Does a council-appointed advisory board have to comply with the Open Meetings Act?

The Texas Open Meetings Act provides that: 1) all meetings of governmental bodies must be open to the public, except for certain expressly authorized executive sessions; and 2) the public must be given notice of the time, place, and subject matter of meetings of governmental bodies. (Chapter 551 of the Texas Government Code).

Section 551.002 reads:

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

In order for the Open Meetings Act to apply, a council-appointed advisory board must fall under the definition of "governmental body." Section 551.001(3)(D) defines a governmental body as:

> a deliberative body that has rule-making or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality.

The key language in this section is "rule-making or quasi-judicial power." In *City of Austin v. Evans*, 794 S.W.2d 78, 83 (Tex.App—Austin 1990, no writ), the court laid out six factors to determine whether an entity has "rule-making or quasi-judicial power":

1) the power to exercise judgment and discretion;

2) the power to hear and determine or to ascertain facts and decide;

3) the power to make binding orders and judgments;

4) the power to affect the personal or property rights of private persons;

5) the power to examine witnesses, to compel the attendance of witnesses, and to hear the litigation of issues on a hearing; and

6) the power to enforce decisions or impose penalties.

An entity need not have all of these powers to be considered a "governmental body", but the more of these powers it has, the more likely it is that it is a governmental body subject to the Open Meetings Act. Other factors to consider are whether any city councilmembers are members of the advisory board and whether the council regularly "rubber stamps" board recommendations with minimal review.

When convening a meeting of any body that might discuss city business, the safest course of action is to follow the provisions of the Open Meetings Act. This insures compliance with state law, which contains criminal penalties for non-compliance, and reassures citizens of the transparency of local governmental processes.

What if city councilmembers happen to run into one another at a purely social function, such as a holiday party?

When a quorum of the members of a governmental body assemble in an informal setting, such as a social occasion, that gathering will be subject to the requirements of the Open Meetings Act if the members engage in a verbal exchange about public business or policy. The attorney general has stated that breakfast meetings of a commissioners court are subject to the requirements of the Open Meetings Act unless the breakfasts "are purely social in nature and do not in any way involve discussion or consideration of public business or public policy." Op. Tex.Att'y Gen.No. H-785 (1976).

What are the notice requirements of the Open Meetings Act? Is there any specific form that notices must follow?

Although this is a very basic question, it bears periodic repeating and reinforcement. Section 551.041 of the Government Code provides that:

> A governmental body shall give written notice of the date, time, place, and subject of each meeting held by the governmental body.

A governmental body must give advance public notice of subjects it will consider in either an open meeting or a closed executive session (although it need not specify whether the topic will be covered in open or closed session). The important point to remember is that no official action may be taken on an issue unless the issue is properly posted on the agenda.

The notice need not be overly-detailed. It only needs to be specific enough to apprise the general public of the subjects to be considered during the meeting.

Section 551.043 states the minimum length of time the notice must be posted before the meeting:

> The notice of a meeting of a governmental body must be posted in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting…

Section 551.050 specifies the location of posting for a "municipal governmental body:"

A municipal governmental body shall post notice of each meeting on a bulletin board at a place convenient to the public in the city hall.

When can we post a supplemental agenda?

As a general rule, an agenda that is posted less than 72 hours before a scheduled meeting is invalid, unless an unforeseen situation arises and an emergency or supplemental agenda is necessary. The circumstances under which supplemental postings are allowed is specifically detailed in Section 551.045 of the Government Code:

(a) In an emergency or when there is an urgent public necessity, the notice of a meeting or the supplemental notice of a subject added as an item to the agenda for a meeting for which notice has been posted in accordance with this subchapter is sufficient if it is posted for at least two hours before the meeting is convened.

(b) An emergency or an urgent public necessity exists only if immediate action is required of a governmental body because of:

(1) an imminent threat to public health and safety; or

(2) a reasonably unforeseeable situation.

(c) The governmental body shall clearly identify the emergency or public necessity in the notice or supplemental notice under this section.

The terms “imminent threat” and “reasonably unforeseeable situation” are strictly construed and are limited to situations such as natural disasters. Forgetting to post an item on the original agenda or poor planning does not constitute a “reasonably unforeseeable situation.”

If there are still more than 72 hours remaining before a scheduled meeting, an agenda may be “supplemented” without the need for a showing of emergency.

What if notice is improperly posted?

You would need to know what part of the notice was insufficient. If the agenda is placed in the wrong location or if the agenda is posted for less than 72 hours before the meeting, the meeting should not be held. If the notice requirement is not met for a single agenda item (if the notice is too vague, for instance), no discussion or official action may be taken with regard to that particular item, but the rest of the agenda would be valid. Any action taken on an improperly posted agenda item is voidable, meaning it may be challenged in court.

What is the difference between “void” and “voidable?”

“Void” means that an action is invalid and has no effect. On the other hand, a voidable action is considered to be valid until and unless affirmative steps are taken to make it void. For instance, an agenda for a council meeting is posted only 48 hours before the meeting, rather than the required 72 hours. The council, unaware of the mistake, meets and votes on the five items on the agenda. The votes and the official action are considered valid, but subject to challenge based on improper posting of the agenda. They are voidable, but not yet void. They will become void if they are successfully challenged in court.

Under what circumstances may the council meet in closed session?

The requirements for a governmental body to meet in closed session are outlined in section 551.101 of the Local Government Code.

> If a closed meeting is allowed under this chapter, a governmental body may not conduct the closed meeting unless a quorum of the governmental body first convenes in an open meeting for which notice has been given as provided by this chapter and during which the presiding officer publicly:
>
> (1) announces that a closed meeting will be held; and
>
> (2) identifies the section or sections of this chapter under which the closed meeting is held.

The two most commonly identified reasons for closed sessions are for consulting with an attorney (Local Government Code 551.071) and to discuss personnel matters (Local Government Code 551.074).