

## IX. Closed Meetings

### A. Overview of Subchapter D of the Open Meetings Act

The Act provides certain narrowly drawn exceptions to the requirement that meetings of a governmental body be open to the public.<sup>347</sup> These exceptions are found in sections 551.071 through 551.090 and are discussed in detail in Part B of this section of the *Handbook*.

Section 551.101 states the requirements for holding a closed meeting. It provides:

If a closed meeting is allowed under this chapter, a governmental body may not conduct the closed meeting unless a quorum of the governmental body first convenes in an open meeting for which notice has been given as provided by this chapter and during which the presiding officer publicly:

- (1) announces that a closed meeting will be held, and
- (2) identifies the section or sections of this chapter under which the closed meeting is held.<sup>348</sup>

Thus, a quorum of the governmental body must be assembled in the meeting room, the meeting must be convened as an open meeting pursuant to proper notice, and the presiding officer must announce that a closed session will be held and must identify the sections of the Act authorizing the closed session.<sup>349</sup> There are several purposes for requiring the presiding officer to identify the section or sections that authorize the closed session: to cause the governmental body to assess the applicability of the exceptions before deciding to close the meeting; to fix the governmental body's legal position as relying upon the exceptions specified; and to inform those present of the exceptions, thereby giving them an opportunity to object intelligently.<sup>350</sup> Judging the sufficiency of the presiding officer's announcement in light of whether it effectuated or hindered these purposes, the court of appeals in *Lone Star Greyhound Park, Inc. v. Texas Racing Commission* determined that the presiding officer's reference to the content of a section, rather than to the section number, sufficiently identified the exception.<sup>351</sup>

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<sup>347</sup> TEX. GOV'T CODE §§ 551.071–.090; *see also Cox Enters., Inc. v. Bd. of Trs.*, 706 S.W.2d 956, 958 (Tex. 1986) (noting the narrowly drawn exceptions).

<sup>348</sup> TEX. GOV'T CODE § 551.101.

<sup>349</sup> *Martinez v. State*, 879 S.W.2d 54, 56 n.5 (Tex. Crim. App. 1994).

<sup>350</sup> *Lone Star Greyhound Park, Inc. v. Tex. Racing Comm'n*, 863 S.W.2d 742, 747 (Tex. App.—Austin 1993, writ denied); *see also Standley v. Sansom*, 367 S.W.3d 343, 355 (Tex. App.—San Antonio 2012, pet. denied) (using the four purposes outlined in *Lone Star* to determine sufficiency of challenged notice for executive session).

<sup>351</sup> *Lone Star Greyhound Park, Inc.*, 863 S.W.2d at 748.

## B. Provisions Authorizing Deliberations in Closed Meeting

### 1. Section 551.071. Consultations with Attorney

Section 551.071 authorizes a governmental body to consult with its attorney in an executive session to seek his or her advice on legal matters. It provides as follows:

A governmental body may not conduct a private consultation with its attorney except:

- (1) when the governmental body seeks the advice of its attorney about:
  - (A) pending or contemplated litigation; or
  - (B) a settlement offer; or
- (2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.<sup>352</sup>

This provision implements the attorney-client privilege, an attorney's duty to preserve the confidences of a client.<sup>353</sup> It allows a governmental body to meet in executive session with its attorney when it seeks the attorney's advice with respect to pending or contemplated litigation or settlement offers,<sup>354</sup> including pending or contemplated administrative proceedings governed by the Administrative Procedure Act.

In addition, subsection 551.071(2) of the Government Code permits a governmental body to consult in an executive session with its attorney "on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts" with the Act.<sup>355</sup> Thus, a governmental body may hold an executive session to seek or receive its attorney's advice on legal matters that are not related to litigation or the settlement of litigation.<sup>356</sup> A governmental body may not invoke section 551.071 to convene a closed session and then discuss matters outside of that provision.<sup>357</sup> "General discussion of policy, unrelated to legal matters is not permitted under the language of [this exception] merely

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<sup>352</sup> TEX. GOV'T CODE § 551.071.

<sup>353</sup> *Tex. State Bd. of Pub. Accountancy*, 366 S.W.3d at 759; *see* Tex. Att'y Gen. Op. Nos. JC-0506 (2002) at 4, JC-0233 (2000) at 3, H-816 (1976) at 4, M-1261 (1972) at 9–10.

<sup>354</sup> TEX. GOV'T CODE § 551.071(1); *Lone Star Greyhound Park Inc.*, 863 S.W.2d at 748.

<sup>355</sup> TEX. GOV'T CODE § 551.071(2).

