A BASIC LEGAL PRIMER FOR TYPE B ECONOMIC DEVELOPMENT CORPORATION BOARDS OF DIRECTORS

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Introduction

This paper is intended to provide basic, useful information for board members of a Type B Economic Development Corporation, focusing on three issues that the board will routinely encounter.

Overview of Economic Development Corporation Law

History:

The idea that cities or other local governments could or should spend tax money to benefit local businesses was not only unheard of in 1876, when the Texas Constitution was enacted; it was absolutely prohibited. Recent experiences with railroads being given large sums of public money or land by cities and counties but getting no railroads in return —only huge public debt— caused the framers and voters to include Article III, Section 52 in the Constitution, whereby the Legislature is prohibited from ever enacting a law that allows cities to spend public money of give away a thing of public value solely "for the benefit of an individual, corporation or association."

Beginning about the turn of the 19th/20th Centuries, however, the legislature and the voters began finding ways to get around Article III, Section 52 (which is still on the books and is still completely effective). In best Texas legislative tradition, however, the lawmakers did not simply repeal or amend the problematic section; they enacted exceptions to it. This gave birth to the numerous types of districts now prevelant in (and outnumbering both cities and counties) in the state, but ultimately gave rise to Economic Development Corporations ("EDCs").

The ball started rolling before 1979, but picked up steam that year when the *Development Corporation Act of 1979* was enacted as *Tex. Rev. Civ. Stat. Ann*. Art. 5190.6 ("the Act"). The primary funding source for corporations formed under that Act was to be industrial foundations and private sources, but this proved inadequate, and in 1987 the Constitution was amended to permit the Legislature to make "loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state . . . ." There is an old saying that "the bidness of Texas is bidness," and this Constitutional amendment made it the law of the land.

In 1989 the Act was amended to provide for the creation of "4A" (now Type A) Development Corporations funded by an "economic development sales tax." Then in 1991 the Act was

amended to allow for the creation so "4B" (now Type B) corporations and adoption of a similar sales tax that could be used for more purposes than could that for a 4A. These two types of Economic Development Corporations proved to be very popular and very successful. Approximately 125 Texas cities (out of approximately 1200) have created a Type A EDC; approximately 320 have created a Type B EDC; and approximately 100 have both a Type A and a Type B EDC.

In 2003, in response to misuse of EDC funds by certain cities (i.e. using it for non-EDC purposes), the legislature enacted HB 2912, which imposed various restrictions and eliminated certain authorities for EDCs. Since 2003 the legislature has repealed some of the more restrictive provisions from HB 2912, but several remain.

In 2007, the legislature codified the Act and moved it from Art. 5190.6 of the *Revised Civil Statutes* to Chapters 501 through 507 of the *Local Government Code.* Of those seven chapters, only three—501, 502, and 505—contain provisions that will be commonly utilized by a Type B EDC. Ch. 501 and 502 apply to all EDCs and 505 applies specifically to Type B EDCs (whereas 503 applies to Texas Small Business Industrial Development Corporations; 504 applies to Type A EDCs, 506 applies to County Alliance Corporations, and 597 applies to Spaceport Development Corporations.

The Nature of EDCs

Despite being subject to the same laws and rules, being funded by the same type of sales tax, being authorized to fund the same type of projects, and having the same qualifications for their board members, the various EDCs across the state operate in a variety of different manners. In some the EDC acts almost independently of the City and City Council, coordinating only when the law requires it to do so, and pursuing its own projects and expenditure of funds without detailed oversight from the City. In a few others, the arrangement is the opposite, and the EDC Board is strictly scrutinized and micromanaged by the City Council. Most EDCs operate between those two extremes.

There are at least four reasons why this is so:
1. Under the Act, "all programs and expenditures" of the EDC must be approved by the "corporation's authorizing unit," which is either the city council, city commission, or county commissioners court. Most city councils do not interpret this literally and exercise their approval through the budgeting process or through individual agenda items for approval of specific projects. A few cities, however, choose to apply it technically and strictly (often in response to a political situation).
2. There is not a great deal of either caselaw or AG opinions interpreting the meaning of provisions in the Act. Because most citizens want their communities to experience economic growth, it is rare that lawsuits are filed against EDCs. The Attorney General has certainly rendered opinions on whether an EDC is authorized to fund a particular project or to provide

guidance on the manner in which and EDC must perform a particular act, but has rarely been asked to render an opinion that has broad application or imposition of new rules.
3. Except for HB 2912, the legislature has not enacted many laws intended to "rein in" EDCs, as it has sometimes done for cities and other local governments.
4. Perhaps most significantly, EDCs are a rather odd mix of non-profit corporation and governmental entity. They are subject to the Open Meetings Act and the Public Information Act, but are not subject to either the procurement (competitive bidding) or conflict of interest (Ch. 171) laws. They must obtain the approval of their "authorizing units" but "have the powers, privileges, and functions of a nonprofit corporation," including their own Articles of Incorporation and By-Laws.

