

Elected Official: Can I Talk About Public Business Outside of a Meeting?
Me: Sure, If You Want to be Sent to Jail, Go Right Ahead!

Scott Houston
Director of Legal Services
Texas Municipal League

I usually don't write in the first person. As a lawyer, that's not what I'm trained to do. My job is to read statutes, court cases, attorney general opinions, and secondary sources, and to advise city officials in plain English what they can and can't do. In other words, I am an instrument that an elected official uses to conduct his or her duties in a lawful manner.

But I'm eminently frustrated when trying to advise elected officials about what behavior violates the Texas Open Meetings Act (Act). Let me be more clear on that statement. I have been a student of the Act for more than six years. I have read every single court opinion interpreting the Act, I have read every attorney general opinion interpreting the Act, I have read hundreds of papers and articles interpreting the Act, and I have analyzed and even drafted legislation amending the Act. Some might call me an expert, for whatever that's worth.

So what's the problem? Well, with all that being said, I still can't answer in a satisfactory way the most common legal question I receive from elected officials:

“Can I talk about public business with other members of my governmental body outside of a properly-posted meeting?”

The answer that I have to give, being a conservative lawyer who doesn't want my elected officials sent to jail based on my advice:

“No.”

Some lawyers disagree with that answer, but I give it knowing that, although it has been rare, elected officials have been indicted for doing so. My friends at the attorney general's office have even told me that they don't think that is what the Act is meant to do, but my reading of the law leads me to believe that it does so nonetheless. I'm not talking about intentionally-planned secret meetings to make decisions outside of the public view. What I'm talking about is one elected official talking to another to learn about an issue or to discuss whether an issue warrants consideration by the entire governmental body.

Of course, the answer is more than just “no.” It requires a long, drawn-out explanation. I don't think the answer that I provide to an elected official, who is trying his or her best to serve the community, should require a one-hour telephone conversation or a 3,000 word article. That being said, here's an abbreviated look at the law on the issue, including a discussion of the recent federal district court for the western district of Texas decision in *Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas, Plaintiffs v. Frank D. Brown, 83rd Judicial District Attorney, Gregg Abbott, Texas Attorney General, and the State of Texas, Defendants* (the “Alpine case”).¹

According to the Act and Texas attorney general's office:

*Act generally applies when a quorum of a governmental body is present and discusses public business.*²

In other words, any gathering of members of a governmental body, such as a city council, is subject to the requirements of the Act (including a 72-hour notice, an agenda, and minutes or a tape recording) if the following two elements are met: (1) a quorum is present; and (2) public business is discussed. The Act actually has two definitions of a meeting,³ but for purposes of determining when the Act applies, I have found that the "two-element" test is the clearest way to explain it. It seems simple enough to explain, but even a simple test can be deceptive.

Why? Because the Act has been interpreted to apply to situations in which members of a governmental body are not in each other's physical presence. For example, e-mail communications, telephone calls, and written correspondence that ultimately involve 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.⁴ In my opinion, the Act is not intended to hamper the ability of individual elected officials to discuss and learn about issues, and my 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."⁵ Discussions between individuals do not normally amount to any systematic attempt to circumvent or avoid the purposes of the Act. However, notwithstanding that fact, I remain cautious in my advice because prosecutors have "substantial disagreement on the interpretation of the [criminal conspiracy provision]...and [have raised] significant doubt as to the constitutionality of the statute."⁶

Several court cases and attorney general opinions have addressed conversations of less than a quorum. Recently, Opinion No. GA-326 (2005) referenced the term "walking quorum." The term seems to indicate, assuming that a city council's 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. GA-326 actually dealt with the criminal conspiracy provision of the Act,⁷ under which discussions among less than a quorum can be a crime. Even so, the reference to the term "walking quorum" blurs the line between discussions that clearly involve a quorum, and those that involve less than a quorum.

Harris County Emergency Service Dist. #1 v. Harris County Emergency Corps, 999 S.W.2d 163 (Tex. App – Houston [14th Dist.] 1999, no writ) clearly indicates that the Act is not violated 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."⁸ Prior to the decision in the Alpine case (discussed below), I was comfortable advising my city officials that discussions about whether or not to place an item on a future agenda are clearly permissible. However, I always cautioned that

councilmembers should not come to a “meeting of the minds” on the issue outside of a properly posted meeting.

That advice was based partially on *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. – San Antonio 1985, no writ), which held that school board trustees violated the Act by telephone conferencing. In *Mabry*, 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.”⁹ 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.”¹⁰ According to the attorney general, “[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.”¹¹ I agree with the policy of that statement, but I don’t believe that elected officials shouldn’t be able to learn about issues outside of a meeting.

And therein lies the danger in advising elected officials. If they speak to one another outside of a meeting, whether to simply share information or to decide whether to place an item on a future agenda, 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. That’s why I reluctantly stick to my “no” answer.

The facts in the Alpine case are these: 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.¹² According to the Brewster County district attorney, that exchange violated the 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,” but the prosecution led to a civil lawsuit challenging the constitutionality of the Act.