<sup>356</sup> *Cf. Weatherford v. City of San Marcos*, 157 S.W.3d 473, 486 (Tex. App.—Austin 2004, pet. denied) (concluding that city council did not violate Act when it went into executive session to seek attorney's advice about land use provision); Tex. Att'y Gen. Op. Nos. JC-0233 (2000) at 3, JM-100 (1983) at 2.

<sup>357</sup> *Gardner v. Herring*, 21 S.W.3d 767, 776 (Tex. App.—Amarillo 2000, no pet.). *But see In re City of Galveston*, No. 14-14-01005-CV, 2015 WL 971314, \*5–6 (Tex. App.—Houston [14th Dist.] March 3, 2015, orig. proceeding) (mem. op) (acknowledging that the Act does not mandate a "rigid stricture of direct legal question . . . followed by a direct legal answer" and that the "conveyance of factual information or the expression of opinion or intent by a member of the governmental body may be appropriate in a closed meeting . . . if the purpose of such statement is to facilitate the rendition of legal advice by the government's attorney").

because an attorney is present.”<sup>358</sup> A governmental body may, for example, consult with its attorney in executive session about the legal issues raised in connection with awarding a contract, but it may not discuss the merits of a proposed contract, financial considerations, or other nonlegal matters in an executive session held under section 551.071 of the Government Code.<sup>359</sup>

The attorney-client privilege can be waived by communicating privileged matters in the presence of persons who are not within the privilege.<sup>360</sup> Two governmental bodies waived this privilege by meeting together for discussions intended to avoid litigation between them, each party consulting with its attorney in the presence of the other, “the party from whom it would normally conceal its intentions and strategy.”<sup>361</sup> An executive session under section 551.071 is not allowed for such discussions. A governmental body may, however, admit to a session closed under this exception its agents or representatives, where those persons’ interest in litigation is aligned with that of the governmental body and their presence is necessary for full communication between the governmental body and its attorney.<sup>362</sup>

This exception is an affirmative defense on which the governmental body bears the burden of proof.<sup>363</sup>

## **2. Section 551.072. Deliberations about Real Property**

Section 551.072 authorizes a governmental body to deliberate in executive session on certain matters concerning real property. It provides as follows:

A governmental body may conduct a closed meeting to deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.<sup>364</sup>

Section 551.072 permits an executive session only where public discussion of the subject would have a detrimental effect on the governmental body’s negotiating position with respect to a third party.<sup>365</sup> Where a court found that open discussion would not be detrimental to a city’s negotiations, a closed session under this provision was not permitted.<sup>366</sup> It does not allow a

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<sup>358</sup> Tex. Att’y Gen. Op. No. JM-100 (1983) at 2; *see Finlan v. City of Dallas*, 888 F. Supp. 779, 782 n.9 (N.D. Tex. 1995); Tex. Att’y Gen. Op. No. JC-0233 (2000) at 3.

<sup>359</sup> *Olympic Waste Servs. v. City of Grand-Saline*, 204 S.W.3d 496, 503–04 (Tex. App.—Tyler 2006, no pet.) (citing Tex. Att’y Gen. Op. No. JC-0233 (2000) at 3).

<sup>360</sup> *See* Tex. Att’y Gen. Op. Nos. JC-0506 (2002) at 6, JM-100 (1983) at 2.

<sup>361</sup> Tex. Att’y Gen. Op. No. MW-417 (1981) at 2–3; *see also* Tex. Att’y Gen. Op. No. JM-1004 (1989) at 4 (concluding that school board member who has sued other board members may be excluded from executive session held to discuss litigation).

<sup>362</sup> *See* Tex. Att’y Gen. Op. No. JC-0506 (2002) at 6; *see also* Tex. Att’y Gen. Op. No. JM-238 (1984) at 5.

<sup>363</sup> *See Killam Ranch Props., Ltd. v. Webb Cty.*, 376 S.W.3d 146, 157 (Tex. App.—San Antonio 2012, pet. denied); *City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 466 (Tex. App.—Dallas 2007, no pet.); *Olympic Waste Servs.*, 204 S.W.3d at 504.

<sup>364</sup> TEX. GOV’T CODE § 551.072.

<sup>365</sup> Tex. Att’y Gen. Op. No. MW-417 (1981) at 2 (construing statutory predecessor to Government Code section 551.072).