In short, there is ample room for creativity and differences. However, at least once every two years, certain persons associated with EDCs must attend a training seminar, those persons being:
1. The City Attorney or City Administrator or City "Clerk" (Secretary) AND
2. The EDC's executive director or other person responsible for the EDC's daily administration.

This training requirement, coupled with the diversity of the nature of EDCs, sometimes has unintended consequences, in that a trainer sometimes expresses an opinion or describes how a particular EDC operates that is inconsistent with what one or more trainees are accustomed for their EDCs. This opinion or description is then reported as "the law" or as proof that the EDC at home is doing something wrong.

EDC Law (in general)

As stated above, the laws governing Type B EDCs are located in Chapters 501, 502 and 505 of the *Local Government Code*. Additionally, the Attorney General has published the *Economic Development Handbook*, the latest version being that for 2008, which any person may obtain by requesting a copy from the Attorney General's office over the phone (512-463-2100), by going online (https://www.oag.state.tx.us/AG_Publications/pdfs/pub_orderform.pdf) and completing an order form to either mail or fax, or by downloading and printing the handbook from https://www.oag.state.tx.us/AG_Publications/pdfs/econdevhb2008.pdf. Finally, also as mentioned above, at least one person with the EDC must receive training at least once every two years (some EDCs require all board members to attend).

Accordingly, this "legal primer" will not go into much detail about issues that are covered in greater detail elsewhere and will, instead, summarize the most common and most important rules for a Type B EDC.

1. What is a "project?"

An EDC may spend funds only an authorized project, and these are identified in both Chapter 501 and 505. There are essentially two types: those that "create or retain primary jobs," and certain specific projects that do not create or retain primary jobs.

The first type of project is broad and it is ultimately the Board of Directors that decides if a project will, in fact, create or retain primary jobs ("the land, buildings, equipment, facilities, expenditures, targeted infrastructure and improvements (one or more) that are for the creation or retention of primary jobs that are found by the board of directors to be required or suitable for any of the following projects"). However, the Act identifies them both generally (by North American Industry Classification System [NAICS] and by enumeration, as follows:

NAICS classifications:

Crop Production
Animal Production
Forestry and Logging
Commercial Fishing
Support Activities for Agriculture and Forestry
Mining
Utilities
Manufacturing
Wholesale Trade
Transportation and Warehousing
Information (excluding movie theaters and drive-in theaters)
Securities, Commodity Contracts, and Other Financial Investments and Related Activities; Insurance Carriers and Related Activities; Funds, Trusts, and Other Financial Vehicles
Scientific Research and Development Services
Management of Companies and Enterprises
Telephone Call Centers
Correctional Institutions; or a job that is included in North American Industry National Security, for corresponding index entries for Armed Forces, Army, Navy, Air Force, Marine Corps and Military Bases.

Enumerated types of projects:

a. Manufacturing and industrial facilities;
b. Research and development facilities
c. Military facilities
d. Transportation facilities (including airports, ports, mass commuting, and parking facilities)
e. Sewage or solid waste disposal facilities.
f. Recycling facilities.
g. Air or water pollution control facilities.
h. Distribution centers.
i. Small warehouse facilities.
j. Primary job training facilities for use by institutions of higher education.

k. Regional or national corporate headquarters facilities.
l. Public safety facilities.
m. Streets and roads.
n. Drainage and related improvements.
o. Demolition of existing structures.
p. General municipally owned improvements.
r. Any improvements or facilities that are related to any of those projects and any other projects that the board in its discretion determines promotes or develop new or expanded business enterprises that create or retain primary jobs.

The second type of project consists of the following, each one of which is defined more specifically in the Act:

a. Job training classes
b. Infrastructure improvements for projects that create or retain primary jobs
c. Career centers
d. Professional and amateur sports facilities
e. Entertainment, tourist and convention facilities
f. Public parks and open space improvements
g. Affordable housing
h. Water supply facilities
i. Water conservation programs
j. Airport facilities
k. Airports, ports, and sewer or solid waste disposal facilities.

However, despite the seemingly broad range of project types that a Type B EDC may undertake, each and every prospect of project that is suggested or proposed must be carefully analyzed to make certain it falls in one of the two types of authorized projects described above.

2. Notice and hearing requirements: Before it spends any money on a project, a Type B EDC must hold at least one public hearing on the proposed project. The Type B EDC must also issue notice that it is considering a project and must wait at least 60 days after the notice is issued before it spends money on it. The most common procedure is for the EDC to issue notice that describes the project and sets the date for the hearing, but the statute does not clearly mandate doing it in that order. In other words, a city could (but rarely) hold a hearing before the notice of the project is issued or might issue the notice and then wait 60 days or more before holding the hearing (more common) and still be within the requirements of the law, the 60 days being measured from the date of the notice, not the date of the hearing.

A project must also be approved by the City Council before the EDC may spend money on it. This is sometimes accomplished in the annual budget process, with the budget for the EDC identifying all ongoing or proposed projects, but is often handled as a specific agenda item at a City Council meeting (which may include a budget amendment) for projects that arise during the year but which were not specifically identified in the budget.

