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Open Meetings: Go to Jail? And How to Tweet/Facebook/Text?

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I. Public Officials as Criminals

A. Background of the Current Case

In Texas, the penalty for violating certain provisions of the state's Open Meetings Act is possible time in jail. One section in particular is at issue in an ongoing court battle:

TEX. GOV'T CODE SECTION 551.144: CLOSED MEETING; OFFENSE; PENALTY.

(a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
(1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
(2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
(3) participates in the closed meeting, whether it is a regular, special, or called meeting.

(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.

(c) It is an affirmative defense to prosecution under Subsection (a) that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body.

TEX. GOV'T CODE SECTION 551.001: DEFINITIONS

The term "meeting" in section 551.144 is defined:

(4)(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, ceremonial event, or press conference, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.
The term includes a session of a governmental body.

The Act also defines the term "deliberation":

(2) "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."

One of the attorneys for the plaintiffs, all city councilmembers, in a case challenging the constitutionality of this provision has stated, "The testimony presented by [plaintiffs] on their self-censorship to avoid possible prosecution in the future by a prosecutor who might take a technical view of the requirements of [the Texas Open Meetings Act] was totally unchallenged. Self-censorship is often, but not always, considered the equivalent of a chilling effect." Author's Interview with Mick McKamie. He appears to be concluding that members of a local governing body will not speak about certain matters at all if they cannot speak about them in private.

The plaintiffs have received much criticism in the press for pressing their case this hard (there was a first round of opinions that initially appeared promising for the city officials before the case was dismissed as moot and the opinions were vacated. *Rangra v. Brown*, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006), *vacated by* 576 F.3d 531 (5th Cir. 2009) (granted rehearing en banc), *appeal dismissed as moot*, 584 F.3d 206 (5th Cir. 2009) (en banc)). For example, Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, which filed an amicus brief in that suit, stated, "Sometimes the audacity of public officials and their complete lack of understanding of what it means to be a public servant astonishes me." Jim Hemphill, a newspaper attorney-representative and a member of the board of directors of the Freedom of Information Foundation of Texas, after opining that the Open Meetings promotes the public's right to transparency in government, remarked, "It's kind of ironic that public officials are saying that the First Amendment requires government to be less transparent to the people," Hemphill said. "It seems in some way it's turning the First Amendment on its head." http://www.statesman.com/news/content/news/stories/local/2009/10/15/1015pflugerville.html.

However, a top attorney for the Texas Municipal League argues that cities' concerns are not that they wish to hold "planned, secret meetings to make decisions outside of the public view. The issue is about elected officials communicating with one another to learn about an issue or to discuss whether an issue warrants consideration by the entire governmental body. Those types of discussions are essential for a good and efficient government." Scott Houston, Texas Open Meetings Act, Constitutional? 13 Tex. Tech. Admin. L. J. 79, 80, Fall 2011. As well,

Houston believes, "No one would argue that council members should come to a 'meeting of the minds' on the issues outside of a properly posted meeting, but it should be acceptable for them at least to have a conversation without the threat of jail time." *Id.* at 84.

There are few precedents nationwide on the constitutionality of criminal provisions more serious than fine-only offenses. The court battle referred to above, *Asgeirsson v. Abbott*, 773 F.Supp.2d 684 (W.D. Tex. 2011), is on appeal to the Federal 5th Circuit after the district court found in favor of the Defendant, the State of Texas. Arguments have been made and we are awaiting the result.

B. Nation-wide OMA analysis

Before examining the *Asgeirsson* case, it is helpful to take a broad look at Open Meetings Acts (OMAs) on the state level. (The Federal act, the Sunshine Act passed in 1976, 5 U.S.C. §552b, is weaker as it does not apply to Congress, only federal agencies, and it does not contain any penalties, civil or criminal, or the ability of courts to invalidate actions taken in violation of the Act.)

All states have such OMAs. *See St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 5 (Minn. 1983). Many of these laws have existed for over 50 years, and every state has had an open-meetings statute in effect for at least the last 35 years. See Ann Taylor Schwing, Open Meetings Laws, § 1.1 (2d ed. 2000). More than half of OMAs apply to the state legislature, although many therefore do not. (In Texas, there is precedent that although its proceedings are covered, the constitutional provisions allowing the Legislature to pass its own procedural rules pre-empts the procedural portions of the Texas Open Meetings Act. *See In re Texas Senate*, 36 S.W.3d 119 (Tex. 2000)).

