

**OPEN GOVERNMENT:**  
**MINDING YOUR OPEN MEETINGS, OPEN RECORDS, AND ETHICS**

Olson & Olson, L.L.P.  
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## 1. BACKDROP

*Just how public is this office? Well, it's all about open government.*

- As a public official or public employee, it is important that you understand and appreciate the rules of open government.
- Think of open meetings, open records, and ethics as related topics. For example, the Open Meetings Act and the Public Information Act (also known as the Open Records Act) are found in Title 5 of the Government Code, entitled "Open Government: Ethics."
- It has been said that there is only one code of ethics, one set of rules – those rules of individual behavior which apply to everyone alike – doing what is right. Everyone wants to be treated fairly.
- Webster's, 11<sup>th</sup> Edition, informs that "ethics" means dealing with moral duty and obligation. That's such a broad definition it's not much help.
- Specifically, open meeting and open record laws, and the laws and rules governing ethics for public officials and employees, all have the same goal; "making government accessible to the people." (2006 *Open Meetings Handbook*, Office of the Attorney General, at p. 70). Don't forget, you're one of the "people."
- The policy statement of the Public Information Act (i.e. Open Records Act) explains open government this way:

"UNDER THE FUNDAMENTAL PHILOSOPHY OF . . . REPRESENTATIVE GOVERNMENT . . . THAT GOVERNMENT IS THE SERVANT AND NOT THE MASTER OF THE PEOPLE, IT IS THE POLICY OF THIS STATE THAT EACH PERSON IS ENTITLED . . . TO COMPLETE INFORMATION ABOUT THE AFFAIRS OF GOVERNMENT AND THE OFFICIAL ACTS OF PUBLIC OFFICIALS AND EMPLOYEES. THE PEOPLE . . . DO NOT GIVE THEIR PUBLIC SERVANTS THE RIGHT TO DECIDE WHAT IS GOOD FOR THE PEOPLE TO KNOW AND WHAT IS NOT GOOD FOR THEM TO KNOW."

See The Public Information Act, Government Code § 552.001(a).

## 2. OPEN MEETINGS

### *What part of “open” don’t you understand?*

The Texas Open Meetings Act (“**TOMA**”) was enacted in 1967 for the purpose of assuring that the public has the opportunity to be informed concerning the transaction of public business. *Acker v. Texas Water Comm’n.*, 790 S.W.2d 299-300 (Tex. 1990); The Open Meetings Act, Government Code Chapter 551, “Open Meetings”). Governmental bodies must function as a body, not as individuals or groups of individuals. Op. Tex. Att’y Gen. No. DM-95 (1992). These are not new ideas.

The Texas Supreme Court announced in 1942, well before the adoption of the Act, that the law was already well-established that a governmental entity must:

- 1) act as a body;
- 2) act at a meeting;
- 3) all members of the governing body must be given notice of the meeting;
- 4) all members must have the opportunity to attend the meeting; and
- 5) all members must have the opportunity to participate at the meeting.

The Supreme Court made it clear that “individual members acting separately, and not as a body, or by a number of the members less than the whole . . . at an unscheduled meeting without notice or opportunity of the other members to attend, is not sufficient.” *Western v. Texas & Pacific Motor Transportation Co.*, 166 S.W.2d 75, 76-77 (Tex. 1942). Sounds familiar, doesn’t it?

### **3. WHAT IS A “MEETING?”**

*You ask, “is the city required to post an agenda for every workshop?”*

The answer is yes, an agenda must be posted for a workshop – because it is a meeting.

“*Meeting*” is defined in the TOMA as a “deliberation between a quorum . . . during which public business . . . is discussed or considered . . . or . . . the governmental body takes formal action.” (TOMA §551.001 [4]).

*“Deliberation”* means a verbal exchange during a meeting between a quorum . . . or between a quorum . . . and another person, concerning . . . any public business. (TOMA § 551.001 [2]).

An emergency meeting is convened to address a matter of urgent public necessity, with less than 72 hours notice. (TOMA §551.045). An emergency presents “an imminent threat to public health or safety.” For example, approving a last-minute contribution to the community holiday parade due to the funding shortfall is not an emergency. Conversely, the collapse of a sanitary sewer main in a major thoroughfare would be.

