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From: Monique Norman <norman.law@earthlink.net>
Sent: Thursday, November 14, 2019 10:47 PM
To: Alan Day; 'Jan Roe'
Subject: Texas Open Meetings Act--recording of Executive Sessions
Attachments: AG TOMA Handbook 2018 Executive Sessions-Recordings.pdf

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Alan and Jan,

Another issue raised in today's Board meeting was regarding whether the Texas Open Meetings Act requires the recording of Executive Sessions. As I have previously advised you, the Texas Attorney General states that:

“A governmental body must make and keep either a certified agenda or a recording of each executive session, except for an executive session held by the governmental body to consult with its attorney in accordance with section 551.071 of the Government Code.”

The District has been following this TOMA law. I have attached the pertinent parts of the Texas Attorney General TOMA Handbook on this matter.

The statute is as follows:

Sec. 551.103. CERTIFIED AGENDA OR RECORDING REQUIRED. (a) A governmental body shall either keep a certified agenda or make a recording of the proceedings of each closed meeting, except for a private consultation permitted under Section 551.071.

(b) The presiding officer shall certify that an agenda kept under Subsection (a) is a true and correct record of the proceedings.

(c) The certified agenda must include:

- (1) a statement of the subject matter of each deliberation;
- (2) a record of any further action taken; and
- (3) an announcement by the presiding officer at the beginning and the end of the meeting indicating the date and time.

(d) A recording made under Subsection (a) must include announcements by the presiding officer at the beginning and the end of the meeting indicating the date and time.

Sec. 551.071. CONSULTATION WITH ATTORNEY; CLOSED MEETING. A governmental body may not conduct a private consultation with its attorney except:

(1) when the governmental body seeks the advice of its attorney about:

(A) pending or contemplated litigation; or

(B) a settlement offer; or

(2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.

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IX. Closed Meetings

A. Overview of Subchapter D of the Open Meetings Act

The Act provides certain narrowly drawn exceptions to the requirement that meetings of a governmental body be open to the public.¹ These exceptions are found in sections 551.071 through 551.090 and are discussed in detail in Part B of this section of the *Handbook*.

Section 551.101 states the requirements for holding a closed meeting. It provides:

If a closed meeting is allowed under this chapter, a governmental body may not conduct the closed meeting unless a quorum of the governmental body first convenes in an open meeting for which notice has been given as provided by this chapter and during which the presiding officer publicly:

- (1) announces that a closed meeting will be held, and
- (2) identifies the section or sections of this chapter under which the closed meeting is held.²

Thus, a quorum of the governmental body must be assembled in the meeting room, the meeting must be convened as an open meeting pursuant to proper notice, and the presiding officer must announce that a closed session will be held and must identify the sections of the Act authorizing the closed session.³ There are several purposes for requiring the presiding officer to identify the section or sections that authorize the closed session: to cause the governmental body to assess the applicability of the exceptions before deciding to close the meeting; to fix the governmental body's legal position as relying upon the exceptions specified; and to inform those present of the exceptions, thereby giving them an opportunity to object intelligently.⁴ Judging the sufficiency of the presiding officer's announcement in light of whether it effectuated or hindered these purposes, the court of appeals in *Lone Star Greyhound Park, Inc. v. Texas Racing Commission* determined that the presiding officer's reference to the content of a section, rather than to the section number, sufficiently identified the exception.⁵

B. Provisions Authorizing Deliberations in Closed Meeting

1. Section 551.071. Consultations with Attorney

¹ TEX. GOV'T CODE §§ 551.071–.090; see also *Cox Enters., Inc. v. Bd. of Trs.*, 706 S.W.2d 956, 958 (Tex. 1986) (noting the narrowly drawn exceptions).

² TEX. GOV'T CODE § 551.101.

³ *Martinez v. State*, 879 S.W.2d 54, 56 n.5 (Tex. Crim. App. 1994).

⁴ *Lone Star Greyhound Park, Inc. v. Tex. Racing Comm'n*, 863 S.W.2d 742, 747 (Tex. App.—Austin 1993, writ denied); see also *Standley v. Sansom*, 367 S.W.3d 343, 355 (Tex. App.—San Antonio 2012, pet. denied) (using the four purposes outlined in *Lone Star* to determine sufficiency of challenged notice for executive session).

⁵ *Lone Star Greyhound Park, Inc.*, 863 S.W.2d at 748.

