

**The Texas Open Meetings Act: Where Are We and How Did We Get Here?**

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## Introduction

Is jail time appropriate for discussions between a quorum of elected officials outside of a meeting? What about discussion amongst less than a quorum? Many state legislators believe so, even though the law doesn't apply to them.

After years of litigation surrounding those questions, one criminal provision in the Texas Open Meetings Act (TOMA or Act) was upheld and another found unconstitutional. The Fifth Circuit Court of Appeals ultimately decided, with the approval of the U.S. Supreme Court, that imprisonment for holding an illegal closed meeting (that is, a meeting among a quorum of a governmental body) does not violate the First Amendment to the U.S. Constitution. On the other hand, the Texas Court of Criminal Appeals concluded that the "criminal conspiracy" provision (that is, "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") was unconstitutional because it was too vague. The legislature immediately stepped in and amended it in an attempt to make it once again enforceable.

All that leaves attorneys who advise elected officials with the same challenge they've had for decades: How to succinctly, but completely, advise those officials about what conversations they can or should have without violating the TOMA.

Hopefully, understanding the specific provisions of the TOMA and, for those who really want to get into the weeds, knowing the background of the legal challenges, will assist with the million-dollar question: "Can I speak to other members of my governmental body outside of a meeting without violating the law?"

## What is a Meeting?

A meeting of a city council, where agenda items are discussed and formal action is taken, is clearly a "meeting" as defined by the TOMA. However, according to the TOMA, many other gatherings of the members of a governmental body may constitute a meeting. Sections 551.001(4)(A) and (B) of the Texas Government Code are the statutory provisions that define whether a gathering of members of a governmental body constitutes a meeting. If the facts of a particular situation fall under *either* of the definitions, the requirements of TOMA will apply, including seventy-two hours notice, a posted agenda, minutes, and other requirements.

For any gathering to be considered a meeting under Section 551.001(4)(A), the following elements must be satisfied:

1. a **quorum** of the governmental body must be present;
2. a **deliberation** (verbal or written exchange) must take place;
3. the deliberation must be between **members of the governing body** or a **quorum of the governing body and any other person**; and

4. the governmental body must have **supervision or control over the topic being deliberated.**

An additional definition of a meeting, Section 551.001(4)(B), was added in 1999 to eliminate the so-called “staff-briefing exception,” which allowed a governmental body to receive information (usually a staff report) from a third person without posting the meeting. The briefings didn’t fall under the first definition because the members of the governmental body never said anything, which meant there was no “deliberation.” The elements necessary to establish a gathering as a meeting under Section 551.001(4)(B) are:

1. a **quorum** of the governmental body must be present;
2. the governmental body **calls** the gathering;
3. the governmental body is **responsible for** or **conducts** the gathering;
4. members of the governmental body **receive information from, give information to, ask questions of, or receive questions from any third person**; and
5. the information concerns **public business** or **policy** over which the governmental body has **supervision or control.**

The following do not constitute meetings under TOMA:

1. 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
2. the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, or the attendance by a quorum of a governmental body at a candidate forum, appearance, or debate to inform the electorate, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, press conference, forum, appearance, or debate.

For example, if a quorum attends a TML regional meeting workshop to learn about the TOMA, that attendance is not subject to the TOMA. In addition, if a quorum attends a cocktail party and does not take formal action or more than incidentally discuss public business, TOMA does not apply.

Several attorney general opinions (also available online at [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov)) and courts have broadly interpreted the definition of a “meeting”:

- **Opinion No. JC-0203 (April 4, 2000)**: If quorum of a governmental body desires to attend the same speaking engagement or lecture, an attending member participates in the discussion, and the deliberation relates to public business or public policy over which the quorum of the governing body in attendance has supervision or control, the attendance will be subject to the requirements of the Act.
- **Opinion Nos. JC-0248 (July 10, 2000) and JC-0308 (November 20, 2000)**: If a quorum of the members of a governmental body attends a meeting or hearing of another

governmental body, and one or more of the attending members testifies, answers questions, or in any manner supplies information, the attending members will be found to have held a “meeting” under the Act. If, on the other hand, any number less than a quorum of the governing body attend the public hearing, no meeting takes place. Similarly, even if a quorum of members of the governing body attends, but no one among them testifies, answers questions, or in any manner furnishes information, the attending members will not have held a “meeting.” (Note: Section 551.0035 of the Act states that “the attendance by a quorum of a governmental body at a meeting of a committee or agency of the *legislature* is not considered to be a meeting of that governmental body if the deliberations at the meeting by the members of that governmental body consist only of publicly testifying at the meeting, publicly commenting at the meeting, and publicly responding at the meeting to a question asked by a member of the legislative committee or agency.” Under that section, a governmental body is generally exempt from complying with the Act *only when it attends a meeting of a legislative committee.*)

- **[Opinion No. JC-0313 \(November 30, 2000\)](#)**: If a quorum of a governmental body attends a meeting of a committee created by the governmental body, and the members of the governmental body “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 entity has authority, the attendance is subject to the requirements of the Act, regardless of whether the members engage in a deliberation. A committee posting indicating that “a quorum of [a city council] ‘may attend’ a committee meeting” complies with the notice requirements of the Act for the city council. *See also* [Op. Tex. Att’y Gen. No. GA-0957 \(2012\)](#).
- **TOMA I, TOMA II (the “Alpine” case), and Doyal First Amendment lawsuits**: Discussed in detail below.

