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**DENTON NAVARRO ROCHA BERNAL**  
**HYDE & ZECH, P.C.**  
**ATTORNEY CLIENT PRIVILEGE**  
**NOT A PUBLIC RECORD**  
**MEMORANDUM**

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**TO:** MAYOR AND CITY COUNCIL  
**CC:** CITY MANAGER  
**FROM:** CHARLES E. ZECH, CITY ATTORNEY'S OFFICE  
**ISSUE:** SOCIAL MEDIA AND THE TEXAS OPEN MEETINGS ACT  
**DATE:** FEBRUARY 13, 2014

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This memorandum is intended to update City Council on recent amendments to the Texas Open Meetings Act and their application to online message boards or similar internet applications, such as Facebook and blogs.

The Texas Open Meetings Act requires, unless a specific exception applies, every meeting of a governmental body to be open to the public.<sup>1</sup> A meeting is defined by the Texas Open Meetings Act in part as “a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, 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”<sup>2</sup> In 2011 the Texas Attorney General determined that, even though the Texas Open Meetings Act applies to a “verbal exchange”, “electronic communications could, depending on the facts of a particular case constitute a deliberation and a meeting for purposes of the Texas Open Meetings Act.”<sup>3</sup>

Last year the Texas Legislature passed Senate Bill 1297, effective September 1, 2013, which amended the Texas Government Code Chapter 551 by adding Section 551.006 and authorizes a quorum of City Council members to participate in an electronic communications in compliance with the amended provision. Senator Kirk Watson, author of Senate Bill 1297, provided in his Statement of Intent within the Bill Analysis that:

*To ensure public business is conducted in an open and transparent manner, the Texas Open Meetings Act (Act) prohibits a member of a state or local governmental body's board or commission from*

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<sup>1</sup> Tex. Gov't Code § 551.002

<sup>2</sup> Tex. Gov't Code § 551.001(4)(A)

<sup>3</sup> Tex. Atty. Gen. Op. GA-0896 (2011)

*communicating with its fellow board members unless it is in an open meeting. As a result, boards cannot communicate electronically or otherwise outside of publicly posted meetings about official business or policy matters.*

*S.B. 1297 expands the Act by authorizing governmental bodies to use a publicly viewable electronic communications board through which board members can communicate with each other, thereby facilitating electronic communications between board members while still protecting the public's interest in open and transparent government. Although the bill authorizes electronic communication among board members, no official action can be taken via this method of communication.<sup>4</sup> (emphasis added)*

As indicated in the Bill Analysis the legislation is intended to authorize governing bodies to utilize electronic communication message boards, such as Facebook, blogs, and other types of electronic communications. The legislation allows for such communications by governing bodies with certain specific requirements and controls as outlined in the Bill Analysis:

- *the communication must be in writing;*
- *the writing must be posted to an online message board that is viewable and searchable by the public;*
- *the communication must be displayed in real time and be displayed on the online message board for no less than 30 days after the communication is first posted;*
- *the governmental body may have only one online message board that the governmental body either owns or controls;*
- *the online message board must be prominently displayed on the governmental body's primary Internet website;*
- *the online message board may only be used by members of the governmental body and/or its officers;*
- *a communication that a member of the governmental body removes from an online message board after the 30-day window is subject to the Public Information Act and must be retained for six years;*
- *and*
- *the governmental body may not vote or take any action that is required to be taken at a meeting simply by posting a written communication to an online message board.<sup>5</sup> (emphasis added)*

SB 1297, in conjunction with Texas Attorney General Opinion Number GA-0896, clearly stands for the proposition that electronic communications by a quorum of the governing body which are not in compliance with Texas Government Code Section 551.006 are a violation of the Texas Open Meetings Act. Enforcement remedies for violations of the Texas Open Meetings Act include, but

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<sup>4</sup> Senate Bill 1297 Bill Analysis; Author's/Sponsor's Statement of Intent

<sup>5</sup> *Id.*

are not limited to, voiding action taken in violation of the Texas Open Meetings Act<sup>6</sup>, suit to enjoin future violations<sup>7</sup>, criminal charges for conspiracy to circumvent the requirements of the Texas Open Meetings Act,<sup>8</sup> and criminal charges for participating in an unauthorized closed meeting.<sup>9</sup> A conviction under either of the criminal penalties includes punishment of (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.<sup>10</sup>

Members of governmental bodies should refrain from discussing public business or public policy over which the governmental body has supervision or control on electronic message boards unless the electronic message board is in compliance with Texas Government Code Section 551.006.