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Section 551.071 authorizes a governmental body to consult with its attorney in an executive session to seek his or her advice on legal matters. It provides as follows:

A governmental body may not conduct a private consultation with its attorney except:

- (1) when the governmental body seeks the advice of its attorney about:
 - (A) pending or contemplated litigation; or
 - (B) a settlement offer; or
- (2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.⁶

This provision implements the attorney-client privilege, an attorney's duty to preserve the confidences of a client.⁷ It allows a governmental body to meet in executive session with its attorney when it seeks the attorney's advice with respect to pending or contemplated litigation or settlement offers,⁸ including pending or contemplated administrative proceedings governed by the Administrative Procedure Act.

In addition, subsection 551.071(2) of the Government Code permits a governmental body to consult in an executive session with its attorney "on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts" with the Act.⁹ Thus, a governmental body may hold an executive session to seek or receive its attorney's advice on legal matters that are not related to litigation or the settlement of litigation.¹⁰ A governmental body may not invoke section 551.071 to convene a closed session and then discuss matters outside of that provision.¹¹ "General discussion of policy, unrelated to legal matters is not permitted under the language of [this exception] merely because an attorney is present."¹² A governmental body may, for example, consult with its attorney in executive session about the legal issues raised in connection with awarding a contract, but it may

⁶ TEX. GOV'T CODE § 551.071.

⁷ *Tex. State Bd. of Pub. Accountancy*, 366 S.W.3d at 759; see *Tex. Att'y Gen. Op. Nos. JC-0506 (2002) at 4, JC0233 (2000) at 3, H-816 (1976) at 4, M-1261 (1972) at 9-10.*

⁸ TEX. GOV'T CODE § 551.071(1); *Lone Star Greyhound Park Inc.*, 863 S.W.2d at 748.

⁹ TEX. GOV'T CODE § 551.071(2).

¹⁰ *Cf. Weatherford v. City of San Marcos*, 157 S.W.3d 473, 486 (Tex. App.—Austin 2004, pet. denied) (concluding that city council did not violate Act when it went into executive session to seek attorney's advice about land use provision); *Tex. Att'y Gen. Op. Nos. JC-0233 (2000) at 3, JM-100 (1983) at 2.*

¹¹ *Gardner v. Herring*, 21 S.W.3d 767, 776 (Tex. App.—Amarillo 2000, no pet.). *But see In re City of Galveston*, No. 14-14-01005-CV, 2015 WL 971314, *5-6 (Tex. App.—Houston [14th Dist.] March 3, 2015, orig. proceeding) (mem. op) (acknowledging that the Act does not mandate a "rigid stricture of direct legal question . . . followed by a direct legal answer" and that the "conveyance of factual information or the expression of opinion or intent by a member of the governmental body may be appropriate in a closed meeting . . . if the purpose of such statement is to facilitate the rendition of legal advice by the government's attorney").

¹² *Tex. Att'y Gen. Op. No. JM-100 (1983) at 2; see Finlan v. City of Dallas*, 888 F. Supp. 779, 782 n.9 (N.D. Tex. 1995); *Tex. Att'y Gen. No. JC-0233 (2000) at 3.*

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not discuss the merits of a proposed contract, financial considerations, or other nonlegal matters in an executive session held under section 551.071 of the Government Code.¹³

The attorney-client privilege can be waived by communicating privileged matters in the presence of persons who are not within the privilege.¹⁴ Two governmental bodies waived this privilege by meeting together for discussions intended to avoid litigation between them, each party consulting with its attorney in the presence of the other, “the party from whom it would normally conceal its intentions and strategy.”¹⁵ An executive session under section 551.071 is not allowed for such discussions. A governmental body may, however, admit to a session closed under this exception its agents or representatives, where those persons’ interest in litigation is aligned with that of the governmental body and their presence is necessary for full communication between the governmental body and its attorney.¹⁶

This exception is an affirmative defense on which the governmental body bears the burden of proof.¹⁷

2. Section 551.072. Deliberations about Real Property

Section 551.072 authorizes a governmental body to deliberate in executive session on certain matters concerning real property. It provides as follows:

A governmental body may conduct a closed meeting to deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.³⁰⁹

Section 551.072 permits an executive session only where public discussion of the subject would have a detrimental effect on the governmental body’s negotiating position with respect to a third party.¹⁸ Where a court found that open discussion would not be detrimental to a city’s negotiations, a closed session under this provision was not permitted.¹⁹ It does not allow a

¹³ *Olympic Waste Servs. v. City of Grand-Saline*, 204 S.W.3d 496, 503–04 (Tex. App.—Tyler 2006, no pet.) (citing Tex. Att’y Gen. Op. No. JC-0233 (2000) at 3).