The description of the project that is the subject of the notice and the City Council approval need not be detailed. The statute says that the notice may be "of the specific project or general type of project."

The reason for the 60 day period is to allow citizens time to circulate a petition to require an election before money is spent on a particular project. If, for example, a Type B EDC had a limited amount of money and different factions of the community believed it should be spent on different types of projects, such a faction might petition and require the City (not the EDC) to call an election on whether the project should be funded. The number of signatures required for such a petition is 10 percent of the registered voters of the city, and the election must be held on the next available uniform election date (May or November).

3. Two reading requirement: In addition to the notice and hearing requirement, a Type B EDC located in a City with a population of less than 20,000 may not undertake a project that requires an expenditure of more than $10,000 unless the "governing body of the corporation's authorizing municipality" adopts a resolution authorizing the project after giving the resolution at least two separate readings. This two reading requirement may also be done in the budget process for projects that have been identified, but must be done separately for a project that is proposed during the fiscal year that is not identified generally or specifically in the budget.

4. A quick examination of Chapters 501, 502 and 505, or of the *Economic Development Handbook* will demonstrate that there are various other legal topics and details for consideration, but rather than spend additional time on those topics and details, the focus of this primer will shift to open government laws, followed by a brief discussion of *Robert's Rules of Order*.

Open Government Laws:

The two areas of the law that EDC board members most encounter outside of the Act are the Open Meetings Act and the Public Information (or "Open Records") Acts. The following discussions of those two acts were drafted for use by City officials, but are equally applicable to EDC Boards of Directors, their officers and employees.

Open Meetings

1. Primary source:

Chapter 551, Government Code. Note that it is not the Local Government Code. The Texas Open Meeting Act will be referred to in this section as "TOMA."

2. Comments and Observations:

If certain City Managers and City Attorneys who come to Texas from other states are to be believed, Texas has one of the most stringent and restrictive open meetings laws in the nation. This is not the message that is conveyed by newspapers, the Attorney General, or public opinion, however, and cities in general, TML in particular, has sometimes been characterized as "the traditional opponent of open government." This characterization is ridiculous, but a few bad apples, bad fact situations, and bad ideas can give all cities a bad rap in regard to both open meetings and open records issues.

Following, in general terms, are the basic open meetings topics and rules about which city officials must be cognizant.

a. Agenda item drafting: Each agenda item must adequately inform the public of the matter that the governing body, whether city council, city commission, planning and zoning commission or other municipal body subject to TOMA, is going to discuss and possibly act on. Failure to adequately describe a matter could lead to the action taken by the governing body being declared void in a subsequent, successful challenge. (Note, however, that there must be a subsequent, successful challenge. Citizens, council members, and newspapers sometimes characterize the action of a governmental body, often for political reasons, as "illegal" because it was inconsistent with the manner in which the item was posted. Such action may, in fact, be voidable, but is not void until a court so declares.)

The basic rule is that an agenda item can never be too informative or contain too much information. When in doubt, describe the potential subject matter and potential action more fully than is absolutely necessary. If there is a subsequent challenge, it will almost certainly be because the action—not the mere wording of the agenda—is controversial and there are opponents to it willing to pay to mount a lawsuit. Controversial items are often large, expensive, career-affecting matters, so it is particularly painful to get such a matter resolved only to have the action thrown out by a court because the agenda item was too vague or did not adequately describe all the possible ways the Council could take to resolve it. There is some debate, based on Attorney General Opinions, about the absolute necessity of having an "action" word in the item, such as "vote," "take action," or "act on," as opposed to merely saying "consider," "discuss," "deliberate," etc. My advice is to always have such a word.

Unless your city secretary, city manager or other person who prepares the agenda is well-versed in proper agenda item wording, it is strongly recommended that the city attorney review every agenda before it is posted.

b. Agenda posting: Unless the meeting qualifies as an emergency, the agenda must be posted no less than 72 hours before the meeting will convene. The place for posting is described in TOMA for cities is "on a bulletin board at a place convenient to the public in

the city hall." It may be posted in additional places, but a bulletin board in city hall that can be viewed 24/7 by members of the public is mandatory.

c. Emergency meeting: A meeting that is truly an emergency may be convened after only two hours of posting. To be an emergency the subject matter of the meeting must involve "an imminent threat to public health or safety or "a reasonably unforeseeable situation." The nature of the emergency must be clearly identified, and the emergency must be something that cannot wait for 72 hours, cannot be based on mere convenience, cannot be due to error on the city's part for not acting sooner. Whether or not an emergency is truly an emergency depends on the facts of the situation, and in some cases it may be appropriate if the governing body, before actually taking the matter up, determines that a majority of its members agree that an emergency exists.

d. Executive, or closed, sessions: This is probably the single most controversial issue related to TOMA. Rightly or wrongly, governing bodies often want to have closed sessions about topics for which a closed session is not authorized. In an ideal world, a governing body would not hold a closed session except in very limited, clearly authorized situations, and would allow everything they do to be observed by the public. In practice, elected officials are simply not always willing to speak their minds freely in front of the voters. I have even had the experience of a city council member announce (during a closed session) that he considered it to be the duty of the city attorney to find ways for the council to hold unauthorized closed meetings. Mercifully, he seemed to be the only council member who felt that way.

TOMA lists 21 flavors of authorized closed sessions, but only eight of those are available to cities (and only six apply to EDCs), viz:

(i) Advice of legal counsel under 551.071;
(ii) Real property under 551.072;
(iii) Prospective gift under 551.073;
(iv) Personnel under 551.074;
(v) Security devices under 551.076;
(vi) Certain public power competitive matters under 551.086; (NOT APPLICABLE TO EDCs)
(vii) Economic Development negotiations under 551.087; and
(viii) Certain licensing or certifications test items under 551.088 (NOT APPLICABLE TO EDCs).

In addition to the Public Information Act exceptions, there is one exception in the Tax Code, Section 321.3022, whereby information related to sales taxes collected from businesses within a city and supplied to that city by the State Comptroller in response to a request must be kept confidential. Also, there is a series of exceptions in the Government Code (Sections 418-175-418.183) related to homeland security/emergency

response issues that must be kept confidential in regard to critical infrastructure, security codes, communication encryption codes, construction of weapons, reported terrorist activity, information intended to prevent acts of terrorism and criminal activity, and information related to disabled persons.

Of those ten, counting the series of homeland security/emergency planning exceptions as one, the four that are used routinely are legal counsel, real property, personnel, and economic development. The basic rules for those four are as follows:

(i) Closed sessions under 551.071: A governing body may go into executive session to obtain legal advice from its attorney under two circumstances: when it will discuss pending or contemplated litigation and when, in the opinion of the attorney, it is necessary to do so in order to uphold his or her ethical obligations under the rules of disciplinary procedure.

Under the first category, there must either be a lawsuit that has been filed in which the city is involved as a party, or there must be genuine likelihood of such a lawsuit. The mere fact that the city might get sued for something it is contemplating doing is not enough. It is necessary that it has been informed, preferably in writing, that litigation is definite or highly probable.

The second category is a little less distinct, but is generally interpreted to mean that the attorney believes that he or she needs to give the city, his or her client, legal advice that should be subject to the attorney/client privilege. Thus, if a city council is seeking to determine what to do in connection with an existing contract, and the attorney believes that its members need to receive legal advice in order to make the right decision, but that giving that advice in a public forum may jeopardize the city's legal position under the contract, then an executive session may be authorized.

This latter category of this type of closed session authorization is, in my opinion, the most likely to be abused by city council members or other officials, and is therefore the most likely to be significantly modified by the legislature if abuses of it occur. It is not terribly unusual for council members to claim that they need legal advice about a particular matter when, in fact, they want to go behind closed doors and freely discuss, or deliberate, the issue.

Until 1999, there was another type of closed session authorized that was generally called a "staff briefing." The idea was that a governing body should be allowed to go behind closed doors and hear its city manager or other staff members deliver a report about sensitive or potentially sensitive matters. If done properly, the council members were allowed to receive the report, ask direct questions of the staff member, and provide direct answers to questions from the staff member, but were not allowed to deliberate or take action about the matter. However, rightfully or wrongfully, a perception arose that

governing bodies were saying they were getting staff briefings when they were, in fact, making decisions about what to do about matters of public interest. The staff briefing was repealed, and if a similar perception develops concerning closed sessions to receive advice of legal counsel, it would not be surprising to see the legislature restrict is usage.

It should go without saying that in order to go into an executive session to receive advice of legal counsel, an attorney must be present, either in person or by telephone, e-mail, or video. City attorneys, unlike council members, are permitted by law to "virtually" participate in meetings, but a council may not meet in closed session to receive legal advice from itself or any non-lawyer.

(ii) Closed sessions under 551.072: a governing body may go into closed session to discuss the sale, exchange, or purchase of land if discussing the transaction in an open session may have a detrimental effect on its negotiating position or would cause the price of the land to change. The mere fact that land is involved and that its ownership might change hands is not enough if there is no purchase, exchange, or sale or if there is no likelihood of public discussion having an effect on the potential bargain.

(iii) Closed sessions under 551.074: a governing body may go into a closed session to discuss one or more of its officers or employees. More precisely, it may do so to discuss the "appointment, employment, evaluation, reassignment, duties, discipline, or dismissal," or a complaint or charge against an officer or employee. The mere fact that an employee or officer is involved in a matter the council wants to discuss is not enough if one of the grocery list of discussion items listed above is not involved. Thus, a discussion of how much an officer or employee should be paid, the amount of an individual's raise, the percentage amount for every employees' annual pay raise, reorganization of a city department, reduction or increase in staff, and similar issues are not something that can be discussed behind closed doors. An evaluation of an officer or employee might include discussion of salary or pay increases, and the duties of the city manager might include reorganization of a department, but the matter to be discussed must actually be covered under the umbrella of one or more of the grocery list of permitted purposes of the closed session—not as its sole purpose.