<sup>366</sup> *See City of Laredo v. Escamilla*, 219 S.W.3d 14, 21 (Tex. App.—San Antonio 2006, pet. denied).

governmental body to “cut a deal in private, devoid of public input or debate.”<sup>367</sup> A governmental body’s discussion of nonmonetary attributes of property to be purchased that relate to the property’s value may fall within this exception if deliberating in open session would detrimentally affect subsequent negotiations.<sup>368</sup>

### **3. Section 551.0725. Deliberations by Certain Commissioners Courts about Contract Being Negotiated**

Section 551.0725 provides as follows:

- (a) The commissioners court of a county may conduct a closed meeting to deliberate business and financial issues relating to a contract being negotiated if, before conducting the closed meeting:
  - (1) the commissioners court votes unanimously that deliberation in an open meeting would have a detrimental effect on the position of the commissioners court in negotiations with a third person; and
  - (2) the attorney advising the commissioners court issues a written determination that deliberation in an open meeting would have a detrimental effect on the position of the commissioners court in negotiations with a third person.
- (b) Notwithstanding Section 551.103(a), Government Code, the commissioners court must make a recording of the proceedings of a closed meeting to deliberate the information.

Section 551.103(a) provides that a governmental body shall either keep a certified agenda or make a recording of the proceedings of each closed meeting, except for a private consultation with its attorney permitted by section 551.071.

### **4. Section 551.0726. Texas Facilities Commission: Deliberation Regarding Contract Being Negotiated**

This section, which provides as follows, is very similar to section 551.0725:

- (a) The Texas Facilities Commission may conduct a closed meeting to deliberate business and financial issues relating to a contract being negotiated if, before conducting the closed meeting:
  - (1) the commission votes unanimously that deliberation in an open meeting would have a detrimental effect on the position of the state in negotiations with a third person; and

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<sup>367</sup> *Finlan*, 888 F. Supp. at 787.

<sup>368</sup> *Save Our Springs All., Inc. v. Austin Indep. Sch. Dist.*, 973 S.W.2d 378, 382 (Tex. App.—Austin 1998, no pet.).

- (2) the attorney advising the commission issues a written determination finding that deliberation in an open meeting would have a detrimental effect on the position of the state in negotiations with a third person and setting forth that finding therein.
- (b) Notwithstanding Section 551.103(a), the commission must make a recording of the proceedings of a closed meeting held under this section..<sup>369</sup>

## **5. Section 551.073. Deliberation Regarding Prospective Gifts**

Section 551.073 provides as follows:

A governmental body may conduct a closed meeting to deliberate a negotiated contract for a prospective gift or donation to the state or the governmental body if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person..<sup>370</sup>

Before the Act was codified as Government Code chapter 551 in 1993, a single provision encompassed the present sections 551.073 and 551.072..<sup>371</sup> The authorities construing the statutory predecessor to section 551.072 may be relevant to section 551.073..<sup>372</sup>

## **6. Section 551.074. Personnel Matters**

Section 551.074 authorizes certain deliberations about officers and employees of the governmental body to be held in executive session:

- (a) This chapter does not require a governmental body to conduct an open meeting:
  - (1) to deliberate the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or
  - (2) to hear a complaint or a charge against an officer or employee.
- (b) Subsection (a) does not apply if the officer or employee who is the subject of the deliberation or hearing requests a public hearing..<sup>373</sup>

This section permits executive session deliberations concerning an individual officer or employee..<sup>374</sup> Deliberations about a *class* of employees, however, must be held in an open

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<sup>369</sup> TEX. GOV'T CODE § 551.0726.

<sup>370</sup> *Id.* § 551.073.

<sup>371</sup> See Act of Mar. 28, 1973, 63d Leg., R.S., ch. 31, § 2, 1973 Tex. Gen. Laws 45, 46 (former article 6252-17, § 2(f), Revised Civil Statutes).

<sup>372</sup> See, e.g., *Dallas Cty. Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 282–83 (Tex. App.—Dallas 1991, writ denied).

<sup>373</sup> TEX. GOV'T CODE § 551.074.

<sup>374</sup> A federal court has said that this provision is not restricted “only to actions affecting a current employee.” *Hispanic Educ. Comm. v. Houston Indep. Sch. Dist.*, 886 F. Supp. 606, 611 (S.D. Tex. 1994), *aff'd*, 68 F.3d 467

session.<sup>375</sup> For example, when a governmental body discusses salary scales without referring to a specific employee, it must meet in open session.<sup>376</sup> The closed meetings authorized by section 551.074 may deal only with officers and employees of a governmental body; closed deliberations about the selection of an independent contractor are not authorized.<sup>377</sup>

