

TO: Members of the Independent Citizens Redistricting Commission, City of Austin

FROM: Steven Aleman, Esq.

DATE: July 22, 2013

RE: Deliberations on Personnel Matters and the Open Meetings Act and Public Information Act

The purpose of this brief correspondence is to highlight and raise awareness of certain provisions of Texas law that might apply to your upcoming deliberations as you consider staffing of the Commission. You are encouraged to verify these points and obtain guidance from the Law Department of the City of Austin and other competent sources before you engage in specific discussions and votes to ensure proper procedures are followed.

In prior meetings some Commissioners have raised the possibility that your body might go into executive session when you are ready to review submissions for positions such as executive director. While there is a personnel matters exception allowing Texas governmental bodies to go into executive session, you should be certain it applies in your circumstance before attempting to invoke it.

In general, the Texas Open Meetings Act¹ requires that all of your meetings occur in public.² The Open Meetings Act, however, has several exceptions that permit a governmental body to go into a private executive session. Specifically, there is an exception in the Open Meetings Act for “personnel matters” to be taken to executive session. This exception allows your body to deliberate in private on the appointment and employment of an “employee.”³ The key question for this Commission is the manner in which you plan to hire staff. For example, if the executive director will be retained as a consultant or an independent contractor, and not as an employee, then the personnel matters exception would not apply and you could not take the review of applications for this position into executive session.⁴

If you elect to utilize an executive session to aid in the selection of staff, the Open Meetings Act has basic procedural requirements. Among other things:

- The Commission must post and hold a public meeting (with a quorum) even if the only business you want to engage in would be during an executive session.⁵
- The posted meeting agenda must state that you may go into executive session and include the specific topic (e.g., executive director position) and a citation to the provision of the Open Meetings Act that authorizes you to meet privately on that topic.⁶

¹ Tex. Gov’t Code Ch. 551.

² As a general resource, the Texas Attorney General has a handbook on the Open Meetings Act available online: www.oag.state.tx.us/AG_Publications/pdfs/openmeeting_hb.pdf (last visited July 22, 2013).

³ Tex. Gov’t Code § 551.074(a)(1).

⁴ *Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 699 (Tex. App. San Antonio 1998); Tex. Att’y Gen. Op. No. JC-0411 (2001).

⁵ Tex. Gov’t Code § 551.101.

⁶ Tex. Gov’t Code § 551.101.

- When your body is ready to go into executive session during the public meeting, the Commission Chair must state the time, the specific topic, and the provision of the Open Meetings Act that authorizes you to meet privately on that topic.⁷ Once the room has been cleared or you have reconvened in a private space, your body may then begin the executive session.
- During the executive session, you may have any necessary staff and/or legal counsel present. You may not selectively invite members of the public who are in attendance of the public meeting to join you and give input during the executive session.⁸
- During the executive session, you may only discuss the topic. Remember, the purpose of the executive session is to allow you to deliberate in private so you may make frank comments on the topic among fellow Commissioners. You may not make a decision on the topic during the executive session.⁹ For instance, while you may share your candid opinions on, and evaluations of, applicants, you may not try to reach consensus on an applicant. The resolution of who to hire and any vote must occur during a public meeting. It is advisable that the agenda for the public meeting, in addition to indicating the executive session, separately indicate the topic as a possible action item.
- A certified agenda of the executive session must be made and maintained.¹⁰
- When your body concludes its executive session, it must reopen the public meeting and the Commission Chair must state the time.¹¹ In the public meeting, you return to the agenda. If there are no other agenda items, the public meeting may be adjourned.

You should be aware that while your deliberations during an executive session are private, that does not automatically mean that documentation used in the executive session is private and exempt from the Texas Public Information Act.¹² For instance, if an easel pad with the strengths and weaknesses of applicants was created during an executive session, it could be classified as public information as it was assembled by and for the benefit of Commissioners. Unless an easel pad with such notations falls under a disclosure exception in the Public Information Act, it would have to be made available if responsive to a written request.

Finally, as a friendly reminder, state law requires that all members of a governmental body subject to the Open Meetings Act undergo at least one hour of formal training on open meeting requirements within 90 days of being sworn in.¹³

Your service is appreciated and the best of luck in your endeavors.

This correspondence is voluntary and not solicited. It is for informational purposes only and should not be considered as legal advice and counsel. No attorney-client relationship with the Commission or Commissioners exists.

⁷ Tex. Gov't Code §§ 551.101, 551.103(c)(3).

⁸ Tex. Att'y Gen. Op. No. GA-0511 (2007).

⁹ Tex. Gov't Code § 551.102.

¹⁰ Tex. Gov't Code §§ 551.103 – 551.104.

¹¹ Tex. Gov't Code § 551.103(c)(3).

¹² Tex. Gov't Code Ch. 552.

¹³ Tex. Gov't Code § 551.005.