The governing body must also discuss specific officers or employees, not a class of them, if it is in closed session under 551.074. The agenda item may not simply say "personnel," "city employees," "police department," "public works employees," or some similar group. The officer(s) or employee(s) should be identified, either by name, or if their office or position with the city is unique, by that office or position. The primary purpose of this exception is to protect the officer or employee from embarrassment or disclosure of confidential information, not to provide a convenient tool for the governing body to speak its mind in private.

If the officer or employee who is the subject of the closed session requests that the matter be deliberated in open session, the governing body has no choice but to do so. The officer or employee does not have an absolute right to be in the closed session, but the ability to bring it out into the open often convinces the governing body that his or her presence is appropriate.

There is some debate about whether a governing body may go into closed session to discuss the hiring of an officer or employee. The narrow, technical view is that it may not because the person is not yet an officer or employee. The more moderate view is that TOMA includes "employment" and "assignment," as items that may be discussed and that the overarching purpose of the exception—keeping private comments related to the abilities, shortcomings, personalities, or qualities of individuals who work for the city—applies equally to candidates and incumbents. The A.G. has not specifically ruled on this question, but has issued an opinion in which it recognized the legality of a closed session in which a governing body talked about hiring an officer even though that governing body did not have the authority to hire such an officer. (i.e. the AG ruled that because the body would be working closely with the officer once he or she was hired by the persons authorized to do the hiring, the closed session was legal).

(iv) Closed sessions under 551.087: a governing body may go into closed session to discuss a specific economic development prospect. The discussion may involve commercial or financial information about the business prospect or details of an offer or incentive package to that prospect, but there must be a specific prospect. A general discussion of economic development needs, strategies, or policies, without reference to any particular prospect, should be deliberated in an open session. The fact that EDC needs, policy, or strategy enters into a discussion posted for the purpose of discussing certain individual prospects does not make the closed session improper, but there must be a logical connection between the discussion and the prospect.

e. <u>Posting executive sessions on a meeting agenda:</u> A certain amount of confusion exists about how an executive session must be posted on an agenda. The rules is that (i) the subject matter of the item must be adequately posted on the agenda to allow it to be discussed in an open session, and (ii) the subject matter of the item must meet one or more of the ten exceptions discussed above that allow a governing body to go into executive session about the matter. In other words, TOMA does not *require* the governing body to announce on its agenda that an executive session will be held, and should it become apparent during a meeting that a close session is desirable and it is allowed under TOMA, as just described, the governing body may go behind closed doors, even though the agenda does not announce that it will do so.
Nevertheless, if a governing body, or the person responsible for preparing the agenda knows that the governing body plans to go into executive session, the agenda should so state. Similarly, there should be an item on the agenda following the executive session for the taking of action in open session regarding matters discussed in closed session,

because no action may be taken in a closed session and posting an item for action (vote, etc.) is recommended.

Many cities post a paragraph of "boiler plate" at the end of their agendas announcing that the governing body may go into executive session on a particular matter. Sample language for such boiler plate is as follows:

> The City Council reserves the right to adjourn into Executive Session at any time during the course of this meeting to discuss any matters listed on the agenda, as authorized by the Texas Government Code, including, but not limited to, Sections 551.071 (Consultation with Attorney), 551.072 (Deliberations about Real Property), 551.073 (Deliberations about Gifts and Donations), 551.074 (Personnel Matters), 551.076 (Deliberations about Security Devices), 551.087 (Economic Development), 418.175-183 (Deliberations about Homeland Security Issues) and as authorized by the Texas Tax Code, including, but not limited to, Section 321.3022 (Sales Tax Information).

If the city is one of the approximately 75 in the state that has a municipally-owned electric utility, it should include "551.986, (Certain public power competitive matters) in the list, and if it is a Civil Service city, or otherwise administers employee testing for licenses or certification, it should include "551.088 (Certain licensing or certification test item)."

Note, however, that use of such boilerplate language is not a substitute for meeting the two part test described above. The item to be discussed must still be properly posted for an open session, and its subject matter must be covered by one of the nine exceptions in the Government Code or the one exception in the Tax Code.

f. Minutes, Certified Agendas, and Tape Recordings: Governing bodies must keep official minutes of their meetings, but doing so is not a requirement of TOMA. Caselaw clearly establishes that the validity of a governing body's actions often turn on what the minutes say. In fact, a contract a city has entered into may be declared unenforceable if the minutes do not reflect that it was authorized.

What TOMA requires is the type of record that must be kept for closed sessions, which is either a "certified agenda," or a tape recording. The two are very dissimilar, in that the latter captures every word spoken, while the former consists only of (i) a statement of the subject matter of each deliberation; (ii) a record of any further action taken (which may not be actual action, in the sense of voting to approve or disapprove, which may only be done in an open session); and (iii) an announcement by the presiding officer at the beginning and end of the closed session indicating the date and time.

