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I.D. # 44822

May 23, 2006

Honorable Greg Abbott,
Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Via Certified Mail, R.R.R.,
 # 7006 0100 0006 4010 5372

RQ-0496-GA

Re: Request for opinion regarding proper construction of Texas Government Code Sections 551.074 and 551.144, specifically as to adequacy of notice and inclusion of members of the public in a session closed under Section 551.074, the personnel exception; whether the closed session is permitted under the Texas Open Meetings Act for purposes of Section 551.144 when notice is inadequate; and whether a closed session remains permitted under the Texas Open Meetings Act for purposes of Section 551.144 if members of the public are selectively allowed into the closed session.

Dear General Abbott,

Please accept this letter as a request for your opinion regarding the proper construction of two provisions in the Texas Open Meetings Act (TOMA). Specifically, your opinion is sought on:

1.) the adequacy of notice under Texas Government Code Section 551.074 to authorize an executive session consistent with TOMA when the notice does not specify which subsection the governmental body is relying upon and listed items pertain only to one subsection;

2.) the permissibility of selectively including members of the public (to the exclusion of other members of the public and the exclusion of news media) in a session closed pursuant to 551.074; and

3.) the construction of Texas Government Code Section 551.144 and whether inadequacy of notice and/or the selective inclusion of members of the public into a session closed under 551.074 defeats the exception such that the closed session is not permitted under TOMA for purposes of the criminal offense provision.

A brief discussing this matter follows this page of the request for your opinion. Should you require any further information, please feel free to give me a call at (409) 770-2354.

Sincerely,

Hon. Kurt Sistrunk,
Criminal District Attorney of Galveston County

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Phone:	(409) 766-2355	(409) 766-2364	(409) 766-2379	(409) 766-2429	(409) 766-2373
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Background Information

This Office has become aware of allegations regarding a governmental body convened at a meeting in which a quorum was present where the governmental body posted notice for and announced a session closed pursuant to Tex. Gov't Code § 551.074(a) and then went into closed session. Thereafter, while keeping the meeting closed, it is alleged that the governmental body selected persons from the general public and brought those persons into the closed session to provide input to the governmental body. The matter posted for deliberation in closed session was of significant local interest, i.e., whether to renew the school district superintendent's contract. Accordingly, news media was in attendance at the meeting.

The news media allege that they objected to the closed meeting but the governmental body continued the executive session. As well, it is alleged that the governmental body brought persons from the public into and out of the executive session. It is alleged that the basis for the selection of certain members of the public was that a member of the governmental body would come out to where the public was sitting, ask who wanted to give input (i.e., say something), then people would raise their hands and a person would be chosen to go into the executive session. The news media asked to go into the closed session and was denied entry. Finally, the superintendent did not object to the closed meeting, did not participate in the closed meeting, and did not request an open meeting.

The governmental body reconvened in open meeting after it concluded its executive session and took no action on the item that was posted for deliberation upon in the closed session. At a later meeting, the governmental body took action on the item that had been posted for deliberation upon in the earlier executive session (it renewed the school district superintendent's contract).

This request for decision is precipitated by an assertion that such conduct is permissible under 551.074(a)(2), since a governmental body may conduct a closed session to hear a complaint. The written posted notice for the executive session included both sub-sections of the exception (it recited the statutory provision) and then listed sub-items (a) through (d) under the exception. The posted notice was as follows:

> "Section 551.074 – For purposes of considering the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee or to hear complaints or charges against a public officer or employee
> (a.) Contract extensions of Administrative Staff – Assistant Superintendents, Directors, Principals and Assistant Principals
> (b.) Deliberation regarding evaluation of the Superintendent
> (c.) Consider approval of the Superintendent's contract
> (d.) Discuss duties and responsibilities of the Superintendent and Board members"

Discussion

A core purpose of TOMA is to allow the public access to the actual decision-making process of its governmental bodies.[1] TOMA requires "openness at every stage of a governmental body's deliberations."[2] To this end, TOMA requires every regular, special, or called meeting of a governmental body to be open to the public, unless TOMA provides otherwise.[3]

The provisions that authorize a closed session are referred to as exceptions.[4] Accordingly, a governmental body must find an exception to the general rule of openness if it desires to conduct a closed meeting.[5]

As to adequacy of notice, TOMA expressly requires a governmental body to give written notice of the date, hour, place, and subject of each meeting that it holds.[6]

In construing adequacy of notice under TOMA, it has been held that "notice is adequate as long as it is sufficiently descriptive to alert a reader that a particular subject will be addressed."[7]

It has also been held that "notice should specifically and fully disclose the subjects to be considered at the upcoming meeting."[8] Moreover, "[a]s expected public interest in a particular subject increases, notice must become more specific."[9]

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[1] *See Willmann v. City of San Antonio*, 123 S.W.3d 469, 473 (Tex. App.—San Antonio 2003, pet. denied); *see* Tex. Att'y Gen. Op. No. GA-0326 (2005).