Please do not hesitate to contact our office at (210) 227-3243 with any questions.

Attachments:

SB 1297  
SB 1297 Bill Analysis  
TML Legislative Update on SB 1297  
Tex. Atty. Gen. Op. No. GA-0896

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<sup>6</sup> Tex. Gov't Code § 551.141

<sup>7</sup> Tex. Gov't Code § 551.142

<sup>8</sup> Tex. Gov't Code § 551.143

<sup>9</sup> Tex. Gov't Code § 551.144

<sup>10</sup> Tex. Gov't Code § 551.143 (b)(1)-(3); Tex. Gov't Code § 551.144 (b)(1)-(3)

AN ACT

relating to written electronic communications between members of a governmental body.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter A, Chapter 551, Government Code, is amended by adding Section 551.006 to read as follows:

Sec. 551.006. WRITTEN ELECTRONIC COMMUNICATIONS ACCESSIBLE TO PUBLIC. (a) A communication or exchange of information between members of a governmental body about public business or public policy over which the governmental body has supervision or control does not constitute a meeting or deliberation for purposes of this chapter if:

(1) the communication is in writing;

(2) the writing is posted to an online message board or similar Internet application that is viewable and searchable by the public; and

(3) the communication is displayed in real time and displayed on the online message board or similar Internet application for no less than 30 days after the communication is first posted.

(b) A governmental body may have no more than one online message board or similar Internet application to be used for the purposes described in Subsection (a). The online message board or similar Internet application must be owned or controlled by the governmental body, prominently displayed on the governmental body's primary Internet web page, and no more than one click away from the governmental body's primary Internet web page.

(c) The online message board or similar Internet application described in Subsection (a) may only be used by members of the governmental body or staff members of the governmental body who have received specific authorization from a member of the governmental body. In the event that a staff member posts a communication to the online message board or similar Internet application, the name and title of the staff member must be posted along with the communication.

(d) If a governmental body removes from the online message board or similar Internet application a communication that has been posted for at least 30 days, the governmental body shall maintain the posting for a period of six years. This communication is public information and must be disclosed in accordance with Chapter 552.

(e) The governmental body may not vote or take any action that is required to be taken at a meeting under this chapter of the governmental body by posting a communication to the online message board or similar Internet application. In no event shall a communication or posting to the online message board or similar Internet application be construed to be an action of the governmental body.

SECTION 2. This Act takes effect September 1, 2013.

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President of the Senate

Speaker of the House

I hereby certify that S.B. No. 1297 passed the Senate on April 4, 2013, by the following  
vote: Yeas 30, Nays 0.

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Secretary of the Senate

I hereby certify that S.B. No. 1297 passed the House on May 22, 2013, by the following  
vote: Yeas 148, Nays 0, two present not voting.

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Chief Clerk of the House

Approved:

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Date

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Governor

## **BILL ANALYSIS**

Senate Research Center

S.B. 1297  
By: Watson  
Open Government  
7/23/2013  
Enrolled

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

To ensure public business is conducted in an open and transparent manner, the Texas Open Meetings Act (Act) prohibits a member of a state or local governmental body's board or commission from communicating with its fellow board members unless it is in an open meeting. As a result, boards cannot communicate electronically or otherwise outside of publicly posted meetings about official business or policy matters.

S.B. 1297 expands the Act by authorizing governmental bodies to use a publicly viewable electronic communications board through which board members can communicate with each other, thereby facilitating electronic communications between board members while still protecting the public's interest in open and transparent government. Although the bill authorizes electronic communication among board members, no official action can be taken via this method of communication.

