CIVIL CAUSE No. 19243

IN THE LLANO COUNTY DISTRICT COURT

OF THE STATE of TEXAS

IN RE: PETITION to District Court for Writ of Mandamus

Marc Sewell

Pro Se Petitioner

JOYCE GILLOW
CLERK DISTRICT COURT, LLANO COUNTY, TEXAS
FILED

Vs.

FEB 23 2015
AT 2:02 O'CLOCK P M
BY D Peck DEPUTY

The City Of Llano Texas

Respondent

PETITION FOR WRIT OF MANDAMUS

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Verification

I, Marc Sewell, am the petitioner in this proceeding. I have read the foregoing Petition and know its contents. The facts stated therein are true and are within my personal knowledge.

I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct.

(signed) M - Sewell

Marc Sewell, Petitioner

108 Summit
Llano, TX 78643
325-247-2508

Sworn to and subscribed before me
this 23rd day of February, 2015

Lisa Reed

Notary Public
(Seal)

Petition Introduction

To the Honorable Presiding Judge of the Llano District Court, Petitioner alleges that the City of Llano violated the Texas Open Meetings Act, Government Code §551, by failing to provide sufficient information in the 2/2/15 Council Meeting Notice to assure that the public has the opportunity to be informed concerning the transactions of public business, particularly an item of special interest.

Petitioner requests the vote be voided, grant application development be stopped, and grant application be recalled.

Jurisdiction

The 2014 Attorney General's Open Meetings Handbook, Chapter XI, Section B Mandamus, Injunction or Declaratory Judgment, paragraph 3, page 58[1] states "jurisdiction in original mandamus and original injunction proceedings lies in the district court."

Standing

I am a citizen and taxpayer in the City of Llano, which is more than sufficient to satisfy standing. I was on the Comprehensive Plan Committee and a volunteer for the second Comprehensive Plan Committee – both described in Facts. I was a Planning and Zoning Commissioner.

The 2014 Attorney General's Open Meetings Handbook, Chapter XI, Section B, page 59[1] states "Section 551.142(a) authorizes any interested person, including a member of the news media, to bring a civil action seeking either a writ of mandamus or an injunction. In

[1] Appendix F – 2014 Attorney General's Open Meetings Handbook

keeping with the purpose of the Act, standing under the Act is interpreted broadly. Standing conferred by the Act is broader than taxpayer standing, and a citizen does not need to prove an interest different from the general public…"

Facts

1. At the 2/2/15 Llano City Council Meeting, Agenda Item H-1[2] was discussed and it was disclosed during the meeting that the subject was a grant to prepare a Comprehensive Plan[3].
2. A "comprehensive plan" is known language as defined by Texas Local Government Code §213.001.
3. The agenda Item H-1[2] notice did not say that the grant was for a Comprehensive Plan or any description of what the grant was for.
4. The agenda Item H-1[2] notice did not say what the cost would be.
5. The agenda Item Report H-1[4], which is not a part of the notice, did not mention "Comprehensive Plan" but rather misled readers to believe the grant was for "Planning Elements for Planning and Urban Environmental Design" and the benefit was for "Low to Moderate Income Residents."
6. The Taylor and Associates speaker at the meeting, Cindy Gutierrez, for Agenda Item H-1, said the subject of the grant was to "overhaul" the Comprehensive Plan[3].
7. It is well known by City Manager Brenton Lewis, Mayor Virdell, City Attorney Bovey, and City Secretary Toni Milam that the subject of the Comprehensive Plan is of special interest to citizens.
8. The Comprehensive Plan is input to the current Zoning Ordinance Overhaul Project which affects every property owner and citizen in Llano.

[2] Appendix B - 2/2/15 City Council Meeting Agenda Item H-1
[3] Appendix A – 2/2/15 City Council Meeting Minutes – Comp Plan
[4] Appendix C - 2/2/15 City Council Meeting Agenda Item Report H-1

9. Three years ago, 20 citizens worked on, and almost finished, an updated comprehensive plan and last year 13 volunteered to finish it, but the City Manager never initiated the committee.
10. On 2/3/15, I sent a Public Information Act Request for background documentation on the H-1 agenda notice and received only partial information. An Open Records violation complaint has been sent to the AG's office.
11. On 2/15/15 I sent a request[5] to the Llano City Council to void the vote and reschedule with proper agenda. They ignored the request.