Whether tape recording or certified agenda, the record is confidential, and must be retained, under seal, at least two years after the date of the closed meeting. It may be reviewed only if a court orders it, or if a current member of the governing body desires to inspect or listen to it, even if the member was not present during the closed session. It may not be copied.

g. Violations of TOMA: The following are criminal violations of TOMA:

(i) Participating in a closed meeting knowing that no certified agenda or tape recording is being kept (Class C misdemeanor);

(ii) Knowingly disclosing to a member of the public a certified agenda or tape recording of a lawful closed session (Class B misdemeanor)

(iii) Knowingly calling, organizing or participating in an unauthorized closed meeting (Misdemeanor fine of $100 to $500, one to six months in jail, or both).

(iv) Knowingly conspiring to circumvent TOMA by meeting in numbers of less than a quorum for the purpose of secret deliberations in violation of TOMA (Misdemeanor fine of $100 to $500, one to six months in jail, or both)

In addition, a person who discloses a certified agenda or tape recording may be liable for actual and exemplary (punitive) damages and attorneys' fees.

A citizen or member of the news media may bring an action for injunction or mandamus to prevent, stop or reverse a violation of the chapter, and my recover costs and attorney fees if successful.

An action of a governing body taken in violation of TOMA is voidable

Of all the potential violations and ramifications of non-compliance with the Open Meetings Act, the one that creates the most confusion is the one listed as (iv) above. Everyone understands that a quorum may not get together and discuss city business outside of a properly posted meeting, but there is a great deal of misunderstanding and fear about whether two, or possibly three, members of a governing body may discuss city business without violating TOMA.

Clearly, if two or more members intentionally decide they do not want the public to know why they are going to vote on a particular matter, and therefore get together to work out agreements and make decisions in secret, knowing that they are violating TOMA, then it is a violation. The misunderstanding arises about what happens when two members simply talk about city business on the phone or in person without actually intending to violate TOMA. If they did not knowingly conspire and had no intent to have secret deliberations, then they have not violated TOMA, but proving a negative is difficult. Public perception, when two or more members of a governing body are seen talking to each other, is often that they are engaged in an illegal secret meeting.

Additionally, the Attorney General has identified a violation that is commonly called "a walking quorum." This occurs either when two members of a governing body get together, or a third person not on the governing body communicates with a member, and then the subject matter of the discussion is communicated to other members of the governing body in a daisy chain fashion, either by one or more of the members or the third person.

Thus, a city manager or city secretary may not "poll" the members of the city council by calling each, asking them their opinion on a particular substantive matter, and then calling the next member and telling them what the other members said. It is permissible for a staff member to call each council member and ask them a procedural question, such as "are you available for a special meeting at a particular time," or "how do you want me to word the agenda item that you directed me to place on the meeting agenda." It is also permissible, even vital, for members to discuss matters of city business with the city manager, city attorney, city secretary, or other staff member who has relevant information. Neither the staff member nor the council member may then turn around and disclose the substantive nature of the discussion to enough additional members of the council to comprise a quorum.

h. Final, important observations about the Open Meetings Act: There are numerous other topics that could be addressed herein, such as what is a meeting as opposed to a social function or a regional training session, whether attendance of a meeting by telephone or video is allowed, who may be allowed to attend a closed session in addition to members of the governing body, and, particularly, when comment from the public or by council and staff members are allowed when the subject matter of the comments is not posted on the agenda. Those topics are important but are addressed fully in the *Attorney General's Open Meetings Handbook* and other publications.

Two final observations that need to be made, however, are:
(i) The ramifications of being accused of violating TOMA can be as disruptive and tormenting as an actual violation. Public opinion, newspaper stories, and response at the ballot box can convince even a careful, law-abiding member of a governing body that holding local office is more or a curse than an honor.

Jurisdiction to enforce TOMA lies with the local prosecutors—county attorney or district attorney. Those officials also have statutory authority to ask the Attorney General to investigate and assist, which often occurs. While some local prosecutors do not like to spend time on open meetings issues, others can be very zealous, and while both local prosecutors and Assistant Attorneys General and their investigators are usually very qualified and professional, the investigations can take on witch hunt characteristics. It is not particularly unusual for either a member of a governing body, a staff member, or a citizen to allege a violation of TOMA for reasons other than desire to promote open government in Texas. It is not unheard of for an investigator to treat an investigation into

an alleged illegal closed meeting as the tip of iceberg of corruption, and to conduct their examination accordingly.

A particular governing body may conduct its meetings and closed sessions for years without challenge or question, only to find itself suddenly in the midst of a storm of bad publicity and allegations of criminal activity, sometimes for good reason, but often not. The Open Meetings Act has many flaws, and it is time, in these writers' opinions, that it be sunsetted and made more workable and efficient by the legislature. That probably will not happen, however, because of the fear on the part of local officials that the result will be something even worse and more inefficient than what currently exists.