Section 551.074 authorizes the public officer or employee under consideration to request a public hearing.<sup>378</sup> In *Bowen v. Calallen Independent School District*,<sup>379</sup> a teacher requested a public hearing concerning nonrenewal of his contract, but did not object when the school board moved to go into executive session. The court concluded that the school board did not violate the Act.<sup>380</sup> Similarly, in *James v. Hitchcock Independent School District*,<sup>381</sup> a school librarian requested an open meeting on the school district's unilateral modification of her contract. The court stated that refusal of the request for a hearing before the school board "is permissible only where the teacher does not object to its denial."<sup>382</sup> However, silence may not be deemed a waiver if the employee has no opportunity to object.<sup>383</sup> When a board heard the employee's complaint, moved onto other topics, and then convened an executive session to discuss the employee after he left, the court found that the employee had not had an opportunity to object.<sup>384</sup>

## **7. Section 551.0745. Deliberations by Commissioners Court about County Advisory Body**

Attorney General Opinion DM-149 (1992) concluded that members of an advisory committee are not public officers or employees within section 551.074 of the Government Code, authorizing executive session deliberations about certain personnel matters. Section 551.0745 now provides that a commissioners court of a county is not required to deliberate in an open meeting about the "appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a member of an advisory body; or . . . to hear a complaint or charge against a member of an advisory body."<sup>385</sup> However, this provision does not apply if the person who is the subject of the deliberation requests a public hearing.<sup>386</sup>

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(5th Cir. 1995); *but see* Tex. Att'y Gen. LO-88-52 (1988) at 3 (stating that the exception "applies only to public employees and officers, not to applicants for public employment or office").

<sup>375</sup> *Gardner*, 21 S.W.3d at 777; Tex. Att'y Gen. Op. No. H-496 (1975) (construing predecessor to Government Code section 551.074).

<sup>376</sup> *See* Tex. Att'y Gen. Op. No. H-496 (1975).

<sup>377</sup> *Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 699 (Tex. App.—San Antonio 1998, pet. denied); *Bd. of Trs. v. Cox Enters., Inc.*, 679 S.W.2d 86, 90 (Tex. App.—Texarkana 1984), *aff'd in part, rev'd in part on other grounds*, 706 S.W.2d 956 (Tex. 1986); Tex. Att'y Gen. Op. No. MW-129 (1980) at 1–2.

<sup>378</sup> TEX. GOV'T CODE § 551.074(b); *see City of Dallas*, 737 S.W.2d at 848; *Corpus Christi Classroom Teachers Ass'n v. Corpus Christi Indep. Sch. Dist.*, 535 S.W.2d 429, 430 (Tex. App.—Corpus Christi 1976, no writ).

<sup>379</sup> *Bowen v. Calallen Indep. Sch. Dist.*, 603 S.W.2d 229 (Tex. App.—Corpus Christi 1980, writ ref'd n.r.e.).

<sup>380</sup> *Id.* at 236; *accord Thompson v. City of Austin*, 979 S.W.2d 676, 685 (Tex. App.—Austin 1998, no pet.).

<sup>381</sup> *James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

<sup>382</sup> *Id.* at 707 (citing *Bowen*, 603 S.W.2d at 236).

<sup>383</sup> *Gardner*, 21 S.W.3d at 775.

<sup>384</sup> *Id.*

<sup>385</sup> TEX. GOV'T CODE § 551.0745.

<sup>386</sup> *See id.*

**8. Section 551.075. Conference Relating to Investments and Potential Investments Attended by Board of Trustees Growth Fund**

Section 551.075 authorizes a closed meeting between the board of trustees of the Texas Growth Fund and an employee of the Fund or a third party in certain circumstances..<sup>387</sup>

**9. Section 551.076. Deliberations Regarding Security Devices or Security Audits**

Section 551.076 provides as follows:

This chapter does not require a governmental body to conduct an open meeting to deliberate:

- (1) the deployment, or specific occasions for implementation, of security personnel or devices; or
- (2) a security audit..<sup>388</sup>

**10. Section 551.077. Agency Financed by Federal Government**

Section 551.077 provides that chapter 551 does not require an agency financed entirely by federal money to conduct an open meeting..<sup>389</sup>

**11. Section 551.078, .0785. Deliberations Involving Individuals' Medical or Psychiatric Records**

These two provisions permit specified governmental bodies to discuss an individual's medical or psychiatric records in closed session. Section 551.078 is the narrower provision, applying to a medical board or medical committee when discussing the records of an applicant for a disability benefit from a public retirement system..<sup>390</sup> Section 551.0785 is much broader, allowing a governmental body that administers a public insurance, health or retirement plan to hold a closed session when discussing the records or information from the records of an individual applicant for a benefit from the plan. The benefits appeals committee for a public self-funded health plan may also meet in executive session for this purpose..<sup>391</sup>

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<sup>387</sup> *Id.* § 551.075.

