, hired Dr. Swate as an independent contractor. After Swate's employment, several members of the Medina Hospital Board of Managers learned that the Texas and Louisiana Medical Boards had suspended Swate's license to practice medicine and had placed him on probation allowing him to practice only under strict guidelines. *Id.* at 1. The Board of Managers for the Medina Community Hospital called a special meeting and posted notice that such meeting was to consider "personnel matters." *Id.* The meeting was concluded with "no action taken." *Id.* The Administrator Arnold participated in this meeting and field questions regarding the hiring of Swate from the Board of Managers. *Id.* at 3. Arnold testified that at the meeting

the Board made it clear that "Dr. Swate needed to go." *Id.* Subsequent to this meeting the Assistant Administrator, Troy E. Scarborough, terminated Dr. Swate's employment. *Id.* at 1. In a memorandum to Arnold, Scarborough stated that "I informed Dr. Swate that the Medina Community Hospital Board of Managers had directed that he be terminated from employment. . . ." *Id.* at 4. The court found that the Board had no authority to fire Dr. Swate. *Id.* at 5. The court further held that the Administrator Arnold held the independent power to hire and fire all hospital personnel, including Swate. *Id.* Swate sought judgment that his termination was void because the Board violated the Texas Open Meetings Act. *Id.* at 1. The Court, following *Speller*, held that the evidence of the Board of Manager's improper actions under the Open Meetings Act was inconsequential as long as Arnold had independent power to act. *Id.* at 5.

B. Official can be convicted even if unaware that the closed meeting the official attended was impermissible under the Act.

In *Tovar v. State*, 949 S.W.2d 370, 371 (Tex.App.- San Antonio 1997, petition for discretionary review granted), Joe Tovar, the former president of the Somerset Independent School Board, was indicted for two charges of violating the Texas Open Meetings Act. Tovar was found guilty of knowingly participating in a special meeting of the school board which was not permitted under the Act, and for calling and organizing a special closed meeting of the school board that was not permitted under the Act. *Id.* at 371. The court rejected Tovar's arguments that he could not be found guilty for the violations of participating, calling, or aiding in calling a meeting prohibited by the Texas Open Meeting Act unless he knew that the meeting was illegal under the Act. *Id.* at 372. The court held that under the plain language of the Open Meetings Act, a government official can be found guilty of violating the Act by calling or participating in an impermissible closed meeting, even when the official is unaware of the illegality of the meeting. *Id.* at 371. The court felt that "the Act's purpose is to safeguard the public's interest in knowing the workings of its governmental bodies" and "this spirit is embodied in the Act's general rule that all meetings are open unless otherwise provided by the statute." *Id.* at 373.

C. Governmental officials cannot be held individually liable for monetary damages for violations under the Act.

In *Forney Messenger, Inc. v. Tennon*, 959 F.Supp. 389 (N.D. Tex. 1997), plaintiff newspaper, Forney Messenger, Inc., (hereinafter the "Messenger"), filed an action against former city council members for an alleged breach of the Texas Open Meetings Act concerning the city's rejection of the newspaper as its official newspaper for all city advertising and public notices. The Messenger alleged that the defendants violated the Texas Open Meetings Act during the course of meetings in which all the City's advertising and public notices were withheld from the Messenger, by meeting and planning their actions outside of formal council meetings. *Id.* at 390. The Messenger sought injunctive relief against the defendants. *Id.* At the time of suit, Defendants were no longer Council members, having been defeated in their bids for reelection after their terms expired. *Id.* After the election, the City re-designated the Messenger as its official newspaper. *Id.* The Messenger alleged that one of the defendants, William Tennon, intends to run for public office again, to support its argument that the defendants as individuals should be enjoined from engaging in future Texas Open Meeting Act violations since conceivably defendants could be elected to the Council at a future date. *Id.* at 391. The court rejected the newspaper's arguments and held that the mere possibility that former city council members would ever again be in a position to violate the Texas Open Meeting Act was far too remote to provide the basis for injunctive relief against them in their individual capacities. *Id.* at 392.

The Court then considered whether the Messenger stated a Texas Open Meetings Act cause of action against the Defendants in their individual capacity which subjected them to monetary liability. *Id.* at 393. The court noted that a party's ability to recover "monetary" benefits upon the reversal of a violation stems from that party's right to recover under a contract. *Id.* The court then reasoned that the newspaper's contract was with the city, and not the defendants, and it could not see how defendants could be held individually liable for damages which stem from the city's breach of the contract." *Id.* The court noted the absence of case law that suggest that members of governmental bodies can be held liable in their individual capacities for monetary damages under the Texas Open Meetings Act. *Id.* In addition, the court stated that the language of the Texas Open Meetings Act provisions under which the plaintiffs have sued does not suggest that the members of governmental bodies are subject to monetary liability in their individual capacities. *Id.* For the foregoing reasons, the court concluded that former members of city council cannot be sued in their individual capacities for monetary damages. *Id.*

D. If a contract was breached, monetary damages can be recovered even when an Open Meetings violation has been later corrected.