[2] *Esperanza Peace and Justice Ctr. v. City of San Antonio*, 316 F.Supp.2d 433, 472 (W.D. Tex 2001), *citing Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990).

[3] *See* Tex. Gov't Code Ann. § 551.002 (Vernon 2004); *see Tovar v. State*, 978 S.W.2d 584, 586 (Tex. Crim. App. 1998) (en banc).

[4] *See Martinez v. State*, 879 S.W.2d 54, 56 at n.7 (Tex. Crim. App. 1994) (en banc) (in dicta).

[5] *See Tovar v. State*, 978 S.W.2d at 587.

[6] *See* Tex. Gov't Code § 551.041.

[7] *Friends of Canyon Lake, Inc. v. Guadaupe-Blanco River Auth.*, 96 S.W.3d 519, 531 (Tex. App.—Austin 2002, pet. denied).

[8] *Finlan v. City of Dallas*, 888 F.Supp. 779, 790 (N.D. Tex 1995), *citing Cox Enterprises Inc. v. Board of Trustees of Austin I.S.D.*, 706 S.W.2d 956 (Tex. 1986).

[9] *Finlan v. City of Dallas*, 888 F.Supp. at 790, *citing Point Isabel I.S.D. v. Hinojosa*, 797 S.W.2d 176, 180 (Tex. App.—Corpus Christi 1990, writ denied).

In this instance, the governmental body posted notice that it intended to go into executive session pursuant to the personnel exception, 551.074.[10] The posted notice recited the statutory provision for both subsections (1 and 2) (i.e., it recited the statutory provision). Then, the posted notice listed four items directly underneath the recitation of the statutory provision.

The beginning of the posted notice is the mere parroting of the exception.[11] The listed items (a) through (d), which contain the heart of the matter (the subject), do not pertain to hearing a complaint, which is 551.074(a)(2). Rather, the listed items pertain exclusively to 551.074(a)(1).[12] Accordingly, it appears the notice would be adequate for purposes of 551.074(a)(1). However, is the notice adequate for purposes of 551.074(a)(2) (does it inform the reader that the subject of the executive session was to hear a complaint(s) against the superintendent)?

The contents of the written notice are undisputed. Thus, adequacy of notice is determinable as a matter of law.[13]

As well, if notice is adequate and a closed meeting under 551.074 is properly convened, may members of the public be brought into the closed session, and if so, to what

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[10] *See* Tex. Gov't Code § 551.074.

[11] *See generally Finlan v. City of Dallas*, 888 F.Supp. at 790 (mere parroting of exception is no notice at all).

[12] One cannot but help infer that reliance on 551.074(a)(2) may be an after the fact justification. However, TOMA exceptions should not be amenable to *after* the fact manipulation – notice is provided, *in advance* of meetings, so that the reader will understand the subject matter to be considered.

Indeed, as the Texas Supreme Court stated in quoting Justice Brandeis, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990).

[13] *See Friends of Canyon Lake,* 96 S.W.3d at 529.

Moreover, under it is presumed that each word or phrase in a statute is deliberately chosen. *See Ward County Irrigation District v. Red Bluff Water Power Control District*, 170 S.W.3d 696, 700 (Tex. App.—El Paso 2005, no pet. h.).

Thus, we presume that "hearing a complaint" against the school district superintendent (which would be covered under 551.074(a)(2)) is distinguishable from and **not** subsumed under the "evaluation" of the school district superintendent (which is what was posted and which is listed in 551.074(a)(1)).

extent. Your opinion is sought regarding both subsections, 551.074(a)(1) and 551.074(a)(2).[14]

In this regard, in JC-0506, the Attorney General construed the acceptability of including a county auditor into a session of a commissioners court closed under the attorney-client consultation exception, Section 551.071.[15] JC-0506 reiterated the general rule that a governmental body may include a person in a closed session if the person's interests are not adverse to the governmental body's interests and the person's participation is necessary to the matter under consideration.[16] However, JC-0506 also noted that a governmental body has limited discretion under TOMA to determine which, if any, nonmembers may attend a closed session.[17]

Thus, may a governmental body include members of the public into a session closed pursuant to 551.074, and if so, what must the governmental body determine in order to include members of the public? In this instance, it is highly probable that no determination was made regarding whether the interests of the persons from the public was adverse to the school district since the persons were simply selected based on a general question (i.e., who wants to say something) – thus, the particulars of each person's comments would be unknown.