<sup>388</sup> *Id.* § 551.076; *see* Tex. Att'y Gen. LO-93-105, at 3 (indicating a belief that "the applicability of 551.076 rests upon the definition of 'security personnel'").

<sup>389</sup> TEX. GOV'T CODE § 551.077.

<sup>390</sup> *Id.* § 551.078; *see also* Tex. Att'y Gen. Op. No. DM-340 (1995) at 2 (concluding that section 551.078 authorizes board of trustees of a public retirement system to consider medical and psychiatric records in closed session).

<sup>391</sup> TEX. GOV'T CODE § 551.0785.

## **12. Sections 551.079–.0811. Exceptions Applicable to Specific Entities**

Sections 551.079 through 551.0811 are set out below. The judicial decisions and attorney general opinions construing the Act have had little to say about these provisions.

### **§ 551.079. Texas Department of Insurance**

- (a) The requirements of this chapter do not apply to a meeting of the commissioner of insurance or the commissioner's designee with the board of directors of a guaranty association established under Chapter 2602, Insurance Code, or Article 21.28–C or 21.28–D, Insurance Code, in the discharge of the commissioner's duties and responsibilities to regulate and maintain the solvency of a person regulated by the Texas Department of Insurance.
- (b) The commissioner of insurance may deliberate and determine the appropriate action to be taken concerning the solvency of a person regulated by the Texas Department of Insurance in a closed meeting with persons in one or more of the following categories:
  - (1) staff of the Texas Department of Insurance;
  - (2) a regulated person;
  - (3) representatives of a regulated person; or
  - (4) members of the board of directors of a guaranty association established under Chapter 2602, Insurance Code, or Article 21.28–C or 21.28–D, Insurance Code.

### **§ 551.080. Board of Pardons and Paroles**

This chapter does not require the Board of Pardons and Paroles to conduct an open meeting to interview or counsel an inmate of the Texas Department of Criminal Justice.

### **§ 551.081. Credit Union Commission**

This chapter does not require the Credit Union Commission to conduct an open meeting to deliberate a matter made confidential by law.

### **§ 551.0811. The Finance Commission of Texas**

This chapter does not require The Finance Commission of Texas to conduct an open meeting to deliberate a matter made confidential by law.



### **13. Sections 551.082, .0821, .083. Certain School Board Deliberations**

Section 551.082 provides as follows:

- (a) This chapter does not require a school board to conduct an open meeting to deliberate in a case:
  - (1) involving discipline of a public school child; or
  - (2) in which a complaint or charge is brought against an employee of the school district by another employee and the complaint or charge directly results in a need for a hearing.
- (b) Subsection (a) does not apply if an open hearing is requested in writing by a parent or guardian of the child or by the employee against whom the complaint or charge is brought.<sup>392</sup>

A student who makes a written request for an open hearing on a disciplinary matter, but does not object to an executive session when announced, waives his or her right to an open hearing.<sup>393</sup>

Section 551.0821 provides as follows:

- (a) This chapter does not require a school board to conduct an open meeting to deliberate a matter regarding a public school student if personally identifiable information about the student will necessarily be revealed by the deliberation.
- (b) Directory information about a public school student is considered to be personally identifiable information about the student for purposes of Subsection (a) only if a parent or guardian of the student, or the student if the student has attained 18 years of age, has informed the school board, the school district, or a school in the school district that the directory information should not be released without prior consent. In this subsection, “directory information” has the meaning assigned by the federal Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g), as amended.
- (c) Subsection (a) does not apply if an open meeting about the matter is requested in writing by a parent or guardian of the student or by the student if the student has attained 18 years of age.

The Federal Family Educational Rights and Privacy Act provides for withholding federal funds from an educational agency or institution with a policy or practice of releasing education records

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<sup>392</sup> *Id.* § 551.082.

<sup>393</sup> *United Indep. Sch. Dist. v. Gonzalez*, 911 S.W.2d 118, 127 (Tex. App.—San Antonio 1995, writ denied).

or personally identifiable information.<sup>394</sup> Section 551.0821 enables school boards to deliberate in closed session to avoid revealing personally identifiable information about a student.