Argument

1. Facts #1 through #6 show that the 2/2/15 Llano City Council Meeting Agenda Item H-1 violated the notification requirement of the Texas Open Meetings Act since it did not state the subject of the grant being requested, which was an Overhaul of the Comprehensive Plan. It also did not state the amount being requested.

   Attorney General Opinion No. H-1163[6] says that "the Open Meetings Act is to be liberally construed to effect its purpose of assuring that the public has the opportunity to be informed concerning the transactions of public business." The public was not so informed since the Agenda Item H-1 did not say "overhaul of the comprehensive plan" nor could that subject have been construed from the text of the notice.

2. Facts #7, #8 and #9 demonstrate the comprehensive plan is of special interest to the public, thus, "Comprehensive Plan" should have been explicitly specified in the

[5] Appendix E – Request to Llano City Council to Void Vote on H-1
[6] Appendix D - Relevant Texas State Attorney General Opinions

agenda item notice. Attorney General Opinion GA-0668[7] states "Whether the subject is of special interest to the public is also a factor that may impact the adequacy of a notice."

3. Agenda Item H-1 should be voided since Government Code Section 551.141 provides that "[a]n action taken by a governmental body in violation of this chapter is voidable."

4. Citizens must know that an overhaul of the Comprehensive Plan is being done. Citizens want to, and should have the opportunity to, create their own comprehensive plan.

   According to Government Code Sec. 552.001 "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

[7] Appendix D - Relevant Texas State Attorney General Opinions

Prayer

Thus, I assert that the 2/2/15 Llano City Council Meeting Agenda Item H-1 and the vote were in violation of the Open Meetings Act. I therefore request a writ of mandamus be issued to the City of Llano to:

a) Void the vote on agenda item H-1.
b) Cease all activity on the development of the grant application defined in agenda item H-1.
c) Recall the grant application, approved by the vote, should it have already been submitted.

_____

Marc T. Sewell

Appendix A – 2/2/15 City Council Meeting Minutes – Comp Plan

2.2.15 MV, TK, GL, ~~RF~~, AH, BM

CTO: 5:30

Pledge: AH

Prayer: E LIGHT

F) none

G-1+2) (BM) (GL) unanimously approved

H-5) LK gave explanation of what happened on bill

JF- asked a ? LK- corrected him w/ explanation

JF- asked for an example of 2 bills- old way + new way

put on webpage, give to ipapers.

LK - yes we can do that.

AH - cheaper rate if fixed or adjustable

LK - should be the same

H-1) Cindy presented - to overhaul city's Comp. plan

JF- would guide planning & zones? BL-correct

(BM) (TK) unanimously approved

H-2) replace gates - pneumatic operator

Appendix B - 2/2/15 City Council Meeting Agenda Item H-1

NOTICE OF MEETING
OF THE
CITY COUNCIL OF
LLANO, TEXAS

This notice is posted pursuant to the Texas Open Meetings Act. Notice is hereby given that **a Regular Called Council Meeting** of the City of Llano, Texas, will be held on **Monday, February 2, 2015** at **5:30 PM.** in the City Hall Council Chambers at 301 W. Main Street, Llano, Texas 78643, at which time the following subjects will be discussed:

H. REGULAR AGENDA ITEMS

1. Discuss and consider action on the approval of Resolution 2015-02-02-1, authorizing the filing of a Texas Community Development Block Grant program application to the Texas Department of Agriculture; and authorizing the Mayor to act as the City's Executive Officer and authorized representative in all matters pertaining to the City's participation in the Texas Community Development Block Grant Program.
   Mayor Mike Virdell

Appendix C - 2/2/15 City Council Meeting Agenda Item Report H-1

City Council Agenda Item Report

February 2, 2015

Regular Agenda Item H-1

Contact – Brenton Lewis, 325-247-4158 x 206
blewis@cityofllano.com

AGENDA TITLE: Discuss and consider action on the approval of Resolution 2015-02-02-1, authorizing the filing of a Texas Community Development Block Grant program application to the Texas Department of Agriculture; and authorizing the Mayor to act as the City's Executive Officer and authorized representative in all matters pertaining to the City's participation in the Texas Community development Block Grant Program.

1. **BACKGROUND/HISTORY –** The City of Llano is eligible to apply for grant funds through the Community Block Grant Program (CDBG). The CDBG program is funded in two cycles, therefore, if awarded a grant, then the funding may occur during the first or second year.