A workshop is a meeting (think “deliberation between a quorum”), whether conducted as part of a regular or a special meeting. It’s hard to imagine an “emergency” workshop.

#### **4. EVERY MEETING SHALL BE OPEN TO THE PUBLIC**

*Does “open” mean the public has access to the posted emergency meeting?*

Yes. Leaving the council chamber doors wide open and the front doors to city hall locked would not provide public access.

The TOMA defines “open” to mean “open to the public.” (TOMA §551.001 (5)). The TOMA specifically provides that “every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.” (TOMA §551.002). That means “every” meeting.

You’re expected to know these things. The TOMA requires that “each elected or appointed official who is a member of a governmental body . . . shall complete a course of training of not less than one and not more than two hours regarding the responsibilities of the governmental body and its members under this chapter not later than the 90<sup>th</sup> day after the member . . . takes the oath of office . . . . The attorney general shall ensure that the training is made available.” (TOMA §551.005 [a], [b]).

## **5. THE OPEN MEETINGS ACT A SUMMARY OF KEY PROVISIONS**

- Every meeting shall be open to the public. (TOMA § 551.002).
- Minutes or a tape recording of each meeting is required. (§ 551.021).
- Written notice of the date, hour, place, and subject of each meeting is required. (§ 551.041). Post the notice/agenda 72 hours before the meeting, or at least 2 hours before if it's an "emergency" meeting. (§§ 551.043, 551.045). Post in a place readily accessible to the general public at all times. (§ 551.043).

The agenda items must be sufficient, that means specific enough, to inform the public of each subject. More specificity is required for items of "special interest."

Authorization to purchase new rose bushes for a city hall flowerbed disrupted during a repair may not be an item of special interest, whereas consideration of an adverse employment action involving the chief of police would be.

- During a meeting a factual response may be given to an inquiry concerning a subject which is not on the agenda. Any deliberation concerning such an inquiry shall be limited to a proposal to place the topic on the agenda for a subsequent meeting. (§ 551.042).
- Some of the "exceptions" for which a "closed meeting" a/k/a an executive session (actually a closed portion of an otherwise public meeting) is authorized:
  - 1) Consultation with the city's attorney about pending or contemplated litigation or settlement.
  - 2) Deliberations regarding real property. (sale, purchase, etc.)
  - 3) Deliberations regarding a prospective gift.
  - 4) Personnel matters. (unless the officer or employee requests that the matter be discussed in public.)
  - 5) Deliberations regarding security and security devices. (§§ 551.071, et seq).

- The mandatory procedures for conducting a “closed meeting,” or executive session, are:
  - 1) A quorum must be present;
  - 2) Convene in open meeting;
  - 3) The presiding officer publicly announces that the closed meeting will be held, and identifies the section which permits it;
  - 4) The certified agenda or tape recording of the closed meeting must contain the presiding officer’s announcement of the date and actual time the closed meeting begins and ends; and
  - 5) Take no final action, decision, or vote in a closed meeting. Those are only permitted in the open meeting. (§§ 551.101 – 551.103). [There are very limited exceptions related to public utilities. See §551.086]
  
- It’s the Law. To ensure your compliance, the TOMA provides for civil and criminal enforcement:
  - 1) An action taken in violation of the Act is voidable by a Court;
  - 2) Suit can be brought to stop, prevent, or reverse a violation or threatened violation;
  - 3) It is a criminal offense (fine, jail time, or both) to conspire to circumvent the TOMA by meeting for the purpose of secret deliberations;
  - 4) or to call, aid in, participate in, or to close a meeting when it is not permitted under the TOMA;
  - 5) Participation in a closed meeting without a certified agenda or tape recording is an offense; and
  - 6) Disclosure of a certified agenda or tape of a closed meeting, without lawful authority, is an offense *and* subjects the offender to possible claims for attorney’s fees, defamation, personal injury, mental distress, etc. (§§ 551.141 – 551.146).

