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OPINION COMMITTEE

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November 3, 2004

Honorable Greg Abbott
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RQ-0291-GA

Re: Request for Opinion

Dear General Abbott:

In the past two years this office has had two occasions to conduct investigations into allegations that public officials may have violated § 551.143 of the Texas Open Meetings Act (TOMA). While neither of these investigations have resulted in criminal prosecutions there continues to exist substantial disagreement on the correct interpretation of the statute at issue and significant doubt as to the constitutionality of the statute.

§ 551.143 of the Open Meetings Act provides:
" (a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

(b) An offense under Subsection (a) is a misdemeanor punishable by:

(1) a fine of not less than $ 100 or more than $ 500;

(2) confinement in the county jail for not less than one month or more than six months; or

(3) both the fine and confinement."

The problem in interpretation arises in part from the definitions section of the TOMA. The term "meeting" is defined in §551.001 as:

"(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.

In the definition of "meeting" in every instance there is a requirement that a quorum of the governmental body be present. The argument may be made that if this definition of "meeting" is applied to §551.143 then a violation could never occur. On the other hand, and we think it more likely, a reasonable explanation harmonizing the definition of meeting and §551.143 would be that the definition section applies when the term "meeting" is used as a noun but the term "meeting" used in §551.143 is a verb and therefore the ordinary understanding of the word would be used.

A more difficult problem arises when the definition of "deliberation" is applied to §551.143. "Deliberation" is defined 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." § 551.001(2) TOMA.

It is difficult to reconcile this definition with §551.143 by reference to parts of speech. The legislature has chosen to define deliberation in terms of a quorum and has also included the use of the term "meeting" clearly used as a noun (also requiring the presence of a quorum). Thus, although §551.143 defines the offense in terms of meeting in numbers of less than a

quorum for purposes of secret "deliberations", deliberation is defined in terms that require a quorum to be involved in a verbal exchange during a meeting.

With these observations as a background please assume the following factual situation. Commissioner A makes successive telephone calls to Commissioner B and the County Judge. During these conversations Commissioner A discusses a matter which has already been posted for the next regularly scheduled Commissioners' Court meeting and urges either directly or impliedly that Commissioner B and the County Judge vote in a certain way. Please further assume that sufficient evidence exists from which a Judge or jury might conclude that the conspiratorial purpose clause of §551.143 would be proven. If these are the provable facts (1) has a violation of §551.143 occurred and, if so, who has violated §551.143? Finally, in light of the apparent difficulty in determining the conduct that might violate §551.143 is that statute void for vagueness?

We have attempted to digest the available case law in an effort to discern the legislative intent of this statutory scheme. The decisions of the appellate courts are sparse and written usually in the context of equitable relief. We are unable to locate any appellate construction of §551.143 in the context of a criminal prosecution.

In 1985 *Hitt v. Mabry* 687 S.W.2d 791 (Tex.App. –San Antonio 1985, no writ) the court in reviewing injunctive relief prohibiting a school board from discussing public business by telephone stated: "We agree with defendants and find that barring all members of the Board as well as employees of the SAISD from the use of telephone conferences to discuss public business is too broad. A decree of injunction must not be so broad as to enjoin a defendant from activities which are a lawful and proper exercise of his rights. [**12] *Villalobos v. Holguin*, 146 Tex. 474, 208 S.W.2d 871, 875 (1948). We doubt the existence of any legal authority, nor has any been cited, that would authorize the enjoining of school administrators, for example, from discussing public business on the telephone or at an informal meeting. *San Antonio Independent School District v. Woods*, 521 S.W.2d 130, 133 (Tex. Civ. App. -- Tyler 1975, no writ)." Justice Cadena, writing in dissent, opined that no violation of TOMA could have been shown since a quorum of the school board was never present in one place. While the majority must have disagreed with Justice Cardena's view of TOMA since they upheld a prohibition on reaching a decision by telephone poll, the majority opinion doesn't expressly address the quorum issue.

In *Harris County Emergency Services Dist. No. 1 v. Harris County Emergency Corps*, 999 S.W. 2d 1613 (Tex.App. –Houston [14th Dist.] 1999, no pet.) the court modified a trial court injunction requiring among other things that "[d]efendants shall not discuss District policy or business over the telephone with other Board members" and "[d]efendants shall not discuss district policy or business with other District Board members except in public meetings, properly noticed, with specific notice of the subjects to be discussed, called, and conducted." After a review of the evidence the court noted "the evidence does not show a violation of the TOMA . . . because there is no evidence that the board members were using the telephone to avoid meeting in a quorum and thereby circumvent the act. As we noted earlier, this record does not show that a quorum of the Board ever discussed policy or public business over the phone or that more than two members ever discussed the same topic. Moreover, it contains no evidence of polling." Thus the court concluded that the injunctive relief was overly broad. Implicit in the discussion is that

if the evidence had shown a discussion of public policy or business or that polling had taken place then a violation of TOMA might have been shown.

The Federal Courts have also weighed in on the issue. In *Finlan v. City of Dallas,* 888 F.Supp. 799 (N. D. Tex. 1995) the court concluded that an ad hoc committee composed of five city council members (nine constituted a quorum) violated TOMA where the councils own rules made the committee subject to TOMA and the court concluded that a real danger existed that the council would merely "rubber stamp" the decisions of the committee in negotiating a contract for a new arena. Apparently this court concluded that a quorum was not necessary to have a meeting under TOMA.