Accordingly, while it may be inconvenient, and may sometimes defy common sense, all city officials should seriously consider a policy that makes the scheduling of executive sessions the rare exception, not the rule, to be held only when absolutely necessary and when in clear compliance with TOMA. They are intended to be allowed only in narrow circumstances; members of the public grow suspicious when closed sessions are held frequently

Elected officials should also accept the idea that they need to wait until they are in a legal, open meeting to discuss their concerns and ideas about matter of public business, rather than trying to work issues out ahead of time outside of public view. They should not be hesitant to let the public see what they think and say about such matters, even if doing so demonstrates that they do not know as much about a particular matter as they need to know. They should be particularly reliant on their city managers, city attorneys, city secretaries, and department heads who live with the issues, make their living understanding the issues, and who are usually anxious to assist the governing body make the right decision if given a reasonable opportunity to do so.

(ii) An important, but often overlooked protection from violating TOMA, at least with regard to participation in an illegal closed session, is contained in Section 551.144(c) which provides that:

> It is an affirmative defense to prosecution under Subsection (a) (i.e. calling, organizing or participating in an unpermitted executive session) that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter in an opinion of a court of record, the attorney general, or the attorney for the governmental body.

In other words, the members of a city council are protected from prosecution for participating in an illegal closed meeting if they first asked their city attorney for a written opinion on the legality of the closed meeting the council wants to conduct <u>even if the attorney is wrong and the closed meeting is actually not legal.</u> However, of the 13 cities for which our law firm serves as city attorney, only one routinely requests, or

requires, a written opinion of that nature prior to every council meeting at which a closed session is scheduled. In all but one instance, the letter opinion has been that the closed session was legal, and in the one instance where we declined to provide such a letter, no closed meeting was held.

3. Secondary Sources: *Open Meetings Handbook*, Texas Attorney General, available online at http://www.oag.state.tx.us/AG_Publications/pdfs/openmeeting_hb2008.pdf.; *Open Government Training video*, Texas Attorney General, *The 2008 Texas Open Meetings Act Made Easy,* Texas Attorney General, available on line at http://www.oag.state.tx.us/AG_Publications/pdfs/openmeetings_easy.pdf

Public Information/Open Records

1. Primary source: Chapter 552, Government Code. Note that it is not the Local Government Code. The Texas Public Information Act will be referred to in this section as "PIA."

2. Comments and Observations: The Texas Public Information Act is often a counter intuitive area of municipal law. Some documents that one would think must be disclosed may be kept private under PIA, while some documents that one would wish not to disclose must in fact be disclosed. Thus there is no "safe side" on which to err. It is a crime to refuse to disclose records that are public information, but it is also a crime, in some circumstances, to disclose records that are not public information. Therefore, the focus in responding to any particular request must be to thoroughly and correctly determine which documents are and aren't public information, without exception.

The following, in general terms, are the basic open records topics and rules about which city officials must be cognizant:

a. All documents presumed public: PIA begins with the proposition that all documents in the possession of a city are presumed to be public information. Internal investigations, legal memoranda, real estate negotiations, medical information, are all presumed to be public.

b. No special form of request needed: While many cities have a standard form for public information requests, the public is not required to use such a form in order to trigger the requirements of PIA. Therefore, it is important to treat any written request for information, in whatever form, as a request for public information under PIA.

c. Withholding documents: Under PIA, a city may withhold documents if the documents meet one of many exceptions to the general rule that all documents are public. However, a city is not empowered to make this determination on its own. Instead, a city wishing to withhold information from a requestor must request a decision from the Attorney General's Office. The request from a city to the Attorney General's Office should contain the arguments of the city regarding which exceptions to disclosure apply to the requested

documents. In addition to argumentation and citation, the Attorney General's Office also requires that the city provide them with a copy of what the city is attempting to withhold.

Timing can be critical, because a city only has ten business days from the date of the request to determine whether it wishes to seek an Attorney General Opinion in an attempt to withhold documents, or waive any objections the city may have. Some additional time (five days from date of request) is added to actually produce the documents in question. The Attorney General however, has up to forty five days to consider your brief, and may extend their time period for response if necessary.

Finally, the requirement to submit a brief to the Attorney General's Office prior to withholding documents only applies to written requests (including e-mail). Verbal requests do not trigger the requirements of PIA. It is, therefore, important from a practical standpoint for a city to obtain all requests for information in writing.

d. Municipal Court: Municipal Courts are not subject to the requirements of PIA. Should your municipal court receive a request for information, the court has different rules for responding to requests for information. The rules and regulations related to such requests are beyond the scope of this paper.

e. Repetitive Requests: If a city has previously provided copies of certain information, PIA provides that the governmental body has no duty to provide the same information to the requestor again. Please note that this only applies to information which has already been given to the requestor. If a requestor repeatedly requests information, and the city has withheld the information in the past pursuant to an Attorney General's Opinion, a request must yet again be sent to the Attorney General addressing the new request for information, and re-alleging the applicable exceptions to public disclosure.

