



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 24, 2019

Mr. Mike Morath
Commissioner of Education
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

Opinion No. KP-0254

Re: Availability of civil remedies for violations
of the Texas Open Meetings Act (RQ-0285-KP)

Dear Commissioner Morath:

You ask whether civil remedies continue to exist for violations of the Texas Open Meetings Act (the "Act") in light of a recent court decision.¹ Earlier this year, the Court of Criminal Appeals in *State v. Doyal* struck down a single criminal provision of the Act that prohibited members of governmental bodies from conspiring to circumvent the Act by meeting in numbers less than a quorum. No. PD-0254-18, 2019 WL 944022 (Tex. Crim. App. Feb. 27, 2019). The Court concluded that section 551.143(a) of the Government Code was unconstitutionally vague on its face. *Doyal*, 2019 WL 944022, at *10. That section provides:

A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent [the Act] by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

TEX. GOV'T CODE § 551.143(a). The Court's decision was limited to section 551.143, and all other provisions of the Act remain valid and binding.²

Given the Court's ruling, you ask whether the Act continues to prohibit a quorum of a governmental body from deliberating about an item of public business outside of an authorized meeting through multiple communications, each involving fewer than a quorum. See Request Letter at 1–2. The Legislature adopted the Act "to safeguard the public's interest in knowing the workings of its governmental bodies." *Cox Enters., Inc. v. Bd. of Trs. of Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 960 (Tex. 1986). Its purpose is "to encourage good government by ending, to the extent possible, closed-door sessions in which deals are cut without public scrutiny."

¹See Letter from Mr. Mike Morath, Comm'r of Educ., to Honorable Ken Paxton, Tex. Att'y Gen. at 1–2 (Apr. 24, 2019), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

²Senate Bill 1640, currently pending before the Texas Legislature, would amend section 551.143 of the Government Code in response to the constitutional infirmities raised by the Court of Criminal Appeals. See Tex. S.B. 1640, 86th Leg., R.S. (2019).

Esperanza Peace & Justice Ctr. v. City of San Antonio, 316 F. Supp. 2d 433, 472 (W.D. Tex. 2001). In furtherance of that purpose, the Act requires that “[e]very regular, special, or called meeting of a governmental body shall be open to the public, except as provided by [the Act].” TEX. GOV’T CODE § 551.002. The Act defines “meeting” to include “a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the body has supervision or control is discussed or considered.” *Id.* § 551.001(4)(A). It further defines “deliberation” as “a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.” *Id.* § 551.001(2). Reading these definitions together, a meeting occurs when a quorum of a governmental body has a verbal exchange about public business or public policy within the jurisdiction of the governmental body.

Nothing in the statutory definitions of these terms or the general rule itself requires that the deliberation occur simultaneously or in the same location to constitute a meeting. *See id.* §§ 551.001(2), (4), .002. A federal district court addressed a scenario similar to that which you describe in a civil context. *See Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d at 471. In *Esperanza*, city council members conducted multiple meetings, each with less than a quorum, to reach consensus on a city budget before the formal council meeting the following day. *Id.* At the conclusion of those meetings, all council members signed a consensus memorandum setting forth the agreed-upon changes to the budget, including significant budget reductions. *Id.* at 471–72. Finding that the council “had no power to deliberate and vote on the budget at a meeting not convened in accordance with the Act,” the court voided the council’s budget reductions. *Id.* at 478.

Consistent with the court’s conclusion, prior opinions of this office have explained that the “physical presence of a quorum in a single place at the same time is not always necessary for a violation of [the Act] to occur.” Tex. Att’y Gen. Op. No. JC-0307 (2000) at 5 (quoting Tex. Att’y Gen. Op. No. DM-95 (1992) at 5). As Opinion GA-0896 explained, depending on the facts of a particular case, a series of e-mail communications could constitute a deliberation and a meeting for purposes of the Act. Tex. Att’y Gen. Op. No. GA-0896 (2011) at 3–4. The fact that the deliberation occurred over the course of multiple communications rather than simultaneously does not change the fact that deliberation among a quorum occurred. “When a majority of a public decision-making body is considering a pending issue, there can be no ‘informal’ discussion. There is either formal consideration of a matter in compliance with the Open Meetings Act or an illegal meeting.” *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 300 (Tex. 1990). Under the plain language of the statute and the definitions provided by the Legislature, if a quorum of a governmental body deliberates about public business within the jurisdiction of the body outside of a meeting authorized by the Act, the governmental body violates the Act.

You also ask whether civil remedies exist, including regulatory actions, for such a violation. Request Letter at 2. Although the Court of Criminal Appeals struck down the criminal penalty for a walking quorum, the civil remedies of the Act remain. “[A]ction taken by a governmental body in violation of [the Act] is voidable.” TEX. GOV’T CODE § 551.141. In addition, any interested person “may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of [the Act] by members of a governmental body.”

Id. § 551.142; *see Hitt v. Mabry*, 687 S.W.2d 791, 795 (Tex. App.—San Antonio 1985, no writ) (upholding an injunction to prevent school district board members from arriving at a decision involving public business by way of private informal meetings or conferences, including telephonic polls of individual board members).

In addition to the general civil remedies available in the Act itself, you ask about regulatory sanctions that may be imposed on certain types of governmental bodies found in violation of the Act. Request Letter at 2. In particular, you note the authority of the Texas Education Agency to conduct regulatory investigations of a school district that allegedly violated certain state or federal laws and to take certain actions based on the results of those investigations. *See id.* at 1 n.3; *see also* TEX. EDUC. CODE §§ 39.057 (“Special Accreditation Investigations”), 39A.002 (“Authorized Commissioner Actions”). The Education Code requires a school district board of trustees to “act only by majority vote of the members present at a meeting held in compliance with [the Act].” TEX. EDUC. CODE § 11.051(a-1). If the Texas Education Agency conducts an investigation as authorized by section 39.057 of the Education Code and concludes that members of a board of trustees violated their duty to comply with this provision, it could take appropriate action authorized by subsection 39.057(d) of the Education Code. *See id.* § 39.057(d).

S U M M A R Y

If a quorum of a governmental body deliberates about public business within the jurisdiction of the body outside of a meeting authorized by the Texas Open Meetings Act, through multiple communications each involving fewer than a quorum, the governmental body violates the Act.

Action taken by a governmental body in violation of the Act is voidable. In addition, any interested person may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of the Act by members of a governmental body.

If the Texas Education Agency conducts an investigation as authorized by section 39.057 of the Education Code and concludes that members of a school district board of trustees violated their duty to comply with the Act, it could take appropriate civil action authorized by subsection 39.057(d) of the Education Code.

Very truly yours,



KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee