



Government Transparency & Enforcement

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Perception is important...



Nuts and Bolts

The definition of “meeting,” includes “a deliberation between a quorum... during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action”.

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Nuts and Bolts – Physical presence not required

The physical presence of a quorum in a single place at the same time is not always necessary for the Act to be triggered.

Examples: Deliberations by telephone, emails or text messaging.



Nuts and Bolts – Discussion... not just Voting

The Act applies to a gathering of a quorum of the governing body if public business is *discussed*, regardless of whether there is any action or vote taken.



Nuts and Bolts – Broad subject matter regulated

The term “public business” has been broadly interpreted, and can include virtually any subject area in which the governmental body has any type of interest.



Criminal Violations: TOMA



Section 551.144 provides an offense if a member knowingly calls, aids in calling, organizes, or participates in an unlawful closed meeting.

nSo what am I missing? As long as you avoid deliberating with five other members at the same time... shouldn't you be safe? Right?

nThere's another Section you need to be aware of.

Criminal Violation: TOMA



Section 551.143(a) provides an offense if a 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.

- n Walking quorum: where a quorum is not present in one place at the same time and secretly discusses public business with the goal of avoiding a public meeting. AG Opinion No. GA-326 (2005).

AVOIDING THE WALKING QUORUM

There is much confusion and misunderstanding surrounding the concept of a walking quorum.

Several media sources mistakenly believe that some prosecutors insist that members are prohibited from talking to one another.



Scott Houston, TML General Counsel



“So what’s the problem?”

“Well, with all that being said, I still can’t answer in a satisfactory way the most common legal question I receive from elected officials:”

“Can I talk about public business with other members of my governmental body outside of a properly-posted meeting?”

Scott Houston, TML General Counsel



“The answer that I have to give, being a conservative lawyer who doesn’t want my elected officials sent to jail based on my advice:”

“No.”

From a 2006 paper (while he was Director of Legal Services for TML)

In a 2011 paper he adds:

“That’s why most city attorneys reluctantly stick to the ‘no discussions with other members outside of a meeting’ answer.”

What They're Saying

The Act wasn't intended to prohibit sharing information among members as long as they don't make decisions.

But...

- The statutory definitions, AG opinions, and/or case law support prohibiting *deliberating* via walking quorums.

- The legislature has declined to amend TOMA to support this argument. (HB 305 in 2005 didn't even get out of committee.)



What They're Saying

Government can't function with this limitation. We can't get anything done.

But...

- While it is true that TOMA sacrifices efficiency in favor of transparency...

- And even though efficiency is restrained... government continues to operate nonetheless.



What They're Saying

This is an unconstitutional infringement of members' first amendment rights of free speech.

But...

n The U.S. 5th Circuit Court of Appeals disagreed with this argument that TOMA is unconstitutional...

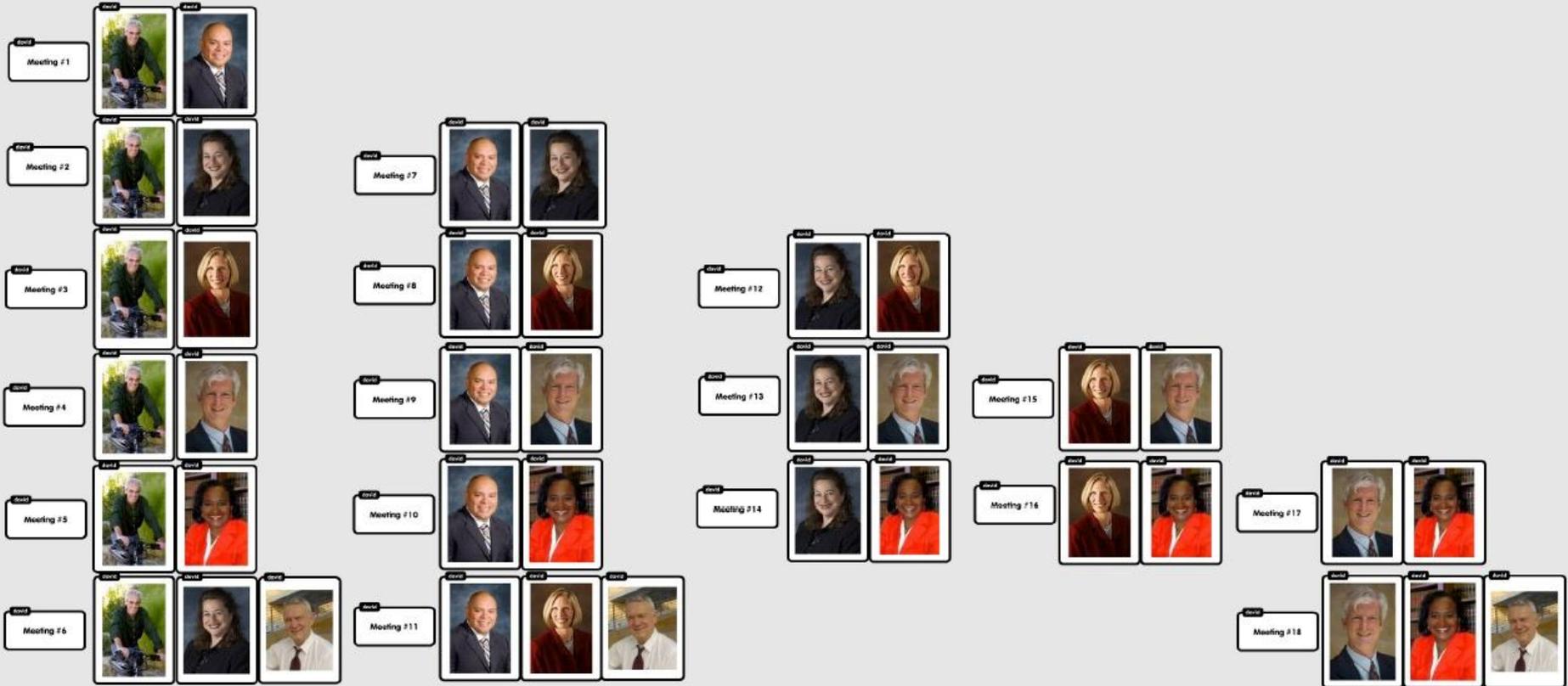
n and SCOTUS declined to take up the case.



Prosecutor Analysis



- Subject Matter
- Timing
- Context
- Means of communication
- Ad Hoc? Orchestrated?
- Institutional Culture



Possible Solution?

Legislation by Senator Watson allowing deliberations (but not voting) via real-time public internet chat room.

- Pros – can deliberate as much as you like.
- Cons: Not used very much to this point... and therefore unsympathetic prosecutors.



Questions

