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# NEW MEMBER TRAINING

LEGAL ASPECTS OF SERVICE AS  
A STATE APPOINTED OFFICIAL

Views expressed are those of the presenters, do not constitute legal advice,  
and are not official opinions of the Office of the Texas Attorney General.

# Topics to Be Covered

- Open Meetings Act (OMA)
- Public Information Act (PIA)
- Administrative Procedure Act (APA)
- Ethics Laws

# Open Meetings Act

TEXAS GOVERNMENT CODE ch. 551

“Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.”

Tex. Gov’t Code § 551.002.

# Open Meetings Act

## **Executive Session/Closed Meeting**

The OMA does allow Government Bodies (“G.B.”) to have executive sessions or closed meetings in certain situations.

### Common Exceptions:

- ▶ Personnel matters concerning specific individuals
- ▶ Certain consultations with an attorney
- ▶ Discussion about the value or transfer of property

# Open Meetings Act

## **Executive Session/Closed Meeting**

Who is permitted to attend an executive session?

- ▶ The OMA does not specify who may or may not attend an executive session.
- ▶ The G.B. has discretion to determine who may attend an executive session. However, the G.B. may not admit those whose attendance is contrary to the legal basis for the executive session.

# Open Meetings Act

## **Executive Session/Closed Meeting**

### Conduct during Executive Session

- Discussions must be limited to the subject and the legal basis of the executive session.
- No votes or straw polls may be taken.
- Action on items discussed in executive session must be taken only after reconvening in open session.

# Open Meetings Act

## **Executive Session/Closed Meeting**

### Certified Agenda Required

- ▶ A G.B. shall produce a certified agenda or make a recording of every executive session.
- ▶ Except: Consultation with an attorney. A G.B. may stop recording or stop taking notes during the portion of the closed meeting that involves consultation with attorney.
- ▶ A recording must include announcements by the presiding officer at the beginning and the end of the closed meeting indicating the date and time.
- ▶ A written certified agenda must be signed by the presiding officer and be retained for two years.

# Open Meetings Act

## Civil and Criminal Penalties

§ 551.141 void any action in violation of OMA

§ 551.142 mandamus or injunctive relief

§ 551.143 ***Prohibited series of communication of less than a quorum*** – fine \$100 to \$500 and/or one month to six month confinement in county jail

§ 551.144 ***Unauthorized closed meeting*** – fine \$100 to \$500 and/or one month to six month confinement in county jail

§ 551.145 ***Failure to keep a certified agenda or recording of a closed meeting*** – Class C misdemeanor

§ 551.146 ***Release of a certified agenda or tape of a closed meeting*** – Class B misdemeanor



# Open Meetings Act

## Committees and the OMA

- ▶ Most committees of a G.B. are subject to the OMA.
- ▶ The committee must be ***truly advisory*** to be exempt:
  - What is the actual authority of the committee?
  - How is the action of the committee treated by the G.B.?
- ▶ If there is a quorum of the G.B. on the committee, then the OMA does apply.

# Open Meetings Act

## **POSTING NOTICE**

### FOR STATE AGENCIES:

- Notice must be provided to the Secretary of State and posted on the Secretary of State's website for **seven days** before the date of the meeting.
- Tex. Gov't Code § 551.044

# Open Meetings Act

## **Published Notice**

### **How detailed does the notice (or agenda) have to be?**

- A. Sufficient to alert the public, in general terms, of each subject that will be considered in the meeting.
- B. The more important a particular subject is to the community, the more specific the posted notice must be.

# Open Meetings Act

## **PROBLEM AREAS**

- Phone calls to other members
- E-mails to other members
- Social gatherings
- Discussion during breaks
- Executive sessions
- “Walking quorum”

# Open Meetings Act

## § 551.127 Videoconference call

- Been in statute since September 1, 1997.
- State G.B. may hold a meeting by videoconference if the member of G.B. presiding over meeting is physically present at the location open to the public.
- A meeting held by videoconference call is subject to the notice requirements applicable to other meetings *in addition to the notice requirements prescribed by § 551.127*.
- G.B. must make at least an audio recording available to the public.
- Participant's face must be visible while speaking so the participant's demeanor can be observed.
- If video or audio difficulties occur, the meeting must go into recess until the problem is resolved.
- If the issues are not resolved within six (6) hours, then the meeting must be adjourned.

# Public Information Act

## TEXAS GOVERNMENT CODE ch. 552

“Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people 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 provisions of this chapter shall be liberally construed to implement this policy.”

Tex. Gov't Code § 552.001

# Public Information Act

## WHAT IS “INFORMATION?”

- Information includes not only papers, but also electronic communication, on **any device** and in virtually any form and medium, including a book, paper, letter, document, *e-mail, Internet posting, text message, instant message*, other electronic communication, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map, and drawing and a voice, data, or video representation held in computer memory.

# Public Information Act

## **CRIMINAL PENALTIES**

- Willful destruction, mutilation, removal, concealment, or alteration of a public document.
- Failure or refusal to provide access to or copies of public information.
- Distribution of a document that is specifically made confidential by the Act.
- These offenses are misdemeanors, punishable by fine or imprisonment.