As well, what is the standard for including members of the public specifically under 551.074(a)(2). For example, would the conduct be permissible under TOMA if the governmental body had sent a member out to where the public was, and the member chose persons from the public based on the question of "who has a complaint"?

The exception refers to hearing "a complaint". In this instance, the executive session went on for quite a long time while, it is alleged, numerous persons from the public filed sequentially into and out of the closed session. In addition, must a governmental body have some substantive information regarding the nature of the complaint to properly use the 551.074(a)(2) exception? What inclusion of the public is acceptable under this exception, such that the exception is not used to swallow the rule.[18]

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[14] In this instance, it was proffered subsequent to the meeting that the governmental body was relying upon 551.074(a)(2) and that members of the public may be brought into a session closed under 551.074(a)(2). However, the actual posted notice recited both (a)(1) and (a)(2).

[15] *See* Tex. Att'y Gen. Op. No. JC-0506 (2002).

[16] *See id.* (discussing including the county auditor into a session closed under 551.072 or 551.074).

[17] *See id.*

[18] *See generally City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (discussing the law enforcement exception under the Public Information Act

Finally, this request seeks your opinion on whether inadequate notice of a closed meeting and/or the impermissible inclusion of persons into a closed session raise criminal sanctions under TOMA, specifically Section 551.144.

Section 551.144 hinges on whether a closed meeting is not *permitted* under the TOMA.[19] Accordingly, if notice of an exception is inadequate, is the closed meeting "not permitted" under TOMA for purposes of criminal sanction? Likewise, if notice is adequate and all other procedural steps have been complied with, but persons are included in the closed session whose presence is not authorized, then is the closed meeting no longer permitted for purposes of criminal sanction?

In *Tovar v. State*, a president of a school board was convicted of violating TOMA by calling or participating in an *impermissible* closed meeting.[20] However, the issue in *Tovar* was culpable mental state.[21] As well, in *Tovar*, the closed meeting was "impermissible" because none of the exceptions applied.[22]

Likewise, in *Finlan v. City of Dallas*, the federal District Court noted that if one of the exceptions under TOMA does not apply, then the closed meeting is in violation of TOMA, regardless of whether the governmental body complied with TOMA's procedural steps.[23] *Finlan* involved a case in which taxpayers were seeking an injunction to enjoin an ad hoc committee created by the city council from holding closed meetings – the committee pertained to downtown sports development and the subjects it considered were of substantial public interest.[24] Accordingly, *Finlan* involved determining whether a violation of TOMA occurred for purposes of equitable relief (rather than criminal sanction). Nonetheless, *Finlan* clearly delineates, in agreement with *Tovar*, that if no exception applies, the closed meeting is not permissible.

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and placing limitations on the information covered by the law enforcement exception to avoid having the exception swallow the rule).

[19] "A member of a governmental body commits an offense if a closed meeting is *not permitted* under this chapter...." Tex. Gov't Code § 551.144(a) (emphasis added).

[20] *See Tovar v. State*, 949 S.W.2d 370, 371 (Tex. App.—San Antonio, 1997), *aff'd*, 978 S.W.2d 584 (Tex. Crim. App. 1998) (en banc).

[21] *See generally Tovar*, 978 S.W.2d at 586-587.

[22] *See generally Tovar*, 949 S.W.2d at 371 (in discussion reviewing jury charge).

[23] *See Finlan v. City of Dallas*, 888 F.Supp. at 783.

[24] *See id.*, 888 F.Supp. at 782.

In this instance, an exception was available that would authorize the closed meeting. However, is a closed meeting permissible when the notice for the closed meeting is inadequate? Posting notice is a procedural step necessary to authorize a closed meeting.[25]

In this regard, in *Martinez*, the Court of Criminal Appeals noted that when a closed meeting is authorized, a governmental body must nonetheless comply with TOMA's procedural steps.[26] The issue in *Martinez* was the charging instrument.[27] As well, *Martinez* is distinguishable in that the procedural step not complied with was the governmental body's failure to have a quorum convene in open meeting before retiring into closed session.[28]

Nonetheless, *Martinez* discusses the failure to comply with a procedural step necessary to convene a closed meeting when a TOMA exception for the closed meeting does apply, stating "the governing body must comply with these procedures in order to properly hold a closed meeting. No exceptions exist for a failure to satisfy these [procedural] requirements."[29] Moreover, *Martinez's* analysis was for purposes of criminal sanction.[30]

Finally, in *Carlisle v. Trudeau*,[31] a recent Federal District Court case involving an appeal of summary judgment on an employment lawsuit, the District Court construed two TOMA exceptions, the personnel exception and the consultation with attorney exception, 551.074 and 551.071 respectively. In *Carlisle*, the governmental body posted notice for closed session pursuant to 551.071 and 551.074. The person whose employment was being considered timely objected and requested an open meeting. The governmental body refused and held a closed meeting, stating that it was not required under 551.071 to open the meeting on the employee's request. However, thereafter, the governmental body took adverse personnel action and terminated the employment of the person who objected.