Most states apply a liberal construction of their OMAs to further open government, although often criminal penalty provisions are construed narrowly and one state even construes its entire Act narrowly as a penal statute; *see State v. Patton*, 837 P.2d 483, 484 (Okla. Crim. App. 1992).

Exceptions in state OMAs, allowing discussion in closed session if the circumstances described in the exception exists, vary widely. Texas contains a fair number of exceptions: discussion of pending or contemplated litigation or settlement offers with the attorney for the governmental entity, Tex. Gov't Code § 551.071(1); receipt of any other legal advice from this attorney, as long as discussion on the merits of the issue does not occur, *id.* § 551.071(2); discussion of pending real property transactions when public disclosure might hurt the entity's negotiating position, *id.* 551.072; discussion of personnel matters, except when the discussion concerns a class of employees, or if the particular employee requests discussion in open session, *id.* 551.074; financial information pertaining to a business being recruited by the entity or a possible subsidy being offered such a business, i.e., an economic development exception, *id.* 551.087. Several exceptions relating to public security and emergency management situations have also been passed in recent years. Tennessee, on the other hand, has no personnel or real property exceptions, has a restricted financial exception applying only to trade secrets (the strict federal test), and applies the attorney exception only to discussion of pending litigation and legal

advice in the absence of any deliberation on the topic of advice. *See* Steven J. Mulroy, Sunlight's Glare: How Overbroad Government Laws Chill Free Speech and Hamper Effective Democracy, 78 Tenn. L. Rev. 309, 323-24, Winter 2011. Many other states lack some or most of the exceptions allowed in Texas.

State supreme courts in Illinois, Colorado, Kansas, Nevada, Minnesota, and Tennessee have upheld their States' respective Open Meetings laws against First Amendment attacks, as a federal court has done with the Federal OMA. *See Ctr. for Auto Safety v. Cox*, 580 F.2d 689, 694 (D.C. Cir. 1978).

C. Criminal provision of OMA's

The criminal penalties for violation of the Open Meetings Act being challenged in Texas are far from unique; nineteen states have OMAs with such penalties, and twelve of these states include, as in Texas, a short term of imprisonment as a penalty. Sunlight's Glare, 78 Tenn. L. Rev. at 324 n.95. A criminal provision was struck down on vagueness grounds, as violating the due process clauses of the federal and state constitutions, in the early days of such Acts (few existed before 1970). The Iowa OMA criminalized "meetings of any public agency which are not open to the public" but failed to define or even mention actual "participation" by the members of the governing body of such an agency. The court mentioned other states that sanctioned remaining in attendance at an illegal meeting or that allowed continued participation in such a meeting after recording one's objections in the official minutes of the agency and having these objections overruled. The court also noted the Iowa Legislature had passed a new OMA defining participation by a member this time and granting exceptions if the member voted against the closed session, or who had a good faith belief in the session's validity, or who relied upon the advice of an attorney or court that the meeting was legal. *See Knight v. Iowa Dist. Ct. of Story Cnty.*, 269 N.W.2d 430 (Iowa 1978). However, some commentators believe some current statutes still contain problematic basic problems, such as the failure to require intent or knowledge for civil or criminal penalties. *See, e.g.*, Mandy Duncan, The Texas Open Meetings Act: In Need of Modification or All Systems Go? 9 Tex. Tech. Admin. L. J. 315, 324, Spring 2008 (discussing the Illinois Act).

The Tennessee Supreme Court in *dicta* indicated it would review criminal penalties strictly if they had been in issue: "[the penalties are] limited to citation for contempt for violation of an injunction issued after a finding of failure to comply with the requirements of the Act. Our Act is distinguishable from the acts of some states that prescribe fines, and/or removal from office for violation of the Open Meetings Act. We concede that in states providing such penalties, both freedom of speech and vagueness are more substantial issues." *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976). But no court had confronted the issue head-on whether criminal sanctions, in a well-defined statute, always violate the First Amendment right of government officials, until the *Rangra* and *Asgeirsson* series of lawsuits.

