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September 25, 2015

Hon. Craig Doyal
County Judge, Montgomery County Texas
501 N. Thompson, Suite 401
Conroe, Texas 77301

Re: *Request for opinion regarding Texas Open Meetings Act and November
2015 Road Bond election*

Dear Judge Doyal:

By written request dated September 23, 2015 and received on September 24, 2015, you requested our office's legal opinion whether alleged violations of the Texas Open Meetings Act has any potential to invalidate the results of the Nov. 3 Road Bond Election on the ballot. This letter is written pursuant to your request and contains our pertinent opinions and authorities.

In reviewing your request for an opinion, we feel that the appropriate issues are (1) whether the action of Commissioners Court on August 24, 2015 calling for a road bond election is voidable under the Texas Open Meetings Act, and (2) can the alleged actions of members of the Commissioners Court and/or others contained in the emails our office has reviewed and released to the media invalidate the action of Commissioners Court on August 24, 2015 calling for a road bond election pursuant to the provisions of the Texas Open Meetings Act.

CONCLUSION(S): It is our strongly held opinion that the action of Commissioners Court in calling for the November 3rd Road Bond Election complied with TOMA and was lawfully made. As a result, we find no basis in law or in fact (including the furnished emails) that would provide for the Commissioners Court's action setting the election to be voided or subject to either mandamus or injunction.

DISCUSSION: In reaching our opinion, we have made an extensive review of the Texas Open Meetings Act, case law and Texas Attorney General Opinions. To clearly state our opinion, it is necessary to provide some general information regarding the Texas Open Meetings Act. The Court in *Foreman v. Whitty* summarized the purpose of the Texas Open Meetings Act:



The purpose of the Texas Open Meetings Act is to enable public access to, and to increase public knowledge of, government decision making. *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex.1991). “The Open Meetings Act was promulgated to encourage good government by ending, to the extent possible, closed-door sessions in which deals are cut without public scrutiny.” *Save Our Springs Alliance, Inc. v. Lowry*, 934 S.W.2d 161, 162 (Tex.App.-Austin 1996, orig. proceeding) (citing *Cox Enters., Inc. v. Bd. of Trustees of the Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 960 (Tex.1986) (“The Act is intended to safeguard the public's interest in knowing the workings of its governmental bodies.”)).

Foreman v. Whitty, 392 S.W.3d 265, 272 (Tex.App.—San Antonio 2012 no pet.).

The Texas Open Meetings Act (“TOMA” or the “Act”) is contained in Chapter 551 of the Texas Government Code. The essential requirement of TOMA is stated in Section 551.002: “Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.” TEX. GOV’T CODE §551.002. In other words, a “closed meeting” violates TOMA unless it is permitted under one of the exceptions, §§ 551.071 through 551.086, inclusive. A “closed meeting” is defined as a meeting to which the public does not have access. TEX. GOV’T CODE §551.001(1)(2001). It has been succinctly stated that “[a] violation of the Act occurs when a quorum of a governmental body meets in private to deliberate over public business.” *Foreman v. Whitty*, 392 S.W.3d 265, 272 (Tex.App.—San Antonio 2012 no pet.). A meeting, as defined in TOMA, is essential before TOMA requirements apply.

TOMA contains two (2) statutory definitions of “meeting”. TEX. GOV’T CODE §551.001(4)(A) & (B). TOMA also contains definitions of “quorum”, “deliberation”, “governmental body” and “open”.¹ TEX. GOV’T CODE §551.001. While it is important to understand the specific meanings of these definitions when analyzing TOMA, a detailed explanation of the definitions is not necessary for the explanation of our opinions.

Chapter 551 of the Texas Government Code containing TOMA is divided into seven (7) subchapters containing approximately 75 sections. The provisions relating to enforcement and remedies for violations are contained in subchapter G consisting of six (6) sections (Sections

¹ Not essential to this opinion but additional support is the definition of “deliberation” meaning “a verbal exchange during a meeting between a quorum of a governmental body ...”. Several courts have concluded that a “verbal exchange” includes only spoken communications. See, *Garner v. Herring*, 21 S.W.3d 767, 771 (Tex.App.—Amarillo 2000, no pet.); *Dallas Morning News Co. v. Bd. Of Trs.*, 861 S.W.2d 532, 537 (Tex.App.—Dallas 1993, writ denied). The Texas Attorney General has opined that “verbal exchange” as used in TOMA and the cited cases do not exclude “all forms of nonspoken exchange, such as written materials or electronic mail,” nor is “verbal” limited to spoken words. Tex.Atty.Gen.Op. JC-0307 (2000). Our opinion does not rely on the cases or AG opinions interpreting the definition of “deliberation” as a result of the conflict on the issue.