**6. LURKING OUT THERE IN CYBERSPACE,  
SOMEWHERE BETWEEN THE OPEN MEETINGS ACT  
AND THE PUBLIC INFORMATION ACT, THERE'S**

**EMAIL \*%@#+!**

*A councilmember circulates an email to the mayor and council from his personal computer expressing his solutions for dogs-running-at-large, and the other members are all kind enough to reply to his email with their own comments. Result? You've probably got a "two-fer" – a prohibited deliberation/meeting, and a public record of it!*

Beware of emails regarding public business. An email from your home or business computer addressing city business is just as public as a memo signed and sent by you on city letterhead, and it is just as subject to the Public Information Act ("PIA"). Even if you hit "delete" it remains a public record. Further, the fact the entire city council or city secretary does not possess the email does not take it outside the PIA. If the city receives a request for council emails which encompasses the email in the example above, it must be released as a public record. (See Tex. Att'y Gen. OR2001-1790, May 2, 2001, re: City of Arlington; see also "Email Issues for City Officials, Including Etiquette and Open Government Issues," 2007, by Scott Houston, Director of Legal Services, Texas Municipal League, available on the website, [www.tml.org](http://www.tml.org) [legal section].)

Suggestion: Treat every email you send from any computer relating to city business as though it was sent on city letterhead, and make sure the city has a copy of it.

**7. THE PUBLIC INFORMATION ACT (i.e. OPEN RECORDS)  
SUMMARY OF KEY PROVISIONS**

*Go ahead - be modest, you may need some help on this one . . .*

- "Each public official shall complete a course of training of not less than one and not more than two hours regarding the responsibilities of the governmental body . . . not later than the 90<sup>th</sup> day after the date the public official . . . takes the oath of office . . ." (PIA § 552.012).

- “Public information” means information that is collected, assembled, or maintained . . . in connection with the transaction of official business. The media included are paper, film, electronic, tape, silk, vellum, etc. (PIA § 552.001-002).
- The “governmental body” includes the city council, a board, commission, department, committee, agency, or office and that is directed by one or more elected or appointed members. (PIA § 552.003).
- The chief administrative officer of a governmental body is the officer for public information, and each department head is an agent of the officer for public information. (PIA §§ 552.201-202).
- Any request for documents should be considered an open records request.
- If the request is written (including a fax) or in email form, forward it to the officer or agent for public information for handling. If verbal, direct the requestor to the officer or agent for public information to have the request reduced to writing.
- If the open records request falls within an exception to disclosure or release, a decision from the attorney general must be requested “not later than the 10<sup>th</sup> business day after the date of receiving the written request.” (PIA § 552.301). Information is presumed public if the city does not comply with the deadlines. Caution, there are additional deadlines and steps which the city must take under §§ 552.301 and 552.302.
- Charges. The city must comply with the attorney general rules governing deposits and charges. (PIA § 552.262).
- Some examples of exceptions from required disclosure:
  - Personnel information that amounts to an unwarranted invasion of personal privacy;
  - Litigation;
  - Information related to competition or bidding;
  - Location or price of property;
  - Certain law enforcement information; and
  - Addresses, telephone numbers, SS Numbers, and personal family information of officials and employees.



- To ensure compliance, the PIA provides for both civil enforcement and criminal penalties. (PIA §§ 552.321, 552.351).

## **8. YOUR FIDUCIARY DUTY, ETHICS, AND DOING IT RIGHT. OTHER RULES GOVERNING THE TRANSACTION OF PUBLIC BUSINESS**

*You've got to be kidding? I didn't know that.*

1. Is your city a Home Rule City or is it a Type A, Type B, or Type C General Law City? It does make a difference.
2. If your city is home rule, are you familiar with the requirements of the city charter? P.S. General law cities don't have charters.
3. What rules has your city adopted for conducting public meetings, has your city adopted a code of ethics, and what other rules has the city adopted which govern the transaction of public business? For example, has your city adopted purchasing rules or rules for submitting expenses for reimbursement.
4. Conflicts of Interest. Texas Local Government Code, Chapter 171, defines a "substantial interest" in a business entity or real property. If a councilmember has a substantial interest in a business entity or real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter. Chapter 171 carries a criminal penalty for violations.
5. Disclosure of relationships with local government officers. Local Government Code, Chapter 176, requires conflicts disclosures, under oath, on statements promulgated by the Texas Ethics Commission. Disclosure applies to vendors, their agents, and public officials, and the city may extend the requirement to include employees. The areas of disclosure extend to family members and include employment and business relationships, and gifts, such as food, lodging, transportation, or entertainment with an aggregate value of more than \$250/12 month period. Penalties are prescribed.
6. Disclosure of Interest in Property. You must disclose by affidavit an interest in property which the city intends to acquire. There are criminal and other penalties for violations. (Government Code §553.002).