In *Tennon*, the above referenced case, the court also considered the issue of whether the Messenger could sue the city for damages arising from former council members violation of the Texas Open Meetings Act, even though subsequently the Messenger was re-designated as the official newspaper of the city. *Id.* at 392. The court stated that in light of *Ferris* (4), the Messenger had stated a viable cause of action against the city under the Texas Open Meetings Act for

reinstatement, back pay and benefits. *Id.* The court stated that a party's ability to recover monetary damages upon the reversal of a Texas Open Meetings Act violation stems from that party's right to recover under a contract. *Id.* at 393. The Messenger may be able to recover for the city's breach of what appears to be have been a requirement contract that Messenger had with the city. *Id.*

E. Notice must be posted for meetings recessed for more than a day; an interested person can challenge a public official's right to hold office in a proceeding other than a quo warranto proceeding; the statute of limitations for actions under the Open Meetings Act is four years.

In *Rivera v. City of Laredo*, 948 S.W.2d 787 (Tex.App--San Antonio 1997, writ denied), a suspended police officer, police officer's association, and others brought action against the City alleging that city council selected the police chief in violation of Texas Open Meetings Act. The city council met in open session on May 4, 1992, after it posted notice on May 1, 1992. *Id.* at 789. The council approved a recess of the May 4th meeting until May 6th. *Id.* The city council met in executive session on May 6th to discuss the selection of a police chief without posting additional notice. *Id.* at 793. The court noted the absence of a statutory provision addressing recesses and also noted a 1977 attorney general opinion which implied that the recess can only be to the next day. *Id.* The court concluded that the City was required to post notice of its May 6th meeting before convening, regardless of whether it considered the meeting a continuation from a recessed meeting held two days previously. *Id.* The court also made the following conclusion regarding the actions brought against the city council for violations of the Texas Open Meetings Act. Generally, a challenge to an official's right to hold office must be brought in a quo warranto proceeding brought by a district attorney or the attorney general. In *Rivera*, the court found that legislative intent placed supreme importance on the Open Meetings Act, creating a cause of action for an interested person. The court held that an interested person can challenge a public official's right to hold office in a proceeding other than a quo warranto proceeding where there is an alleged violation of the Open Meetings Act. *Id.* at 792.

The City argued that the case should be dismissed because it was brought several years after the Open Meetings violation. The court found that an action brought under the Open Meetings Act would fall under the four-year residual limitations period in TEX. CIV. PRAC. & REM. CODE ANN. §16.051 since the Act does not specify the amount of time a plaintiff has to bring an action for open meetings violations. *Id.* at 793. Since the city council, by violating the Open Meetings Act, could not validly appoint Martinez as police chief, he was officer (i.e. police chief) de facto. However, actions taken by Martinez, as an officer de facto, are still valid despite the invalidity of his appointment. *Id.* at 794.

IV. Recent Attorney General Opinions

A. Meetings to discuss tax abatement must be held in open session.

In a Letter Opinion, the attorney general addressed the issue of whether a city council or a county commissioners court may discuss a tax abatement in executive session under the Open Meetings Act. Tex. Att'y Gen. LO 97-096 (1997). The Attorney General stated that the Act requires every regular, special, or called meeting of a governmental body, including a county commissioners court and a municipal governing body, to be open to the public, with certain narrowly-drawn exceptions. *Id.* The Attorney General held that a "proposed property tax abatement for an existing industry is not a subject that can be fitted into any of the exceptions of subchapter D, Chapter 551. *Id.* The Attorney General stated that a tax abatement for a particular industry can not reasonably be said to constitute the "value of real property" under the Section 551.072 exception. *Id.* He then concluded that a city council or county commissioners court is not authorized to meet in executive session under the Open Meetings Act to discuss a proposed city or county property tax abatement for an existing industry. *Id.*

B. Members of governmental bodies may not make a copy of the tape recording of executive sessions.

In Letter Opinion, LO 98-033, the Attorney General considered the issue of whether a member of a governmental body who participated in an executive session may copy a tape recording of that executive session for his own use. Tex. Att'y. Gen. LO 98-033 (1998). The Galveston County Municipal Utility District No.12 held an executive session to discuss personnel matters, and tape recorded the meeting in accordance with the Open Meetings Act. *Id.* at 1. Subsequent to the meeting a board member who was present during the executive session made a copy of the tape recording for unspecified purposes. *Id.* In previous opinions the Attorney General opined that a member was entitled to review the certified agenda or tape of a closed meeting in which he participated. *Id.* at 2. However, in this opinion, the Attorney General refused to extend the opportunity to review the certified agenda or tape, to a right of copying. *Id.* The Attorney General concluded that a member of a governmental body may not copy for his own use a tape recording of an executive session of a meeting in which he participated, nor may the governmental body permit him to do so. *Id.*

C. Participation by a public board subcommittee of less than a quorum in a meeting with the board of a private organization transforms the meeting into an one subject to the Act.

