

*Viva Las Vegas*

# **The Proper Use of Executive Session**

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# Open Meetings

Chapter 551 of the Texas Government Code (Texas Open Meetings Act or “TOMA”) requires that meetings of governmental bodies must be open to the public, in accordance with a meeting notice posted a minimum of 72 hours in advance.

# Exceptions – Executive Session

- The TOMA provides 27 exceptions to the open meetings requirement.
- Additionally, occasionally, other statutes provide for an exception to the TOMA.
- For instance, Chapter 418 of the Texas Government Code, which relates to emergencies and disasters, including those caused by terrorists, contains a provision excepting the application of the TOMA to meetings to deliberate information related to Chapter 418.

# Exceptions – Executive Session

- Additionally, Section 41.66 of the Texas Tax Code allows an Appraisal Review Board to meet in closed session if the hearing involves proprietary or confidential information.
- Similarly, the Texas Oyster Council is subject to TOMA but may meet in closed session to deliberate confidential communications and records “relating to the investigation of a food-borne illness that is suspected of being related to molluscan shellfish.” Tex. Health & Safety Code §436.108(f).

# Common Exceptions for Cities

Although there are 27+ exceptions to the open meetings requirement of the TOMA, it is hardly a case where the exceptions swallow the rule. Most of the exceptions are very specific and only arise in certain circumstances.

# Common Exceptions for Cities

## §551.071 – Consultations with Attorney

- Based on the attorney/client communication privilege
- Does not necessarily have to be listed on the agenda to be used

# Common Exceptions for Cities

## §551.071 – Consultations with Attorney

- Governing body may meet in executive session when it seeks the advice of its attorney regarding:
  - Pending or contemplated litigation; or
  - A settlement offer; or
  - On a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional of the State Bar of Texas clearly conflicts with this chapter.



# Common Exceptions for Cities

## §551.071 – Consultations with Attorney

- Must be related to legal issues – can discuss legal aspects of the award of a contract, for example, but may not discuss the contract itself
- Inclusion of any person not part of the attorney/client communication privilege circle waives the privilege

# Common Exceptions for Cities

## §551.072 – Deliberations about Real Property

- A GB may meet in executive session to deliberate the purchase, exchange, lease or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the GB in negotiations with a third person

# Common Exceptions for Cities

## §551.074 – Personnel Matters

- A GB can meet in executive session to:
  - Deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or
  - To hear a complaint or charge against an officer or employee

# Common Exceptions for Cities

## §551.074 – Personnel Matters

- This does not apply if the person who is the subject of the deliberation wants the discussion to be in public
- Applies only to officers and employees, not independent contractors
- Applies only to individual employees, not an entire class of employees
- Important employees or positions must be named on the agenda

# Common Exceptions for Cities

## §551.076 – Deliberations Regarding Security Devices

- A GB may meet in executive session to discuss:
  - The deployment, or specific occasions for implementation, of security personnel or devices, or
  - A security audit

## §551.089 – Very Similar

# Common Exceptions for Cities

## §551.087 – Economic Development Negotiations

- A GB may meet in executive session to discuss commercial or financial information that the GB has received from a business prospect that the GB seeks to have locate, stay, or expand in or near the territory of the GB and with which the GB is conducting economic development negotiations; or
- To deliberate the offer of a financial or other incentive to a business prospect