7. Bribery. Acceptance of any benefit as consideration for a vote or exercise of discretion. (Penal Code §36.02).
8. Acceptance of Honorarium; Gift to Public Servants. Unlawful to accept an honorarium in consideration for services (with certain exceptions), or to accept any benefit from those subject to city regulation or investigation. An unsolicited benefit may be donated to a recognized charitable organization. (Penal Code §§ 36.07, 36.08).
9. Tampering With Government Records. (Penal Code §37.10).
10. Official Misconduct; Abuse of Office; Official Oppression (mistreatment). (Penal Code §§ 39.01, 39.02, 39.03).
11. Misuse of Official Information. (Penal Code §39.06).
12. Annual Budget. Required by Chapter 102 of Local Government Code. After final approval of the budget, the city council may spend municipal funds only in strict compliance with the budget.
13. Annual Audit. Required by Chapter 103 of the Local Government Code. What is an audit? Don't forget to put the "teeth" in your outside audit.
14. Depository for Municipal Funds. See Chapter 105, Local Government Code. The city shall designate a depository for municipal funds. Published notice must be given requesting applications from qualified financial institutions to act as depository. Collateral for deposited funds is required – see Government Code, Chapter 2257, "Collateral for Public Funds."
15. Public Funds Investment Act. See Chapter 2256 of the Government Code. Investment policy training, standard of care, reporting, and an annual audit are required.
16. City Contracts. See Chapter 252 Local Government Code. For contracts of more than \$3,000 but less than \$50,000, the City must contact two "historically underutilized businesses," or HUBS. Be mindful of HUBS. Contracts for more than \$50,000 must be advertised for competitive sealed bidding or competitive sealed proposals (proposals are allowed for certain "high technology procurements").

NOTE: This is only a partial listing of statutes and their requirements. The Texas Municipal League Handbooks for mayors and council members of Home Rule and General Law Cities are a good source of additional information.

REMINDER: A city can only act, practically as well as legally, by and through its governing body, the city council. The act of the city council expresses the collective will of the body acting in its official capacity at a duly assembled meeting.

## **9. SOME OPEN GOVERNMENT HYPOTHETICALS FOR YOU TO PONDER**

### **SITUATION # 1:**

**ACTION:** An applicant has submitted a request for approval of a controversial subdivision plat. During a brief break in the city council meeting, the applicant's attorney overhears a majority of the councilmembers conversing in the restroom about denying that crummy application.

**REACTION:** The applicant files suit to set aside the decision denying the plat, claiming the "restroom discourse" violated the Texas Open Meetings Act.

**RESULT:** \_\_\_\_\_  
\_\_\_\_\_

### **SITUATION # 2:**

**ACTION:** A letter is circulated from one member of city council to another, expressing the support of the "undersigned majority" for a resolution calling for the acquisition of park property. The council members who signed the letter were not in each other's presence or company, except as the letter was passed along from one to another. The letter is filed with the city.

QUESTION: Was the process by which this letter was signed a deliberation subject to the Open Meetings Act?

ANSWER: \_\_\_\_\_

**SITUATION # 3:**

ACTION: The mayor calls each council member individually, “one on one,” about a major road widening project on the agenda. The Mayor wants to be sure they are informed for the upcoming city council meeting.

QUESTION: Would this violate the Open Meetings Act?

ANSWER: \_\_\_\_\_

**SITUATION # 4:**

ACTION: For months the city council has been working on a public works bid package to repave a city street. The process has been arduous, and city council is ready to authorize advertisement for bids at the regular city council meeting. The day before the regular meeting, someone points out that the paving project was inadvertently omitted from the posted agenda. It is suggested that the project be added to the agenda as an “emergency” action item (posted for at least two hours before the meeting is convened).