551.141 through 551.146, inclusive). Subchapter G provides for both civil and criminal penalties. The relevant civil remedies are found in two (2) sections: §§ 551.141 and 551.142. Only one section of TOMA refers to voidability of action taken in violation of TOMA.

Voidability of action

TOMA provides that “an *action taken by the governmental body* in violation of this chapter is voidable.” TEX. GOV’T CODE §551.141 (V.A.T.S. 2001)(Emphasis added)². Section 551.141 is very specific. Section 551.141 focuses only on the action of the governmental body, e.g. Commissioners Court, and not on the actions of the individual members of the governmental body, e.g. Commissioner(s) and County Judge. It is the official action of the governmental body that must be in violation of TOMA in order to render such action voidable.³

Section 551.441 requires *action* by the governmental body in violation of TOMA. There is nothing to invalidate if there is no action taken by the governmental body. *See, Eudaly v. City of Colleyville*, 642 S.W.2d 75, 78 (Tex.Civ.App.—Fort Worth 1982 writ ref’d n.r.e); *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 182 (Tex.App.—Corpus Christi 1990, writ denied); *Burks v. Yarbrough*, 157 S.W.3d 876,882 (Tex.App.—Houston [14th Dist.] 2005 no pet.)(TOMA §551.141 provides a basis for voiding “specific acts” that violate TOMA). In *Burks*, the former county treasurer alleged TOMA was violated when a quorum of county commissioners and a contractor discussed business during a trip to New York. The discussions were alleged to be improper deliberations, i.e. a “closed” meeting. Later, the Commissioners Court approved the contract with the contractor and payment to the contractor for services rendered at an open, duly noticed meeting. Burks sought to void the payments to the contractor and the travel reimbursements on the basis that the discussions on the trip to New York “tainted” the entire relationship between the county and contractor. The Court refused to void the payments or trip reimbursements because there was no *action* taken during the trip, only deliberations. The actions of the Commissioners Court approving the contract and the reimbursement payments were taken in a proper meeting. In *Burks v. Yarbrough*, the Fourteenth Court of Appeals stated

² “Voidable” means that the action is valid unless set aside by a court. *See, Tex. Atty. Gen. Op. No. JM-985; Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271 (Tex.App.—Dallas 1991, error denied)

³ In contrast, the criminal penalty sections (551.143 through 551.146) refer to actions of the members of the governmental body and/or third parties and not to the governmental body or its action as a body. The criminal sections describe prohibited conduct by “a member or group of members of a governmental body” (551.143), “a member of a governmental body” (551.144 and 551.145), and “an individual, corporation or partnership” (551.146).



The (Open Meetings) Act provides a basis for voiding “specific acts which violate the Act.” *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 182 (Tex.App.—Corpus Christi 1990, writ denied). It does not render any subsequent decision made based on deliberations at a closed meeting voidable. *Hill v. Palestine Indep. Sch. Dist.*, 113 S.W.3d 14, 17 (Tex.App.—Tyler 2000, pet. denied).

157 S.W.3d at 882. *Cf. Hays Cty. Water Planning Partnership v. Hays Co.*, 41 S.W.3d 174 (Tex.App.—Austin 2001 pet. denied)(The lack of action by the commissioners court following an improperly noticed presentation by a commissioner did not “as a matter of law” mean that there was no remedy available)⁴. In short, an improper meeting under TOMA, i.e. a “closed” meeting, does not provide a basis to invalidate subsequent actions taken by the governmental body that relate to the subject matter of the closed meeting.