Criminal Penalties under the Act can include fines and/or jail time. TOMA provides that a closed meeting involving a quorum of members is an offense:

Sec. 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.

The above seems clear enough: Don't meet with a quorum of your governmental body to discuss public business outside of a formal meeting. However, the TOMA also makes a communication among less than a quorum a crime in certain circumstances, which is discussed in the next section.

### What is a Prohibited Series of Communications?

The Act also provides that a deliberation among less than a quorum of members can be a crime:

Sec. 551.143. PROHIBITED SERIES OF COMMUNICATIONS; OFFENSE; PENALTY.

(a) A member of a governmental body commits an offense if the member:

(1) **knowingly** engages in at least **one communication among a series of communications** that each occur **outside of a meeting** authorized by this chapter and that concern an issue within the jurisdiction of the governmental body in which **the members engaging in the individual communications constitute fewer than a quorum** of members but **the members engaging in the series of communications constitute a quorum of members**; and

(2) **knew at the time** the member engaged in the communication that the series of communications:

(A) involved or would involve a **quorum**; and

(B) **would constitute a deliberation** once a quorum of members engaged in the series of communications.

(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.

The provision above became effective by virtue of the signing of S.B. 1640 on June 10, 2019. The bill was passed in response to the Texas Court of Criminal Appeals, the state's highest criminal court, striking down the prior "criminal conspiracy provision" in the TOMA. According to the Court in [\*State of Texas v. Craig Doyal\*](#):

A provision of the Texas Open Meetings Act (TOMA) makes it a crime if a member or group of members of a governmental body "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." We conclude that this provision is unconstitutionally vague on its face.

*State v. Doyal*, \_\_ S.W.3d \_\_\_, 2019 WL 944022 at \*1 (Tex. Crim. App. Feb. 27, 2019), reh'g denied (June 5, 2019). In the case, a county judge and two commissioners were indicted for violating the provision when they allegedly engaged in a so-called "walking quorum." That term was used frequently to allege violations of the TOMA, but it was also frequently misunderstood. The "prohibited series of communications" replacement may be a little bit clearer.

A breakdown of the actual elements of the prohibited series of communications crime may be instructive. To be criminally convicted, a member of the governmental body must (knowingly):

1. engage in at least one communication;
2. among a series of communications;
3. that each occur outside of a meeting;
4. among fewer than a quorum of members;
5. but the member knew at the time of the initial communication; and
6. that the series of communications involved or would involve a quorum.

That is quite a bit to digest. Rather than addressing the *Doyal* opinion, the legislature enacted a new criminal provision with (at least) six elements in an attempt to make it constitutional again. The legislature did not in any way address the concurring opinion in *Doyal*, which rightfully opined that: “Stated plainly, ‘[t]his shows that criminal penalties, particularly imprisonment, are not necessary to the proper and effective functioning of open meeting laws.’”

Whether constitutional or not, the new provision may be marginally better for avoiding accidental violations. That’s because the member who speaks to another member about public business must know – at that time – that the other member would discuss it with other members.

Does prior TOMA legal precedent remain instructive? Some of it probably is because many court and attorney general opinions blurred the line by applying both the criminal closed meeting provision and the prior criminal conspiracy provision to fact patterns involving various gatherings. One reason is that the TOMA has been interpreted to apply to situations in which members of a governmental body are not in each other’s physical presence. For example, email communications, texts, social media posts, telephone calls, and written correspondence that ultimately involve a quorum could violate *either* the existing “criminal closed meeting” provision or the new “prohibited series of communications” offense added by S.B. 1640. Here are some examples:

- [\*Esperanza Peace and Justice Center v. City of San Antonio\*, 316 F. Supp. 2d 433, 474 \(W.D. Tex. 2001\)](#): In this case, plaintiffs challenged the adoption of a city’s budget. On the eve of the budget vote, the mayor, city manager, and several councilmembers met in small groups in the city manager’s office to reach a consensus on changes to the city budget. The participants were careful to avoid the physical presence of a quorum. In fact, on several occasions throughout the evening, the city manager told the group that there were too many people together, and they were at risk of violating TOMA. The court held that “the facts of this case present a classic fact pattern of deliberation by a quorum that purposely attempts to avoid the technical definitions of the Act by shuffling members in and out of an office. Clearly, a quorum of council members deliberated and reached agreement concerning the budget...” This fact scenario would likely violate the new “prohibited series of communications” criminal provision because every member of the city council was aware of the other communications taking place.