Section 551.083 provides as follows:

This chapter does not require a school board operating under a consultation agreement authorized by Section 13.901, Education Code [repealed in 1993], to conduct an open meeting to deliberate the standards, guidelines, terms, or conditions the board will follow, or instruct its representatives to follow, in a consultation with a representative of an employee group.<sup>395</sup>

#### **14. Section 551.085. Deliberation by Governing Board of Certain Providers of Health Care Services**

Section 551.085 provides as follows:

- (a) This chapter does not require the governing board of a municipal hospital, municipal hospital authority, county hospital, county hospital authority, hospital district created under general or special law, or nonprofit health maintenance organization created under Section 534.101, Health and Safety Code,<sup>396</sup> to conduct an open meeting to deliberate:
  - (1) pricing or financial planning information relating to a bid or negotiation for the arrangement or provision of services or product lines to another person if disclosure of the information would give advantage to competitors of the hospital, hospital district, or nonprofit health maintenance organization; or
  - (2) information relating to a proposed new service or product line of the hospital, hospital district, or nonprofit health maintenance organization before publicly announcing the service or product line.
- (b) The governing board of a health maintenance organization created under Section 281.0515, Health and Safety Code,<sup>397</sup> that is subject to this chapter is not required to conduct an open meeting to deliberate information described by Subsection (a).<sup>398</sup>

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<sup>394</sup> 20 U.S.C.A. § 1232g; *see also Axtell v. Univ. of Tex.*, 69 S.W.3d 261, 267 (Tex. App.—Austin 2002, no pet.) (holding that student did not have cause of action under Tort Claims Act for release of his grades to radio station).

<sup>395</sup> *See* Act of May 28, 1993, 73d Leg., R.S., ch. 347, § 8.33, 1993 Tex. Gen. Laws 1479, 1556. *See* Tex. Att’y Gen. Op. No. H-651 (1975) at 3 (construing predecessor of Government Code section 551.083).

<sup>396</sup> Section 534.101 of the Health and Safety Code authorizes community mental health and mental retardation centers to create a limited purpose health maintenance organization. TEX. HEALTH & SAFETY CODE § 534.101–.124.

<sup>397</sup> This provision authorizes certain hospital districts to establish HMOs.

<sup>398</sup> TEX. GOV’T CODE § 551.085.

## **15. Section 551.086. Certain Public Power Utilities: Competitive Matters**

This section was adopted as part of an act relating to electric utility restructuring and is only briefly summarized here.<sup>399</sup> Anyone wishing to know when and how it applies should read it in its entirety.<sup>400</sup> It provides that certain public power utilities are not required to conduct an open meeting to deliberate, vote or take final action on any competitive matter as defined by section 552.133 of the Government Code.<sup>401</sup> Section 552.133 defines “competitive matter” as “a utility-related matter that is related to the public power utility’s competitive activity, including commercial information and would, if disclosed, give advantage to competitors or prospective competitors.”<sup>402</sup> The definition of “competitive matter” further provides that the term is reasonably related to several categories of information specifically defined<sup>403</sup> and does not include other specified categories of information.<sup>404</sup> “Public power utility” is defined as “an entity providing electric or gas utility services” that is subject to the provisions of the Act.<sup>405</sup> Finally, this executive session provision includes the following provision on notice:

For purposes of Section 551.041, the notice of the subject matter of an item that may be considered as a competitive matter under this section is required to contain no more than a general representation of the subject matter to be considered, such that the competitive activity of the public power utility with respect to the issue in question is not compromised or disclosed.<sup>406</sup>

## **16. Section 551.087. Deliberation Regarding Economic Development Negotiations**

The provision reads as follows:

This chapter does not require a governmental body to conduct an open meeting:

- (1) to discuss or deliberate regarding commercial or financial information that the governmental body has received from a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and with which the governmental body is conducting economic development negotiations; or
- (2) to deliberate the offer of a financial or other incentive to a business prospect described by Subdivision (1).<sup>407</sup>

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<sup>399</sup> See Act of May 27, 1999, 76th Leg., R.S., ch. 405, 1999 Tex. Gen. Laws 2543, 2543–2625.

<sup>400</sup> TEX. GOV’T CODE § 551.086.

<sup>401</sup> *Id.* § 551.086(c).

<sup>402</sup> *Id.* § 552.133(a-1).

<sup>403</sup> *Id.* § 552.133(a-1)(1)(A)–(F).

<sup>404</sup> *Id.* § 552.133(a-1)(2)(A)–(O).

<sup>405</sup> *Id.* § 551.086(b)(1).

<sup>406</sup> *Id.* § 551.086(d).

<sup>407</sup> *Id.* § 551.087.