¹⁴ See Tex. Att’y Gen. Op. Nos. JC-0506 (2002) at 6, JM-100 (1983) at 2.

¹⁵ Tex. Att’y Gen. Op. No. MW-417 (1981) at 2–3; see also Tex. Att’y Gen. Op. No. JM-1004 (1989) at 4 (concluding that school board member who has sued other board members may be excluded from executive session held to discuss litigation).

¹⁶ See Tex. Att’y Gen. Op. No. JC-0506 (2002) at 6; see also Tex. Att’y Gen. Op. No. JM-238 (1984) at 5.

¹⁷ See *Killam Ranch Props., Ltd. v. Webb Cty.*, 376 S.W.3d 146, 157 (Tex. App.—San Antonio 2012, pet. denied); *City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 466 (Tex. App.—Dallas 2007, no pet.); *Olympic Waste Servs.*, 204 S.W.3d at 504. ³⁰⁹ TEX. GOV’T CODE § 551.072.

¹⁸ Tex. Att’y Gen. Op. No. MW-417 (1981) at 2 (construing statutory predecessor to Government Code section 551.072).

¹⁹ See *City of Laredo v. Escamilla*, 219 S.W.3d 14, 21 (Tex. App.—San Antonio 2006, pet. denied).

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though in some of the cases very personal information was disclosed about claimants and employers. Reasoning that the Act states that closed meetings may be held only where specifically authorized, the opinion concluded that there was no basis to read into it implied authority for closed meetings.²⁰ It disapproved the language in earlier opinions that suggests otherwise, but stated that the commission could protect privacy rights by avoiding discussion of private information.²¹ Thus, the disapproved opinions should no longer be relied on as a source of authority for a closed session.

E. Who May Attend a Closed Meeting

Only the members of a governmental body have a right to attend an executive session,²² except that the governmental body's attorney must be present when it meets under section 551.071. A governmental body has discretion to include in an executive session any of its officers and employees whose participation is necessary to the matter under consideration.²³ Thus, a school board could require its superintendent of schools to attend all executive sessions of the board without violating the Act.²⁴ Given the board's responsibility to oversee the district's management and the superintendent's administrative responsibility and leadership of the district, the board could reasonably conclude that the superintendent's presence was necessary at executive sessions.²⁵

A commissioners court may include the county auditor in a meeting closed under section 551.071 to consult with its attorney if the court determines that (1) the auditor's interests are not adverse to the county's; (2) the auditor's presence is necessary for the court to communicate with its attorney; and (3) the county auditor's presence will not waive the attorney-client privilege.²⁶ If the meeting is closed under an executive session provision other than section 551.071, the commissioners court may include the county auditor if the auditor's interests are not adverse to the county and his or her participation is necessary to the discussion.²⁷

A governmental body must not admit to an executive session a person whose presence is contrary to the governmental interest protected by the provision authorizing the session. For example, a person who wishes to sell real estate to a city may not attend an executive session under section 551.072, a provision designed to protect the city's bargaining position in negotiations with a third

²⁰ See Tex. Att'y Gen. Op. No. MW-578 (1982) at 4.

²¹ *Id.*

²² See Tex. Att'y Gen. Op. Nos. JM-6 (1983) at 1–2 (stating that only members of the governmental body have the right to convene in executive session), KP-0006 (2015) at 2.

²³ Tex. Att'y Gen. Op. No. JC-0375 (2001) at 2; see also Tex. Att'y Gen. Op. No. GA-0277 (2004) at 3 (concluding that commissioners court may allow the county clerk to attend its executive sessions), KP-0006 (2015) at 2 (concluding that a representative of a municipality may attend an executive session of a housing authority if the governing body of the housing authority determines the municipal representative's participation is necessary to the matter to be discussed).

²⁴ Tex. Att'y Gen. Op. No. JC-0375 (2001) at 2.