- [Opinion No. GA-326 \(May 18, 2005\)](#): Coined the term “walking quorum.” This opinion is now likely a throw-away as its conclusions were essentially rejected by the Court of Criminal Appeals in *Doyal* (see discussion below).
- [Harris County Emergency Service Dist. #1 v. Harris County Emergency Corps, 999 S.W.2d 163 \(Tex. App – Houston \[14<sup>th</sup> Dist.\] 1999, no writ\)](#): Indicates that the Act is not violated by two members using the telephone to discuss agendas for future meetings. The record in that case showed “that the board members discussed only what they needed to put on the agenda for future meetings” and that there was “no evidence that the district members were attempting to circumvent the [Act] by conducting telephone polls with each other.” *Harris County*, 999 S.W.2d at 169.

Prior to the decision in *Harris County*, however, the attorney general’s office had stated that “agenda preparation procedures may not involve deliberations among a quorum of members of a governmental body except in a public meeting for which notice has been posted.” [Op. Tex. Att’y Gen. No. DM-473 \(1998\) at 3](#) (conclusory opinion with an incomplete analysis). That opinion dealt with a City of Dallas policy that requires five of fifteen councilmembers to agree to place an item on an agenda. After the *Harris County* case, and in spite of DM-473, it was relatively safe to advise city officials that discussions about whether or not to place an item on a future agenda are clearly permissible. But a 2009 attorney general opinion cites DM-473 with approval. That opinion, which once again called into question any discussions outside of meeting, states that: “As was the case with agenda preparation, the procedures for calling a special meeting under the charter provision may not involve deliberations among a quorum of the city council outside of a public meeting for which notice has been posted.” [Op. Tex. Att’y Gen. No. GA-717 \(2009\) at 3](#) (analyzing fact pattern using both definition of meeting and criminal conspiracy provision).

- **Op. Nos. [DM-95 \(1992\)](#) and [LO-95-055 \(1995\)](#)**: A criminal closed meeting can occur even if the quorum is not physically present in the same location and the discussion does not take place at the same moment in time. This opinion concluded that members of a governmental body may violate the criminal closed meeting provision or the prior conspiracy to circumvent provisions by signing a letter on matters relevant to public business without meeting to take action on the matter in a properly posted and conducted open meeting. That same logic would presumably apply to the new “prohibited series of communications” offense if the members all knew the others would be signing the same letter.
- [Hitt v. Mabry, 687 S.W.2d 791 \(Tex. App.—San Antonio 1985, no writ\)](#): Members of a school board violated the criminal closed meeting provision by deciding to send out a letter to all parents of the school district without discussion of the matter in an open meeting.
- [Op. No. JC-0307 \(2000\)](#): A person who acts independently to urge individual members of a governmental body to place an item on a future agenda or vote a certain way on an item on the agenda does not commit an offense under the Act, even if he or she informs

members of other members' views on the matter. A person who is not a member of the commissioners court may be charged with a violation of Section 551.143 or 551.144 of the Act, but only if the person, acting with intent, aids or assists a member or members who knowingly act to violate the Act. This opinion would also seem to apply to the new "prohibited series of communications" offense and stand for the proposition that members are free to discuss their views with city staff or third parties in almost any circumstance. *But see* Op. Tex. Att'y Gen. No. DM-95 (1992) (The mere fact that two councilmembers visit over the phone does not in itself constitute a violation of either the criminal closed meeting provision or the prior conspiracy to circumvent provisions. However, if city councilmembers are using individual telephone conversations to poll the members of the council on an issue or are making such telephone calls to conduct their deliberations about public business, there may be the potential for criminal prosecution.).

## **The First Constitutional Challenge to the Open Meetings Act**

### **The Background**

In October 2004, a member of the city council in Alpine, Texas, sent an email to other councilmembers asking if they wanted to place an item on a future council agenda. The following day, one of the other councilmembers responded to recipients of the first e-mail, agreeing that the item should be discussed. Here's the actual text of those emails:

*Original E-mail: Avinash, Manuel ... Anna just called and we are both in agreement we need a special meeting at 6:00 pm Monday ... so you or I need to call the mayor to schedule it (mainly you, she does'nt [sic] like me right now I'm Keri's MOM).. we both feel Mr. Tom Brown was the most impressive..no need for interviewing another engineer at this time ... have him prepare the postphonment [sic] of the 4.8 million, get us his firms [sic] review and implementations for the CURE for South Alpine....borrow the money locally and get it fixed NOW....then if they show good faith and do the job allow them to sell us their bill of goods for water corrections for the entire city.....at a later date..and use the 0% amounts to repay the locally borrowed money and fix the parts that don't meet TECQ [sic] standards....We don't have to marry them ... with a life long contract, lets [sic] just get engaged! Let us hear from you both. KT*

*Response E-mail: Hello Katie....I just talked with John Voller of Hibb and Todds of Abilene ... and invited him to come to the Monday meeting.... I asked him to bring his money man also.... these guys work for Sul Ross ... He said ... he will be at meeting Monday....I'll talk with Tom Brown also after my 8:00 class ... Thanks for the advice..... and I'll talk with Mickey as per your, Anna, and Manuel directions ... and arrange the meeting on Monday....We must reach some sort of decision SOOOOOOOOOOOON. Avinash*

The local prosecutor decided that the e-mail exchange violated the TOMA because the emails ultimately involved a quorum of the city council. As a result, two of the councilmembers were criminally indicted by a grand jury.