## **17. Section 551.088. Deliberation Regarding Test Item**

This provision states as follows:

This chapter does not require a governmental body to conduct an open meeting to deliberate a test item or information related to a test item if the governmental body believes that the test item may be included in a test the governmental body administers to individuals who seek to obtain or renew a license or certificate that is necessary to engage in an activity.<sup>408</sup>

An executive session may be held only when expressly authorized by law. Thus, before section 551.088 was adopted, the Act did not permit a governmental body to meet in executive session to discuss the contents of a licensing examination.<sup>409</sup>

## **18. Section 551.089. Deliberation Regarding Security Devices or Security Audits; Closed Meeting**

Section 551.089 provides as follows:

This chapter does not require a governmental body to conduct an open meeting to deliberate:

- (1) security assessments or deployments relating to information resources technology;
- (2) network security information as described by Section 2059.055(b); or
- (3) the deployment, or specific occasions for implementation, of security personnel, critical infrastructure, or security devices.<sup>410</sup>

## **19. Section 551.090. Enforcement Committee Appointed by Texas State Board of Public Accountancy**

Section 551.090 provides that an enforcement committee appointed by the State Board of Public Accountancy is not required to conduct an open meeting to investigate and deliberate a disciplinary action under Subchapter K, Chapter 901, Occupations Code, relating to the enforcement of Chapter 901 or the rules of the Texas State Board of Public Accountancy.<sup>411</sup>

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<sup>408</sup> *Id.* § 551.088.

<sup>409</sup> *See* Tex. Att’y Gen. LO-96-058, at 2.

<sup>410</sup> TEX. GOV’T CODE § 551.089. Chapter 2059 of the Government Code relates to the “Texas Computer Network Security System.” *Id.* §§ 2059.001–.153.

<sup>411</sup> *Id.* § 551.090; *see also* TEX. OCC. CODE §§ 901.501–.511 (subchapter K entitled “Prohibited Practices and Disciplinary Procedures”).

## **C. Closed Meetings Authorized by Other Statutes**

Some state agencies are authorized by their governing law to hold closed meetings in addition to those authorized by the Act.<sup>412</sup> Chapter 418 of the Government Code, the Texas Disaster Act, which relates to managing emergencies and disasters, including those caused by terroristic acts, provides in section 418.183(f):

A governmental body subject to Chapter 551 is not required to conduct an open meeting to deliberate information to which this section applies. Notwithstanding Section 551.103(a), the governmental body must make a tape recording of the proceedings of a closed meeting to deliberate the information.<sup>413</sup>

Section 418.183 states that “[t]his section applies only to information that is confidential under” specific sections of chapter 418.<sup>414</sup>

Similarly, the Texas Oyster Council is subject to the Act but is “not required to conduct an open meeting to deliberate confidential communications and records . . . relating to the investigation of a food-borne illness that is suspected of being related to molluscan shellfish.”<sup>415</sup> And though an appraisal review board is generally required to conduct protest hearings in the open, it is authorized to conduct a closed hearing if the hearing involves disclosure or proprietary or confidential information.<sup>416</sup>

## **D. No Implied Authority for Closed Meetings**

Older attorney general opinions have stated that a governmental body could deliberate in a closed session about confidential information, even though no provision of the Act authorizing a closed session applied to the deliberations.<sup>417</sup> These opinions reasoned that information made confidential by statute was not within the Act’s prohibition against privately discussing “public business or public policy,” or that the board members could deliberate on information in a closed session if an open meeting would result in violation of a confidentiality provision.<sup>418</sup>

However, Attorney General Opinion MW-578 (1982) held that the Texas Employment Commission had no authority to review unemployment benefit cases in closed session, even

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<sup>412</sup> See, e.g., TEX. FAM. CODE § 264.005(g) (County Child Welfare Boards); TEX. LAB. CODE § 401.021(3) (certain proceedings of Workers’ Compensation Commission); TEX. OCC. CODE § 152.009(c) (Board of Medical Examiners; deliberation about license applications and disciplinary actions).

<sup>413</sup> TEX. GOV’T CODE § 418.183(f).

<sup>414</sup> *Id.* § 418.183(a).

<sup>415</sup> TEX. HEALTH & SAFETY CODE § 436.108(f); see also TEX. LOC. GOV’T CODE § 161.172(b) (excluding county ethics commissions in certain counties from operation of parts of chapter 551).

<sup>416</sup> TEX. TAX CODE § 41.66(d-1).