D. Details of Current Case

The *Asgeirsson* case was filed in 2009 by both Texas cities and city councilmembers as plaintiffs after the *Rangra* case was dismissed as moot after the plaintiff councilmembers left office during the pendency of this first lawsuit. *Rangra v. Brown*, 2006 WL 3327634 (W.D. Tex. Nov. 7, 2006), *vacated by* 576 F.3d 531 (5th Cir. 2009) (granted rehearing en banc), *appeal dismissed as moot,* 584 F.3d 206 (5th Cir. 2009) (en banc)). The federal district court dismissed the cities as plaintiffs, holding that they did not possess First Amendment rights as a collective entity in the same way that its citizens or officials did as individuals. This holding was not appealed.

The first and perhaps most important question analyzed by the *Asgeirsson* district court was whether the provision of the Texas Open Meetings Act attacked was a content-based restriction or content-neutral in nature. One commentator has said that the larger question of state OMAs in general being one or the other of these is "surprisingly unclear." Sunshine's Glare, 78 Tenn. L. Rev. at 332. He goes on to note that despite arguments to the contrary, "A court evaluating a free speech challenge to an open meetings law could very easily conclude that its goal is not 'official suppression of ideas' (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389-90 (1992)), nor is it motivated because of disapproval of the ideas expressed in the covered speech. These conclusions would argue for treating the law as content-neutral." He then suggests that OMAs do in fact regulate content of speech, that is, they prevent policy decisions and deliberations, although they do so in a particular location, that is, outside "sunshined" meetings. Yet again, however, he suggests a court might use the "secondary effects" analysis used to uphold certain adult-oriented business location ordinance restrictions such as that arrived at in *Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986), involving increased crime and effects on property values and commerce, here instead dealing with decreasing corruption and increasing trust in public officials. Once more, he hedges this conclusion by hypothesizing that these secondary effects have to be unrelated to the content of the speech, and he wraps this up by stating that the government's purpose is both content-neutral, to keep the public in the know on public issues, and content-based, to stifle public officials' discussion of policy issues!

He does point one case that appears more on point, that being *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which struck down a state supreme court's judicial canon banning judicial election candidates from announcing their views on legal or political issues during the campaign. This ban, however, is obviously broader than the time, place, and manner restriction of OMAs, as he points out.

Back to the Texas statute being challenged.

1. Strict Scrutiny

Perhaps first the IMLA amicus brief filed in support of the plaintiff officials might speak for itself:

"This case is of special importance to *amici* because of its capacity to undermine the First Amendment's protection of public officials' speech. Many individuals across this nation volunteer their time and expertise to serve their local communities as elected and appointed officials. In doing so, these individuals come to understand the requirements of applicable open

government laws. *Amici* do not take exception to the policies underlying open government laws and, in particular, the Texas Open Meetings Act (TOMA); our members understand the importance of and support open government. Open government laws should not, however, impinge on the First Amendment rights afforded to speech by officials made pursuant to their official duties and certainly should not restrict their political expression.

In order to maintain public officials' First Amendment protections, open government laws that restrict and criminalize their speech must be measured against the proper standard. In regard to TOMA's criminal provisions, that means a court must apply strict scrutiny analysis. Because this case will determine the proper standard against which open government laws like TOMA are to measured, the impact of this Court's decision in this matter is of significant interest to amici."

The plaintiffs argued that the criminal provision for an intentional violation of the closed meeting provision was a content-based, chilling restriction on free speech of the elected officials that should be analyzed under a strict scrutiny analysis. They started out behind the eight ball, as it were, when the court decided their challenge was facial, not as applied, as, unlike in *Rangra*, the officials were never indicted under the OMA. *Asgeirsson*, 773 F.Supp.2d at 690 n.3. Therefore, the statute would have to be unconstitutional under most circumstances and applications. Next, the court dealt plaintiffs a further blow by noting that the panel decision in *Rangra*, which initially remanded the case to the district court and held strict scrutiny would apply, was no longer precedential due to the en banc court's dismissal for mootness. *Asgeirsson*, 773 F.Supp.2d at 689 (citing 5th Cir. R. 41.3 and *United States v. Seale*, 577 F.2d 566, 570 (5th Cir. 2009)). That still left, in the court's summary, the plaintiffs arguing that criminal prosecution possibly leading to imprisonment suppressed their free speech in fear of that consequence and that strict scrutiny applied because of the regulations being content-based and/or constituting identity discrimination. *Id.* at 690.