The two councilmembers who were trying to get an item on a future agenda now have an arrest record and could have been imprisoned for up to six months. The TOMA provides that: “A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly . . . participates in the closed meeting, whether it is a regular, special, or called meeting.” An offense under the TOMA 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.” TEX. GOV’T CODE § 551.144.

Although the indictments were later dismissed, the two councilmembers sued in federal court claiming that the criminal provision of the TOMA infringed upon their right to freedom of speech under the First Amendment. *Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas, Plaintiffs v. Frank D. Brown, 83<sup>rd</sup> Judicial District Attorney, Gregg Abbott, Texas Attorney General, and the State of Texas, Defendants*, P-05-CV-075 (W.D. Tex. Nov. 7, 2006). TOMA, like other states’ open meetings laws, limits government officials’ freedom of speech by providing for certain topics that may not be discussed with certain other people at certain times. Most officials accept that limitation and recognize that it must be balanced with the importance of open government.

But the limitation on their speech raised an important question: What penalty should be imposed on a government official who commits a violation? In Texas, the penalty can be imprisonment. Several other states, including Arkansas, California, Florida, Hawaii, Illinois, Michigan, Nebraska, Nevada, North and South Dakota, Oklahoma, South Carolina, and Utah, also provide for imprisonment as a penalty. ARK. CODE 25-19-104; CAL. GOV’T CODE § 54950.5; FLA. STAT. § 286.011; HAW. REV. STAT. § 92-13; 5 ILL. COMP. STAT. 120/4 (2006); MICH. COMP. LAWS § 15.272; NEB. REV. STAT. § 84-1414; NEV. REV. STAT. § 241.040; N.D. CENT. CODE § 44-04-21.3; OKLA. STAT. tit. 25, § 314; S.C. CODE § 30-4-110; S.D. CODIFIED LAWS § 1-25-1; UTAH CODE § 52-4-1. That leaves thirty-six states in which violations are punished by some other means, such as a civil or criminal fine.

### **The District Court’s Ruling**

On November 7, 2006, the judge issued his ruling. The following summed up his holding:

*Because the speech at issue is uttered entirely in the speaker’s capacity as a member of a collective decision-making body, and thus is the kind of communication in which he or she is required to engage as part of his or her official duties, it is not protected by the First Amendment from the restrictions imposed by the Texas Open Meetings Act.*

In other words, the district court concluded that, when a person accepts public office, his or her constitutional rights are limited. The decision cited a Kansas Supreme Court opinion upholding the constitutionality of that state’s open meetings laws. In the Kansas case, actual secret meetings were prearranged, planned, and carried out for the purpose of deliberations and decisions that were not open to the public. *State ex rel. Murray v. Palmgren*, 646 P.2d 1091, 1099 (Kan. 1982).

In addition, the Kansas Open Meetings Act does not have criminal penalties, only the possibility of a civil fine of no more than \$500. Those are not the same facts as the Texas case.

The judge also relied on the U.S. Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) for the proposition that government can restrict elected officials' speech in the same way as it can restrict public employees' speech. (*Garcetti* relied on the *Pickering/Connick* employee speech precedent. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 147 (1983).) The Alpine officials appealed to the U.S. Court of Appeals for the Fifth Circuit.

### **The Fifth Circuit Panel Decision**

In April 2009, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit released its opinion. *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009). The panel held that district court incorrectly applied the *Pickering/Connick* analysis to the case:

*Indeed, the Supreme Court's decisions demonstrate that the First Amendment's protection of elected officials' speech is robust and no less strenuous than that afforded to the speech of citizens in general. Further, the [U.S. Supreme] Court reaffirmed that "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.*

According to the panel, the district court assumed that there is no meaningful distinction between the speech of elected officials and that of public employees and held that, under *Garcetti*, the plaintiffs' speech pursuant to their official duties was not protected by the First Amendment. See *Garcetti*, 547 U.S. at 421. The panel disagreed, and opined that "[w]e agree with the plaintiffs that the criminal provisions of TOMA are content-based regulations of speech that require the state to satisfy the strict scrutiny test in order to uphold them." *Id.* at 521. They concluded that the penalty provision of TOMA is "content-based" because whether a quorum of public officials may communicate with each other outside of an open meeting depends on whether the content of their speech refers to "public business or public policy over which the governmental body has supervision or control." *Id.* at 522.