²⁵ *Id.*

²⁶ Tex. Att'y Gen. Op. No. JC-0506 (2002) at 6; see Tex. Att'y Gen. Op. No. JM-238 (1984) at 5 (concluding that county officers and employees may attend closed session of county commissioners court to discuss litigation against sheriff and commissioners court about county jail conditions).

²⁷ See Tex. Att'y Gen. Op. No. JC-0506 (2002) at 6.

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party.²⁸ Nor may a governmental body admit the opposing party in litigation to an executive session under section 551.071.²⁹ A governmental body has no authority to admit members of the public to a meeting closed under section 551.074 to give input about the public officer or employee being considered at the meeting.³⁰

²⁸ *Finlan v. City of Dallas*, 888 F. Supp. 779, 787 (N.D. Tex. 1995).

²⁹ See Tex. Att'y Gen. Op. Nos. JM-1004 (1989) at 4 (concluding that school board member who has sued other board members may be excluded from executive session held to discuss litigation), MW-417 (1981) at 2–3 (concluding that provision authorizing governmental body to consult with attorney in executive session about contemplated litigation does not apply to joint meeting between the governmental bodies to avoid lawsuit between them).

³⁰ See Tex. Att'y Gen. Op. No. GA-0511 (2007) at 6.

X. Records of Meetings

A. Minutes or Recordings of Open Meeting

Section 551.021 of the Government Code provides as follows:

- (a) A governmental body shall prepare and keep minutes or make a recording of each open meeting of the body.
- (b) The minutes must:
 - (1) state the subject of each deliberation; and
 - (2) indicate each vote, order, decision, or other action taken.³¹ Section

551.022 of the Government Code provides:

The minutes and recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee.³²

If minutes are kept instead of a recording, the minutes should record every action taken by the governmental body.³³ If open sessions of a commissioners court meeting are recorded, the recordings are available to the public under the Public Information Act.³⁴ (For a discussion of record retention laws, refer to Part XII.F of this *Handbook*).

³¹ TEX. GOV'T CODE § 551.021; *see also* Tex. Att'y Gen. Op. No. GA-0727 (2009) at 2 (opining that Texas State Library and Archives Commission rule requiring written minutes of every open meeting of a state agency is likely invalid as inconsistent with section 551.021(a), which authorizes a governmental body to make a recording of an open meeting).

³² TEX. GOV'T CODE § 551.022; *see York v. Tex. Guaranteed Student Loan Corp.*, 408 S.W.3d 677, 688 (Tex. App.—Austin 2013, no pet.) (concluding that exceptions in the Public Information Act do not operate to prevent public disclosure of minutes requested under section 551.022).

³³ *See York*, 408 S.W.3d at 687 (defining “minutes” to refer “to the record or notes of a meeting or proceeding, whatever they may contain”).

³⁴ Tex. Att'y Gen. Op. No. JM-1143 (1990) at 2–3 (concluding that tape recording of open session of commissioners court meeting is subject to Open Records Act); *see* Tex. Att'y Gen. ORD-225 (1979) at 3 (concluding that handwritten notes of open meetings made by secretary of governmental body are subject to disclosure under Open Records Act); ORD-32 (1974) at 2 (concluding that audio tape recording of open meeting of state licensing agency used as aid in preparation of accurate minutes is subject to disclosure under Open Records Act).

B. Certified Agenda or Recording of Closed Meeting

A governmental body must make and keep either a certified agenda or a recording of each executive session, except for an executive session held by the governmental body to consult with its attorney in accordance with section 551.071 of the Government Code.³⁵ If a certified agenda

³⁵ TEX. GOV'T CODE § 551.103(a); *see* Tex. Att'y Gen. Op. No. JM-840 (1988) at 3 (discussing meaning of “certified agenda”). *But see* TEX. GOV'T CODE §§ 551.0725(b) (providing that notwithstanding section

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is kept, the presiding officer must certify that the agenda is a true and correct record of the executive session.³⁷⁹ The certified agenda must include “(1) a statement of the subject matter of each deliberation, (2) a record of any further action taken, and (3) an announcement by the presiding officer at the beginning and the end of the closed meeting indicating the date and time.”³⁸⁰ While the agenda does not have to be a verbatim transcript of the meeting, it must at least provide a brief summary of each deliberation.³⁸¹ Whether a particular agenda satisfies the Act is a question of fact that must be addressed by the courts. Attorney General Opinion JM-840 (1988) cautioned governmental bodies to consider providing greater detail in the agenda with regard to topics not authorized for consideration in executive session or to avoid the uncertainty concerning the requisite detail required in an agenda by recording executive sessions.³⁸² Any member of a governmental body participating in a closed session knowing that an agenda or recording is not being made commits a Class C misdemeanor.³⁸³