Even if the district court had so agreed and applied strict scrutiny or should the 5th Circuit or other courts hold likewise, and even as the original *Rangra* panel had written, the OMA can be upheld if the speech restrictions are narrowly tailored to serve a compelling government interest. A commentator sympathetic to free speech challenges believes that OMAs requiring a quorum to be present for a violation to occur of a private meeting are "constitutionally defensible" and those just requiring a majority of a quorum to be present are a "middle ground" and a "closer case." He also suggests that those OMAs with personnel, privacy, legal consultation, economic development, and real property exceptions will normally meet this strict scrutiny test while broad OMAs like Tennessee's may well not. Sunshine's Glare, 78 Tenn. L. Rev. at 340-41. Texas's OMA under most analyses should meet his test.

The district court did find that the Texas OMA met strict scrutiny even if the 5th Circuit were to apply this standard on appeal. It rejected the plaintiffs' argument that imprisonment, a punishment in 11 of the 50 state OMA's, was not narrowly tailored. *Asgeirsson*, 773 F.Supp.2d at 704. It did not find the differences in certain state OMAs constitutionally significant based upon Supreme Court precedent. It also agreed with the State of Texas' three arguments for a compelling interest for the Texas OMA: transparency in the government's decision-making process, discouragement of corruption and fraud, and the fostering of trust in the government due

to meetings taking place in the sunshine. *Id.* at 698. A commentator indirectly disputes these findings by discussing studies that found no more empirical corruption in states with supposedly more lenient OMA's than those states with stricter laws. Sunshine's Glare, 78 Tenn. L. Rev. at 358 n.331. In fact, he proposes that stricter laws chill discussion, decrease collegial decision making, reduce the number of public meetings, and shift authority to staff and lobbyists. *Id.* at 360.

This discussion is important. After all, the 5th Circuit panel did apply strict scrutiny, the first court to do so to an OMA, even if its decision is no longer citable. There is certainly a chance the court could so rule again. In that case, the above analysis will come into play, and it is very understandable why the district court included this in its decision—even after it decided intermediate scrutiny would apply instead.

2. Intermediate Scrutiny

The court so held after noting, in different language but similar in substance to the article mentioned above, that "Plaintiffs' challenge…implicates two competing rights: the city council members' right to freedom of speech versus the Texas citizen's right to open government." *Id.* at 694. The court held that it would apply intermediate scrutiny because the regulations were time, place, and manner restrictions and were not based upon the content or subject matter of speech. It further held that the OMA was viewpoint neutral, not prohibiting speech because of the ideas expressed. Again, plaintiffs would disagree and say that certain political, substantive policy speech is being regulated by subject matter, admittedly a broad description, and that the State is prohibiting it because it is often too sensitive to discuss at a public meeting and therefore will not be spoken at all. They would vehemently disagree with the court's assertion that "Texas public officials…are not in danger of having their ideas or viewpoints driven from the marketplace…instead, their election to public office allows them a bullhorn for their ideas." *Id.* at 696.

The court also agrees with the validity of the "secondary effects" test discussed by the commentator above, inserting it as an aside in this "setting the standard" analysis but as a major holding. In an interesting twist, the three arguments discussed above that the State suggested showed the OMA serves a compelling state interest are now said to be the secondary effects needed to be addressed! *Id.* at 698.