The panel's opinion was based largely on *Jenevein v. Willing*, 493 F.3d 551, 557-58 (5th Cir. 2007) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002)). In that case, the Fifth Circuit applied the strict scrutiny test to a state judiciary commission's order censuring an elected judge's speech and concluded that, because the order was based on content, it violated the judge's First Amendment right. The censure order, which disciplined the judge for holding a press conference at which he addressed alleged abuses of the judicial process by lawyers in a pending case, shut down all communication between the elected judge and his constituents. See *id.* at 556-58. The court held that the censure order, in substantial part, was an unconstitutional, content-based restriction of the elected official's speech because the state had failed to prove that it was narrowly tailored to further a compelling state interest. See *id.* at 559-60.

The panel ultimately reversed the district court's judgment and remanded the TOMA case for the application of strict scrutiny review.

### **The *En Banc* Dismissal**

Shortly after the opinion was issued, both parties filed for rehearing *en banc*. The State of Texas argued that the panel's decision should be overturned. The city officials argued that no additional trial proceedings were necessary and that the court should simply declare the criminal provision of TOMA unconstitutional.

The court granted both motions, and was set to hear oral arguments. However, the court dismissed the case on September 10, 2009, by a sixteen-to-one decision without hearing oral arguments. The case was dismissed for lack of standing. The plaintiff is no longer a city official (he was term-limited as a councilmember), and the court in a one-sentence order deemed the case moot. *Rangra v. Brown*, 584 F.3d 206, 207 (5th Cir. 2009) (The lone dissenting justice chided the other members of the court for doing so. *Id.* at 207 (Dennis, J., dissenting)).

## **The "TOMA II" Challenge**

### **The Background**

Because of the dismissal of the first case, several city officials agreed to serve as new plaintiffs to "start over" at the district court with a new lawsuit based on the same legal principles. See *Asgeirsson v. Abbott* (TOMA II), 773 F. Supp. 2d 684, 688 (W.D. Tex. 2011). The plaintiffs in TOMA II filed their lawsuit at the end of 2009 and argued that the Act is facially overbroad and unconstitutional as applied. They sought a declaratory judgment and injunction against the state, which prevented the criminal provisions of the Act from being enforced because those provisions violate the First Amendment—both on its face and as applied.

### **The District Court Ruling**

The court held a bench trial in November 2010. Several city officials testified at the trial. The attorney general's attorneys cross-examined those witnesses but put on no evidence of their own.

On March 25, 2011, Judge Junell issued his ruling. After a finding that the parties "stipulate[d] that the substantive legal issues of this case [were] the same as those tried before this Court in the Alpine Case, he addressed one of the key issues in the case." That issue was whether the three-judge panel decision in the previous suit, which held that strict scrutiny should apply to the dispute, had precedential value.

The city official plaintiffs pointed out that legal scholars, judges, and attorneys had already cited the panel decision as precedent. Further, the plaintiffs contended that, although the Fifth Circuit ultimately dismissed the Alpine Case on mootness grounds, the decision to dismiss did not invalidate the panel decision. Judge Junell disagreed and concluded that the panel decision had no precedential value. In an interesting move, however, he covered his bases by addressing the constitutionality of the Act under the strict scrutiny standard anyway. The plaintiffs sued as an

“as-applied” challenge to the Act. That simply meant that they believe TOMA, as applied to each of them, is unconstitutional. The defendants argued that, because none of the plaintiffs had ever been indicted under TOMA, the suit is actually a “facial challenge.” That means the TOMA would be unconstitutional regardless of whether it has ever applied to anyone. The court concluded the challenge was facial because the plaintiffs were not indicted under TOMA. The distinction is important because, under a facial challenge, a plaintiff must show that the law in question prohibits “a substantial amount of protected speech” for it to be unconstitutional.

### *Content-Based Analysis*

The court acknowledged the difficulty in balancing a public official’s right to freedom of speech and the citizens’ right to open meetings. *Id.* at 694. In doing so, however, it cited to Supreme Court precedent holding that “[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Id.* at 695. Further, the court reasoned that a “permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.” The court concluded that TOMA is a permissible time, place, and manner restriction, and ruled that it does not unconstitutionally ban the free speech of public officials. According to the court, the Act is:

. . . content-neutral because: (1) [it] is viewpoint neutral-the regulation does not prohibit certain speech because of the ideas expressed; (2) [it] does not prevent speech from reaching the [public]; (3) [the purpose of the law] is unrelated to a desire to suppress speech . . . ; and (4) [its requirement that speech be disclosed at an open meeting] does not suppress speech.

*Id.* at 696. “Plaintiffs are merely asked to limit their group discussions about these ideas to forums in which the public may participate.” *Id.* Oddly, the court also “bootstrapped” its decision by applying First Amendment law relating to sexually-oriented business. *Id.* (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

The court cited the case of *City of Renton v. Playtime Theatres, Inc.* for the proposition that “a law that appears to be content-based on its face [is considered] content-neutral when the regulation is justified by a content-neutral purpose” (e.g., prohibiting crime around sexually oriented business or prohibiting secret meetings). This means the Texas legislature presumably intended for the Act to prohibit the negative effects of having “secret” meetings, so it is thus acceptable to limit the speech of an individual to accomplish that goal. The negative effects of closed meetings, according to the court, are that “(1) closed meetings prevent transparency; (2) [they] encourage fraud and corruption; and (3) [they] foster mistrust in government.”

