

OPEN MEETINGS ACT ERODES **FREEDOM OF SPEECH**

In October of 2004, a member of the city council in Alpine, Texas, sent an e-mail to other councilmembers asking if they wanted to place a particular item on a future council agenda. The following day, one of the other councilmembers responded to recipients of the first e-mail, stating that she agreed that the item should be discussed. The local district attorney decided that this e-mail exchange violated the Texas Open Meetings Act (TOMA) because the e-mails ultimately involved a quorum of the city council. As a result, two of the councilmembers were criminally indicted by a grand jury.

These two Alpine councilmembers, who were volunteering to serve their city, were merely trying to get an item on a future agenda for a public discussion by the entire city council. For doing so, they now have an arrest record and could have been convicted of a crime and sent to jail for up to six months.

Although the indictments were later dismissed, the two councilmembers sued in federal court claiming that the criminal provisions of TOMA violate their free speech rights under the First Amendment to the U.S. Constitution. There is no doubt that TOMA limits a local official's freedom of speech by laying out certain topics that a local official may not discuss with certain other people at certain times. Local officials accept this erosion of freedom of speech and recognize that it must be balanced with the importance of open government.

But this limitation on free speech raises an important question: What penalty should be imposed on a local official who commits a violation of the Act, no matter how inadvertent or inconsequential? In Texas, the penalty can be imprisonment. Thousands of other local elected officials in Texas agree with their Alpine counterparts that the criminal provisions of TOMA are unjust, unnecessary, and unconstitutional. Many of those local officials are working to ease TOMA's jail-time penalties, penalties that do not exist in most other states where open meetings statutes work very effectively.

In response to these efforts by city officials, the Texas Daily Newspaper Association, a powerful Austin-based lobbying organization, has taken to the op-ed pages in newspapers across Texas to attack and vilify local officials by calling their actions "duplicitous," by claiming they want secrecy in government, and by making other outrageous statements that are patently and demonstrably false.

In an apparent effort to deceive and confuse readers, the newspaper association simply reports that the lawsuit brought by the two Alpine councilmembers was dismissed. They cleverly fail to mention that it was dismissed only because the plaintiffs' terms of office had come to an end due to term limits, and the court ruled they no longer had standing. The newspaper moguls also make no mention of the fact that prior to that dismissal, a three-judge panel of the Fifth U.S. Circuit Court ruled that TOMA should be subject to strict scrutiny because it regulates speech. A court that applies that scrutiny would likely strike down the punishment of imprisonment.

City officials are planning to file a new lawsuit.

The flippant way in which the newspaper group glosses over these facts raises another important question. Does the eagerness of the daily newspapers to influence state policy prevent them from fairly and objectively reporting and commenting on that policy? Unfortunately for the ever-diminishing ranks of newspaper readers, that's apparently the case.