2. **FINDINGS/CURRENT ACTIVITY –** To maximize the use of possible funds, and to have the greatest benefit for the citizens and the community the City should apply for a planning grant. This grant will address planning elements for planning and urban environmental design with the following categories: Certifications, Presentation, Reports, & Publications; Base Fee, Mapping, Land Use, Housing, Population; Street Conditions, Wastewater Study (Collection and Treatment); Capital Improvement Program; Parks and Recreation; and Digitized Mapping. This type of project will also provide a direction for the City to work in, while designating projects and mile stones to be completed. The grant does not allow for projects to be included in the plan if there is a current or future grant that will address various improvements. Therefore, the water distribution and treatment system and the central business district, are not included.

3. **FINANCIAL IMPACT –** Grant funds of $32,145 with a match of $6,430.00 (20% of Project), total project of $38,575.00

4. ACTION OPTIONS/RECOMMENDATION – **Motion to approve Resolution 2015-02-02-1, authorizing the filing of a TxCDBG application and authorizing the Mayor to execute documents.**

RESOLUTION 2015-02-02-1

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LLANO, TEXAS, AUTHORIZING THE FILING OF A TEXAS COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM APPLICATION TO THE TEXAS DEPARTMENT OF AGRICULTURE; AND AUTHORIZING THE MAYOR TO ACT AS THE CITY'S EXECUTIVE OFFICER AND AUTHORIZED REPRESENTATIVE IN ALL MATTERS PERTAINING TO THE CITY'S PARTICIPATION IN THE TEXAS COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM.

WHEREAS, the City Council of the City Of Llano desires to develop a viable community, including decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income; and WHEREAS, certain conditions exist which represent a threat to public health and safety; and

WHEREAS, it is necessary and in the best interests of the City of Llano to avail itself of the 2015 Texas Community Development Planning Program;

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE OF CITY OF LLANO, TEXAS;

1. That the City of Llano undertake a program to prepare the following planning effort(s):
   - Certifications, presentations, reports & publications
   - Base Fee: Mapping Land use, Housing, Population
   - Street Conditions
   - Wastewater Study (Collection and treatment)
   - Capital Improvements Program
   - Parks and Recreation
   - Digitized Base Map

2. That the requested amount of TxCDBG funds is a maximum of $ 32,145.

3. That a Texas Community Development Block Grant Program application for Planning/Capacity Building fund is hereby authorized to be filed on behalf of the City with the Texas Department of Agriculture and any other appropriate agencies as defined in the regulations.

4. That the City Council directs and designates the Mayor as the City's Chief Executive Officer and Authorized Representative to act in all matters in connection with this application and the City's participation in the Texas Community Development Block Grant Program.

5. That all funds will be used in accordance with all applicable federal, state, local and programmatic requirements including but not limited to procurement, environmental review, and civil rights requirements.

6. That the city/county commits itself, if funded by Texas Community Development Block Grant Program to appropriate $6,340 as matching funds and as a demonstration of its local support to the planning project.

Passed and approved this 2nd day of February 2015

_____
Mikel Virdell, Mayor

_____
Toni Milam, City Secretary

TABLE 2 - BENEFIT TO LOW AND MODERATE INCOME RESIDENTS

PLANNING ELEMENTS FOR PLANNING AND URBAN ENVIRONMENTAL DESIGN	Total Benes	LMI Benes	% LMI Benes	TxCDBG Funds	Other Funds	Total Funds
Certifications, Presentations, Reports, & Publications	3,075	1,745	56.75%	$750.00	$0.00	$750.00
Base Fee: Mapping, Land Use, Housing, Population	3,075	1,745	56.75%	$9,975.00	$1,130.00	$11,105.00
Street Conditions	3,075	1,745	56.75%	$4,095.00	$1,000.00	$5,095.00
Wastewater Study (Collection and Treatment)	3,075	1,745	56.75%	$6,720.00	$2,000.00	$8,720.00
Capital Improvements Program	3,075	1,745	56.75%	$3,255.00	$1,500.00	$4,755.00
Parks and Recreation	3,075	1,745	56.75%	$3,150.00	$0.00	$3,150.00
Digitized Base Map	3,075	1,745	56.75%	$4,200.00	$800.00	$5,000.00
	3,075	1,745	56.75%	**$32,145.00**	**$6,430.00**	**$38,575.00**

TxCDBG Cost Per Beneficiary: $10.45

TxCDBG Cost Per LMI Beneficiary: $18.42

ADDITIONAL PROJECT INFORMATION

1. Are there any persons with a reportable financial interest to disclose? ☐ Yes ☒ No

2. Disclose source(s) and use(s) of non-TxCDBG funds:

Source of Funds	Amount	Use of Funds	+
City of Llano general revenue	$6,430.00	Planning	x

Appendix D - Relevant Texas State Attorney General Opinions

Opinion No. H-1163 - The Open Meetings Act is to be liberally construed to effect its purpose 'of assuring that the public has the opportunity to be informed concerning the transactions of public business.' Toyah Independent School District v. Pecos- Barstow Independent School District, 466 S.W.2d 377, 380 (Tex. Civ. App.--San Antonio 1971, no writ).

