

TOP LEGAL QUESTIONS

Received By

TML LEGAL SERVICES



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About the TML Legal Services Department

The Texas Municipal League Legal Services Department provides legal assistance to TML member cities. We answer general questions; participate in educational seminars; provide support services for the legislative department; and prepare handbooks, magazine articles, and written materials including legal opinions and amicus briefs. Since our staff of four lawyers serves over 1,100 member cities, there are limits on the types of assistance we can provide. For more information on the Legal Services Department, please go to www.tml.org, and click on “Legal.”

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Introduction

Cities are formed for the purpose of managing the needs of people who live and work in close quarters. Cities provide basic services, such as streets, law enforcement, and utilities, as well as enact and enforce ordinances to protect the citizens of the community and foster a better living environment. City government in Texas, as in most of the United States, was founded on, and continues to evolve from, the premise that local communities know best how to run their local affairs. The following are some of the most common questions received by the Texas Municipal League Legal Services Department. As this is a brief overview of the area, and not intended as legal advice, local counsel should always be consulted prior to taking any action. Please contact the TML Legal Services Department at 512-231-7400 or legalinfo@tml.org with questions or comments. And without further *a due*:

Can citizens vote on property taxes?

City officials considering imposing a property tax often ask if citizen approval of property taxes is necessary. In addition, officials sometimes ask if they can go to the voters anyway for political “cover,” because property taxes tend to be very controversial.

The answer to both questions is no. Citizen approval of the adoption of property taxes is neither required, nor is it permitted. According to the Texas Tax Code: “The governing body of each taxing unit...shall adopt a tax rate for the current tax year and shall notify the assessor for the unit of the rate adopted.” TEX. TAX CODE § 26.05. Nothing in Chapter 25 of the Tax Code speaks to voter approval of tax rates. As such, none is required. TEX. TAX CODE § 26.05.

Even if a city wants to submit property taxes to the voters, it is prohibited from doing so. When a state statute comprehensively covers an area of the law, as the Tax Code does for property taxes, local governments are preempted from changing the law on their own. Because the Tax Code speaks in detail about the procedures for adoption of city property tax rates, a court would likely find that voter referenda on property tax adoption are preempted by the Tax Code.

Of course, cities are not prohibited from gauging the will of the public when it comes to property taxes or any other issue. A city could conduct a non-binding poll or survey to find out whether the public supports imposition of property taxes. Some cities conduct such polls through inserts in utility bills, for instance.

On a related note, citizens are allowed to vote on subsequent property tax increases (after the initial adoption of the tax) that exceed the effective property tax rate by more than eight percent. This threshold rate—108 percent of the effective rate—is known as the “rollback rate.” Any adopted rate that exceeds the rollback rate allows the citizens 90 days to acquire a certain number of signatures to force a rollback election. TEX. TAX CODE § 26.07. If a proper petition is received by the city, an election must be held on the issue of whether to “rollback” the tax increase to 108 percent of the effective rate. Somewhere in the neighborhood of half a dozen rollback elections are held around the state each year, and 64 percent have been historically successful in rolling back the tax rate to the rollback rate.

Finally, it is sometimes asked whether home rule cities with the power of initiative and referendum may have their tax rates challenged by those processes. The answer is likely not. Texas cases have held that ordinances that rely on careful application of facts and figures are generally not subject to home rule voter initiative or referendum. *Denman v. Quin*, 116 S.W.2d 783 (Tex. Civ. App.—San Antonio 1938, writ ref'd).

Can we submit an ordinance to citizen referendum?

Citizen referendum and initiative are powers that only home rule cities possess, and then only if the city's charter provides for it. Thus, a city council of a home rule city would have the authority to call a referendum on an issue, including an ordinance, if the city's charter allowed for such an election. See *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998); *Glass v. Smith*, 244 S.W.2d 645, 648—49 (Tex. 1951); Tex. Att'y Gen. Op. No. GA-0222 (2004).

For general law cities, the answer is different because the calling of an election must be authorized by a particular state statute. See *Countz v. Mitchell*, 38 S.W.2d 770, 774 (Tex. 1931) (stating that “[t]he right to hold an election cannot exist or be lawfully exercised without express grant of power by the Constitution or Legislature”); *Ellis v. Hanks*, 478 S.W.2d 172, 176 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (stating that the right to hold an election “must be derived from the law”); Tex. Att'y Gen. Op. No. GA-0001 (2002) (stating that “generally the right to hold an election depends upon statutory authorization”).

Because there is no Election Code provision or other state statute that authorizes a general law city council to submit general ordinances to the electorate through a referendum election, a general law city may not do so.

A general law city is free to conduct a poll or hold a public hearing to gauge the preferences of the voters. The results of such a poll or hearing are not binding on the council, nor could the council the results binding on itself.

Cities sometimes ask whether a non-binding election referenda may be placed on an official election ballot. The Secretary of State believes the answer is no, and cites attorney general opinions Nos. LO-94-091 (1994) and H-425 (1974) for that conclusion. In fact, placing an unauthorized proposition on a ballot may be considered a misappropriation of public funds.