S.B. 1297 imposes the following requirements and controls on official message boards:

- the communication must be in writing;
- the writing must be posted to an online message board that is viewable and searchable by the public;
- the communication must be displayed in real time and be displayed on the online message board for no less than 30 days after the communication is first posted;
- the governmental body may have only one online message board that the governmental body either owns or controls;
- the online message board must be prominently displayed on the governmental body's primary Internet website;
- the online message board may only be used by members of the governmental body and/or its officers;
- a communication that a member of the governmental body removes from an online message board after the 30-day window is subject to the Public Information Act and must be retained for six years; and
- the governmental body may not vote or take any action that is required to be taken at a meeting simply by posting a written communication to an online message board.

S.B. 1297 amends current law relating to written electronic communications between members of a governmental body.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Subchapter A, Chapter 551, Government Code, by adding Section 551.006, as follows:

Sec. 551.006. WRITTEN ELECTRONIC COMMUNICATIONS ACCESSIBLE TO PUBLIC. (a) Provides that a communication or exchange of information between members of a governmental body about public business or public policy over which the governmental body has supervision or control does not constitute a meeting or deliberation for purposes of this chapter if:

- (1) the communication is in writing;
- (2) the writing is posted to an online message board or similar Internet application that is viewable and searchable by the public; and
- (3) the communication is displayed in real time and displayed on the online message board or similar Internet application for no less than thirty days after the communication is first posted.

(b) Authorizes a governmental body to have no more than one online message board or similar Internet application to be used for the purposes described in subsection (a). Requires that the online message board or similar Internet application be owned or controlled by the governmental body, be prominently displayed on the governmental body's primary Internet web page, and be no more than one click away from the governmental body's primary Internet web page.

(c) Authorizes the online message board or similar Internet application described in subsection (a) to only be used by members of the governmental body or staff members of the governmental body who have received specific authorization from a member of the governmental body. Requires that, in the event that a staff member posts a communication to the online message board or similar Internet application, the name and title of the staff member be posted along with the communication.

(d) Requires the governmental body, if a governmental body removes from the online message board or similar Internet application a communication that has been posted for at least thirty days, to maintain the posting for a period of six years.



Provides that this communication is public information and is required to be disclosed in accordance with Chapter 552 (Public Information), Government Code.

(e) Prohibits the governmental body from voting or taking any action that is required to be taken at a meeting under this chapter of the governmental body by posting a communication to the online message board or similar Internet application. Prohibits a communication or posting to the online message board or similar Internet application from being construed to be an action of the governmental body.

SECTION 2. Effective date: September 1, 2013.

## **S.B. 1297: Online Message Board Discussions**

Recent legislation has attempted to allow some discussion amongst members of a governmental body outside of an open meeting using the Internet. Senate Bill 1297, a bill that passed during the Eighty-Third Legislative Session, adds a provision to the Texas Open Meetings Act that is effective September 1, 2013. This provision provides that communication between councilmembers about public business or public policy over which the council has supervision or control does *not* constitute a meeting if certain conditions are met. The communication must be:

1. in writing;
2. posted to an online message board that is viewable and searchable by the public; and
3. displayed in real time and displayed on the message board for no less than 30 days after the communication is first posted.

A city is prohibited from having more than one online message board used for these purposes. Additionally:

- o The online message board must be prominently displayed on the city's primary website and no more than one click away from the city's website.
- o The message board may only be used by city councilmembers or city employees that have received authorization from the council.
- o If a city employee posts on the message board, the employee must include his or her name and title with the communication.
- o The council may not vote or take action by posting on the city's online message board, and if the city removes a posted message, the city must retain the posting for six years.