Opinion No. GA-0668 - A court may also consider whether the notice departs from any customary practice where such custom establishes an expectation in the public about the subject of the meeting. *See River Rd. Neighborhood Ass'n v. S. Tex. Sports*, 720 S.W.2d 551, 557 (Tex. App.--San Antonio 1986, writ dism'd)

Opinion No. GA-0668 - Whether the subject is of special interest to the public is also a factor that may impact the adequacy of a notice under the Act. *See Cox Enters., Inc. v. Bd. of Trs. of Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 958-59 (Tex. 1986); *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 179-81 (Tex. App.--Corpus Christi 1990, writ denied).

Opinion No. GA-0668 - Underlying these considerations is the fact that the provisions of the Act "are mandatory and are to be liberally construed in favor of open government." *City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 467 (Tex. App.--Dallas 2007, no pet.).

Appendix E – Request to Llano City Council to Void Vote on H-1

From: Marc Sewell [mailto:marcs@simonlabs.com]
Sent: Sunday, February 15, 2015 12:46 PM
To: 'blewis@cityofllano.com'; 'mvirdell@cityofllano.com'; 'bmiller@cityofllano.com'; 'jferguson@cityofllano.com'; 'glang@cityofllano.com'; 'tkeller@cityofllano.com'; 'ahopson@cityofllano.com'
Subject: Illegal Vote on Comprehensive Plan Grant

Dear Council Members,

I request voiding the vote at the 2/2/15 City Council Meeting for Agenda Item H-1. The agenda posted by the City[1] did not contain sufficient information to inform citizens of the intent of the agenda item.

As identified by the Taylor and Associates speaker at the meeting (Cindy Gutierrez I think), the subject of the grant was a Comprehensive Plan. It is well known by City Manager Brenton Lewis, Mayor Virdell, City Attorney Bovey, and City Secretary Toni Milam that the subject of the Comprehensive Plan is of special interest to citizens[2] and should have been explicitly specified in the agenda item.

Even the packet detail[3] did not mention "Comprehensive Plan" but rather led readers to believe the grant was for "Planning Elements for Planning and Urban Environmental Design" and the benefit was for "Low to Moderate Income Residents." Also, there was no cost stated in the agenda item.

Thus, I assert that the agenda and the vote were in violation of the Open Meetings Act and the result of the agenda item H-1 should be voided and rescheduled. See Relevant Texas State Attorney General Opinions below[4].

I request that this subject be added to the closed meeting sessions on 2/17/15 as allowed by comment at the bottom of agendas[5]. Please give citizens an opportunity to comment.

See full report with references here.

Marc Sewell

[1] Appendix B - **2/2/15 Ci**ty Council Meeting Agenda Item H**-1**
[2] Appendix A - Comprehensive Plan History
[3][3] Appendix E - 2/12/15 City Council Agenda Item Report H-1
[4] Appendix F - **Relevant Texas State Attorney General Opinions**
[5] Appendix C - **Statement on Agenda Allowing Spontanious Closed Meeting**

XI. Penalties and Remedies

A. Introduction

The Act provides civil remedies and criminal penalties for violations of its provisions. District courts have original jurisdiction over criminal violations of the Act as misdemeanors involving official misconduct.[373] The Act does not authorize the attorney general to enforce its provisions. However, a district attorney, criminal district attorney or county attorney may request the attorney general's assistance in prosecuting a criminal case, including one under the Act.[374]

B. Mandamus, Injunction or Declaratory Judgment

Section 551.142 of the Act provides as follows:

> (a) An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.
>
> (b) The court may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or defendant who substantially prevails in an action under Subsection (a). In exercising its discretion, the court shall consider whether the action was brought in good faith and whether the conduct of the governmental body had a reasonable basis in law.[375]

Texas courts examining this provision have said that "[t]he Open Meetings Act expressly waives sovereign immunity for violations of the [A]ct."[376] The four-year residual limitations period in section 16.051 of the Civil Practices and Remedies Code applies to an action under this provision.[377]