How can we increase collections on delinquent utility bills?

First, cities may use late fees to encourage utility customers to pay their bills in a timely manner. A late charge on bills for utility service is neither interest nor penalty, but is a cost of doing business assessed against a delinquent customer. Tex. Att'y Gen. Op. No. H-1289 (1978). The late fee should be authorized by ordinance, and should be reasonable. Reasonableness will generally be determined by the degree to which the amount of the late fee relates to the costs the

fee is meant to recoup. *Id.* With regard to a utility bill, the city's cost of collection plus any other city costs resulting from the tardiness of the payment, would likely create a fee that is reasonably related to the cost to the city.

Next, a city may require varying utility deposits for customers as it deems appropriate in each case. TEX. LOC. GOV'T CODE § 552.0025(c). Due to the additional work related to collecting late fees and placing a lien on a property, a city should have a clear and consistent policy for the shut off of utilities due to a late payment, and for collecting an adequate deposit to cover an average month of service.

A city can discontinue utility service to a customer whose account is delinquent provided that due process is satisfied. Due process requires that the customer be given notice and an opportunity for a hearing before service is terminated. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1977). The notice must state the reasons for discontinuance, such as payment being overdue, and that service will be discontinued if payment is not made by a certain date. The notice must be reasonably calculated to inform customers of a procedure for protesting the proposed termination of service. Giving customers the opportunity for an informal consultation with designated city personnel can constitute a due process hearing. The designated officer or employee must have the authority to resolve the dispute and rescind the discontinuance order if the officer or employee determines during the hearing that the order was issued in error. This administrative procedure is necessary prior to termination of services in order to afford reasonable assurance against the erroneous or arbitrary withholding of essential services.

Cities that own more than one utility have an additional tool to encourage payment of utilities bills. Cities that own more than one utility or provide solid waste disposal may be authorized to suspend service of any city-owned utility or service until the delinquent claim is fully paid. TEX. HEALTH & SAFETY CODE § 364.034(d). To ensure that a city's utility has this option, a city should consult with its attorney before taking this path.

Cities should be aware of the limitation on their authority set out in Section 552.0025 of the Local Government Code. Pursuant to this section, a city may not require a customer to pay for utility service previously furnished to another customer at the same service connection as a condition of connecting or continuing service. Also, a city may not require a customer's utility bill to be guaranteed by a third party as a condition of connecting or continuing service. For example, if the city contracts directly with the renters, not the property owners, then the city is not able to collect from the property owners.

Finally, if a utility bill is unpaid, a city may by ordinance impose a lien against an owner's property, unless the property is a homestead that is protected by the Texas Constitution. TEX. LOC. GOV'T CODE § 552.0025(d). To impose a lien, a city must adopt an ordinance setting out the city's intention to do so. The authority to impose utility liens has certain limitations. For example, a water lien may not be imposed for delinquent utility bills where:

1. Service is connected in a tenant's name after the property owner has given notice to the city that the property is rental property. TEX. LOC. GOV'T CODE § 552.0025(e).

2. Service is connected in a tenant's name prior to the effective date of the ordinance imposing the lien. *Id.* § 552.0025(f).
3. The property involved is a homestead. *Id.* § 552.0025(d).

A city's utility lien, when perfected, is superior to all other liens except a bona fide mortgage lien recorded before the utility lien. TEX. LOC. GOV'T CODE § 552.0025(h).

How do we abandon or close an existing or platted street?

A city council has the authority to close a street within the city limits, subject to certain procedural requirements. Section 311.008 of the Texas Transportation Code specifically authorizes the governing body of a general law city to abandon or close a city street or alley by ordinance when it receives a petition signed by all the owners of real property abutting the street or alley. Section 311.007 authorizes a home rule city to vacate, abandon, or close a street, and no petition is required.

A city is usually required, by Chapter 272 and Section 253.008 of the Local Government Code, to sell real property by sealed bid or public auction. But Section 272.001(b)(2) provides an exception to the required notice, sealed bidding, and obtaining fair market value, when the city sells city streets to abutting property owners.

Roads are found in unlikely places. For example, city officials are frequently asked by citizens to transfer ownership of undeveloped roads platted underneath their house. In a general law city, after the city receives a petition from the land owners on both sides of the street, the council has the option to close the street and transfer all city rights to the land to the homeowner. A home rule city may close the street on its own motion.

After satisfying statutory requirements, many city councils set application fees and specific criteria for approving closure. In addition, some cities require the applicant to provide notice to surrounding landowners, and bear the costs of any required turnaround area or emergency exit. Depending on its size, some cities require city staff to conduct studies of how a road closure will effect traffic patterns, report on the accident history for the area, and identify alternative traffic calming and traffic control solutions to address a traffic problem.

Is it permissible for a city to make a donation?

The issue is not whether it is okay to make a donation or give a gift generally, but whether an expenditure of public money serves a valid public purpose. If it is purely a charitable donation, it is prohibited by the Texas Constitution. If it is an expenditure of public funds for the achievement of a legitimate public purpose, it is acceptable.