The court further buttressed its placement of the OMA in a non-strict-scrutiny category by agreeing with the State of Texas' argument that the OMA was a disclosure law along the lines of the *Citizens United* case so much in the news lately. *Citizens United v. FEC*, 130 S.Ct. 876 (2010). Although that court shot down federal bans on corporate spending (and thus led to the Super PACs that haunt 2012) it upheld the disclaimers and disclosures required for such spending. The district court here held that public officials could be charged criminally if they failed to disclose the information that was discussed at the illegal closed meeting to their constituents. *Id.* at 700. This holding is felt by a plaintiff's attorney to be the key to the case: whether the 5th Circuit finds the OMA provision chills, or whether it finds that is requires disclosure. Author's Interview with Mick McKamie. Several attorneys involved on the plaintiff's side have attacked vehemently the district court's suggestion that councilmembers would not

face criminal charges if they corrected their illegal conduct (holding a closed meeting) by subsequently reconsidering the actions in an open meeting. *See* Texas Open Meetings Act, Constitutional; *see also* Plaintiffs/Appellants' Brief in the 5th Circuit: "The disclosure does not actually correct or undo the body's wrongdoing. Rather, it merely allows the new action to have legal effect where the voidable one could not. *Mayes v. City of De Leon*, 922 S.W.2d 200, 203–04 (Tex. App.—Eastland, 1996)." While this course might be available for a civil violation, it would not serve as a foolproof token of immunity for criminal penalties. One might fight this interpretation by pointing out that no official appears ever to have been imprisoned as a result of this OMA provision in Texas. And so the battle rages.

Finally, in allowing the OMA to meet this easier standard, the court held that no plaintiff was targeted by his or her identity as a councilmember for speech violations. Ironically, this was in part because of the broad reach of the OMA as interpreted by the Texas Attorney General, where even non-councilmembers might violate another provision of the Act we will discuss below applying when a "walking quorum" is attempted to be established. *See* Tex. Att'y Gen. Op. JC-0307 (2000).

The lesser test applied to a content-neutral law, one which regulates time, place and manner, one that combats secondary effects, one that merely requires disclosure. The prongs of the usual test mentioned in the district court's opinion are that it must leave open ample alternative channels of communication and be narrowly tailored to serve a significant government interest, quoting *Serv. Emp. Int'l Union v. City of Houston*, 593 F.3d 588, 596 (5th Cir. 2010). The three compelling interests mentioned above easily meet the second prong. As for the first, the court believed councilmembers could discuss policy with friends, family, and even each other as long as truly less than a quorum was involved. (The plaintiffs fear this latter scenario would put them in danger of imprisonment for attempting to form a walking quorum, a statute not at issue in the case but mentioned below.)

Finally, the OMA is narrowly tailored, according to the court, because it offers the protections mentioned in the commentary above such as numerous exceptions that can be discussed in closed session and an affirmative defense to criminal prosecution for acting in reliance on a city attorney's or attorney general's ruling.

(Interestingly, the State of Texas argues in its brief to the 5th Circuit that **another** standard applies in this case: "As *Citizens United* made clear, a First Amendment challenge to a regulation like section 551.144 imposing a disclosure requirement on speech implicates '**exacting scrutiny**,' and the challenged regulation will therefore be upheld so long as there is 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.' *Citizens United*, 130 S. Ct. at 914" (boldface added)).

3. Overbreadth and Vagueness

The plaintiffs made additional First Amendment arguments that the court rejected claiming the statute was both overbroad and vague. Regarding the first, when a statute restricts a significant amount of speech, it must be struck down unless a limiting construction can save it.

Although most times plaintiffs must show a statute is unconstitutional as applied to them, the overbreadth doctrine "is one of the few exceptions to this principle and must be justified by 'weighty countervailing policies.'…[b]ecause of the wide-reaching effects of striking down a statute on its face . . . we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then only as a last resort." *New York v. Ferber*, 458 U.S. 747, 768 (1982).

Plaintiffs argued that all speech about policy matters was restrained. This would presumably apply to matters they felt they could not discuss in public, as well as exchanges regarding crises that came up between regular meetings of the governing body. The latter argument certainly has some validity, although one might wonder if the council should be the one making quick decisions on the ground rather than the mayor or city manager entrusted with the CEO role in the city.