3. Secondary Sources: *Public Information Handbook*, Texas Attorney General, available at: http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf; *Texas Public Information Act Made Easy,* Texas Attorney General, available at: http://www.oag.state.tx.us/AG_Publications/pdfs/2006pia_easy.pdf.

Robert's Rules of Order:

Robert's Rules of Order can be a useful tool that can ensure effective meetings. They are not the law and were not intended to be the law, although sometimes, often for political reasons, they are treated as the law. If misused, they can lead to less efficient, less effective, and less organized meetings than if they were not followed at all.

The highest and best use of *Robert's Rules of Order* occurs when the city council or other governing body has (1) agreed to follow and apply the rules, but only so long as they facilitate rather than complicate orderly meetings: (2) all members have a general understanding of the

rules; (3) a parliamentarian is present who has an in-depth understanding of the rules or who is allowed to recess and find the correct answer when necessary; (4) the presiding officer relies on the parliamentarian but is prepared to announce that a particular rule will not be followed; and (5) ultimately the will of a majority of the governing body prevails, which may be a decision to either follow or not follow a particular rules.

There are at least six reasons the *Rules* are used loosely and/or incorrectly: (1) the Rules were designed for large legislative bodies—a true parliament—and therefore contain various provisions that are unwieldy or inappropriate for bodies of only five to ten members; (2) some of the functions of the Rules, such as quorum, agenda, by-laws, frequency of meetings, minutes, disciplining of members, and others, are controlled by or influenced by state law, such as the Open Meetings Act, or by City Charter; (3) it is very rare that all members of a governing body have a good, working knowledge of the Rules; (4) if the members, or some of them, have a good working knowledge of the Rules, new members or others who do not may feel intimidated and hesitant to contribute; (5) the Rules are sometimes used for strategic or political reasons by members who either know or purport to know the Rules better than other members of the body; and (6) a true, full understanding of the rules leads to a level of detail and knowledge that few people have time or desire to master.

The challenge, then, is to identify those portions of the Rules that are most useful, educate all members of the Council, boards and commissions in their use, and then follow the Rules "to the fullest extent possible" but never in a way that results in "delay, intimidation, thwarting the will of the (Council, board or commission), or to make ineffective a lawful vote."

Background and Resources

Robert's Rules are the best-known of various sets of parliamentary procedure. They were first published in 1873 by Henry M. Robert and are now in their 10th edition (by Henry M. Robert III). In addition to the ten "official" editions, which are substantially the same in substance, there are literally hundreds of publications like *Robert's Rules Made Easy, Robert's Rules at a Glance*, *Robert's Rules for Dummies,* and *The Guerilla Guide to Robert's Rules*. Amazon.com lists 430 such publications. Considering the length of the official editions—over 700 pages—it is not surprising that there is ample room for confusion and misunderstanding. In addition to an "official" edition of the rules, three other books and various internet sites were consulted in the preparation of this paper.

Adapting Robert's Rules to City Use

The "official" edition of Robert's Rules is divided into 20 sections. Of those 20, six focus on the types and priority of motions, while several of the other 14 are either inapplicable to city bodies or address topics that are, for cities, controlled by the Open Meetings Act, the Local Government Code, City Charter, or ordinance. The author of this primer has also drafted a paper entitled *"Robert's Rules of Order" Made a Little Easier*, in which those 20 sections are condensed into

13 pages of text, at the end of which is a summary of those 13 pages boiled down to the 13 most basic and succinct rules to follow, viz:

1. Don't speak unless recognized by the Chair except for (1) privileged motions (e.g. "use the microphone"); (2) point of order; (3) appeals (from a ruling of the Chair); (4) objection to consideration; or (5) reconsideration.

2. Although more than one motion may have been made, only one may be discussed at a time.

3. Decide the main motion last.

4. "A motion to reconsider," whereby a matter decided at the current, ongoing meeting is taken up again, may be moved for only by a person who voted in the majority on the matter the first time. However, this rule applies only to the ongoing meeting and for 24 hours thereafter; it does not prevent any governing body member from putting the same item on the agenda of a future meeting.

5. Speak only twice on each motion and speak to the Chair when doing so.

6. Use a "privileged motion" to take care of something necessary for comfort ("please turn up the heat") or functioning ("can we take a short break").

7. Rely on the parliamentarian for advice to the Chair; not for rulings.

8. Move to postpone; not to table.

9. Don't "call the question;" move that debate be closed.

10. Just "amend" a main motion or an amendment (including "substitute motions"); don't use "friendly" amendments.

11. Rise to a point of order if something is being done incorrectly.

12. Use a "point of information" or a "point of clarification" when you need more explanation.

13. Be courteous, be patient, be quiet unless you have something to say about the matter of pending business; and be an example for everyone else

Conclusion: The forgoing is intended to cover a great deal of information in a relatively short paper. Any questions about its content or meaning should be directed to its author.