

LEGAL UPDATES

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## Texas Court of Criminal Appeals Strikes Down "Secret Deliberations" Provision of Open Meetings Act

On Wednesday, the Texas Court of Criminal Appeals struck down Section 551.143(a) of the Open Meetings Act, making it a crime for members of a governmental body to “knowingly conspire to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.” The court held the provision unconstitutionally vague on its face, and affirmed the judgment of the trial court dismissing the prosecution.

The ruling arose out of the 2016 indictment of Montgomery County Judge Craig Doyal, who was indicted under the statute for meeting with another member of commissioners’ court and a private consultant to discuss the potential structure of a November 2015 Montgomery County Road Bond. The trial court granted Judge Doyal’s motion to dismiss on the basis that Section 551.143 was overbroad in violation of the First Amendment, and unconstitutionally vague. The appellate court reversed, and the Court of Criminal Appeals accepted Judge Doyal’s petition for discretionary review.

The court’s opinion first clarifies that Section 551.143 implicated the First Amendment because it involved the direct regulation of speech, rather than conduct. Because the statute implicated the First Amendment, the statute required a heightened degree of specificity. Under Supreme Court precedents, the statute failed to meet this standard.

The court first held that various parts of the statute failed in providing any limiting function. “Less than a quorum” was not limiting, because the Open Meetings Act as a whole (aside from Section 551.143 itself) applies only when a governmental body meets as a “quorum.” By applying only to situations where there is “less than a quorum,” Section 551.143 actually expanded the reach of

the statute. Likewise, while “meeting” and “deliberation” are defined in the Open Meetings Act, both definitions require a quorum. Therefore, those definitions created a contradiction, and could not be applied literally to Section 551.143, which referred to “meetings” and “deliberations” in situations where there is “less than a quorum.”

Finally, the court focused on what it termed the “crucial part of the statute”: “knowingly conspires to circumvent this chapter.” The court found that in light of its other observations on the internal contradictions in Section 551.143, it was unclear what conduct would constitute “circumventing” the Open Meetings Act. By requiring a person to “envision actions that are like a violation” of the Open Meetings Act without actually being a violation, and then avoiding that conduct, the statute was “hopelessly abstract” and therefore unconstitutionally vague. The court also rejected the state’s argument, based on an attorney general opinion from 2005, that Section 551.143 applied only to “walking quorums,” where members gather in numbers that do not at one time constitute a quorum, but through successive gatherings, do eventually reach a quorum.

Judge Slaughter authored a concurring opinion, which would have held the statute not unconstitutionally vague, but nevertheless in violation of the First Amendment. Judge Yeary authored a dissenting opinion, which would have saved the statute by considering it in light of the overall purpose of the Open Meetings Act, and by finding that the statute was susceptible to non-vague constructions and applications not considered by the majority.

### **What This Means to You**

The ruling removes potential criminal penalties for government officials who discuss official business in smaller gatherings. However, it did not impact the balance of the Open Meetings Act, and government officials should still take care to comply with the Act’s provisions when gathering in a quorum. Expect a likely request for reconsideration of the ruling, as well as potential legislative action to reinstate criminal penalties in the future.

### **Contact Us**

If you have questions about this update, contact Robert Eckels, Sandy Gomez, Arturo Michel, Mike Stafford or Ben Stephens.