Facebook *should* satisfy the requirements of S.B. 1297. If a city intends to use Facebook as the city's sole online message board, the city must ensure that the Facebook page is "public" and viewable by the public. Additionally, a disclaimer underneath the link from the city's main page and on the Facebook page should be displayed with language stating that the page is in compliance with S.B. 1297 and only members of the city council or staff members authorized by the council may post on the board. A section-by-section analysis of the Government Code provision added by the bill is available at <http://www.tml.org/p/SB-1297-and-Facebook-July2013.pdf> (/p/SB-1297-and-Facebook-July2013.pdf).

Other than the exception created by S.B. 1297, city officials should remember that communications between a quorum of a city council about public business, no matter the forum or the time, can be a "meeting" to which the Open Meetings Act applies. If the Act

applies to a discussion, an agenda must be posted 72 hours in advance, and the public must be able to attend. It is essentially impossible for a private Facebook post or discussion to meet those requirements.

As such, city councilmembers should avoid commenting on private Facebook posts related to city business if the discussion will ultimately involve a quorum. (Note: Less than a quorum can also violate the Act by having secret deliberations to circumvent the Act's requirements. Thus, city officials should always use caution with social media.).

Office of the Attorney General  
State of Texas

Opinion No. GA-0896

December 13, 2011

Re: Whether certain kinds of electronic communication among members of the board of directors of a river authority constitute a violation of the Open Meetings Act, chapter 551 of the Government Code (RQ-0977-GA)

Mr. Don Sloan  
President  
Bandera County River Authority and Groundwater District  
Post Office Box 177  
Bandera, Texas 78003

Dear Mr. Sloan:

You ask “when, and to what extent, might e-mail or other electronic communications rise to the potential of a violation of the Texas Open Meetings Act, or in particular, constitute a ‘walking quorum.’”<sup>[FN1]</sup> You explain that the Bandera County River Authority and Groundwater District (the “District”) is “concerned about three categories of electronic communications”: First, e-mail disseminated among a quorum of the District's Board of Directors (the “Board”); second, e-mail sent to less than a quorum of the Board and copied to the District's general manager, who does not know whether the e-mail was sent to other Board members; and third, messages sent by a Board member to an internet-based group whose members are unknown to the District. Request Letter at 1. Your letter includes copies of many messages that might fall within one or more of the three categories you describe. *Id.* at 1 (tabs 3-12). You write that the District is concerned that some of the Board members' electronic communications might violate the Act, and you want our “opinion as to the appropriateness” of the communications. *Id.* at 2. However, the “District recognizes that this may be [a] very difficult issue [on which] to render opinions based upon the number of unknowns.”*Id.* at 2. Indeed, this office cannot resolve questions of fact. [Tex. Att'y Gen. Op. No. GA-0751 \(2009\)](#) at 1. Therefore, we cannot resolve the many factual questions surrounding the messages you ask about in your letter. *Id.* Instead, we will give you general legal guidance on your questions.

We begin by reviewing the Act. “Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.”[Tex. Gov't Code Ann. § 551.002 \(West 2004\)](#). The Board is a “governmental body.” *See id.* § 551.001(3)(H) (West, Supp. 2011) (providing that the governing board of a special district created by law is a governmental body).*See also* Act of May 31, 1971, 62d Leg., R.S., ch. 629, § 1, 1971 Tex. Gen. Laws 2045, 2045 (creating the District). Therefore, the Act applies to the Board. The Act defines a “meeting” as a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, 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; ...

<sup>\*2</sup> [Tex. Gov't Code Ann. § 551.001\(4\)\(A\)](#) (West, Supp. 2011). A “deliberation” is a “verbal exchange during a meeting

between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.”*Id.* § 551.001(2). The Act does not define a “walking quorum.” *See generally id.* § 551.001. However, a Texas appellate court has defined the term to mean “serial meetings of less than a quorum.” *Willmann v. City of San Antonio*, 123 S.W.3d 469, 478 (Tex. App.—San Antonio 2003, pet. denied). *See also Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 474 (W.D. Tex. 2001) (describing the term as “an overlapping series of meetings or telephone conferences [when] a quorum of members was not in the same room at the same time”).