# Administrative Procedure Act

## Texas Government Code Ch. 2001

- PURPOSE. It is the public policy of the state through this chapter to:
- (1) provide minimum standards of uniform practice and procedure for state agencies;
- (2) provide for public participation in the rulemaking process; and
- (3) restate the law of judicial review of state agency action.

Tex. Gov't Code §2001.001

# Administrative Procedure Act

## **RULEMAKING**

- Agency rules implement statutes
- Address policy and details that the Legislature did not address
- Give the agency's interpretation of law
- May establish procedures or practices
- Have the force of law

# Administrative Procedure Act

## **DEFINITION OF “RULE”**

“Rule” is defined broadly in the Administrative Procedure Act. It means a state agency statement of general applicability that: (1) implements, interprets, or prescribes a law or policy; or (2) describes the procedure or practice requirements of a state agency. It includes the amendment or repeal of a prior rule; and does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

# Administrative Procedure Act

## EXAMPLES OF WHAT COURTS HAVE DETERMINED TO BE RULES

- Agency memo determined to be a “rule”: *Tex. Alcoholic Beverage Comm’n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651, 657 (Tex. App.—Austin 1999, pet. dism’d w.o.j.).
- Agency letter determined to be a “rule”: *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 608-11 (Tex. App.—Austin 2014, pet. denied).

# Administrative Procedure Act

## **CONTESTED CASE HEARINGS**

- Applies to “proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency....” Tex. Gov’t Code § 2001.003

# Administrative Procedure Act

## **BOARD CHANGES TO FINDINGS OF FACT OR CONCLUSIONS OF LAW IN A PFD (Tex. Gov't Code § 2001.058(e))**

- ALJ did not properly apply/interpret agency rules, policy, or prior administrative decisions.
- ALJ relied on prior administrative decision that is incorrect/should be changed.
- There is a technical error in a finding of fact.
- State reason and legal basis for change.

# Ethics Laws

- Bribery and Corrupt Influence, Tex. Penal Code ch. 36.
- Standards of Conduct for State Officers and Employees, Tex. Gov't Code § 572.051.
- Registration of Lobbyists, Tex. Gov't Code ch. 305.
- Common Law Conflict of Interest, Tex. Gov't Code ch. 572.

# Ethics Laws

## WHAT IS PROHIBITED?

- Giving or accepting a bribe
- Coercion of a public servant
- *Ex parte* communication with judge
- Tampering with witness
- Retaliation against witness or official
- Acceptance of honorarium (with exceptions)
- Acceptance of gift from interested party



# Ethics Laws

## WHAT IS PROHIBITED (cont.)

- Offering prohibited gift to official
- Items of nominal value (<\$50) are generally excepted from these prohibitions, except cash or negotiable instruments.
- Benefit may be to a third party and still be a violation.
- Beware: Conduct allowable under one section of the law may be a violation of or be subject to limitations under another section of the law.

# Ethics Laws

## **STANDARDS OF CONDUCT**

- Don't solicit or accept gift or benefit that might influence official acts.
- Don't engage in business that would require disclosure of confidential information gained through official position.
- Don't accept employment or compensation that might impair independence of judgment.

# Ethics Laws

## **STANDARDS OF CONDUCT (ctd.)**

- Don't make investments that could create a conflict between the public interest and private interests.
- Don't accept a benefit for having exercised powers or authority in favor of another.
- Consequence of violation is removal from office or termination of employment, and in some cases is a criminal violation.

# Ethics Laws

## COMMON LAW CONFLICT OF INTEREST

*Meyers v. Walker*, 276 S.W. 305 (Tex. Civ. App.—Eastland 1925, no writ)

- Prohibits agency from entering into grant or contract where any commissioner has a financial interest, no matter how small.
- Recusal from vote won't correct problem.
- Contract entered into in violation of this principle is void.

# Ethics Laws

## **LOBBYING THE LEGISLATURE**

- State officials may lobby the Legislature on personal time, so long as they do not use state funds, such as state travel or state staff, equipment, or materials.
- Staff may not lobby on state time because their time is considered a state resource. Tex. Gov't Code § 556.006.
- Staff may provide information responsive to a request. Tex. Gov't Code § 556.006.
- G.B. members may be subject to lobby laws. Tex. Gov't Code ch. 305.

# Ethics Laws

## **LOBBYING THE LEGISLATURE**

- G.B. member may accept a gift or benefit from a lobbyist, but beware.
- Generally, it is the lobbyist's duty to report the expenditure.
- Reports are public information.
- Gifts may still subject you to violations of Penal Code or Standards of Conduct.

# For More Information

- Open Government Hotline  
(877) 673-6839 (toll-free)  
(877) OPEN-TEX  
(512) 478-6736
- OAG Website: [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov)

# For More Information

- AG Publications at AG Website:
  - 2020 Open Meetings Handbook
  - 2020 Public Information Act Handbook
  - 2020 Administrative Law Handbook