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[25] *See* Tex. Gov't Code § 551.041; *see Weatherford v. City of San Marcos*, 157 S.W.3d 473, 485 (Tex. App.—Austin 2004, pet. denied) (notice requirements also apply to executive sessions).

[26] *See Martinez v. State*, 879 S.W.2d 54, 56 (Tex. Crim. App. 1994) (en banc).

[27] *See id.*

[28] *See id.*

[29] *Id.*, 870 S.W.2d at 56-67. Albeit, the *failure* in Martinez was the failure to first convene a quorum in open meeting – nonetheless, a governmental body must go through the procedural step of posting notice of the closed meeting before recessing into closed session. If inadequate notice serves to satisfy notice requirements, then the core purposes of TOMA will not be served.

[30] *See id.*, 870 S.W.2d at 54.

[31] *Carlisle v. Trudeau*, ___F.Supp.___, 2006 WL 722122 (E.D. Tex. 2006) (opinion issued March 14, 2006).

The District Court held that a fact issue was raised on whether TOMA was violated. Thus, under *Carlisle*, a civil case, a governmental body must actually conduct business consistent with the posted exception and if it does not do so, it has violated TOMA.

As well, construing whether inadequate notice or subsequent conduct means a meeting is *not permitted* for purposes of 551.144 is determinable as a matter of law – that is, statutory construction is a matter of law.[32]

TOMA does not define "permitted." Accordingly, we may look to the plain and common meaning of the words and rely on definitions listed in commonly used dictionaries to discern the plain meaning.[33] In this instance, "permit" is defined as "to consent to expressly or formally", "to give an opportunity", and "to give leave: Authorize".[34] As well, "permissible" is defined as "that may be permitted: Allowable."[35]

Black's law dictionary, in reviewing "permit" as a verb, states, "[t]o suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act."[36] Likewise, Black's Law Dictionary provides that "permission" is "[a] license to do a thing; an authority to do an act which, without such authority, would have been unlawful."[37]

In addition, in construing a statute, words and phrases are to be read in their context.[38] In this instance, "permitted" refers to being "permitted" under TOMA. It is also presumed that the entire statute is intended to be effective and that a just and reasonable result is

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[32] *See Centerpointe Energy Entex v. Railroad Comm'n of Texas*, ___ S.W.3d___, 2006 WL 1041145 (Tex. App.—2006, no pet. h.) (opinion issued April 21, 2006), *citing City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003) (statutory construction is a matter of law which the appellate courts review de novo).

[33] *See Abbott v. North East I.S.D.*, ___ S.W.3d___, 2006 WL 1293545 (Tex. App. Austin—2006, no pet. h.) (opinion issued May 12, 2006); *see generally* Tex. Gov't Code Ann. § 311.011(a) (Vernon 2005) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage").

[34] Meriam Webster's Collegiate Dictionary 866 (10th ed. 1995).

[35] *Id.*

[36] Black's Law Dictionary 1140 (6th ed. 1990).

[37] *Id.*

[38] *See* Tex. Gov't Code § 311.011(a).

intended.[39] "The goal of statutory construction is to give effect to the intent of the legislature."[40]

Finally, it is cardinal that where a statute's language is unambiguous, rules of construction are not to be used to create an ambiguity.[41]

In accord, we ask whether a closed meeting is "not permitted under TOMA" for purposes of Section 551.144 where the notice for the closed meeting is inadequate and/or where the conduct defeats the posted exception.

Your opinion in this matter is requested and greatly appreciated. Thank you in advance for your consideration of this request.

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[39] *See id.* § 311.021(2),(4).

[40] *Centerpointe Energy Entex v. Railroad Comm'n of Texas*, 2006 WL 1041145 at *3.

[41] See *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.* 145 S.W.3d 170, 177 (Tex. 2004), *citing Tune v. Tex. Dep't of Pub. Safety*, 23 S.W.3d 358, 363 (Tex. 2000) (stating, "[w]e must enforce the plain meaning of an unambiguous statute.").

Moreover, the Texas Supreme Court has stated "[w]hen the purpose of a legislative enactment is obvious from the language of the law itself, there is nothing left to construction. In such case it is vain to ask the courts to attempt to liberate an invisible spirit, supposed to live concealed within the body of the law." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.* 996 S.W.2d 864, 866 (Tex. 1999), *citing Dodson v. Bunton*, 81 Tex. 655, 17 S.W. 507, 508 (1891).