“Thus, at no point are members of governmental bodies . . . prevented from speaking. Public officials are allowed to talk about any topic they please [and] are only required to disclose [their speech to their constituents].” Based on its findings, the court applied intermediate scrutiny to TOMA’s criminal provisions. *Id.* at 701.

### *Intermediate Scrutiny/Strict Scrutiny Analyses*

“Content-based speech prohibitions receive strict scrutiny from courts determining a statute’s constitutionality.” *Id.* at 694. “However, content-neutral statutes that minimally affect speech rights are examined under intermediate scrutiny.” *Id.* Under intermediate scrutiny, “content-neutral laws must (1) ‘leave open ample alternative channels of communication’ and (2) be ‘narrowly-tailored to serve a significant government interest.’” *Id.* at 701. The court concluded that TOMA meets criteria (1) because a council that holds an illegal closed meeting “can correct their violation [at] a subsequent open meeting.” *Id.*

In a civil context, that conclusion might make sense. But in the criminal law sense, it appears to be incorrect. Why? Because once the closed meeting occurs, by accident or otherwise, the officials met the elements of the crime. A public official is then subject to prosecution, at the discretion of the prosecuting attorney.

The court continued the analysis by stating that city council members can “even discuss public business one-on-one with their fellow city council members as long as they do not knowingly conspire to circumvent [TOMA].” *Id.* at 701.

As for whether TOMA is narrowly-tailored to serve a significant government interest, the court concluded that, because a city official can rely on an attorney general opinion or the city attorney, he or she is protected from prosecution for actions that might otherwise be crimes under the Act. *Id.* at 703. TOMA does provide an affirmative defense to prosecution for reliance on those things, but that does not prohibit a prosecutor from seeking an indictment and even moving forward with a trial.

Even though the court concluded that no court in the nation has ever applied strict scrutiny to any of the fifty states’ open meetings laws, it applied that standard to this case. *Id.* at 695 (citing *Hays Cnty. Water Planning P’ship v. Hays Cnty.*, 41 S.W.3d 174, 181-82 (Tex. App.—Austin 2001, no pet.) (“However, we see no restriction of the right of free speech by the necessity of a public official’s compliance with the [Act] when the official seeks to exercise that right at a meeting of the public body of which he is a member.”)). Judge Junell applied the standard to show that, even if the plaintiffs appealed the case, and the Fifth Circuit Court of Appeals required him to apply it, he would still uphold TOMA as constitutional.

To pass strict scrutiny analysis, the government must show that the regulation (1) serves a compelling state interest and (2) is narrowly-tailored. The court briefly explained why the Act would meet the higher standard based on the same conclusions it applied to intermediate scrutiny.

#### *Overbreadth/Vagueness Analysis*

The court heard testimony from city council members that the Act suppresses their speech at social functions. Many public officials clearly have this worry. Judge Junell dismissed this fear by quoting from Section 551.001 of the Act, which provides that if a quorum attends a social function and does not take formal action or more than incidentally discusses public business, the Act does not apply. *Id.* at 705. The court also heard from council members who do not talk to

each other – even individually – outside of open meetings because of the fear of establishing a “walking quorum.” Judge Junell also dismissed these complaints by stating that, so long as the council members do not “knowingly conspire to circumvent [the Act],” they are not committing a crime. *Id.* at 706. That statement was based on the criminal conspiracy provision in that TOMA, which was found unconstitutional in 2019 and is discussed in more detail below.

An attorney advising a governmental body could use some of the language in the opinion to argue that one-on-one conversations are acceptable; council members “do not violate [the Act] when they communicate with their fellow city council members . . . one-on-one by phone or e-mail about public business outside of a quorum.” *Id.* at 707 (citing Tex. Gov’t Code Ann. § 551.143(a) (West 2004)). However, doing so may not be the safest advice.

On August 11, 2011, the plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit.

### **The Fifth Circuit Panel Decision**

Oral arguments were heard in April 2012 in Houston. A three-judge panel asked numerous questions of both sides, including whether TOMA merely limits the time and place in which elected officials speak, or whether it actually prohibits them from speaking. In addition, one judge noted that every state has an open meetings law, and that this is the first challenge of its type. The plaintiffs responded that most states do not include jail time as a punishment for speech, as Texas does.

In September 2012, a three-judge panel issued its opinion. *Asgeirsson v. Abbott*, 696 F.3d 454, 460 (5th Cir. 2012). In short, the city officials lost. The trial court had ruled that the Act is a valid “time, place, and manner restriction.” In other words, the trial court concluded that the Act does not limit what city officials can say (i.e., the content of their speech), but merely limits when and where they can say it (e.g., at a properly-posted open meeting). The Fifth Circuit upheld the trial court’s ruling, and the court analogized TOMA to regulations that govern the operation of sexually oriented business.

