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Opinion Committee

TARRANT COUNTY

OFFICE OF THE
CRIMINAL DISTRICT ATTORNEY

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RQ-0098-JC

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FORT WORTH, TX 76196-0201

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August 6, 1999

AUG 09 1999

Hon. John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2458

FILE # ML-40934-99

OPEN RECORDS DIVISION

I.D. # 40934

By fax to (512) 463-2092 and by CMRRR

RE: Request for Attorney General Opinion Construing HB 156

Whether Governmental Bodies May Still Permit
Members of the Public to Comment at Public Meetings
On Matters not Specified in the Posted Meeting Notice
And Related Questions

Dear General Cornyn:

Pursuant to section 402.042 of the Texas Government Code, we submit this letter-brief requesting that you issue your opinion on the following question:

Once HB 156 takes effect on August 30, 1999, may governmental bodies still permit members of the public to comment at public meetings on matters not specified in the posted meeting notice?

If you answer yes, related questions are also posed.

The Governor has signed HB 156, relating to the application of the Open Meetings law; it goes into effect on August 30, 1999. The law makes two important changes that will apply to every governmental body that is subject to the Open Meetings Act: it redefines "meeting" and it effectively repeals the exception that permitted closed meetings to confer with governmental employees. The definition of "meeting" is important because when an event is a "meeting", it must be Open (unless an exception exists) and it cannot lawfully occur unless it is properly posted:

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

Government Code § 551.041.

The purpose of HB 156 was to close the 'briefing exception' loophole that resulted in unposted open and closed door communication on a variety of issues merely because the format of the meeting was a 'briefing'. In closing the loophole, however, the Legislature used very inclusive language, making a number of different exchanges covered as 'meetings' in the new definition. The new law provides:

(4) "Meeting" means :

(A) 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 governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or

(B) except as otherwise provided by this subdivision, a gathering:

(i) that is conducted by the governmental body or for which the governmental body is responsible;

(ii) at which a quorum of members of the governmental body is present;

(iii) that has been called by the governmental body; and

(iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control. The term does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, or the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, if formal action is not taken and any discussion of public business is incidental to the social function, convention, or workshop. The term includes a session of a governmental body. [Underlining in original HB 156 bill text; bold emphasis added.]

Government Code § 551.001 (4), as amended by HB 156, effective August 30, 1999.

Our first question is simply whether this new law must be read to prohibit a member of the public from addressing the governmental body on a matter not specifically on the agenda. We believe the law is not to be read so strictly as to preclude all speech by members of the public in a governmental meeting merely because the subject of concern is not on the agenda, although we recognize the contrary argument.

Many, but not all, governmental bodies provide a regular 'public comments' portion to their regularly posted meetings. This permits the members of the public to vindicate their state constitutional right to address their government:

Right of assembly; petition for redress of grievances

Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance.

Texas Constitution, Article 1, § 27.

While some entities require all citizen entreaties to their government to be made in writing, *see e.g.* Local Government Code § 22.043, it has become increasingly common for units of local government to invite any member of the public to make whatever comments they desire in the public forum at the time of the public meeting. Some entities permit any member of the public to speak as long as they desire; others permit a few minutes per speaker per meeting. The member of the public typically shows up, fills out a card indicating they wish to address the body, and then is called upon when the comments section of the meeting is reached. Topics are usually entirely at the discretion of the speaker. Requiring the speaker to submit their topic of address the number of days before the meeting necessary to allow for a specific agenda item would, we believe, limit the discourse between members of the public and their government. The 'public comments' mode of communication seems to us an option that should be retained by local governmental units; it would be ironic indeed if this law, which sought to open government to the public, instead closed public comment opportunities. We think this was not the law's intent, and we ask for your clarification.

The statute retains the following language that supports the ability of members of the public to make comments on matters that are not on the agenda:

Inquiry Made at Meeting

(a) If, at a meeting of a governmental body, a member of the public or of the governmental body inquires about a subject for which notice has not been given as required by this subchapter, the notice provisions of this subchapter do not apply to:

- (1) a statement of specific factual information given in response to the inquiry; or
- (2) a recitation of existing policy in response to the inquiry.

(b) Any deliberation of or decision about the subject of the inquiry shall be limited to a proposal to place the subject on the agenda for a subsequent meeting.

Government Code § 551.042.

Thus, while deliberation of, or decision on, a matter raised by a member of the public must be deferred until a later time when the matter may be placed on the agenda, the law retains reference to the possibility that a member of the public might make an inquiry about a subject for which notice has not been specifically given. And, there appears to be no penalty for a member of the public who speaks on a topic that is not on the agenda (although any action the governmental body might take on the item would be voidable if not properly posted for action; Government Code § 552.141).

Harmonizing § 551.042, § 551.001(4), and the Texas Constitution we believe permits the governmental body to have members of the public address the body on any topic of concern, even if not specifically on the agenda, *for the purpose of requesting that the issue be placed on the agenda for a subsequent meeting.* It is clear that no action may be taken on a matter not specifically posted on the agenda; what is less clear is whether the law as amended now prohibits other comment to a quorum of the governmental body by a member of the public unless the matter is specifically

on the agenda. We ask that you clarify whether members of the public who do not seek to have a matter placed on a subsequent meeting agenda may nevertheless address a governmental body in open session on a topic of interest to the speaker under a heading of 'public comments' or another similarly broad agenda item without first requiring the member of the public to submit the topic of the communication far in advance enough to permit the same to be specifically on the agenda.

If members of the public may still address their governmental bodies in the context of a general 'public comments' agenda item, is the rule the same for briefings by governmental employees? That is, may a 'briefings' agenda item, with nothing more, suffice as notice under the Open Meetings Act's requirement that the subject of the meeting must be shown in the notice?

The *statutory* language that regulates 'public comments' is without a doubt the same language as regulates 'briefings'. Thus, if the language permits a member of the public to comment under a broad category labeled only 'public comments', it is difficult to say that the same principle does not apply to briefings. Conversely, if one demands that briefings be specific as to subject matter, it is difficult to say that the same principle does not apply to public comments.

Perhaps one reason the law does not distinguish between public comments and employee briefings is that employees are also members of the public; it is not unheard of for the commenting speaker to be an employee speaking out about some issue that has arisen in their employment scope. And, if one draws a distinction, one risks having an employee insist that they are not speaking as an employee, but as a member of the public entitled to the same rights to address the government.

Exactly how the line should be drawn is not yet clear; perhaps experience with the new law will inform its interpretation. Meanwhile, however, we seek your guidance on these important issues. Must the new law be interpreted to prohibit members of the public from speaking at a public 'meeting' if the matter of their interest is not specified on the agenda and if they do not seek to have the item placed on a future agenda? If the law is to be construed to permit comment under a broad 'public comments' category without more detail, are briefings by employees subject to the same construction, permitting the briefings to occur under a broad 'briefing' category without more detail?

Your opinion on this important matter is respectfully requested.

Respectfully submitted,



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