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## **Open Government Case Law Update**

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## I. Introduction

This case law update includes eleven Texas administrative law cases decided in the past year. Each case contains issues of open government related to the Texas Open Meetings Act (“TOMA”) or the Public Information Act (“TPIA”). Note that while many of these cases include discussion or holdings regarding other areas of administrative law, this summary is limited to issues involving the TOMA and/or TPIA.

## II. Texas Open Meetings Act (TOMA)

- i. *Leftwich v. City of Harlingen*, No. 13-20-00110-CV, 2021 WL 4096148 (Tex. App.—Corpus Christi—Edinburg Sept. 9, 2021, no pet.)

This case addresses whether an open meeting that violates TOMA can affect the results of a related open meeting that does not violate the Act. The City published a notice in a local paper notifying the public of two upcoming hearings to discuss a proposed tax rate increase. At the hearings, Appellant provided comments in opposition of the proposed tax increase. Following the two hearings, the City held another session and performed the first reading of the proposed ordinances. After the reading, it was asked if there was any discussion, and nobody responded. The City then opened the floor to public comment. The City held a second reading of the proposed ordinances two weeks later, and the ordinances were adopted unanimously. Appellant filed suit alleging that, among other claims, the City violated Section 551.007(b) of TOMA by not allowing public comment “before or during” the consideration of the agenda items. Appellant requested a temporary injunction prohibiting the enforcement of the tax ordinances, a declaratory judgment that the City violated TOMA, a declaratory judgment that the ordinances were invalid, and a permanent injunction requiring the City to comply with TOMA.

The City filed a plea to the jurisdiction. The trial court granted the plea and dismissed Appellant’s lawsuit. Appellant then filed a request for findings of fact and conclusions of law, and ultimately filed a motion for a new trial. The trial court denied the motion for a new trial and Appellant appealed.

Appellant argued that by not allowing public comment “before or during” the consideration of the agenda items at the session for the first reading of the ordinance, the City violated TOMA and other provisions of the Texas Tax and Government Codes. The court rejected that argument by reasoning that because the vote to adopt the ordinances occurred in a different session than the alleged violations, the ordinances cannot be void due to the violations. Section 551.141 of TOMA states that only an action that violates TOMA is voidable. Here, the vote to adopt the ordinances did not occur until the session with the second ordinance readings, and that second session was not alleged to have violated TOMA. The court of appeals affirmed the trial court’s decision and held that Appellant’s claims under TOMA were overruled.

- Key Holding: An ordinance adopted in an open meeting where no violations occurred cannot be void due to violations that occurred in a different open meeting.

- ii. *Hardy v. Carthage Indep. Sch. Dist.*, No. 219CV00277JRGRSP, 2022 WL 609151 (E.D. Tex. Mar. 1, 2022)

This case addresses disclosing information discussed in closed meetings during a deposition. Plaintiff alleged that he was wrongfully terminated from Carthage Independent School District (“CISD”) and filed an employment discrimination lawsuit. During the deposition of a CISD board member within the course of the lawsuit, Plaintiff asked questions about a discussion during a closed school board meeting. CISD’s counsel objected and stated that if a Board member discussed what occurred in a closed meeting, said Board member is personally liable under Section 551.146 of TOMA and can be fined and imprisoned. Plaintiff disagreed with this analysis and filed a motion to compel.

CISD interpreted Section 551.146 of TOMA to mean that Plaintiff is not entitled to any discovery related to the closed meeting. The court rejected that argument by reasoning that Section 551.146 merely

penalizes disclosure of the certified meeting agenda or recording, and it is not a blanket prohibition against testifying about conversations that occurred in a closed meeting. Section 551.146(a) states that “[a]n individual ... that without lawful authority knowingly discloses to a member of the public the certified agenda or recording of a [closed] meeting.” The court referenced a 1989 Texas Attorney General Opinion that supported this conclusion, stating: “We interpret subsection 2A(h) as applying only to the records of executive sessions which governmental bodies are required to keep pursuant to section 2A of the act. It does not prohibit persons who are present at the executive session from afterwards talking about the subject matter of the session.” See Tex. Att’y Gen. Op. No. JM-1071 (1989). The court further reasoned that TOMA’s purpose includes transparency and accountability in local government, so construing the statute in a way that goes against that purpose was not proper. The court overruled CISD’s objections to Plaintiff’s questioning; deferred ruling on whether there is an evidentiary privilege for the agenda, recording, or related documents; and ordered CISD to preserve relevant documents and data.

- Key Holding: Participants in closed meetings must not disclose the certified meeting agenda or recording, but may testify about conversations that occurred in a closed meeting.

- iii. *Windermere Oaks Water Supply Corp. v. Allied World Specialty Ins. Co.*, No. A-21-CV-00258-RP, 2022 WL 378265 (W.D. Tex. Feb. 8, 2022), report and recommendation adopted, No. 1:21-CV-258-RP, 2022 WL 1811423 (W.D. Tex. Feb. 24, 2022)

This case involves a dispute regarding the obligation of an insurer to provide a governmental body with a defense in ongoing litigation involving alleged violations of TOMA. Defendant Allied World Specialty Insurance Company was the insurance company for Plaintiff Windermere Oaks Water Supply Corporation (“WSC”). Allied sued WSC for violating TOMA by failing to provide public notice in Board of Director meetings of its intent to sell a tract of land. The lawsuit against WSC alleged that WSC and the Board members exceeded their authority and breached their duties by transferring land to another member of the Board and her company for less than market value. The Board then gave the same member and her company additional property for no consideration. The final judgment in that lawsuit triggered a dispute as to whether one of the exclusions in the insurance policy would release Allied from its duty to defend WSC. This lawsuit sought to resolve the dispute.

Among other claims, Allied argued that the underlying lawsuit fell within the criminal acts exclusion of the insurance policy because WSC willfully violated TOMA when it held a closed meeting and did not provide public notice of the land sale. Allied claimed that Section 551.144 of TOMA requires proof that an “individual *knowingly* called a closed meeting.” The court rejected Allied’s argument and followed the analysis in *Tovar v. State*, which concluded that “knowingly” modified other forms of liability potentially incurred, but ultimately TOMA imposed strict liability because “a member of a governmental body can be held criminally responsible for his involvement in the holding of a closed meeting which is not permitted under the Act regardless of his mental state with respect to whether the closed meeting is permitted under the Act.” The court denied Allied’s motion for summary judgement regarding the duty to defend and held that the criminal acts exclusion does not apply.

- Key Holding: The criminal acts exclusion under the applicable insurance policy did not bar coverage absent any finding of a willful violation of TOMA.

- iv. *Scribner v. Treger*, No. 02-21-00277-CV, 2022 WL 714654 (Tex. App.—Fort Worth Mar. 10, 2022, no pet.), reh’g denied (Mar. 31, 2022)

This case addresses whether a party must exhaust administrative remedies before seeking legal action for a TOMA violation. Plaintiff and others sued the Superintendent and the Fort Worth Independent School District (the “District”) to challenge the implemented mask policy and for an alleged violation of

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