

September 2006

**Legal Q&A**

**By Scott Houston**

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**What are the facts behind, and the status of, the federal lawsuit claiming that the Texas Open Meetings Act is unconstitutional?**

The case is currently pending in the federal district court for the western district of Texas, and it is entitled *Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas, Plaintiffs v. Frank D. Brown, 83<sup>rd</sup> Judicial District Attorney, Gregg Abbott, Texas Attorney General, and the State of Texas, Defendants.*

These are the facts: A city councilmember in a West Texas town sent an e-mail to four other councilmembers asking if they felt that a particular item should be placed on a future agenda. The following day, one of the four councilmembers responded to the first e-mail, stating that she agreed that the item was relevant and should be discussed.

According to the Brewster County district attorney, that exchange violated the Texas Open Meetings Act (Act). As a result, two of the councilmembers involved in the exchange were criminally indicted by a grand jury. The indictments were ultimately dismissed “without prejudice,” meaning the councilmembers could be charged again, but the prosecution led to the civil lawsuit challenging the constitutionality of the Act.

Fed up with the tortured interpretations and absurd applications of the Act, the two councilmembers—represented by well-known defense attorney Dick DeGuerin, the Alpine city attorney, and a Texas Tech law professor—sued the district attorney and the State of Texas.

According to appellate court decisions and attorney general opinions, an exchange between councilmembers for the purpose of deciding if an item should be placed on a future agenda is not a violation of the Act. However, councilmembers should not discuss the merits of an issue or how they intend to vote. Clear as mud? Of course not, and that is what a TML attorney testified to at the trial. When a TML attorney or city attorney advises on whether or not councilmembers can discuss business outside of a posted meeting, either as a quorum or in numbers less than a quorum, the only way to ensure that no one will be criminally prosecuted is to say “don’t do it.” In other words, the most conservative legal advice is to advise councilmembers not to talk about items of public business with each other outside of a properly-posted meeting. Of course, it is essentially impossible to run a city that way.

Beyond that advice, there is a continuum of behavior to consider. Some discussions clearly violate the Act, whereas others do not. It is a fact that there is a gray area in the middle of that continuum, rather than a “bright line,” that has a chilling effect on a councilmember’s freedom of speech. Because councilmembers do not know specifically what they can and can’t talk about, they are afraid to talk about anything. And that scenario is exactly what the First Amendment to the United States Constitution was meant to protect.

In addition, because there is a gray area in the law, local prosecutors have too much discretion when deciding if they should prosecute. Prosecutors always have absolute discretion regarding whether or not to prosecute a crime; that's not the issue here. The issue is this: Under the current terms of the Act, prosecutors are essentially given discretion to make up the elements of the crime. That is the very definition of an overbroad (and therefore unconstitutional) law. A bench trial in the federal case was held in Pecos, Texas, on July 26, 2006. The parties have until September to submit additional evidence, and a decision will probably come down later this year.

Neither the Texas Municipal League nor its member city officials are opposed to open government, nor do they favor "backdoor deals in smoke-filled rooms." To say so would be patently absurd. What city officials would like is the opportunity to serve their cities without the constant threat of fines and jail time for doing so. They need a "bright line" to know what behavior is permissible, and what is not. It is hoped that this case will give them what they need.

### **How does the Open Meetings Act govern conversations involving a quorum of city councilmembers?**

According to the Texas attorney general's office:

*A meeting occurs and the (Open Meetings) Act applies whenever a quorum of a governmental body is present and discusses public business, regardless of whether any action is taken.*

In other words, any gathering of members of a governmental body, such as a city council, is subject to the requirements of the Texas Open Meetings Act (including a 72-hour notice, an agenda, and minutes or a tape recording) if the following two conditions are met: (1) a quorum is present; and (2) public business is discussed. For example, a regular meeting of a city council, where agenda items are discussed and formal action is taken, is clearly a meeting. However, according to the Act and several recent attorney general opinions, many other gatherings of the members of a governmental body may also constitute a meeting.

The Act has been interpreted to apply to situations in which members of a governmental body act as a body but are not in each other's physical presence. For example, e-mail communications, telephone calls, and written correspondence between a quorum may constitute a violation of the Act, even if the quorum is not physically present in the same location and the discussion does not take place at the same moment in time. Op. Tex Att'y Gen. Nos. DM-95 (1992) & LO-95-055 (1995)(members of a governmental body may violate the Act by signing a letter on matters relevant to public business without meeting to take action on the matter in a properly posted and conducted open meeting); JC-0307 (2000)(the circulation of any document that requires approval of the governing body to take effect in lieu of its consideration at a meeting would violate the Act); DM-95 (1992)(the mere fact that two councilmembers visit over the phone does not in itself constitute a violation of state law. However, if city councilmembers are using individual telephone conversations to poll the members of the council on an issue or are making such telephone calls to conduct their deliberations about public business, there may be the potential for criminal prosecution.); and *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App.-San Antonio 1985, no

writ)(members of a school board violated the Act by deciding to send out a letter to all parents of the school district without discussion of the matter in an open meeting).