In *Esparanza Peace and Justice Center v. City of San Antonio,* 316 F. Supp. 2d 433 (W.D. Tex. 2001) the district court also disapproved the notion that the physical presence of a quorum was necessary to conduct a meeting subject to TOMA stating: "[T]he Act would apply to *meetings of groups of less than a quorum where a quorum or more of a body attempted to avoid* the purposes of the Act by deliberately meeting in groups less than a quorum in closed sessions to discuss and/or deliberate public business, and then ratifying their actions as a quorum in a subsequent public meeting." Id @ 35. It seems that the city council considered and approved budget changes holding serial meetings with groups less than a quorum resulting in a consensus memorandum signed by all city council members. According to the opinion the city manager would warn the group when too many council members were present that they risked violating TOMA and then one or more members would leave the meeting (apparently temporarily) to avoid having a quorum. Presumptively the city council and city manager of San Antonio were aware of the act and believed that they were in compliance.

However, most recently the City of San Antonio again found its conduct in question in the appointment of municipal judges. As was its custom, the city council appointed 5 of its 11 members as the Municipal Court Committee to review and make recommendations for the appointment/reappointment of municipal judges. The committee did its work and made written recommendations to the city council. Prior to the council considering the recommendations one councilman wrote to the Plaintiffs/appellants informing them that the committee had not recommended them for reappointment and thanking them for their years of service. At the subsequent council meeting only the three new judges were the subject of any significant discussion. The Plaintiffs sued to void the action of the city council contending that the committee meetings violated the city charter and that the decision of the council was a "rubber stamp" of the recommendations of the committee in violation of TOMA. The trial court disagreed. The position of the city was that the committee was an advisory committee only and that the challenged ordinance was adopted in a proper open meeting by the city. In reversing a summary judgment in favor of the city the appellate court found the evidence raised the issue of whether the committee was a governmental body or subcommittee of a governmental body subject to the act and that the decision of the committee was in practice the decision of the council. In so holding the court noted: "Indeed it would appear that the legislature intended expressly to reach deliberate evasions of these definitions in enacting [section 551.143(a)]". Id. @ 479. The court cites two decision of your office, DM-95 and JC-0307 in support of its statement concerning the provision not at issue in its decision. It may be that the court intended to call attention to the fact that the conduct in question might result in criminal prosecution but the case was seeking a civil remedy. At any rate the remark is hardly useful as a precedent.

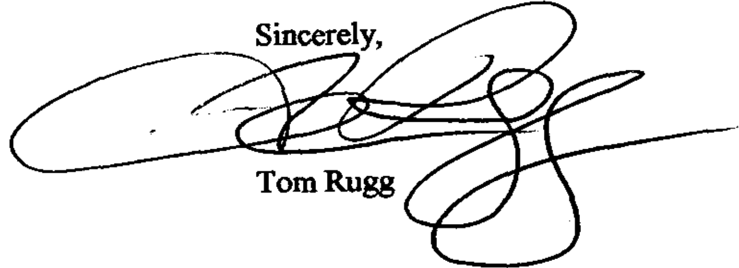
In Opinion No. DM-95 (1992), your office considered whether members of a city council violate the open Meeting Act, *article 6252-17, V.T.C.S.* (hereinafter the "act"), when the members, constituting a majority of the council, sign a letter expressing an opinion on matters relevant to the city government. The question was presented to your office without any factual details concerning the process by which the letter was singed by a majority of the council and so a definitive answer could not be given. However, your office noted the obvious difficulty in the act stating: "A more problematic fact situation occurs when one or more members, but less than a quorum, drafts a letter, and then presents the material (or has the material presented) to the other signatories, always meeting in numbers less than a quorum. In this way a "meeting" and a "deliberation" as defined in the act are arguably avoided because even though the verbal exchange among the council members may at any one time engage less than a quorum of the council, the verbal exchanges do not occur during a meeting where a quorum of members is simultaneously in each other's physical presence." Id. @ page 2. Ultimately your office concluded "[i]f a quorum of a governmental body agrees on a joint statement on a matter of governmental business or policy, the deliberation by which that agreement is reached is subject to the requirements of the Open Meetings Act, and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time. Whether any specific behavior or pattern of behavior constitutes a violation of the act must ultimately be determined by a trier of fact."

In Opinion No. JC-0307 (2000) your office considered whether a non-member of a governmental body could violate the criminal provisions of TOMA by what could be described as facilitating secret deliberations. You concluded that a person would not commit an offense by lobbying members of the commissioners court even if the person informed members of the court of the views held by others. In that same opinion you concluded that a violation of the act would occur if a bill or invoice was circulated among the members of the court until three signatures were obtained and the bill or invoice then forwarded to the auditor for payment. In that opinion you note that apparently the appellate court in *Harris County Emergency Serv. Dist. No. 1. v. Harris County Emergency Corps., supra.*, was of the opinion that the legislature did not intend for the acts definitions to be strictly applied to the criminal provisions, presumptively because so doing renders the criminal provision of section 551.143 meaningless.

Faced with the difficulty of construction of 551.143 we ask that you consider this criminal provision in light of the constitutional requirement that a criminal statute contain an adequate warning of just what conduct is proscribed. Such a statute is said to violate the due process clause of the United States Constitution. *Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972). It is axiomatic that a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law. It is axiomatic that a statute which either forbids or requires the doing of an act in terms so vague that persons of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law. *Ex parte Chernosky, 153 Tex. Crim. 52, 217 S.W.2d 673, 674 (1949).*

So that we may properly advise our public officials and since a high likelihood exists that public officials across the state are faced with the same questions we seek your opinion.

Sincerely,



Tom Rugg