The certified agenda or recording of an executive session must be kept a minimum of two years after the date of the session.³⁸⁴ If during that time a lawsuit that concerns the meeting is brought, the agenda or recording of that meeting must be kept pending resolution of the lawsuit.³⁸⁵ The commissioners court, not the county clerk, is the proper custodian for the certified agenda or recording of a closed meeting, but it may delegate that duty to the county clerk.³⁸⁶

A certified agenda or recording of an executive session is confidential. A person who knowingly and without lawful authority makes these records public commits a Class B misdemeanor and may be held liable for actual damages, court costs, reasonable attorney fees and exemplary or punitive damages.³⁸⁷ Section 551.104 provides for court-ordered access to the certified agenda or recording under specific circumstances:

- (b) In litigation in a district court involving an alleged violation of this chapter, the court:
 - (1) is entitled to make an in camera inspection of the certified agenda or recording;
 - (2) may admit all or part of the certified agenda or recording as evidence, on entry of a final judgment; and

551.103(a), the commissioners court must make a recording of the proceedings of a closed meeting under this section), 551.0726(b) (“[N]otwithstanding Section 551.103(a), the [Texas Facilities] Commission must make a recording of the proceedings of a closed meeting held under this section.”).

³⁷⁹ TEX. GOV'T CODE § 551.103(b).

³⁸⁰ *Id.* § 551.103(c).

³⁸¹ Tex. Att’y Gen. Op. No. JM-840 (1988) at 4–7.

³⁸² *Id.* at 5–6 (referring to legislative history of section indicating that its primary purpose is to document fact that governmental body did not discuss unauthorized topics in closed session).

³⁸³ TEX. GOV'T CODE § 551.145.

³⁸⁴ *Id.* § 551.104(a).

³⁸⁵ *Id.*

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³⁸⁶ Tex. Att’y Gen. Op. No. GA-0277 (2004) at 3–4.

³⁸⁷ TEX. GOV’T CODE § 551.146.

- (3) may grant legal or equitable relief it considers appropriate, including an order that the governmental body make available to the public the certified agenda or recording of any part of a meeting that was required to be open under this chapter.

- (c) the certified agenda or recording of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).³⁶

Section 551.104 authorizes a district court to admit all or part of the certified agenda or recording of a closed session as evidence in an action alleging a violation of the Act, thus providing the only means under state law whereby a certified agenda or recording of a closed session may be released to the public.³⁷ The Office of the Attorney General has recognized that it lacks authority under the Public Information Act³⁸ to review certified agendas or recordings of closed sessions for compliance with the Open Meetings Act.³⁹ However, the confidentiality provision may be preempted by federal law.⁴⁰ When the Equal Employment Opportunity Commission served a Texas city with an administrative subpoena for tapes of closed city council meetings, the Open Meetings Act did not excuse compliance.⁴¹

A member of the governmental body has a right to inspect the certified agenda or recording of a closed meeting, even if he or she did not participate in the meeting.⁴² This is not a release to the public in violation of the confidentiality provisions of the Act, because a board member is not a member of the public within that prohibition. The governmental body may adopt a procedure permitting review of the certified agenda or recording, but may not entirely prohibit a board member from reviewing the record. The board member may not copy the recording or certified agenda of a closed meeting, nor may a former member of a governmental body inspect these records once he or she leaves office.³⁹⁵

³⁶ *Id.* § 551.104.

³⁷ Tex. Att’y Gen. Op. No. JM-995 (1988) at 5.

³⁸ TEX. GOV’T CODE ch. 552.

³⁹ See Tex. Att’y Gen. ORD-495 (1988) at 2, 4.

⁴⁰ *Equal Emp’t Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995).

⁴¹ *Id.*

⁴² Tex. Att’y Gen. Op. No. JC-0120 (1999) at 4, 5, 7 (overruling Tex. Att’y Gen. Op. No. DM-227 (1993), in part).³⁹⁵ Tex. Att’y Gen. LO-98-033, at 2–3.