Generally, a writ of mandamus would be issued by a court to require a public official or other person to perform duties imposed on him or her by law. Thus, mandamus ordinarily commands a person or entity to act, while an injunction restrains action.[378] The Act does not automatically confer jurisdiction on the county court, but where the plaintiff's money demand brings the amount in controversy within the court's monetary limits, the county court has authority to issue injunctive and mandamus relief.[379] Absent such a pleading, jurisdiction in original mandamus and original injunction proceedings lies in the district court.[380]

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373 *See State v. Williams*, 780 S.W.2d 891, 892–93 (Tex. App.—San Antonio 1989, no writ).
374 *See* TEX. GOV'T CODE ANN. § 402.028(a).
375 *Id.* § 551.142.
376 *Hays Cnty. v. Hays Cnty. Water Planning P'ship*, 69 S.W.3d 253, 257 (Tex. App.—Austin 2002, no pet.); *see Riley v. Comm'rs Ct.*, ___ S.W.3d ___, No. 03-11-00276-CV, 2013 WL 2348272, at *1–2 (Tex. App.—Austin May 23, 2013, no pet.).
377 *Rivera v. City of Laredo*, 948 S.W.2d 787, 793 (Tex. App.—San Antonio 1997, writ denied).
378 *Boston v. Garrison*, 256 S.W.2d 67, 69 (Tex. 1953).
379 *Martin v. Victoria Indep. Sch. Dist.*, 972 S.W.2d 815, 818 (Tex. App.—Corpus Christi 1998, pet. denied).
380 *Id.*

Section 551.142(a) authorizes any interested person, including a member of the news media, to bring a civil action seeking either a writ of mandamus or an injunction.[381] In keeping with the purpose of the Act, standing under the Act is interpreted broadly.[382] Standing conferred by the Act is broader than taxpayer standing, and a citizen does not need to prove an interest different from the general public, "because 'the interest protected by the Open Meetings Act is the interest of the general public.'"[383] The phrase "any interested person" includes a government league,[384] an environmental group,[385] the president of a local homeowners group,[386] a city challenging the closure of a hospital by the county hospital district,[387] and a town challenging annexation ordinances.[388] A suspended police officer and a police officers' association were "interested persons" who could bring a suit alleging that the city council had violated the Act in selecting a police chief.[389]

Texas courts have also recognized that an individual authorized to seek a writ of mandamus or an injunction under the Act may also bring a declaratory judgment action pursuant to the Uniform Declaratory Judgments Act, chapter 37 of the Texas Civil Practice and Remedies Code.[390] In such a proceeding, the court is authorized to determine the "rights, status, duties and other legal relations" of various persons, including public officers, and thus may determine the validity of a governmental body's actions under the Act.[391]

Section 551.142(b) authorizes a court to award reasonable attorney fees and litigation costs to the party who substantially prevails in an action brought under the Act.[392] This relief, however, is discretionary. The Uniform Declaratory Judgments Act also authorizes a court to award reasonable attorney fees.[393]

Depending on the nature of the violation, additional monetary damages may be assessed against a governmental body that violated the Act. In *Ferris v. Texas Board of Chiropractic Examiners*,[394] the appellate court awarded back pay and reinstatement to an executive director whom the board had

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381 TEX. GOV'T CODE ANN. § 551.142(a); *see Cameron Cnty. Good Gov't League v. Ramon*, 619 S.W.2d 224, 230–31 (Tex. App.—Beaumont 1981, writ ref'd n.r.e.).

382 *See Burks v. Yarbrough*, 157 S.W.3d 876, 880 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Hays Cnty. Water Planning P'ship v. Hays Cnty.*, 41 S.W.3d 174, 177 (Tex. App.—Austin 2003, no pet.).

383 *See Hays Cnty. Water Planning P'ship*, 41 S.W.3d at 177–78 (quoting *Save Our Springs Alliance, Inc. v. Lowry*, 934 S.W.2d 161, 163 (Tex. App.—Austin 1996, orig. proceeding [leave denied]).

384 *See Cameron Cnty.*, 619 S.W.2d at 230.

385 *See Save Our Springs Alliance, Inc.*, 934 S.W.2d at 162–64.

386 *Id.*

387 *Matagorda Cnty. Hosp. Dist. v. City of Palacios*, 47 S.W.3d 96, 102 (Tex. App.—Corpus Christi 2001, no pet.).

388 *City of Port Isabel v. Pinnell*, 161 S.W.3d 233, 241 (Tex. App.—Corpus Christi 2005, no pet.).