As a general rule, a gratuitous donation or gift by a city is prohibited by the Texas Constitution, article III, Section 52, and article XI, Section 3, which, in part, state that the legislature may not

authorize any county, city, or other political subdivision of the state to lend its credit or grant public money or anything of value in aid of an individual, association, or corporation. The purpose of these provisions is to prevent local governments from appropriating public money for private purposes.

However, the fact that private interests are *incidentally* benefited by a public expenditure does not invalidate an expenditure for a legitimate public purpose. *Barrington v. Cokinos*, 338 S.W.2d 133, 145 (Tex. 1960); Tex. Att’y Gen. Op. No. GA-747 (2009). In other words, if a city determines that an expenditure accomplishes a valid public purpose, the fact that one or more individuals or corporations might benefit does not invalidate the expenditure. The key question is whether a valid public purpose is being *directly* accomplished by the expenditure. Numerous courts have been asked to invalidate or uphold particular expenditures based on whether a public purpose was being served. See *Brazos River Authority v. Carr*, 405 S.W.2d 689, 693 (Tex. 1966); *Zimmelman v. Harris County*, 819 S.W.2d 178, 184 (Tex. App.—Hous. [1st Dist.] 1991, extension of time to file for writ of error overruled); *Key v. Commissioners Court of Marion County*, 727 S.W.2d 667, 669 (Tex.App. — Texarkana 1987); *Parks v. Elliott*, 465 S.W.2d 434, 438 (TexCivApp—Houston [14th Dist.] 1971, writ refused n.r.e.).

The test established by several attorney general opinions is that the donation must go to a legitimate municipal purpose, the city must receive adequate consideration for its donation, and the arrangement must have sufficient controls to guarantee that city money is being used for a municipal public purpose. Tex. Att’y Gen. Op. No. DM-394 (1996), Tex. Att’y Gen. Op. No. JC-439 (2001), Tex. Att’y Gen. Op. No. JC-582 (2002), Tex. Att’y Gen. Op. No. LO 98-024 (1998).

The determination of whether a particular expenditure accomplishes a public purpose must be made by the city council. Some expenditures, such as those for street repair or police protection are easily deemed to serve a public purpose, while others, such as contributing to Meals on Wheels or Crimestoppers, are more difficult. Cities may not expend public funds simply to obtain for the community the general benefits resulting from the operation of the corporate enterprise. *Barrington*, 338 S.W.2d at 145; *City of Corpus Christi v. Bayfront Assoc., Ltd.*, 814 S.W.2d 98 (Tex. App.—Corpus Christi 1991, writ denied).

The council’s determination as to public purpose is subject to judicial review. According to the attorney general’s opinions, what is a public purpose “cannot be answered by any precise definition” beyond “if an object is beneficial to the inhabitants and directly connected with the local government it will be considered a public purpose.” Tex. Att’y Gen. ORD-660 (1999), Tex. Att’y Gen. Op. No. JC-212 (2000). However, if the council goes on record recognizing the expenditure as a valid public purpose, the courts are not likely to overturn that determination. Courts are hesitant to second guess the legislative determinations of local governments. Accordingly, in the absence of fraud on the part of the council, or a total lack of evidence that an expenditure serves a public purpose, a court is not apt to declare a particular city expenditure to be invalid. See Tex. Att’y Gen. Op. GA-0706 (2009).

Once a legitimate public purpose is identified, the city must consider whether contractual obligations or other forms of formal control are necessary in order for the council to ensure that

the city receives its consideration — the accomplishment of the public purpose. Tex. Att’y Gen. Op. No. LO 94-008 (1994), Tex. Att’y Gen. Op. No. DM-394 (1996), Tex. Att’y Gen. Op. No. JC-439 (2001), Tex. Att’y Gen. Op. No. JC-582 (2002), Tex. Att’y Gen. Op. No. LO 98-024 (1998), Tex. Att’y Gen. Op. No. GA-88 (2003).

What notice is required by the Texas Open Meetings Act?

The Texas Open Meetings Act (Act) requires written notice of the date, hour, place, and subject of all meetings. TEX. GOV’T CODE § 551.041. The agendas for all meetings subject to the Act must be posted at least 72 hours before the meeting.

Any action taken in violation of Act’s notice requirements is voidable. TEX. GOV’T CODE § 551.141; *Swate v. Medina Community Hospital*, 966 S.W.2d 693, 699 (Tex. App.—San Antonio 1998, pet. denied). This means that an action in violation of the Act may be voided by a court pursuant to a lawsuit filed for that purpose. See *Collin County v. Home Owners’ Association for Values Essential to Neighborhoods*, 716 F.Supp. 953, 960 (N.D. Tex. 1989), *City of Bells v. Greater Texoma Utility Authority*, 744 S.W.2d 636, 640 (Tex. App.—Dallas 1987, no writ). If some, but not all, actions in a meeting are in violation of the Act, only those actions in violation may be voided. *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 182—183 (Tex.App. — Corpus Christi 1990, writ denied).