More recently, Opinion No. GA-326 (2005) adopts the term “walking quorum.” The term seems to indicate, assuming a quorum is three, that: If councilmember A deliberates with councilmember B, then councilmember B deliberates with councilmember C, and finally councilmember C deliberates with councilmember A, a quorum was formed.

### **How does the “criminal conspiracy” provision make conversations of less than a quorum subject to criminal prosecution?**

Prosecutors have “substantial disagreement on the interpretation of the [criminal conspiracy provision]...and [have raised] significant doubt as to the constitutionality of the statute.” Tex. Att’y Gen. Op. Req. No. RQ-291-GA. Section 551.143(a) provides that:

*A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.*

Several court cases and attorney general opinions have addressed conversations of less than a quorum, but none directly address the criminal conspiracy provision. Most city attorneys advise their member city officials that discussions about whether or not to place an item on a future agenda is clearly permissible (but that is what formed the basis of the prosecution discussed above). Most also believe that casual discussions between councilmembers should be permissible. For example, a newly elected councilmember should be permitted to discuss city business with a veteran councilmember, who has more experience and a greater depth of knowledge about city issues. However, in light of Section 551.143, city attorneys must always caution that councilmembers should not come to a “meeting of the minds” on the issue outside of a properly posted meeting.

The ruling in the case of *Harris County Emergency Service Dist. #1 v. Harris County Emergency Corps*, 999 S.W.2d 163 (Tex. App – Houston [14<sup>th</sup> Dist.] 1999, no writ) indicates that a councilmember does not violate the Act by using the telephone to discuss agendas for future meetings. The record in that case showed “that the board members discussed only what they needed to put on the agenda for future meetings” and that there was “no evidence that the district members were attempting to circumvent the [Act] by conducting telephone polls with each other.” *Id.* at 168; *see also* Op. Tex. Att’y Gen. No. MW-32 (1979) (concluding that a procedure permitting individual members of a governmental body to write to the executive director suggesting items to be placed on a future agenda does not violate the Act). However, the e-mail exchange in the case discussed above shows that prosecutors can still bring criminal charges for such a discussion.

On the other hand, the court in *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. – San Antonio 1985, no writ) held that school board trustees violated the Act by telephone conferencing. In that case, the trustees visited on the telephone and agreed to mail out a letter to all parents residing in the

district advising recipients of their voting rights and stating that the message was a service of the board of trustees. The court upheld an injunction that prohibited the board from conducting informal meetings or telephone conferences to discuss or decide matters of public policy. *Id.* at 796. According to the attorney general's interpretation of *Mabry*, "[it] appears that the physical presence of a quorum in a single place at the same time is not always necessary for a violation...to occur. Avoiding the technical definition of "meeting" or "deliberation" is not, therefore, a foolproof insulator from the effect of the act. Op. Tex. Att'y Gen. No. DM-95 at 2 (1992). According to DM-95, there is:

*a continuum of behavior from that which clearly complies with the act to that which clearly violates it. We think, however, that a governing body that deliberates through a series of closed meetings of members of less than a quorum risks a finding by a trier of fact that...a violation...has occurred, or worse, that members have conspired to circumvent the act.*

*Id.* DM-95 further states that "[i]f a quorum of a governmental body agrees on a joint statement on a matter of such business or policy, the deliberation by which that agreement is reached is subject to the requirements of the act, and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time. *Id.* at 5-6 (citing *Hitt v. Mabry, supra*); see also Op. Tex. Att'y Gen. No. JC-307 (2000) (concluding that county commissioners violated the Act by circulating an invoice for approval in writing in lieu of consideration at a meeting); Tex. Att'y Gen. LO-95-055 (1995) (opining that a city councilmember may violate the Act when he telephones individual councilmembers to express his views about public business that has not been formerly considered by the council in an open session).