REACTION: Can this be added to the agenda as an emergency item?

ANSWER: \_\_\_\_\_

**SITUATION # 5:**

**ACTION:** You're thrilled – you have just been elected, or appointed, or hired as a public official or employee, and you want to do your job right. Confident you can get what you're after, you ask city staff to just give you a copy of the "standard" list of ethical, rules, guidelines, and laws – the bible for public officials and employees - which will instruct you in your service.

**QUESTION:** There is such a document, right?

**ANSWER:** \_\_\_\_\_

**SITUATION # 6:**

**ACTION:** The agenda item reads: "Discussion and Possible Action on a Service Contract."

**QUESTION:** Is this sufficient notice of the subject matter of this agenda item?

**ANSWER:** \_\_\_\_\_

**SITUATION # 7:**

**ACTION:** The mayor and city council convene a public meeting. Citizens angry about a pending water and sewer line project listed on the agenda attend and loudly demand to be heard on the subject. When the agenda item is reached, and to avoid a confrontation, the mayor and city council retire to another room to discuss the project in a closed meeting (i.e. an executive session), following which they return to the public meeting.

**QUESTION:** There is no "angry citizen" exception to the open meetings requirement. Does this closed meeting (after

they walked out of the public meeting) expose the mayor and city council to criminal charges?

ANSWER:

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**SITUATION # 8:**

ACTION:

A city council planning workshop is scheduled to be held at city hall. Because it is a long-range planning session and no action will be taken for some time, no agenda is posted. Because no agenda was posted the public is not aware of it and does not attend.

QUESTION:

Can the planning session workshop be held without posting an agenda?

ANSWER:

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**SITUATION # 9:**

ACTION:

A councilmember solicits citizens to communicate with her via her personal computer regarding city business such as traffic, construction, and ordinance violations. She provides her personal email address to make it easier for them to do so.

QUESTION:

Are these emails on her home computer public records?

ANSWER:

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**SITUATION # 10:**

**ACTION:** Councilmember A calls councilmember B and suggests they “talk and get this water rate increase nailed down,” also asking councilmember B to call councilmember C, and so on. Because the water rate increase is already posted on the agenda, councilmember A tells B that their actions will be validated when the city council takes a public vote on the subject.

**QUESTION:** Do you think this is a violation of the Open Meetings Act?

**ANSWER:** \_\_\_\_\_

**SITUATION # 11:**

**ACTION:** City employee contacts Ima Councilmember to inform her that city employee’s high school friend didn’t get the posted parks department job because department head is a good-ole-boy who will only hire his own friends, so he can get favors in return.

**QUESTION:** How would you approach this?

- a. Ignore the whole thing?
- b. Suggest Ima Councilmember do her own investigation?
- c. Inform the city manager of the matter?
- d. Ask the mayor to put it on the agenda for immediate action?
- e. Ask the mayor to put it on the agenda for an executive session – personnel?

**ANSWER:** \_\_\_\_\_

**SITUATION # 12:**

**ACTION:** An executive session (closed meeting) is posted on the regular agenda which states: “to deliberate the employment of a public employee.” As the executive session begins, you learn that the purpose is to discuss the performance of the chief of police. You express concern, but another councilmember tells you, “don’t worry about it, the city attorney drafted the item for the mayor, so we’re OK.”

**QUESTION:** What’s your exposure if you participate in the executive session?

**ANSWER:** \_\_\_\_\_

**SITUATION # 13:**

**ACTION:** Your city has a seven (7) member council. Three (3) councilmembers also serve on the economic development corporation (EDC) board. A controversial industrial project is the subject of an action item posted on the EDC agenda. A fourth (4<sup>th</sup>) councilmember attends the EDC public meeting to speak in favor of the controversial project and does so.

**QUESTION:** Is a quorum of council present?  
Has there been a deliberation/meeting?

**ANSWER:** \_\_\_\_\_

**SITUATION # 14:**

**ACTION:** Your city has a five (5) member council. Three (3) councilmembers attend a Planning and Zoning Commission meeting to voice their opinions on a highly charged rezoning application.

**QUESTION:** Is a quorum of council present?  
Has there been a deliberation/meeting?



ANSWER:

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