Although the Act applies to a “verbal exchange” involving a quorum of the governmental body, the Act does not provide that the words exchanged must be spoken in person. *Tex. Gov’t Code Ann. § 551.001*(4) (West, Supp. 2011). *See also Tex. Att’y Gen. Op. No. JC-0307 (2000)* at 5-6 (explaining that the word “verbally” usually describes the expression of something in words generally rather than the expression of something in spoken words only). Indeed, members of a governmental body need not be in each other’s physical presence to constitute a quorum. *Tex. Att’y Gen. Op. Nos. GA-0326 (2005)* at 3, *JC-0307 (2000)* at 4, *DM-95 (1992)* at 5. *See also Esperanza Peace & Justice Ctr.*, 316 F. Supp. 2d at 473 (indicating that the court of appeals in *Hitt v. Mabry*, 687 S.W.2d 791, 796 (Tex. App.—San Antonio, no writ), found that members of a governmental body need not be in each other’s physical presence to constitute a quorum), *Willmann*, 123 S.W.3d at 476-77 (same). *See also Tex. Gov’t Code Ann. §§ 551.125, .127* (West 2004) (providing that a governmental body is not prohibited from holding a “meeting” by telephone and video, respectively, and that such a meeting must comply with the “notice requirements applicable to other meetings”). Therefore, based on the plain language of the Act, Texas court opinions, and prior opinions of this office, we conclude that electronic communications could, depending on the facts of a particular case, constitute a deliberation and a meeting that must comply with the Act. *See Tex. Att’y Gen. Op. No. JC-0307 (2000)* at 5-6 (declining to opine that the word “deliberation” in *section 551.001*(2) refers only to spoken words because, if it did, members of a governmental body could avoid the Act’s requirements by using e-mail).

We have not determined whether the electronic communications you include in your request constitute a deliberation for purposes of the Act. Attempting to make that determination would require the consideration of fact questions, which we cannot do in the opinion process. *Tex. Att’y Gen. Op. No. GA-0751 (2009)* at 1. Nor have we determined whether the members who disseminated the electronic communications violated the Act. Attempting to make that determination would require an inquiry into their respective states of mind. *See Tex. Gov’t Code Ann. § 551.143*(a) (West 2004) (prohibiting members of a governmental body from “knowingly” conspiring to circumvent the Act by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of the Act); *id.* § 551.144(a) (prohibiting a member of a governmental body from “knowingly” calling or participating in a closed meeting that is not permitted under the Act). Instead, we conclude that the fact that communications are electronic does not render them free from the Act’s requirements.

## SUMMARY

**\*3** Electronic communications could, depending on the facts of a particular case, constitute a deliberation and a meeting for purposes of the Texas Open Meetings Act.

Very truly yours,  
Greg Abbott  
Attorney General of Texas

Daniel T. Hodge  
First Assistant Attorney General

David J. Schenck  
Deputy Attorney General for Legal Counsel

Jason Boatright  
Chair  
Opinion Committee

Jason Boatright  
Assistant Attorney General  
Opinion Committee

[FN1]. Letter from Mr. Don Sloan, President, Bandera County River Authority and Groundwater District, to Honorable Greg Abbott, Attorney General of Texas at 1 (June 9, 2011), [https://www.oag.state.tx.us/opin/index\\_rq.shtml](https://www.oag.state.tx.us/opin/index_rq.shtml) (“Request Letter”) (with attachments, tabs 3 through 12). We limit this opinion to the question you ask about the Open Meetings Act (the “Act”) and presume, as a Texas court would, that the Act is constitutional. *See* [Tex. Att’y Gen. Op. No. GA-0890 \(2011\)](#) at 1, n.1 (citing [section 311.021\(1\) of the Government Code](#), providing that it is presumed that laws are constitutional); *Nootsie Ltd. v. Williamson Cnty. Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996) (presuming that a statute is constitutional)).

Tex. Atty. Gen. Op. GA-0896, 2011 WL 6319553 (Tex.A.G.)

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