In *Renton v. Playtime Theaters*, the court upheld a zoning ordinance that was facially content-based because it regulated only theaters showing sexually explicit material. The court reasoned that the regulation was content-neutral because it was not aimed at suppressing the erotic message of the speech but instead at “secondary effects,” such as crime and lowered property values, that tend to accompany such theaters. In other words, the court concluded that a regulation is not content-based merely because the applicability of the regulation depends on the content of the speech. A statute that appears content-based on its face may still be deemed content neutral if it is justified without regard to the content of the speech.

The Fifth Circuit applied the same logic to TOMA. It held that – even though the Act applies only to speech that relates to public business (i.e., it is “facially content-based”) – it is aimed at prohibiting the secondary effects of closed meetings. According to the court, closed meetings: (1) prevent transparency; (2) encourage fraud and corruption; and (3) foster mistrust in

government. 696 F.3d at 461. Those justifications are unrelated to the messages or ideas that are likely to be expressed in closed meetings.

The court held that, if a quorum of a governing body were to meet in secret and discuss knitting or other topics unrelated to their powers as a governing body, no harm would occur. That situation is analogous to *Playtime Theaters*, in which adult movie theaters attracted crime and lowered property values, but not because the ideas or messages expressed in adult movies caused crime.

Footnote 13 in the opinion cites an *amicus curiae* brief:

*In its brief as amicus curiae, the Texas Municipal League offers other situations in which TOMA arguably could prohibit constitutionally-protected speech. For example, amicus mentions a situation in which a city council member is prohibited from attending a civic event at which a fellow member who is running for re-election will be speaking about public-policy issues. Amicus argues that that is prohibited, because it is a quorum discussing government policy at an event not open to the general public.*

*The potential situations listed, however, are not from actual cases but are only examples of advice attorneys have given to local government officials. Furthermore, such broad interpretations of the law are suspect, given that TOMA appears to exclude such gatherings from its definition of “meeting”:*

*[“Meeting”] 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.*

While the footnote could be used to defend against prosecution, it doesn't change the fact the governmental officials should exercise caution at any event in which a quorum of their governmental body is present and public business is being discussed. The court's opinion may not take into account the broad interpretations of the Act by the attorney general and some prosecutors.

The opinion was appealed directly to the U.S. Supreme Court.

### **The U.S. Supreme Court**

In March 2013, the U.S. Supreme Court denied the petition for writ of *certiorari*. *Asgeirsson v. Abbott*, 133 S. Ct. 1634, 185 L. Ed. 2d 616 (2013). The court's denial brought eight years of litigation to a close. The legal result of the court's decision is that the Fifth Circuit's opinion upholding the criminal closed meeting provision in the Act is the law of the land in Texas.

The practical result is that attorneys for governmental bodies are still left trying to properly advise on the legality of speaking with other members outside of a properly-posted open meeting. Government officials were now left in the same place as before the appeal: They should use caution when communicating outside of an open meeting to avoid possible criminal prosecution.

## **The Doyal Challenge**

### **The Court of Criminal Appeals Opinion**

In 2019, the Texas Court of Criminal Appeals, the state's highest criminal court, struck down the criminal conspiracy provision in the Texas Open Meetings Act. According to the Court in *State of Texas v. Craig Doyal*:

A provision of the Texas Open Meetings Act (TOMA) makes it a crime if a member or group of members of a governmental body “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.” We conclude that this provision is unconstitutionally vague on its face.

*State v. Doyal*, \_\_ S.W.3d \_\_\_, 2019 WL 944022 at \*1 (Tex. Crim. App. Feb. 27, 2019), reh'g denied (June 5, 2019). In the case, a county judge and two commissioners were indicted for violating the provision when they allegedly engaged in a so-called “walking quorum.” The criminal punishment could have included up to a \$500 fine and six months in jail.

Rather than mount a substantive defense, attorneys for the county officials challenged the underlying statute as an unconstitutional restriction on the officials' First Amendment right to freedom of speech. In a hearing at the trial court, municipal attorneys testified to the criminal conspiracy provision's vagueness, and city officials testified as to their confusion about who they can talk to and when.

Recognizing the League's “friend of the court” brief, which was filed “to inform the Court how city and county officials desperately need guidance as to what they can and cannot do,” the court rejected the attorney general's prior opinion, Tex. Att'y Gen. Op. GA-0326 (2005), on the subject. *Id.* at \*2, fn. 9. The opinion struck down by the court referred to “a daisy chain of members the sum of whom constitute a quorum” or a “walking quorum.” *Id.* at \*8.

