

# The Texas Open Meetings and Texas Open Records Act: Protecting the Public's Right to Know

Government by the People, For the People ... it is hollow rhetoric if government ensures no accessibility (or accountability) to the public it professes to serve. The Texas Open Meetings Act and the Texas Open Records Act entitle the public to accessibility and information regarding the affairs of government and the official acts of public officials and employees.

The preamble to the Texas Open Records Act declares that because "government is the servant of the people, and not the master of them ... that the people, in delegating authority, do not give their public servants the right to decide what is good for them to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

The State Bar's Public Affairs Committee and the Freedom of Information Foundation of Texas sponsored a seminar at the State Bar's Annual Meeting June 24 to examine the two acts and their effect on open government. According to the panelists, the two acts are often violated not out of malice, but ignorance.

The Texas Open Meetings Act defines governmental bodies as any board, commission, department, committee, or agency within the executive or legislative department of the state which is under the direction of one or more elected or appointed members. The definition does not apply to the judiciary but if a judge serves on a governmental body the act is still applicable.

According to seminar panelist Thomas Williams of the Fort Worth law firm of Bishop, Payne, Lamsens, Williams & Werley, the most frequently raised—and sometimes most difficult—questions concerning the definition of a "governmental body" are governmental subcommittees and advisory boards. Attorney General opinions addressing this question have found the

critical issue to be whether the advisory board or subcommittee exercises any rule-making or quasi-judicial power. If the subcommittee is truly advisory then it is not a governmental body.

So what constitutes a "meeting"? A governmental body is subject to the act, said Williams, if any deliberation occurs between a quorum of its members. A private conversation between two members of a three-member board about public business of that board would violate the act. Williams recalled an incident where two water commissioners were chatting in a bathroom and, unknown to them, an attorney overheard the conversation. The attorney invoked the act.

Public notices of an impending meeting—with the exception of emergencies—must be posted in a location readily accessible to the public 72 hours in advance of the meeting. It must set forth the place, time, and specific subjects of the meeting.

Literal compliance with the notice requirements of the act has been upheld by the Texas Supreme Court, according to Williams.

"A commissioners court meeting was posted in a county courthouse basement on one Friday for a meeting the following Monday," he recalled. "The courthouse was locked over the weekend, although there was apparently emergency accessibility through the Sheriff's office. The [supreme] court held that notice had not been posted 'in a place readily accessible to the general public' for the entire 72-hour period, and therefore the Monday meeting did not comply with the Open Meetings Act."

The act allows for public officials to retire into executive session; the three most common reasons are to discuss land, litigation, and specific personnel

(unless the employee requests a public hearing.) Having an attorney present at a meeting is not sufficient reason to go into executive session: the governmental body must be seeking the attorney's legal advice, said Williams. Even when the act permits retiring into executive session, the meeting must be posted and the presiding officer publicly announce that a closed meeting will be held and identify the particular exception under the act authorizing the executive session. The governmental body must return to open meeting to take any final action or vote on the matter.

Williams suggested that tape recordings should be made of all executive sessions to be used as evidence in the event of a lawsuit.

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Penalties for not complying with the Open Meetings Act include a \$500 fine and six months in jail and any action taken by the governmental body in violation of the act is voidable. Any interested person—including the press—may bring a suit for injunctive relief or a writ of mandamus to stop or reverse a violation.

“Most of the litigation we see is filed by a private citizen aggrieved by a substantive action,” Williams explained. “It gives him or her another argument to set aside the action.”

The Texas Open Records Act declares that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.

“The burden is always on government to prove it has a right to maintain closed records,” said seminar panelist Ray Speece, staff counsel for the Administrative Office of the District Courts in Houston. “Government agencies tend to view all requests [for information under the act] with the utmost suspicion. They think, ‘I’ve done something wrong that will get me in trouble.’”

According to Speece, a private organization is subject to the Open Records Act.

“Virtually every document relating to expenditure of public funds is open—even salaries,” he said. Speece commented that the attorney general has held

that information collected by a third person acting on behalf of a governmental body may fall within the definition of public information. Relevant factors to determine whether information held by a third party is subject to the act include whether 1) the information collected is related to the governmental body's official business; 2) the third party acted as an agent of the governmental body in collecting the information; and 3) the governmental body is entitled to have access to the information. For example, once medical records are released to a public agency they are subject to the act. The attorney general's office has told the Texas Department of Mental Health and Mental Retardation five times in the last two years to stop concealing documents from patients' families or the public, said Speece.

Any person may make a written request for information to a governmental body in order to trigger the act. Speece said that requests should not be too broad because certain provisions in the act exist to protect agencies from burdensome requests. The requestor, on the other hand, may not want to make the request so narrow as to tip the agency off to what he or she is seeking. Public officials are never entitled to ask requestors why they want the information.

The governmental body must make a good faith effort to promptly produce the information for inspection and/or duplication. Requestors may be charged a “reasonable” fee for copying the records. Public officials may not refuse to comply with the act just because the request is expensive; they can, however, require a bond for payment of costs where “preparation of the public record is unduly costly and its reproduction costs would cause hardship to the department or agency if the costs were not paid,” said Speece. Abuse of this provision spurred the legislature to require that governmental bodies waive the act's cost provisions entirely when it is in the public interest to do so.

If a record is denied to a requestor, the agency has 10 days to request an attorney general's opinion (which usually takes a minimum of six weeks) and must notify the requestor in writing of the reason for the denial.

The Freedom of Information Foundation of Texas maintains a hotline to offer help and answer questions. If you suspect you are being illegally denied access to meetings or records, call [(800) 580-6651]. **TBJ**