<sup>417</sup> Tex. Att’y Gen. Op. Nos. H-1154 (1978) at 3 (concluding that county child welfare board may meet in executive session to discuss case files made confidential by statute), H-780 (1976) at 3 (concluding that Medical Advisory Board must meet in closed session to consider confidential reports about medical condition of applicants for a driver’s license), H-484 (1974) at 3 (concluding that licensing board may discuss confidential information from applicant’s file and may prepare examination questions in closed session), H-223 (1974) at 5 (concluding that administrative hearings in comptroller’s office concerning confidential tax information may be closed).

<sup>418</sup> Tex. Att’y Gen. Op. No. H-484 (1974) at 2.

though in some of the cases very personal information was disclosed about claimants and employers. Reasoning that the Act states that closed meetings may be held only where specifically authorized, the opinion concluded that there was no basis to read into it implied authority for closed meetings.<sup>419</sup> It disapproved the language in earlier opinions that suggests otherwise, but stated that the commission could protect privacy rights by avoiding discussion of private information.<sup>420</sup> Thus, the disapproved opinions should no longer be relied on as a source of authority for a closed session.

## **E. Who May Attend a Closed Meeting**

Only the members of a governmental body have a right to attend an executive session,<sup>421</sup> except that the governmental body's attorney must be present when it meets under section 551.071. A governmental body has discretion to include in an executive session any of its officers and employees whose participation is necessary to the matter under consideration.<sup>422</sup> Thus, a school board could require its superintendent of schools to attend all executive sessions of the board without violating the Act.<sup>423</sup> Given the board's responsibility to oversee the district's management and the superintendent's administrative responsibility and leadership of the district, the board could reasonably conclude that the superintendent's presence was necessary at executive sessions.<sup>424</sup>

A commissioners court may include the county auditor in a meeting closed under section 551.071 to consult with its attorney if the court determines that (1) the auditor's interests are not adverse to the county's; (2) the auditor's presence is necessary for the court to communicate with its attorney; and (3) the county auditor's presence will not waive the attorney-client privilege.<sup>425</sup> If the meeting is closed under an executive session provision other than section 551.071, the commissioners court may include the county auditor if the auditor's interests are not adverse to the county and his or her participation is necessary to the discussion.<sup>426</sup>

A governmental body must not admit to an executive session a person whose presence is contrary to the governmental interest protected by the provision authorizing the session. A person who wishes to sell real estate to a city may not attend an executive session under section 551.072, a provision designed to protect the city's bargaining position in negotiations with a third party.<sup>427</sup>

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<sup>419</sup> See Tex. Att'y Gen. Op. No. MW-578 (1982) at 4.

<sup>420</sup> *Id.*

<sup>421</sup> See Tex. Att'y Gen. Op. Nos. JM-6 (1983) at 1–2 (stating that only members of the governmental body have the right to convene in executive session), KP-0006 (2015) at 2.

<sup>422</sup> Tex. Att'y Gen. Op. No. JC-0375 (2001) at 2; *see also* Tex. Att'y Gen. Op. No. GA-0277 (2004) at 3 (concluding that commissioners court may allow the county clerk to attend its executive sessions), KP-0006 (2015) at 2 (concluding that a representative of a municipality may attend an executive session of a housing authority if the governing body of the housing authority determines the municipal representative's participation is necessary to the matter to be discussed).

<sup>423</sup> Tex. Att'y Gen. Op. No. JC-0375 (2001) at 2.

<sup>424</sup> *Id.*

<sup>425</sup> Tex. Att'y Gen. Op. No. JC-0506 (2002) at 6; *see* Tex. Att'y Gen. Op. No. JM-238 (1984) at 5 (concluding that county officers and employees may attend closed session of county commissioners court to discuss litigation against sheriff and commissioners court about county jail conditions).

<sup>426</sup> See Tex. Att'y Gen. Op. No. JC-0506 (2002) at 6.

<sup>427</sup> *Finlan v. City of Dallas*, 888 F. Supp. 779, 787 (N.D. Tex. 1995).

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Nor may a governmental body admit the opposing party in litigation to an executive session under section 551.071.<sup>428</sup> A governmental body has no authority to admit members of the public to a meeting closed under section 551.074 to give input about the public officer or employee being considered at the meeting.<sup>429</sup>

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<sup>428</sup> See Tex. Att’y Gen. Op. Nos. JM-1004 (1989) at 4 (concluding that school board member who has sued other board members may be excluded from executive session held to discuss litigation), MW-417 (1981) at 2–3 (concluding that provision authorizing governmental body to consult with attorney in executive session about contemplated litigation does not apply to joint meeting between the governmental bodies to avoid lawsuit between them).

<sup>429</sup> See Tex. Att’y Gen. Op. No. GA-0511 (2007) at 6.