The attorney general's position appears to be that, when a group of people act in concert, some meeting of the minds must have occurred to make that action possible. See Op. Tex. Att'y Gen. No. DM-95 (1992). With respect to actions taken by governmental bodies, the attorney general concludes that it is the process by which this meeting of the minds occurs that the Act is intended to open to public scrutiny. *Id.* at 1 (citing *Cox Enters. Inc. v. Board of Trustees of Austin Indep. School Dist.*, 706 S.W.2d 956, 960 (Tex. 1986)). Therein lies the danger in advising city officials. If they speak to one another outside of a meeting and then take action in the future on the topic they discussed, a prosecutor might infer that a meeting of the minds occurred prior to the meeting. While an official may not have actually violated the Act, he or she must still bear the publicity and hire an attorney, resulting in considerable inconvenience, to say the least.

A recent case addressed a situation that may be a classic example of a violation of the criminal conspiracy provision. In *Esperanza Peace and Justice Center v. City of San Antonio*, 316 F.Supp.2d 433 (W.D. Tex. 2001), the plaintiffs challenged the adoption of a city's budget based on a series of telephone calls and personal discussions between the mayor and individual councilmembers. On the eve of the budget vote, the mayor, city manager, and several councilmembers met in small groups in the city manager's office to discuss the budget. The mayor's purpose in meeting with the members was to reach a consensus on changes to the city budget. The participants were careful to avoid the physical presence of a quorum. In fact, on several occasions throughout the evening, the city manager told the group that there were too

many people together, and they were at risk of violating the Act. In response to the city manager's warnings, one or more councilmembers would leave the office and wait in the reception area outside.

The city argued that no violation occurred because no quorum was ever present in one place. The court held that:

*[T]he facts of this case present a classic fact pattern of deliberation by a quorum that purposely attempts to avoid the technical definitions of the Act by shuffling members in and out of an office. Clearly, a quorum of council members deliberated and reached agreement concerning the budget--perhaps the most important piece of public business the council considers--behind closed doors, actions condemned by both the Hitt court and the Texas Attorney General. The transparent subterfuge of separating members physically by an office wall or a telephone line cannot avoid the strictures of the Act.*

*Esperanza*, 316 F.Supp.2d at 474. In the *Esperanza* case, the facts were such that intent to violate the Act could be inferred. To the contrary, the mere fact that two city councilmembers visit about an issue does not show intent to violate the Act. However, nothing would prevent a local prosecutor from charging the mayor and councilmembers with conspiracy to circumvent the Act. See TEX. GOV'T CODE § 551.143.

The anecdotal evidence clearly shows that the criminal conspiracy provision is difficult to interpret. The discussion over how to interpret Section 551.143 has waged since the enactment of the provision. In the opinion of the TML legal staff, the Act is not intended to hamper the ability of individual elected officials to discuss and learn about issues, and TML's belief has always been that city councilmembers should be free to consult among themselves in a candid and unrestrained manner to resolve issues. "Limiting board members' ability to discuss...issues with one another outside of formal meetings would seriously impede the board's ability to function." *Hispanic Educ. Committee v. Houston Ind. School Dist.*, 886 F.Supp. 606, 610 (S.D. Tex. 1994). Discussions between individuals do not normally amount to any systematic attempt to circumvent or avoid the purposes of the Act. However, notwithstanding that position and until Section 551.143 is clarified, TML remains cautious in our interpretation. The following quote from LO-95-055 clearly shows why we must take such a position:

*we cannot advise you that a member of the city council may telephone individually a quorum of the members of the council to express his views and/or concerns about public business without violating the act.*

Tex. Att'y Gen. LO-95-055 at 3 (1995). As such, we sometimes advise city officials to visit with their local prosecutor, who has the discretion to investigate and prosecute criminal violations of the Act.

**In light of the above analysis, what practical advice does TML provide for city officials?**

The cases and attorney general opinions that interpret the Act suggest several logistical problems for cities and city officials, and they could be interpreted to say that:

1. A member of a governmental body should not discuss matters over which the body has supervision or control outside of a properly posted open meeting.
2. While modern conveniences such as the telephone and e-mail should be used to facilitate the exchange of information, these tools should definitely not be used to deliberate substantive policy issues.
3. A member of a governmental body should avoid discussing public business with less than a quorum of the body outside of a properly posted meeting.
4. A city should adopt a policy governing councilmember communications.
5. In light of the recent federal court lawsuit, city officials should inquire of their local prosecutor as to his or her interpretation of the Act. The criminal prosecution in that case illustrates that the local district or county attorney may be the key factor.

While the TML Legal Services Department is always available to answer your questions (512-231-7400 or [legal@tml.org](mailto:legal@tml.org)), city officials should follow the advice of local legal counsel on Open Meetings Act questions. As always, TML legal staff will defer to the advice of local counsel.