389 *Rivera v. City of Laredo*, 948 S.W.2d 787, 792 (Tex. App.—San Antonio 1997, writ denied).

390 *Bd. of Trs. v. Cox Enters., Inc.*, 679 S.W.2d 86, 88 (Tex. App.—Texarkana 1984), *aff'd in part, rev'd in part on other grounds*, 706 S.W.2d 956 (Tex. 1986) (recognizing news media's right to bring declaratory judgment action to determine if board had violated the Act); *see also City of Fort Worth v. Groves*, 746 S.W.2d 907, 913 (Tex. App.—Fort Worth 1988, no writ) (concluding that resident and taxpayer of city had standing to bring suit for declaratory judgment and injunction against city for violation of the Act).

391 TEX. CIV. PRAC. & REM. CODE ANN. § 37.003.

392 TEX. GOV'T CODE ANN. § 551.142(b); *see Austin Transp. Study Policy Advisory Comm. v. Sierra Club*, 843 S.W.2d 683, 690 (Tex. App.—Austin 1992, writ denied) (upholding award of attorney fees).

393 TEX. CIV. PRAC. & REM. CODE ANN. § 37.009; *City of Fort Worth*, 746 S.W.2d at 911, 917–19 (affirming trial court's award in excess of $40,000 in attorney fees to prevailing plaintiff in action pursuant to Uniform Declaratory Judgments Act).

394 *Ferris v. Tex. Bd. of Chiropractic Exam'rs*, 808 S.W.2d 514, 518–19 (Tex. App.—Austin 1991, writ denied).

attempted to fire at two meetings convened in violation of the Act. Finally, at the third meeting held to discuss the matter, the board lawfully fired the executive director. Back pay was awarded for the period between the initial unlawful firing and the third meeting at which the director's employment was lawfully terminated.[395]

Court costs or attorney fees as well as certain other monetary damages can also be assessed under section 551.146, which relates to the confidentiality of the certified agenda. It provides that an individual, corporation or partnership that knowingly and without lawful authority makes public the certified agenda or recording of an executive session shall be liable for:

(1) actual damages, including damages for personal injury or damage, lost wages, defamation, or mental or other emotional distress;

(2) reasonable attorney fees and court costs; and

(3) at the discretion of the trier of fact, exemplary damages.[396]

C. Voidability of a Governmental Body's Action in Violation of the Act; Ratification of Questionable Actions

Section 551.141 provides that "[a]n action taken by a governmental body in violation of this chapter is voidable." Before this section was adopted, Texas courts held as a matter of common law that a governmental body's actions that are in violation of the Act are subject to judicial invalidation.[397] Section 551.141 does not require a court to invalidate an action taken in violation of the Act, and it may choose not to do so, given the facts of a specific case.[398]

In *Point Isabel Independent School District v. Hinojosa*,[399] the Corpus Christi Court of Appeals construed this provision to permit the judicial invalidation of only the specific action or actions found to violate the Act. Prior to doing so, the court in *Point Isabel Independent School District* addressed the sufficiency of the notice for the school board's July 12, 1988, meeting. With regard to that issue, the court determined that the description "personnel" in the notice was insufficient notice of the selection of three principals at the meeting, a matter of special interest to the public, but was sufficient notice of the selection of a librarian, an English teacher, an elementary school teacher, a band director and a part-time counselor.[400] (For further discussion of required content of notice under the Act, *see supra* Part VII.A of this *Handbook*.) The court in *Point Isabel Independent*

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395 *Id.* at 519 (awarding executive director attorney fees of $7,500).

396 TEX. GOV'T CODE ANN. § 551.146(a)(2).

397 *See Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 646 (Tex. 1975); *Toyah Indep. Sch. Dist. v. Pecos-Barstow Indep. Sch. Dist.*, 466 S.W.2d 377, 380 (Tex. Civ. App.—San Antonio 1971, no writ); *see also Ferris*, 808 S.W.2d at 517; Tex. Att'y Gen. Op. No. H-594 (1975) at 2 (noting that governmental body cannot independently assert its prior action that governmental body failed to ratify is invalid when it is to governmental body's advantage to do so).

398 *See Collin Cnty., Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods*, 716 F. Supp. 953, 960 n.12 (N.D. Tex. 1989) (declining to dismiss lawsuit that county authorized in violation of Act's notice requirements if county within thirty days of court's opinion and order authorized lawsuit at meeting in compliance with Act). *But see City of Bells v. Greater Texoma Util. Auth.*, 744 S.W.2d 636, 640 (Tex. App.—Dallas 1987, no writ) (dismissing authority's lawsuit initiated at meeting in violation of Act's notice requirements).