While the date, hour, and place of a meeting are self-explanatory, whether the agenda gives the general public sufficient notice of the subjects to be discussed is often a source of confusion for city officials. The agenda serves to give the general public access to decision making by their governing body, and the specificity of the subjects listed on the agenda depends upon the situation. For example, a posted agenda listing “personnel” as a subject to be discussed may be sufficient notice in one situation, but not in another. The Supreme Court of Texas has held that a subject listing of “personnel” was not sufficient notice of a discussion surrounding the hiring of a new superintendent of a school district. *Cox Enterprises, Inc v. Board of Trustees*, 706 S.W.2d 956, 959 (Tex. 1986). The hiring of a new superintendent is a matter of great public interest, held the court, and “personnel” was not specific enough to notify the general public of the discussion to be held in executive session. *Id.* The same was held to be true for the termination of a police chief. *Mayer v. City of De Leon*, 922 S.W.2d 200 (Tex. App.—Eastland 1996, writ denied). While the posting of “personnel” may be sufficient for less publicized positions, such as clerks, the TML Legal Services Department advises that more specific notice, including listing the reason for the discussion and/or action and the employee’s or officer’s name or position, is the better practice.

Phrases such as “old business,” “new business,” “regular or routine business,” or “other business” do not address the subjects to be discussed in any way, and have been declared insufficient notice to the general public for the purposes of the Act. Tex. Att’y Gen. Op. No. H-662 (1975) at 3. In addition, “presentation,” “mayor’s report,” or “city manager’s report” is not sufficient where a presentation is to be made by a city employee or official. In that case, the governing body has the ability to ascertain what the city employee or official will discuss prior to the meeting. Thus, the specific subject matter of the presentation should be posted. *Hays*

County Water Planning P'ship v. Hays County, 41 S.W.3d 174, 180 (Tex. App.—Austin 2001, pet. denied); Tex. Att'y Gen. Op. No. GA-668 (2008).

The phrase “public comment” may be used in a posted agenda to provide notice of a period in which members of the public may address the governing body regarding subjects not listed on the agenda. The city is not generally expected to post notice of the subjects to be discussed in this case because the city has no way of knowing what subjects members of the public may wish to address. Tex. Att'y Gen. Op. JC-0169 (2000). City officials may respond to questions asked during the public comment period only with factual statements, a recitation of existing city policy, or by placing the subject on the agenda for a future meeting. *Id.*; TEX. GOV'T CODE § 551.042.

Posting that certain subjects will be discussed in executive rather than open session is not required. Tex. Att'y. Gen. Op. No. JC-0057 (1999). However, all subjects that are to be discussed in executive session must be described on the agenda in a manner that will provide sufficient notice to the public (i.e., they must be just as detailed as open meeting agenda items). In addition, if a city has historically indicated on its posted agenda which subjects are to be discussed in executive session, and then changes that practice, the city must give adequate notice to the public. *Id.* Many governing bodies include a statement at the end of the agenda informing the public that the body may go into executive session, if authorized by the Act, on any posted agenda item. Such a statement serves as additional notice to the public of the body's intentions.

Cities should be aware that any major change in the way that agenda items are listed, even if valid under the Act, can affect the validity of the notice. For example, if the phrase “Discussion/Action” is historically used on the posted agenda to indicate when a governing body intends to take action on a measure, then a posting of “Discussion” with no notice of the change in posting procedures renders any action taken by the council on that subject voidable. *River Road Neighborhood Association v. South Texas Sports*, 720 S.W.2d 551 (Tex. App.—San Antonio 1986, writ dismissed); *see also Hays County Water Planning P'ship*, 41 S.W.3d at 180. Without proper notice of the change, the general public has no way of knowing that there has been a change in posting procedures.

Finally, a city is not required to notify an individual that he or she will be discussed at a meeting. The posted notice must be adequate, but no letter to the person or similar action is necessary in most cases. The purpose of the posted agenda is to provide notice to the general public, not to replace due process. *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 764-765. *See Retterberg v. Texas Department of Health*, 873 S.W.2d 408 (Tex. App.—Austin 1994, no writ).

Do I have to post notice of a city job opening?

Generally, there is no law that requires a city to post or advertise a job opening. Nevertheless, the best way to prevent having an Equal Employment Opportunity Commission (EEOC) discrimination complaint or lawsuit filed against an employer is to advertise a job opening and then ensure that the city hires the applicant that is best qualified for the position. Federal, state,

and sometimes, local laws prohibit hiring practices that discriminate on the grounds of age, disability, race, color, religion, sex, pregnancy, citizenship, military service and national origin. A city's hiring practice of only advertising an opening to a certain geographic area, or merely by word of mouth, for example, may be used as evidence of discriminatory intent if a claim is filed against the city. To avoid a discrimination claim, an employer should advertise a job opening so that it reaches a large cross-section of the population. Advertising in a general circulation newspaper and on the internet are good examples of places to post a job opening. Posting jobs internally that are promotional opportunities for current employees is usually a good idea and accepted as proper as long as it is pursuant to a consistent policy of doing so. If a city does not have a hiring policy, including a policy regarding the advertisement of a job opening, the city should seriously consider adopting one. Before advertising a job vacancy, an employer should ensure that the advertisement contains a written job description that provides objective qualifications and responsibilities necessary to perform the job. The description should be devoid of any reference to sex, race, national origin, or any other protected class. In addition, a job description should include the essential functions of the position and other requirements, such as education, skills, and work experience. Once a job description is in place, it should be used as a template for the job advertisement.