The “taint” of voidability of an improper closed meeting does not extend beyond the actions, if any, taken in such improper meeting or deliberations. *Hill* at 17 (Decision made to not renew teacher contract at subsequent open meeting not voidable because of prior improper closed meeting where the hearing on teacher contract was conducted). This principle cannot be better illustrated than by *Olympic Waste Services v. City of Grand Saline*, 204 S.W.3d 496 (Tex.Civ.App.—Tyler 2006, no pet). In *Olympic Waste*, the Court found a violation of TOMA due to improper discussion in executive session relating to the merits of a substitute contract with a new vendor. Nonetheless, the Court concluded that the award of a new contract to the substitute vendor (Easley) at the same meeting during open session was not void, stating:

Section 551.141 provides that an action taken by a governmental body in violation of the Open Meetings Act is voidable. TEX. GOV'T CODE ANN. § 551.141. Here, while the discussion that took place in executive session was in violation of the Act, voiding the Easley contract does not follow. The vote awarding the contract to Easley took place in open session, after the violation occurred. The vote was not taken in violation of the Act. Therefore, Olympic is not entitled to the remedy of voiding the Easley contract. *See United Indep. Sch. Dist. v. Gonzalez*, 911 S.W.2d 118, 128 (Tex.App.—San Antonio 1995, writ denied) (*op. on reh'g*).

Olympic Waste at 504. In *Olympic Waste*, the vote in open session occurred immediately after the improper discussion in executive session on the same subject. The improper *act* of

⁴ The Court of Appeals stated *Hill v. Palestine ISD* and other cases were “factually distinguishable” and such cases did not address §551.142. The trial court had found no TOMA violation and therefore did not award the plaintiff relief. The Court remanded the case to the trial court stating “...we express no opinion concerning the relief to which HCWPP (plaintiff) may be entitled.” The Court of Appeals failed to say that “voiding” some action was available; however, given that no action was taken by the Commissioners Court there is no action to overturn.

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deliberation under TOMA occurred in executive session, but the *action of the Commissioners Court* occurred in open session. *See also, Burks v. Yarbrough*, 157 S.W.3d 876 (Tex.App.—Houston [14th Dist.] 2005 no pet.)(Out of town meeting between commissioners and contractor did not void contract and payment authorizations made a subsequent open meeting); *Hill v. Palestine Indep. Sch. Dist.*, 113 S.W.3d 14, 17. *See also, United Independent Sch. Dist. v. Gonzalez*, 911 S.W.2d 118 (Tex.App.-San Antonio 1995), *writ denied*, 940 S.W.2d 593 (Tex.1996)(per curiam)(Violation of TOMA by improper executive session relating to student expulsion did not invalidate expulsion made by vote in open meeting immediately thereafter).

For Montgomery County, the governmental body is the Commissioners Court. To be voidable, the action of Commissioners Court in calling the November 2015 Road Bond Election must violate or fail to comply with TOMA's requirement. The resolution of August 24th was timely and properly noticed and sufficiently described on the agenda. The decision, *i.e.* governmental action, to call for the election was made in open session. Before voting, each member of Commissioners Court made statements on the record in the open session. The vote was taken in open session. The resolution to call for the November 2015 Road Bond Election passed unanimously; two (2) additional resolutions relating to the proposed bond election and County procedures passed but received one "NO" vote. Any previous discussions or meetings held between one or more commissioner court member and/or third parties would not make the subsequent vote in open court voidable under any scenario. *See, Hill v. Palestine Indep. Sch. Dist.*, 113 S.W.3d 14, 17⁵.

For clarity purposes, an additional issue needs to be addressed. In general, TOMA is not violated simply by elected officials in less than a quorum meeting with members of the public on