399 *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176 (Tex. App.—Corpus Christi 1990, writ denied).

400 *Id.* at 182.

School District then turned to the question of whether the board's invalid selection of the three principals tainted all hiring decisions made at the meeting. The court felt that, given the reference in the statutory predecessor to section 551.141 to "an action taken" and not to "all actions taken," this provision meant only that a specific action or specific actions violating the Act were subject to judicial invalidation. Consequently, the court refused the plaintiff's request to invalidate all hiring decisions made at the meeting and held void only the board's selection of the three principals.[401]

A governmental body cannot give retroactive effect to a prior action taken in violation of the Act, but it may ratify the invalid act in an open meeting held in compliance with the Act.[402] The ratification will be effective only from the date of the meeting at which the valid action is taken.[403]

In *Ferris v. Texas Board of Chiropractic Examiners*, the Austin Court of Appeals refused to give retroactive effect to a decision to fire the executive director reached at a meeting of the board that was held in compliance with the Act.[404] The board had attempted to fire the director at two previous meetings that did not comply with the Act. The subsequent lawful termination did not cure the two previous unlawful firings retroactively, and the court awarded back pay to the director for the period between the initial unlawful firing and the final lawful termination.[405]

Ratification of an action previously taken in violation of the Act must comply with all applicable provisions of the Act.[406] In *Porth v. Morgan*, the Houston County Hospital Authority Board attempted to reauthorize the appointment of an individual to the board but did not comply fully with the Act.[407] The board had originally appointed the individual during a closed meeting, violating the requirement that final action take place in an open meeting. The original appointment also violated the notice requirement, because the posted notice did not include appointing a board member as an item of business. At a subsequent open meeting, the board chose the individual as its vice-chairman and, as such, a member of the board, but the notice did not say that the board might appoint a new member or ratify its prior invalid appointment. Accordingly, the board's subsequent selection of the individual as vice-chairman did not ratify the board's prior invalid appointment.

D. Criminal Provisions

Certain violations of the Act's requirements concerning certified agendas or recordings of executive sessions are punishable as Class C or Class B misdemeanors. Section 551.145 provides as follows:

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401 *Id.* at 182–83 (noting that previous decisions did not expressly address whether invalidation was limited to specific actions violating Act).

402 *Lower Colorado River Auth.*, 523 S.W.2d at 646–47 (recognizing effectiveness of increase in electric rates only from date reauthorized at lawful meeting); *City of San Antonio v. River City Cabaret, Ltd.*, 32 S.W.3d 291, 293 (Tex. App.—San Antonio 2000, pet. denied). *Cf. Dallas Cnty. Flood Control v. Cross*, 815 S.W.2d 271, 284 (Tex. App.—Dallas 1991, writ denied) (holding ineffective district's reauthorization at lawful meeting of easement transaction initially authorized at unlawful meeting, because to do so, given facts in that case, would give retroactive effect to transaction).

403 *River City Cabaret, Ltd.*, 32 S.W.3d at 293.

404 *Ferris*, 808 S.W.2d at 518–19.

405 *Id.*

406 *See id.* at 518 ("A governmental entity may ratify only what it could have lawfully authorized initially.").

407 *Porth v. Morgan*, 622 S.W.2d 470, 473, 475–76 (Tex. App.—Tyler 1981, writ ref'd n.r.e.).

> (a) A member of a governmental body commits an offense if the member participates in a closed meeting of the governmental body knowing that a certified agenda of the closed meeting is not being kept or that a recording of the closed meeting is not being made.
>
> (b) An offense under Subsection (a) is a Class C misdemeanor.[408]

Section 551.146 provides:

> (a) An individual, corporation, or partnership that without lawful authority knowingly discloses to a member of the public the certified agenda or recording of a meeting that was lawfully closed to the public under this chapter:
>
> (1) commits an offense; and
>
> (2) is liable to a person injured or damaged by the disclosure for:
>
> (A) actual damages, including damages for personal injury or damage, lost wages, defamation, or mental or other emotional distress;
>
> (B) reasonable attorney fees and court costs; and
>
> (C) at the discretion of the trier of fact, exemplary damages.
>
> (b) An offense under Subsection (a)(1) is a Class B misdemeanor.
>
> (c) It is a defense to prosecution under Subsection (a)(1) and an affirmative defense to a civil action under Subsection (a)(2) that:
>
> (1) the defendant had good reason to believe the disclosure was lawful; or
>
> (2) the disclosure was the result of a mistake of fact concerning the nature or content of the certified agenda or recording.[409]

In order to find that a person has violated one of these provisions, the trier of fact must determine that the person acted "knowingly." Section 6.03(b) of the Texas Penal Code defines that state of mind as follows:

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.[410]

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408 TEX. GOV'T CODE ANN. § 551.145.
409 *Id.* § 551.146.
410 TEX. PENAL CODE ANN. § 6.03(b).