By taking the time to adopt a hiring policy and to advertise a job opening to a wide range of people, an employer increases its chance of hiring the best qualified person for the job. In addition, an employer may avoid a discrimination claim or lawsuit.

Can I terminate this employee?

Cities often struggle with the question of when and how to fire a poor performing employee. Despite being an "at-will" employment state, where anyone can be fired for any nondiscriminatory reason, many federal and state laws protect employees in Texas. These laws often keep a city from firing an employee for fear of litigation for discrimination. Sometimes it seems that there are some people you just can't fire, no matter how incompetent or obnoxious they are. Many times supervisors hold back on firing an employee in fear of a lawsuit. They ask themselves, "How can I safely fire a poor performer who's pregnant, or on medical leave, or who just filed a worker's compensation claim?" The reality is that any time someone is terminated she can sue the city for discrimination or the violation of some right. However, there are a number of steps you can take to minimize the risks associated with terminating an employee. The following provides some basic information to consider prior to terminating an employee:

(a) Employment-at-will: First, determine whether the employee is "at-will" or whether the employee has a contract, a collective bargaining agreement, or is subject to civil service. Also, the Local Government Code puts some limitations on Type A cities on how they can terminate certain employees who are also officers. TEX. LOC. GOV'T CODE § 22.077. If one of these issues arises then the procedure outlined by these items should be followed.

(b) Documentation: Make a paper trail. This is one of the most important items involved in terminating an individual. Usually employees are not terminated for a one-time offense, but for poor performance based on violations of personnel policies. Ideally, there

will be objective documentation detailing what performance measures the employee has not met or personnel policies he or she has violated. Written documentation that shows that the employee was informed of the problem and is signed by the employee is often best. Even if there is a possible discriminatory claim based on some quality of the employee, this kind of documentation is good evidence if sued. Also, if an employee is aware of problems he or she may be less likely to take action against the city when adverse action is taken against the employee. Finally, keep in mind that there are special documentation requirements for police officers. *See id.* §§ 614.021-023.

(c) Consistency: Ensure that similarly-situated employees are treated the same. If one person in the city library is late everyday and is never disciplined and another person is terminated for being late, that is a recipe for a discrimination claim. Keep an eye on how every employee is treated and ensure that your personnel policies and discipline procedures lend themselves to objectivity and consistency. However, if there could be a rational basis for treating some employees differently if they are in different departments or have different duties.

(d) Discrimination and Retaliation: Are there any legitimate claims that the employee or applicant could make? Could an injured employee make a claim under the Family Medical Leave Act, the Americans with Disabilities Act, or Workers' Compensation? Are they part of another protected class? Look at the above acts plus USERRA, the Texas Whistleblowers Act, the Age Discrimination in Employment Act, and other state and federal laws before taking action.

In addition, if your city is a member of the TML Intergovernmental Risk Pool, it is recommended that you contact the "Call before You Fire" program at (800) 537-6655 before you take any major action.

Can I talk to other city councilmembers outside of a posted meeting?

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.

The 2008 Open Meetings Act Made Easy, citing Tex. Att'y Gen. Op. No. JC-313 (2000). (http://www.oag.state.tx.us/AG_Publications/pdfs/openmeetings_easy.pdf; accessed Sept. 15, 2011.) 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 72 hours 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, school board, or county commissioners court, where agenda items are discussed and formal action is taken, is clearly a meeting. However, according to the Texas Open Meetings Act (Act) and several recent attorney general opinions, many other gatherings of the members of a governmental body may 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 may constitute a violation of the Act. Several attorney general opinions and cases from Texas and other jurisdictions have addressed this issue:

Opinion Nos. DM-95 (1992) & LO-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.

Opinion No. 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. For example, an invoice that requires city council approval may not be circulated among the members in lieu of a vote at a properly-posted meeting.

***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. The physical presence of a quorum in a single place at the same time is not always necessary for a violation to occur.

Opinion No. 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. Physical presence in one place is not necessary to violate the Open Meetings Act.

Opinion No. MW-432 (1979): An individual member of a governing body does not violate the Act when he or she communicates in writing to a staff member indicating a desire to have an item placed on the agenda and sends a copy to other members of the board.

Opinion No. GA-326 (2005): Adopts the term “walking quorum.” The term seems to indicate that (assuming a quorum is three): 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 if the discussions were intended to avoid having a physical quorum in one location.