The councilmembers did not discuss the merits of the issue outside of a properly-posted meeting. According to the appellate court decisions and attorney general opinions mentioned above, 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. *But the councilmembers were indicted by their district attorney anyway.* The two councilmembers—represented by well-known defense attorney Dick DeGuerin, Rod Ponton (the Alpine city attorney), and Dennis Olson (a Texas Tech law professor)—sued the district attorney and the State of Texas. The suit was based on the fact that some discussions clearly violate the Act, whereas others do not. 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. On November 7, 2006, the judge in the case issued his ruling. The following quote sums up the holding of the case:

Because the speech at issue is uttered entirely in the speaker's capacity as a member of a collective decision-making body, and thus is the kind of communication in which he or she is required to engage as part of his or her official duties, it is not protected by the First Amendment from the restrictions imposed by the Texas Open Meetings Act.

In other words, when you are elected to public office, your constitutional rights go away.¹³ I note that neither the Texas Municipal League, nor myself, believes that elected officials should be able to deliberate and make substantive decisions in private. In my opinion, the e-mails sent between the Alpine city councilmembers *did no such thing*. They simply discussed *whether or not an item should be placed on an agenda*. That discussion is not a violation under *Harris County Emergency Service Dist. #1, supra* and other precedent. As a practical matter, I do not believe such a discussion should subject an elected official to jail time.

In the Alpine case, the court's decision cites a Kansas Supreme Court opinion upholding the constitutionality of that state's open meetings laws. In the Kansas case, actual secret meetings were prearranged, planned, and carried out for the purpose of deliberations and decisions that were not open to the public.¹⁴ Let's be clear: those are *not* that same facts as the Alpine case. The Texas attorney general issued a press release following the decision that states the following:

Public officials who seek ways to skirt the law governing public meetings, while asserting their right to 'free speech,' are not acting in the spirit of democracy and we must never tolerate these acts in a free country.

A November 13, 2006, editorial in the Austin American Statesman opined that:

[The court's decision] might discourage other elected officials who chafe at doing the people's business in the sunshine from filing frivolous lawsuits.

Neither statement comports with what the Alpine councilmembers did. To read the press release and editorial, you'd suspect that the councilmembers were "chafing" evildoers who were sneaking around to make decisions outside of the public view. That's simply not the case. *One simply asked the others if they would like to discuss the hiring of an engineer in a public meeting!* The Kansas Open Meetings Act does not contain criminal penalties, only the possibility of a civil fine of no more than \$500. In Texas, however, a councilmember who asks another councilmember whether or not an item should be placed on a future agenda could be sent to jail for up to six months.

Thus, I must advise city councilmembers not to talk about items of public business with each other outside of a properly-posted meeting, period. Of course, it is essentially impossible to run a city that way. Beyond that advice, there is a continuum of behavior to consider, with criminal prosecution for innocent (and, in my opinion, lawful) discussions being a real possibility. The

cases and attorney general opinions that interpret the Act suggest several logistical problems for elected officials:

1. A member of a governmental body should not for any reason or in any context 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 discuss 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 governmental body should adopt a policy governing councilmember communications.
5. Elected officials should inquire of their local prosecutor as to his or her interpretation of the Act. The local district or county attorney's interpretation of the Act may be the key factor.

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.

It is likely that the Alpine case will be appealed, and thus may provide some guidance in the future. Also, legislation has been filed in the past that attempted to give elected officials the flexibility to learn about issues and decide whether or not issues merit discussion at a meeting. For example, H.B. 305 (2005) would have clarified that members of a governmental body do not commit a crime if they meet in numbers less than a quorum so long as the discussion is limited to: (1) the exchanging of information about public business among the members present; (2) the receiving of information by the members present from an officer or employee of the governmental body about public business; or (3) the giving of information by the members present to an officer or employee of the governmental body about public business. The bill would also have required that the members present: (1) take no action; and (2) do not privately discuss the information with any other member of the governmental body before the information is discussed with a quorum of the governmental body in an open meeting. H.B. 305 never made it out of committee, and similar legislation would probably meet the same fate.

While the TML Legal Services Department is always available to answer city officials' questions (512-231-7400 or legal@tml.org), elected 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.

¹ In the United States District Court for the Western District of Texas, Case No. P-05-CV-075.

² 2006 Open Meetings Act Made Easy (http://www.oag.state.tx.us/AG_Publications/pdfs/2006om_easy.pdf).

³ See TEX. GOV'T CODE § 551.001(4).

⁴ 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); *But see* 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).

⁵ *Hispanic Educ. Committee v. Houston Ind. School Dist.*, 886 F.Supp. 606, 610 (S.D. Tex. 1994).

⁶ *See e.g.*, Tex. Att’y Gen. LO-95-055 at 3 (1995)(Concluding that “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. Op. Req. No. RQ-291-GA.

⁷ Section 551.143(a) provides that an elected official commits an offense of he or she knowingly conspires with less than a quorum to circumvent the Act.

⁸ *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).

⁹ *Id.* at 796.

¹⁰ Op. Tex. Att’y Gen. No. DM-95 at 2 (1992).

¹¹ *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).

¹² The exact text of the e-mails is in the court’s opinion, available at http://www.oag.state.tx.us/newspubs/releases/2006/110806brown_fof.pdf.

¹³ *See also*, *Hays County Water Planning Partnership v. Hays County, Texas*, 41 S.W.3d 171, 181-182 (Tex. App. – Austin 2001, no pet.) (Holding that the requirement that an elected official comply with the Open Meetings Act does not abridge his right to freedom of speech.)

¹⁴ *State ex rel. Murray v. Palmgren*, 646 P.2d 1091 (Kan. 1982).