In Letter Opinion, LO 97-017, the Attorney General considered the question of whether the participation of three members of the seven member board of managers of a county hospital district, established under chapter 281 of the Health and Safety Code, on the fourteen member board of trustees of a private nonprofit corporation would cause the meetings of the board of trustees of the private nonprofit corporation to be subject to the Open Meetings Act. Tex. Att'y. Gen. LO 97-017 (1997). The board of managers of a hospital district, created under the authority of Health and Safety Code chapter 281, is a governmental body under the act. *Id.* at 3. The private nonprofit corporation based on the facts is assumed not to be a governmental body. *Id.* However, whether the presence of the three board of managers members at the meetings of the private nonprofit corporation's board of trustees meetings transformed those meetings into meetings of the board of managers, or a subcommittee of that body, governed by the Open Meetings Act, turns on whether the group of three board managers members who served on the nonprofit corporation's board had been delegated any authority by the board of managers. *Id.* The Attorney General reasoned that the group of three board members, (hereinafter referred to as the "group"), may constitute a government body in and of itself if the board of managers has delegated the group any authority over hospital district business or rubber-stamps the group's recommendations regarding hospital district business. *Id.* In that case, meetings of the board of trustees of the private nonprofit corporation at which the three board of managers members deliberate regarding the business of the hospital district would be subject to the Open Meetings Act. *Id.*

D. A committee composed of a public board subcommittee of less than a quorum and employees of an agency is a governmental body when the committee supervises or controls public business or policy.

In Attorney General Opinion Letter LO 97-058, the Attorney General was presented the question of whether a "complaint review committee" that the Texas Funeral Service Commission has created is a "governmental body" for the purposes of the Open Meetings Act. Tex. Att'y. Gen. LO 97-058 (1997). The "complaint review committee" is composed of two commissioners whom the commission chair appointed, as well as two commission employees, the executive director and the general counsel. *Id.* The committee functions are twofold. *Id.* First, the committee reviews the results of investigations commission employees have conducted in response to complaints from members of the public or upon commission initiative. *Id.* Second, the committee participates in informal conferences with licensees who are accused of violating article 4582b. *Id.* The Attorney General stated that a committee of a governmental body is itself a governmental body **only if** the committee supervises or controls public business or policy. *Id.* (Citations omitted) (Emphasis added). The Attorney General applied this rule and opined that the "complaint review committee" was subject to the Texas Open Meetings Act when it reviews investigations, but was not subject to the Act when it functions as a participant in informal conferences. *Id.* at 2. Generally, the duties of the committee are to make recommendations to the commission. However, after the committee reviews various documents the commission staff compiled during an investigation, it "may direct the staff to proceed by instituting an administrative proceeding to take action with respect to a license." *Id.* This factor caused the Attorney General to conclude that the committee supervises and controls public business with regard to its review of investigation function. *Id.*

E. Validity of City Council Rule requiring one-third of the Council to request inclusion of an item on the agenda.

The validity of a rule requiring a third of the City Council to request an agenda item before it could be added to the agenda was questioned in Tex. Att'y. Gen. Op. DM-473 (1998). Council members complained that the rule had restricted what matters of public interest could come before the Council. Although the Attorney General did not conclude that the rule conflicted with the Open Meetings Act, he did note that there is a statutory provision by which one member could request inclusion of an issue on the agenda. Section 551.042 of the Act provides that if a member of the public inquires about a subject which is not an agenda item, any deliberation of or decision about the subject of inquiry must be limited to a proposal to place the subject on the agenda for a subsequent meeting. Only one member of the body would be required to propose that the item be placed on the agenda. Of course, the members of the governmental entity could decide as a body not to deliberate the item at a subsequent meeting.

In this opinion the Attorney General cautioned governmental bodies to avoid rules on preparing agendas which required consent of a majority of the body to place an item on the agenda.

Footnotes

⚠ 1. Unless otherwise noted, all statutory references are to the Texas Government Code.

⚡ 2. There are two §551.126. The first provides for videoconference calls for institutions of higher education and the second pertains to videoconference calls for all governmental bodies. It is the second §551.126 which is referred to in this paper.

⚡ 3. NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED IT IS SUBJECT TO REVISION OR WITHDRAWAL.

⚡ 4. *Ferris v. Texas Board of Chiropractic Examiners*, 808 S.W.2d 514 (Tex.App.--Austin 1991, writ denied)

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