Those terms have been thrown around now for years and have proved alarming to elected officials. The court stated that, “(e)ven if the statute could be limited to a ‘daisy chain’ of meetings or a ‘walking quorum,’ there are a number of different ways in which those concepts could be defined, and there is disagreement on whether certain situations qualify.” *Id.*

To further cast doubt on the attorney general's opinion, the court explained in a complex series of hypotheticals that an elected official's job is essentially to communicate with his or her colleagues. That's why the law is a problem:

To pass constitutional muster, a law that imposes criminal liability must be sufficiently clear to: (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited; and (2) establish determinate guidelines for law enforcement. Greater specificity is required when First Amendment freedoms are implicated because ‘uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas are clearly marked.’

*Id.* at \*5. “Steering wide of the unlawful zone” is exactly what city officials have been doing for years. Because municipal attorneys couldn’t sufficiently explain what a mayor or city councilmember could discuss with another councilmember outside of a meeting in which a quorum is present, the default, conservative advice was “don’t talk about public business outside of a properly-posted open meeting.” That default is exactly what the First Amendment is designed to prevent. According to the court, the statute before us is “hopelessly indeterminate” by being too abstract:

A broad view of what constitutes a ‘walking quorum’ would constrain one-on-one lobbying for votes or even one-on-one discussions . . . [w]e do not doubt the legislature’s power to prevent government officials from using clever tactics to circumvent the purpose and effect of the Texas Open Meetings Act . . . . But the statute before us wholly lacks any specificity . . . we conclude that § 551.143 is unconstitutionally vague on its face.

*Id.* at \*9. A [concurring opinion](#) went even farther. It did not agree that the law is void for being vague, but it found that the law:

‘abridg[es] the freedom of speech’ in violation of the First Amendment of the United States Constitution. By criminalizing all policy discussions by a quorum of members of a governmental body outside the context of a formal meeting, the statute significantly infringes on the rights of governmental officials to engage in the free exchange of ideas that are essential to effective governance. The State has not established that this sweeping regulation prohibiting even informal policy discussions outside of a formal meeting is necessary to achieve its interest in maintaining an open and transparent government.

While everyone seems to agree that the government may validly regulate conduct that would amount to secret and/or corrupt decision-making outside the public eye, Section 551.143 goes far beyond that by prohibiting even informal deliberations which might aid governmental officials in learning about issues and perspectives ahead of a formal vote. Because of this, rather than advancing the government’s interests in effective government, Section 551.143 arguably undermines the broader purpose of TOMA to ensure effective representation for all citizens.

Further, due to the significant threat of criminal sanctions, Section 551.143 operates to chill even more speech than is already encompassed within the statute’s broad scope. Many public officials, out of fear of even just being accused of a TOMA violation, avoid communicating with each other or even being seen together outside of an official

meeting. This chilling effect results in a significant infringement upon the rights of public officials to communicate one-on-one regarding policy issues.

Stated plainly, '[t]his shows that criminal penalties, particularly imprisonment, are not necessary to the proper and effective functioning of open meeting laws.'

*Id.* at \*21.

### **The Legislature Reacts to *Doyal***

Because the Texas Court of Criminal Appeals decided *Doyal* while the Texas legislature was still in session, the legislature reacted by passing S.B. 1640. Senator Kirk Watson (D – Austin) introduced the bill to rewrite the criminal provision in a constitutional way. S.B. 1640 passed and Governor Abbott signed it into law on June 10, 2019, with an immediate effective date. It modified the definition of “deliberation” to include written communications and rewrote the criminal conspiracy provision found unconstitutional by the Court of Criminal Appeals.

The criminal provision in Texas Government Code Section 551.143(a) now reads that it is an offense if a councilmember:

1. knowingly engages in at least one communication among a series of communications that each occur outside of a meeting authorized by this chapter and that concern an issue within the jurisdiction of the governmental body in which the members engaging in the individual communications constitute fewer than a quorum of members but the members engaging in the series of communications constitute a quorum of members; and
2. knew at the time the member engaged in the communication that the series of communications:
  - a. involved or would involve a quorum; and
  - b. would constitute a deliberation once a quorum of members engaged in the series of communications.

A violation of Section 551.143 is punishable by a fine of not less than \$100 or more than \$500, confinement in the county jail for not less than one month or more than six months, or both fine and confinement.

### **Conclusion: Some Confusion Remains**

Most government attorneys in Texas agree that government officials subject to the TOMA are frequently confused about whether they can communicate – either in person, on the phone, or electronically – with other members of their governmental body outside of a properly-posted meeting.

Advice relating to intentionally-planned, secret meetings to make decisions outside of the public view is easy. Those would clearly violate the TOMA. But what about one-on-one conversations with less than a quorum? Legal advice is difficult because the “prohibited series of communications” criminal provision is so new. Adding to the confusion, prior precedent

interpreting the criminal conspiracy provision is no longer controlling, but some of it is still relevant. The bottom line is that a member of a governmental body should be fine having a casual conversation with a fellow member outside of a meeting. Of course, whether any particular fact-pattern violates the Act is up to the local prosecutor in the first instance, and a judge or jury in the last.