⁵ *Cf, Esperanza Peace & Justice Center v. City of San Antonio*, 316 F.Supp.2d 433 (W.D.Tex. 2001). *Esperanza* is a federal district court opinion arising from the City of San Antonio's action of deliberation by a quorum by shuffling council members in and out of an office while reaching consensus on budget amendments. The court concluded "[a] clearer manifestation of intent to reach a decision in private while avoiding the technical requirement of the Act can hardly be imagined." 316 F.Supp at 474. The facts of *Esperanza* are egregious and the court analyzed the subsequent open meeting approving budget changes as an attempted "ratification" of the prior closed meeting. On this issue, the federal district court seems to confuse the issue of "ratification" of acts of members of the governmental body with the properly noticed open actions of a governmental body after improper deliberations by some of the governmental body members. *Ferris, Lower Colorado River Auth.* and other cases cited by the court clearly allow valid proper actions to "ratify" invalid actions but state that the "ratification" does not relate back in time to the original action which was invalid due to its own improper notice or other issue. In the "ratification cases" the governmental action takes effect at the time of the later valid action taken at an open meeting. *Esperanza* is often cited relating to the issue of the existence of a quorum/walking quorum and to a lesser extent for "deliberations". It is not cited relating to the "voidability" of the governmental action. The fact pattern and the federal court's analysis is clearly distinguishable from the action relating to the Commissioners Court calling of the November 2015 Road Bond.



public business. In 2000, the Texas Attorney General responded to a question as to whether there was a violation under Section 551.143 of TOMA “when a person urges individual members of a commissioners court to place an item on the commissioners court’s agenda or to vote a certain way on an item on the agenda.” Tex. Atty. Gen. Op. No. JC-0307 (2000). With one caveat, the Attorney General opined that there would be no TOMA Section 551.143 violation absent intent to circumvent the quorum requirement of TOMA.⁶

There simply is no question that the action of Commissioners Court on August 24th voting to hold an election on November 3rd complied with all requirements of TOMA.

Other civil remedies

Section 551.142 of TOMA provides “an interested person” standing to obtain attorney’s fees and civil mandamus or injunctive relief to stop, prevent, or reverse a violation or threatened violation of TOMA by “members of a governmental body”. TEX. GOV’T CODE §551.142(a) (V.A.T.S. 2001). Notwithstanding the use of the term “members of a governmental body”, Section 551.142 has been held to be applicable to suits against the governmental body. *See, Riley v. Comm. Ct. of Blanco Co.*, 413 S.W.3d 774 (Tex.App.—Austin 2013, pet. denied); *Hays Cty. Water Planning Partnership v. Hays Co.*, 41 S.W.3d 174 (Tex.App.—Austin 2001 pet. denied). The effect of Section 551.142 is (1) to provide standing to interested persons, (2) provide additional remedies of mandamus and injunction for TOMA violations, and (3) grant the court discretion to award costs and attorney’s fees to a party who “substantially prevails” in the remedies listed in subsection (a). TEX. GOV’T CODE §551.142(a) & (b).

The remedies of injunction and mandamus in Section 551.142 merely provide equitable remedies to the statutory stated effect of “voidable” in Section 551.141. Unlike its predecessor section, Section 551.142 does not describe any potential result of violations of TOMA’s requirements. As a result, the provisions of Sec. 551.142 would not invalidate or provide a means of invalidating the vote to authorize the Road Bond Election for the same reasons described above that the Road Bond Election may not be voided pursuant to Section 551.141.

Exclusions from Opinion

Our office has not been asked and we have not analyzed the November 2015 Road Bond election with regard to any potential remedies for contesting elections under the Texas Election Code, the Texas Constitution or common law. Our opinion deals only with the potential voidability of the election under TOMA.

⁶ The Attorney General opinion did not address Section §551.141 which is the primary section of TOMA involved in this opinion. Op. JC-0307 dealt primarily with whether a third party could be held criminally liable under §551.143.

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Summary and conclusion(s)

The allegations of improper meetings or communications would not provide a basis for voiding the August 24th Commissioners Court action in calling for the November 2015 Road Bond Election. Section 551.141 of TOMA makes potentially voidable the actions of the governmental body taken in violation of TOMA's requirements. The Commissioners Court action in calling for the November 2015 Road Bond Election was properly noticed, deliberated in open session and voted upon in open session. In short, all the requirements of TOMA were met prior to and in connection with the vote to call for the Road Bond.

Our conclusions are as previously stated and as restated herein: the action of Commissioners Court in calling for the November 3rd Road Bond Election complied with TOMA and was lawfully made. As a result, we find no basis in law or in fact (including the furnished emails) that would provide for the Commissioners Court's action setting the election to be voided or subject to either mandamus or injunction.

Please contact me with any questions.

Very truly yours,

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