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## **Avoiding Open Government Pitfalls: A Land Use Perspective**

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# AVOIDING OPEN GOVERNMENT PITFALLS: A LAND USE PERSPECTIVE

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## I. Introduction

This article gives an overview of pitfalls and real property related exceptions in the Texas Open Meetings Act and Public Information Act. The Open Meetings Act provides the public with access to the decision making process of governmental bodies. The Public Information Act gives the public access to government documents and recordings.

Understanding the pitfalls and exceptions discussed in this article is a step towards thoughtful, ethical, and effective advice to government clients and clients who interact with the government.

## II. Pitfalls and Exceptions

### a. TOMA: Hidden Open Meetings Violations

#### i. Walking Quorums

The Texas Open Meetings Act (TOMA) requires all meetings of a governmental body to be open to the public, unless an exception applies.<sup>1</sup> With this requirement, the legislature intended to prohibit secret meetings between a quorum of members of governmental bodies or their committees.<sup>2</sup> Members of a governmental body can violate this requirement without being physically present in the same room at the same time by participating in a walking quorum. A walking quorum is a series of communications, including telephone and email communications,<sup>3</sup> about public business that results in a discussion among a quorum, done with the intent to avoid TOMA's open deliberations requirement.<sup>4</sup> In a case from San Antonio, the mayor spoke with multiple city council members in the city manager's office and over the phone about the city budget, which the council would vote on the following day.<sup>5</sup> The court found that the mayor's purpose "was to achieve a consensus on changes to the budget."<sup>6</sup> The city council's subsequent vote reflected the consensus reached the previous night.<sup>7</sup> The intent to avoid TOMA's requirements was evidenced by the fact that the city manager kept track of the number of council

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<sup>1</sup> Tex. Gov't Code § 551.002 ("Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.").

<sup>2</sup> *Id.* at § 551.003.

<sup>3</sup> Tex. Att'y. Gen. Op. GA-0895 at 2-3 (2011).

<sup>4</sup> *Esperanza Peace & Justice Ctr. V. City of San Antonio*, 316 F. Supp. 2d 433, 474 and 476 (W.D. Tex. 2001) (describing a walking quorum as "an overlapping series of meetings or telephone conferences") ("[A] meeting of less than a quorum is not a "meeting" within the Act when there is no intent to avoid the Act's requirements. On the other hand, the Act would apply to meetings of groups of less than a quorum where a quorum or more of the body attempted to avoid the purposes of the Act by deliberately meeting in groups of less than a quorum in closed sessions to discuss and/or deliberate public business, and then ratifying their actions as a quorum in a subsequent public meeting.").

<sup>5</sup> *Id.* at 442-43.

<sup>6</sup> *Id.* at 442.

<sup>7</sup> *Id.* at 442.

members present to avoid a quorum, a “consensus memorandum” signed by each council member, and the ratification of the consensus at an open meeting.<sup>8</sup>

ii. Attendance at Informal or Social Meetings

Not all non-public meetings of a quorum necessarily violate TOMA. A quorum of members of a governmental body or committee may assemble in an informal or social setting without violating TOMA, as long as the members do not discuss public business or policy.<sup>9</sup> Such meetings are permissible because TOMA’s definition of “meeting” expressly excludes gatherings of a “quorum of a governmental body at a social function unrelated to the public business that is conducted by the body.”<sup>10</sup> A quorum may also assemble at a more formal event, such as a “regional, state, or national convention or workshop, ceremonial event, or press conference” without the assembly constituting a meeting as long as “formal action is not taken and any discussion of public business is *incidental* to the social function, convention, workshop, ceremonial event, or press conference.”<sup>11</sup>

iii. Attendance by Governmental Body at Committee Meetings (committee meaning boards, commissions, etc.)

When a quorum of a governmental body<sup>12</sup> or committee\* attends a meeting of a different governmental body or committee, that meeting could potentially qualify as a meeting of both governmental bodies and committees. For example, if a quorum of members of the local Planning Commission attend a City Council meeting, that meeting could qualify as a meeting of the City Council and as a meeting of the Planning Commission. Case law and multiple Attorney

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<sup>8</sup> *Id.* at 442-43.

<sup>9</sup> Tex. Att’y Gen., Public Information Handbook at 19 (2014), *available at* [https://www.texasattorneygeneral.gov/ag\\_publications/pdfs/publicinfo\\_hb.pdf](https://www.texasattorneygeneral.gov/ag_publications/pdfs/publicinfo_hb.pdf).

<sup>10</sup> *Id.* at § 551.001(4)(B).

<sup>11</sup> *Id.* (emphasis added). (551.001(4)(B).)

<sup>12</sup> *Id.* at § 551.001(3) (“(3) “Governmental body” means: (A) a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members; (B) a county commissioners court in the state; (C) a municipal governing body in the state; (D) a deliberative body that has rulemaking or quasijudicial power and that is classified as a department, agency, or political subdivision of a county or municipality; (E) a school district board of trustees; (F) a county board of school trustees; (G) a county board of education; (H) the governing board of a special district created by law; (I) a local workforce development board created under Section 2308.253; (J) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and (K) a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code.”).

\* “Committee” here is a general term for any local board, commission, panel, committee, or other group subject to TOMA.

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