The State of Texas, on the other hand, saw the possibility of corruption as a valid concern justifying the regulations on speech, again characterizing them as disclosure laws and time, place, and manner limitations. It saw the regulations as expanding communication in regard to the general public and characterized any reduced speech by the Plaintiffs as self-censorship, not censorship caused by the OMA. The court generally agreed with the State, denying that the Plaintiffs had any constitutional right to closed meetings; it further gave instances of social functions, conventions, workshops, ceremonial functions, and press conferences as places where they could speak to fellow councilmembers about non-policy related issues. *Asgeirsson*, 773 F.Supp.2d at 705.

The court then turned to the vagueness question. It used the following test: A penal statute must define the criminal offense with sufficient definiteness so that an ordinary person may understand what conduct is actually prohibited, and the statute must define a criminal offense in a way that does not encourage discriminatory and arbitrary enforcement. *See Kolander v. Lawson*, 461 U.S. 352, 357 (1983). Using the same case's mandate to use the state supreme court's interpretation on a statute's vagueness, the district court cited such a case as clearly delineating any meeting of a physical quorum as a formal meeting subject to the OMA. *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990). *Acker* involved a quorum of the Commission meeting in the men's bathroom between official sessions and discussing business before the board at that session, quite informally, yet this was an illegal closed meeting according to the Texas Supreme Court. Presumably, any meeting such as in a coffee shop by a quorum of a governmental entity would clearly violate this interpretation and the statute would not be at all vague to the ordinary person.

A side discussion about the Texas statute mandating training on the OMA for all new public officials, Tex. Gov't Code § 551.005, and how one could violate it, occurs in the Plaintiffs' and State's briefs. One could argue both that a council member could be given advance warning of what conduct was illegal or, conversely, that the need for training showed that the definition of violations of the Act was sufficiently vague that a layperson could not normally understand it (indeed, the General Counsel for the Texas Municipal League was quoted in the plaintiffs' brief as not fully understanding the OMA himself). One commentator has also stated that a Texas Attorney General article entitled " The Texas Open Meetings Act Made

Easy" that appears on the agency website and runs over 30 pages indicates the futility of understanding the Act. In Need of Modification or All Systems Go? 9 Tex. Tech Admin. L. J. at 327.

The final substantive discussion in the *Asgeirsson* case addresses Plaintiff's arguments that the real vagueness of the OMA comes from its possible application to meetings less than a quorum and the complete shutdown of any face-to-face contact from fear of imprisonment from such meetings. The court in effect told Plaintiffs they were addressing the wrong provision of the OMA; innocent meetings of less than a quorum would not violate any section of the Act, while knowledgeable meetings to set up a "walking quorum" would violate a provision we will study below. *Id.* at 706-07.

At oral argument before the 5th Circuit, a plaintiff's attorney talked in favor of "robust secret speech," and a commentator has suggested it may be "time for some shade." The city councilmembers' brief points out "(they) do not seek permission to make decisions in the proverbial 'smoke-filled room.' Rather, they want only the freedom to speak with their colleagues and their constituents about important issues without fearing criminal prosecution which can result in a jail sentence." Although this plea is pitted against the press's overwhelming calls for open government and sunshine, those in the city attorney world certainly are aware of the real-world, *Realpolitik* arguments that see just the possibility of jail time for private face time as a chilling and debilitating cause. However, so far this argument has not carried the day in the current case, and oral arguments suggest the current panel may not agree with Plaintiffs either; however, the future is unknowable, and review by the full 5th Circuit and perhaps the U.S. Supreme Court are also to come.

2. Meetings without a Physical Presence

Picking up on the last part of the OMA criminal provisions case: the court quoted a Texas Attorney General opinion in rejecting the void-for-vagueness challenge by the Plaintiff City Councilmembers that "[a walking quorum occurs when] members of a governmental body…gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body…[the OMA is violated when] a quorum or more of a body…attempts to avoid the Act's purposes by deliberately meeting in numbers physically less than a quorum in closed sessions to discuss public business and then ratifying its actions in a physical gathering of the quorum in a subsequent sham public meeting." Tex. Att'y Gen. Op. No. GA-0326 (2005) at 2-3 (*quoting Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F.Supp.2d 433, 476 (W.D. Tex. 2001). This opinion concluded that the following statute was not unconstitutionally vague:

TEX. GOV'T CODE SECTION 551.143. CONSPIRACY TO CIRCUMVENT CHAPTER; OFFENSE; PENALTY.