***Wood v. Battle Ground School District*, 27 P.3d 1208 (2001):** a series of e-mails between members of a school board constituted a meeting. In this case, four out of five school board members sent each other e-mail messages discussing whether a school district employee should be terminated. When the employee was later

fired, she sued the school district for violations of Washington's Open Public Meetings Act.

The appeals court held that the exchange of e-mails can constitute a meeting if members communicate about issues that may or will come before the board for a vote. In doing so, however, the court recognized the need for balance between the right of the public to have its business conducted in the open, and the need for members of governing bodies to obtain information and communicate in order to function effectively. The opinion emphasized the fact that the mere use or passive receipt of e-mail does not automatically constitute a meeting. 'The Act is not implicated when members receive information about upcoming issues or communicate amongst themselves about matters unrelated to the governing body's business via e-mail.'

According to the Washington court, the employee established a prima facie case of "meeting" by e-mails. The e-mail discussions involved a quorum of the five-member school board, and the discussions related to board business (including the possibility of instituting a declaratory judgment in regard to an employee's contract with the school district and otherwise evaluating the employee's performance). "[T]he active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss Board business."

While no Texas law specifically addresses e-mail communications, the attorney general or a court would likely hold that a governing body that comes to some decision on public business or policy through exchanged e-mails would violate the Act.

What if only two councilmembers talk about public business outside of a meeting? The Act also provides for criminal prosecution. Texas Government Code Section 551.143 provides that a member or group of members of a governmental body commits a criminal offense if they:

1. **knowingly** conspire;
2. to **circumvent** the Act's requirements;
3. by meeting in numbers **less than a quorum**;
4. for the **purpose of secret deliberations**.

A violation of § 551.143 is punishable by a fine of not less than \$100 or more than \$500, confinement in the county jail for not less than one month or more than six months, or both fine and confinement. Several cases have interpreted this provision:

***Harris County Emergency Serv. Dist. No. 1 v. Harris County Emergency Corps*, 999 S.W.2d 163, 169 (Tex. App. — Houston [14th Dist.] 1999, no pet.):** absent evidence of secret deliberations attempting to circumvent the Act, when less than a quorum of a governmental body meets together they have not had a "meeting" for purposes of the Act and have not violated the Act. Evidence that one board

member of five-member county emergency service district occasionally used telephone to discuss agenda for future meetings with one other board member did not amount to an Open Meetings Act violation.

***Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. — San Antonio 1985, no writ):** school trustees violated Act by telephone conferencing. Whether phone conversations between less than a quorum of a city council is a violation of the TOMA is a fact question. Such interactions could amount to meeting in numbers less than a quorum to circumvent the purposes of the Open Meetings Act. Similarly, if two members of a governing body meet in numbers less than a quorum by deliberating through e-mail, a violation may occur.

***Rangra v. Brown*, 566 F.3d 515 (5th Cir. (Tex.) April 24, 2009):** a member of the city council in Alpine, Texas, sent an e-mail to other councilmembers asking if they wanted to place an item on a future council agenda. The following day, one of the other councilmembers responded to recipients of the first e-mail, agreeing that the item should be discussed. The local prosecutor decided that the e-mail exchange violated the Act 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. Although the indictments were later dismissed, the two councilmembers sued in federal court claiming that the criminal provision of the TOMA infringes upon their right to freedom of speech under the First Amendment. *Rangra v. Brown*, 566 F.3d 515 (5th Cir. (Tex.) 2009). While the district court found against the councilmembers, the Fifth Circuit originally reversed the district court's judgment and remanded the case for strict scrutiny review. *Id.* However, both parties filed for rehearing *en banc*, and on September 10, 2009, the Fifth Circuit dismissed the case as moot because Mr. Rangra was no longer a member of the city council. Judge Dennis dissented emphatically. *Id.* City officials are currently suing the state in a new case on the same grounds of violation of free speech as in *Rangra*, but TML is not directly involved with the case.

The cases and attorney general opinions above again suggest several logistical problems, and 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 telephones and e-mail should be used to facilitate the exchange of information, these tools should 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.

Presumably, when a group of people act in concert, some meeting of the minds has occurred to make that action possible. With respect to actions taken by governmental bodies, it is the process

by which this meeting of the minds occurs that the act is intended to open to public scrutiny. *Cox Enters. Inc. v. Bd. of Trustees of Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 960 (Tex. 1986). In other words, the act is intended to safeguard the public's interest in knowing the workings of its governmental bodies. The requirements of the Act are here to stay, and with a little common sense, self-awareness, and sound legal advice, city officials should be able to conduct city business without fear.

How do we move our city limits sign, i.e., how do we annex property?

Annexation has always been, and will probably always be, one of the most contentious issues in municipal law. The annexation laws are very complicated because there have been so many piecemeal, compromise bills throughout the years. The bottom line is this: (1) for a general law city, the general rule is that annexation can only be accomplished at the request of area landowners or voters, depending on the number of registered voters in the area; and (2) a home rule city may annex without consent, but only if the charter provides for it. In other words, a general law city must, in almost every case, have a request before it can annex (there are a handful of exceptions).

