

Client Alert

March 2019

Texas High Court Strikes Down Open Meetings Act Provision; New Bill Proposed

In a split decision, on March 1, 2019, the Texas Court of Criminal Appeals invalidated a significant provision of Texas's Open Meetings Act as unconstitutionally vague. *State of Texas v. Doyal*, No. PD-0254-18 (Tex. Crim. App. 2019).

The provision at issue makes it a crime if any member of a governmental body "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." Tex. Gov't Code § 551.143(a). The County Judge of Montgomery County, Texas had been indicted under that provision for allegedly conducting secret deliberations about a road bond. He moved to dismiss the indictment on grounds that the statute was unconstitutionally vague.

In its opinion, the Court of Criminal Appeals first recognized that elected officials' speech is protected by the First Amendment just as robustly as that of citizens in general. *Id.* at *6. Finding that Section 551.143(a) implicates the First Amendment and recognizing that "uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas are clearly marked," the court analyzed whether Section 551.143(a) is sufficiently definite to avoid chilling protected expression. *Id.* at *12 (citing *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972)).

The court noted that Section 551.143(a) does not criminalize a conspiracy to **violate** a law; rather, it criminalizes a conspiracy to **circumvent** a law. "[T]he 'circumvent' language necessarily requires something other than a literal violation of some other provision of TOMA." *Id.* at *16. But, said the court, it is unclear what else would be included. "It requires a person to envision actions that are like a violation of TOMA without actually being a violation of TOMA and refrain from engaging in them." *Id.* As such, the court struck down Section 551.143(a) as unconstitutionally vague and dismissed the County Judge's indictment.

Following *Doyle*, the other provisions of the Open Meetings Act still stand, including the provision making it a crime for a person knowingly to call or participate in a closed meeting if a closed meeting is not permitted under the Act. Tex. Gov't Code § 551.144. Moreover, actions taken by a governmental body without compliance with the Open Meetings Act remain subject to nullification by Texas civil courts. *Id.* at § 551.141

There have been calls for the Texas legislature, which is in session until May 27, 2019, to enact legislation to cure the vagueness problem in Section 551.143(a). On March 4, 2019, Representative Steve Toth filed House Bill 2965 providing that a member of a governmental body commits a crime if he or she "knowingly engages directly or indirectly in a series of verbal or written communications with other members of the governmental body without a quorum present regarding a tacit or explicit agreement to act uniformly in sufficient number to constitute a quorum" about "an issue within the jurisdiction of the governmental body" or "any public business." In addition, the State's lawyer plans to ask the court to reconsider its decision. We continue to monitor these issues and will provide updates on any further legislative or judicial developments in the wake of the *Doyle* decision.

Contacts

Mark B. Arnold

markarnold@HuntonAK.com

Kelly Sandill

kellysandill@HuntonAK.com

Kathryn Elizabeth Boatman

kathrynboatman@HuntonAK.com