> **(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.

In that *Esperanza* case, city council members passed around a consensus memo on the city budget, which was signed by a quorum of the council, and then the budget was adopted at an open meeting without discussion of the memo's contents. That case used two prior Texas Attorney General opinions: DM-0095 (1992) and JC-0307 (2000). The first concluded that members of a governing body could violate the provision above by circulating a letter and signing it individually without meeting as a physical quorum at any one point. The second, mentioned in the paper above, concluded that both a member of the governing body and a third party non-member could violate the provision above by agreeing to use the third party as a go-between to facilitate secret deliberations between a quorum of members who again were not together physically. All of this precedent has been adopted by a Texas appellate court as well in *Willmann v. City of San Antonio*, 123 S.W.3d 469 (Tex. App.—San Antonio 2003, pet. denied).

GA-0326 interprets the provision above to apply to successive gatherings in order to secretly discuss a public matter and thus establishing a "walking quorum" or "daisy chain of members." What about when there is no physical gathering?

Before consider this question, however, one should examine how the Texas Municipal League interprets these opinions as stated in its *amicus* brief along with IMLA in the *Asgeirsson* case:

> When informing officials of TOMA's requirements, TML attorneys generally abide by the following principles:
>
> A member of a governmental body should not discuss, with another member of the governmental body, matters over which the body has supervision or control outside of a properly posted open meeting.
>
> Phones, electronic mail, and similar devices should not be used among members of the governmental body to discuss policy issues over which the body has supervision or control.
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> A member of a governmental body should avoid discussing public business with less than a quorum of the body outside of a properly posted meeting.
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> A governmental body should adopt a policy governing councilmember communications.
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> City officials subject to TOMA should inquire of their county's prosecutor as to his or her interpretation of TOMA.

These interpretations are not at all unusual. Texas city attorneys may go so far as to advise councilmembers to run out the door when they see another member approaching in the distance; they may advise a number less than a quorum can speak if no further contact is made with other members; they may be more conservative with a "quorum minus two" rule to avoid the possible application of the OMA when a quorum minus one might be considered a "rubber stamp"; they may believe discussion by a quorum of procedural matters such as what items to place on a meeting agenda is fine, while substantive policy discussions are not. *See Harris Co. Emergency Serv. Dist. No. 1 v. Harris Co. Emergency Corps*, 999 S.W.2d 163 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (no OMA violation where telephone discussion was only of agenda item placement, no discussion of policy took place, no more than two members, less than a quorum of three, ever discussed the same topic, and no vote polling took place); Tex. Att'y Gen. Op. No. GA-0717 (2009) (city charter provision allowing majority of council members to call for special meeting did not constitute facial violation of OMA because "deliberations" involving public issues would not necessarily take place); Texas Loc. Gov't Code § 22.038 (allowing quorum of aldermen in a Type A general law city to call special meeting). One recent and subsequently withdrawn request for a Texas Attorney General opinion concerned a press conference, a speech, a crisis simulation, and a candidate forum. *See* RQ-1034-GA (withdrawn). This shows the continuing uncertainty about actual physical meetings of a number less than a quorum and the possible criminal indictment and conviction with imprisonment as a potential penalty.

Yet beyond all this discussion of physical gatherings is the advice given above by the Texas Municipal League: **Phones, electronic mail, and similar devices should not be used among members of the governmental body to discuss policy issues over which the body has supervision or control.** And what about texting, Instant Messaging, Facebooking, Tweeting? All of these concerns obviously go beyond those faced here in Texas. No case has addressed or is addressing 551.043's criminal penalty or reach in the electronic realm. Your state may and probably will be facing such cases. Almost every legal seminar seems to contain a speech on this general topic of cyber-communication and its effects on attorneys today.

Here in Austin the local state prosecutor has recently investigated some members of the Austin City Council for possible violations of Texas open government laws, some if not all involving electronic communications. The city has revamped its communications procedures after this first occurred. As an ongoing matter, there is not a lot to draw from it yet except the obvious: read this paper (which is solely the author's opinions), read TML's and IMLA's guidance papers, read relevant AG opinions and state and federal case law, and beware!