S.B. 89 was a 1999 bill that was enacted to restrict perceived abuses of the annexation process by certain cities. The end result of the S.B. 89 negotiations is a complex, disjointed, rewrite of Chapter 43 of the Texas Local Government Code. The bill added several new provisions that require, only in certain circumstances, a three-year waiting period and negotiations and arbitration regarding provision of services to the area proposed for annexation.

S.B. 89 centers on the concept of an "annexation plan." The bill required every city in Texas to adopt a plan on or before December 1, 1999. The plan must identify annexations that will occur beginning three years after the date the plan is adopted. However, only areas that contain 100 or more residential dwellings are required to be in the annexation plan. As a result, most of the new, onerous, provisions only apply to large, residential, areas.

Under the provisions of the bill, certain types of areas are exempt from the plan requirement altogether. Areas in which no more than 99 of the tracts contain residential dwellings are not required to be in a plan. Also, if the land is annexed by petition of area landowners or voters, the area is not required to be in a plan. Thus, many cities will have a one page plan stating that they do not intend to annex any area for which an annexation plan is required.

First, city officials must decide whether an area the city wishes to annex falls under one of the exemptions from the annexation plan requirement. For example, if an annexation is initiated by petition of area landowners or voters, or if the area contains fewer than 99 tracts with homes on it, the area is exempt from the plan requirement and its tedious provisions. If an area is not exempt, a city can place it in the annexation plan and wait three years to annex the area under the more stringent provisions.

Other cities may continue to annex in a very similar manner as before 1999, which basically requires: (1) the preparation of a "service plan" detailing the services to be provided to the area;

and (2) notice of and two public hearings within certain time periods before the annexation ordinance is adopted.

For a much more detailed explanation of annexation in Texas, including sample forms and calendars, please go to the Texas Municipal League's website at www.tml.org.

Can I require drug tests for city employees?

Sometimes, but not often. The TML Legal Department receives many calls from cities on this issue. Most cities either: (1) desire to implement random drug testing for all their employees; or (2) already have such a policy in place. Many city officials are surprised to learn that cities may not randomly drug test all employees. Unless an exception applies (such as special safety or security concerns, reasonable suspicion, or Department of Transportation regulations), a city may not drug test its employees.

A city may only drug test its employees without individualized suspicion, also referred to as "random drug testing," if there is a "special need" that outweighs the individual's privacy interest. *Skinner v. Ry. Labor Execs. Ass'n.*, 489 U.S. 602 (1989); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989). This standard means that most city employees may not be tested for drugs without individualized suspicion. While a private employer may often have the ability to randomly drug test its employees, governmental entities, such as cities, are more restricted by the United States Constitution, including the search and seizure provisions of the Fourth Amendment. The primary reason a city might be able to "randomly" drug test an employee is when the employee performs safety-sensitive or security-sensitive duties. Not all police officers or fire fighters fit into this category, but backhoe drivers might.

Can a councilmember place an item on the agenda?

Generally speaking, no state law addresses agenda preparation. However, the attorney general has opined that, absent a written policy, each member of the governing body should be allowed to place items of his or her choosing on the agenda prior to a meeting. *See generally* Tex. Att'y Gen. Op. Nos. JM-63 (1983), DM-228 (1993). In a city without an agenda setting policy, the mayor or city secretary would not control the preparation of the agenda for the city council. *See* Tex. Att'y Gen. Op. No. JM-63 (1983) (stating that the county commissioners court as a whole has the authority to determine its agenda, and not the county judge or county clerk).

A city council is free to adopt a reasonable written policy governing agenda preparation. Many home rule cities have charter provisions addressing agenda setting that would govern. The net effect of any adopted policy cannot be to preclude a councilmember from placing an item on the agenda for public discussion. Tex. Att'y Gen. Op. No. DM-228 (1993). As a result, an item arguably could only be removed from the agenda by the councilmember who placed it on the agenda, or by majority vote of the city council at an open meeting. If an item is on the agenda, but a majority of council does not wish to discuss the item, then the council can move not to discuss it pursuant to any applicable rules of procedure.

Some agenda setting policies require a certain number of councilmembers to request an item be placed on the agenda. Because the Open Meetings Act prevents a quorum of city council from discussing city business outside of an open meeting, it is important to ensure that any policy requires no more than two councilmembers to agree to place an item on an agenda. Past case law indicates that it is not a violation of the Open Meetings Act for councilmembers to discuss whether or not to place an item on an agenda. *See Harris County Emergency Serv. Dist. #1 v. Harris County Emergency Corps*, 999 S.W.2d 163 (Tex. App. — Houston [14th Dist.] 1999, no writ). But recent developments under the Open Meetings Act, most notably the indictment of councilmembers in the City of Alpine for discussing agenda preparation outside of an open meeting, casts significant doubt on the ability of a quorum of city council to discuss what should be placed on an agenda. For this reason, a policy should require no more than two councilmembers to agree to place an item on a council meeting's agenda.

Most cities have policies on how to place items on an agenda, and we recommend cities adopt such a policy to avoid confusion. Please contact the TML Legal Department for an example agenda setting policy.

