



THE TEXAS HOUSE OF REPRESENTATIVES

RQ-755

FRED HILL

CHAIRMAN, COMMITTEE ON URBAN AFFAIRS

October 3, 1994

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Opinion Committee

SJS

ML-29661-94
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The Honorable Dan Morales
Texas Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Re: Whether the Texas Open Meetings Act prohibits a council member from calling a quorum of members for the purpose of expressing his views and related questions.

Dear Dan,

A city posits the following questions regarding the Texas Open Meetings Act, Tex. Gov't Code Ann. §551.001 et seq. (hereinafter the "act"):

1. Whether a member of the city council may telephone individually a quorum of the members of the council in order to express his views and/or concerns about public business which has not been formerly considered by the council in an open session without violating the act?
2. Whether the whole series of telephone calls hypothetically posed above violates the act if all, except one, of the quorum of council members contacted remain silent while listening to the council member's views, and the one council member who responds merely asks "why" in response to something that the council member who initiated the call expounds?
3. Whether a violation of the act be cured if the same deliberation which occurred in a closed session is revisited in an open meeting or if the telephone conversations were taped and replayed in the open meeting?

The city is of the opinion that the above referenced questions center around the definition of "meeting" and "deliberation" as defined by the act. Specifically, a "meeting" is defined as a "deliberation between a quorum of a governmental body," and a "deliberation" is defined as "a verbal exchange during a meeting between a quorum of the governmental body." *Id.* at §551.001. Therefore, based upon these definitions, absent a quorum, there is no meeting thereby requiring compliance with the act *Hitt v. Mabry*, 687 S.W.2d. 791 (Tex. App. — San Antonio 1985, no writ) (dissenting opinion). However, in Attorney General's Opinion No. JM-1058, your office surmised that the "physical presence of a quorum in a single place at the same time is *not always necessary* for a violation of the act" and that reliance on the technical definition of

"meeting" and "deliberation" is not a "foolproof insulator" from such requirements. Op. Tex. Att'y Gen. No. JM 1058 (1992). Therefore, based upon such authorities, the city advised its council that the hypothetical posed in first question referenced above would violate the Open Meetings Act if a discussion regarding the public business, which was the subject of the telephone call ensued (i.e., the caller spoke to a quorum of council members about the same matter of public business). However, a council member insists that unity of time and place is necessary in order for the above-posed hypothetical situations to constitute a violation of the act. He argues that absent such unity, a council member would have to keep track of every single conversation with each council member; and before freely speaking with such individual, the council member would need to consult his records in order to determine how many council members, if any, he, as a council member, has conversed on the matter of public business. Furthermore, he contends that it is ludicrous that a council member may place separate telephone calls to two people on the council (not a quorum) to actively "deliberate", but not to three (a quorum).

In the second hypothetical situation described above, the city advised its council that if one member merely asks "why" in response to something that the council member who initiated the call expounds, no deliberations have occurred. Such conclusion was based upon the fact that a council member uttering, "why", "uh", "O.K." or the like is not a substantive or material verbal exchange as contemplated by the act. Therefore, the same cannot be considered a "deliberation". In *Hitt*, an informal telephone poll of the school board was conducted; the board in groups less than a quorum discussed public business; and as a result, the board took action on the matter without an open meeting. Unlike the question posed above, the board not only deliberated on the matter but also acted based upon such decision. Furthermore, convening to receive information without deliberating is consistent with the legislative intent as expressed in Section 551.075 of the act. Tex. Gov't Code Ann. §551.075 (Vernon 1993). Such section allows a governmental body to convene in a closed session in order to either "receive information from a governmental employee; or [to] question an employee." *Id.* The city opines that this provision is analogous to the above-referenced scenarios, and that merely asking "why" is not a material response and therefore again no deliberation has occurred. The city did, however, caution council that any sort of communication between a quorum of the members could be construed as a deliberation, therefore, discussions of public business outside a public meeting should be kept to a minimum.

Lastly, the city is unaware of any provision in the Open Meetings Act which provides for a member of a governmental body to cure a violation of the act. Although deliberation a matter in the very same manner that such subject was previously deliberated in a closed meeting may *seem* to cure the offense, no statutory authority exists establishing such an absolute defense. Sections 551.143 and 551.144 of the Texas Government Code merely establish a penalty and provide that a violation of the act constitutes a criminal offense. Tex. Gov't Code Ann. § § 551.143, 551.44 (Vernon 1993). As such, the city advised council that if a violation of the act occurred, nothing could be done to absolutely cure such violation.

Please advise me concerning the above-referenced questions of the city. Thank you for your attention and assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred Hill", written in a cursive style.

Fred Hill

FH/dmo