A 2012 court of appeals case enumerated the elements of this criminal offense to be (1) a lawfully closed meeting, (2) a knowing disclosure of the agenda or tape recording of the lawfully closed meeting to a member of the public, and (3) a disclosure made without lawful authority.[411] In *Cooksey v. State*, Cooksey attached a copy of the tape recording of a closed meeting to his petition in his suit to remove the county judge.[412] He was later charged with violation of section 551.146.[413] The court of appeals determined that the posted notice for the emergency meeting did not clearly identify the emergency and thus the meeting was not sufficient as a "lawfully closed meeting" to uphold Cooksey's conviction.[414]

Section 551.146 does not prohibit members of the governmental body or other persons who attend an executive session from making public statements about the subject matter of the executive session.[415] Other statutes or duties, however, may limit what a member of the governmental body may say publicly.

Sections 551.143 and 551.144 of the Government Code establish criminal sanctions for certain conduct that violates openness requirements. A member of a governmental body must be found to have acted "knowingly" to be found guilty of either of these offenses.

Section 551.143 provides as follows:

> (a) 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.
>
> (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.[416]

Section 551.144 provides as follows:

> (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

411 *Cooksey v. State*, 377 S.W.3d 901, 905 (Tex. App.—Eastland 2012, no pet.).
412 *Id.* at 903–04.
413 *Id.* at 904.
414 *Id.* at 907.
415 Tex. Att'y Gen. Op. No. JM-1071 (1989) at 2–3.
416 TEX. GOV'T CODE ANN. § 551.143; *see* Tex. Att'y Gen. Op. No. GA-0326 (2005) at 7 (concluding that Government Code section 551.143 is not on its face void for vagueness).

> (1) participates in the closed meeting, whether it is a regular, special, or called meeting.[417]
>
> (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.[418]
>
> (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.[419]

Section 551.144(c) was adopted by the Seventy-sixth Legislature in 1999.[420] In 1998, the Texas Court of Criminal Appeals determined in *Tovar v. State*[421] that a government official who knowingly participated in an impermissible closed meeting may be found guilty of violating the Act even though he did not know that the meeting was prohibited under the Act. There was no statutory good faith exception to the Act.[422] Subsection 551.144(c) now provides an affirmative defense to prosecution under subsection (a) if the member of the governmental body acted in reasonable reliance on a court order or a legal opinion as set out in subsection (c).[423]

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417 *See Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 690, 693 (W.D. Tex. 2011), *aff'd*, 696 F.3d 454 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1634 (2013) (upholding constitutionality of section 551.144).

418 *See Martinez v. State*, 879 S.W.2d 54, 55–56 (Tex. Crim. App. 1994) (upholding validity of information which charged county commissioners with violating Act by failing to comply with procedural prerequisites for holding closed session).

419 TEX. GOV'T CODE ANN. § 551.144.

420 Act of May 22, 1999, 76th Leg., R.S., ch. 647, 1999 Tex. Gen. Laws 3218, 3219.

421 *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

422 *Tovar v. State*, 949 S.W.2d 370, 374 (Tex. App.—San Antonio 1997), *aff'd*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

423 TEX. GOV'T CODE ANN. § 551.144(c).

Appendix G – Certificate of Service

Certificate of Service

I certify that I have served this Petition on all other parties—which are listed below—on 2/23/14 as follows:

1. Llano City Attorney Carey Bovey **via email**
   Law office of Cary L. Bovey, PLLC
   2251 Double Creek Drive, Suite 204
   Round Rock, TX 78664
   (512) 904-9441
   cary@boveylaaw.com

2. Llano Mayor Mikel Virdell **via email**
   City of Llano
   301 West Main
   Llano, TX 78643
   (325) 247-4158
   mvirdell@cityofllano.com

3. Per Texas Rules of Court RULE 99, requested that the District Clerk prepare a citation.

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Marc T. Sewell
108 Summit
Llano, TX 78643-1127
325-247-2508
marcs@simonlabs.com