Who can enforce city ordinances?

City ordinances may be enforced via citations from peace officers, or through notices of violation from a code enforcement officer or complaints by citizens filed with the municipal court.

Many cities give certain employees, including code enforcement officers and animal control officers, the power to issue a "notice of violation" on behalf of the city in cases where there is an alleged ordinance violation. The notice usually includes information such as: (1) the text of the ordinance being violated; (2) the conduct that violates the ordinance; and (3) how to come into compliance. The notice serves as a warning to the alleged violator, letting him know that he is in violation of the ordinance. Typically, it also provides for a period of time in which he may rectify the situation. In addition, a notice of violation will often include a warning that, if the situation is not brought into code compliance within a certain period of time, a complaint will be filed in municipal court. A complaint is a sworn allegation charging the accused with the commission of an offense under either a state law or a city's ordinance. Subsequent to receiving a sworn complaint regarding an ordinance violation, the court may issue a summons requiring the alleged violator to appear before the court. TEX. CODE CRIM. PROC. arts. 45.014(a); 15.03(a). If the alleged violator does not appear on the date listed in the summons, a warrant may be issued for his arrest. TEX. CODE CRIM. PROC. art. 45.026.

As a general rule, anyone may file a complaint in municipal court alleging a violation of a state law or a city ordinance. TEX. CODE CRIM. PROC. art. 21.011. Under Texas Code of Criminal Procedure Article 45.019, in order to be acted on by the court, a complaint must be sworn to by an "affiant." An affiant is any credible person who is acquainted with the facts of the alleged offense. The complaint may be sworn before any officer authorized to give oaths. TEX. CODE CRIM. PROC. art. 45.019.

Any citation, including one for a Class C misdemeanor, is issued in lieu of an arrest. Thus, the most conservative interpretation of state law holds that only a peace officer certified by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) is authorized by statute to issue a true citation. Peace officers are granted the power to issue citations in lieu of arrest by Texas Code of Criminal Procedure Article 14.06(b) and Texas Transportation Code Sections 543.002-543.005. Thus, the most conservative advice is that no one but a certified peace officer may issue a citation compelling an individual to appear in court on a certain day. That advice holds true for both a violation of state law or a city ordinance.

The TML Legal Services Department gives only the most conservative advice. In this case, that advice is to only allow TCLEOSE-certified peace officers to issue citations. However, city officials should be aware that an argument can be made that Texas Local Government Code Chapter 51 allows for the designation by ordinance of code enforcement officers, animal control officers, or other designated city employees to issue citations for code violations. On this matter, as with others, TML attorneys defer to the advice of local legal counsel.

Does a mayor or city councilmember have full access to city records?

A current member of the governing body who requests information from the city in his or her official capacity has full access to the requested information. The Public Information Act (Act) is not implicated when a request is made in a mayor or councilmember's official capacity, as the release of the documents is not viewed as a release to the general public. Tex. Att'y Gen. Op. No. JM-119 (1983).

Should a city receive such a request, the exceptions to disclosure that might otherwise apply to an open records request from a citizen would not apply to a mayor or councilperson. *Id.* In other words, information that would typically be considered confidential under the Act would need to be released to a mayor or councilperson requesting the information in their official capacity. Furthermore, because the Act would not control the handling of the request, charges for expenses associated with fulfilling the request that are usually assessed pursuant to the Act could not be imposed upon the mayor or councilmember.

If, however, a member of the governing body requests city records in his or her individual capacity for personal use, then the request would need to be treated like any other open records request from a member of the public. The exceptions to disclosure under the Act would apply, and the custodian of records could not release protected information to the mayor or councilmember. Open records charges could be assessed against the mayor or councilmember if the information is requested in an individual capacity.

Because a release of information to a mayor or councilmember requesting in their official capacity is not a release to the public, the recipient must be cautious in maintaining the documents in the same way they are maintained by the governmental body as a whole. The Act imposes criminal provisions for the release of confidential information. *See* TEX. GOV'T CODE § 552.352. As a result, a member of the governing body who receives confidential information must ensure that it remains confidential. Disclosing confidential information would constitute

official misconduct, and would be considered a misdemeanor punishable by either a fine of up to \$1,000, confinement in county jail for up to six months, or both. *Id.*

Conclusion & Other Resources

This paper is meant to provide an overview of the most common legal questions asked of the TML Legal Services Department. Remember that there are a multitude of tools available to Texas cities to protect, preserve, and revitalize their communities. There are numerous city, federal, state, and private organizations that are excited and willing to share their knowledge and experience. Cities should take full advantage of the wide range of resources that are available. The following is a non-exhaustive list of some agencies and organizations that may be of assistance:

Texas Municipal League Legal Department

www.tml.org

legalinfo@tml.org

512-231-7400

Office of the Texas Attorney General Municipal Affairs Division

www.oag.state.tx.us

512-475-4683

Texas Secretary of State's Elections Division

www.sos.state.tx.us

800-252-VOTE

Texas Comptroller's Office

www.cpa.state.tx.us

800-531-5441