

SUBJECT: Prohibiting certain communications outside of open meetings

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 13 ayes — Phelan, Hernandez, Deshotel, Guerra, Harless, Holland,
Hunter, P. King, Parker, Raymond, E. Rodriguez, Smithee, Springer

0 nays

SENATE VOTE: On final passage, April 9 — 30-1 (Creighton)

WITNESSES: *On House companion bill, HB 3402:*

For — Stacy Allen, Texas Association of Broadcasters; Kelley Shannon, Freedom of Information Foundation of Texas; (*Registered, but did not testify*: Chris Barbee and Mike Hodges, Texas Press Association; Perry Fowler, Texas Water Infrastructure Network; Anthony Gutierrez, Common Cause Texas; Aryn James, Travis County Commissioners Court; Tom Oney, Lower Colorado River Authority; Michael Schneider, Texas Association of Broadcasters; Alexie Swirsky)

Against — None

On — Jennie Hoelscher, Office of the Attorney General

BACKGROUND: Government Code ch. 551, the Texas Open Meetings Act, generally requires meetings of governmental bodies to be open to the public. Closed meetings are allowed under certain circumstances. The act also requires governmental bodies to give written notices of upcoming meetings and to keep minutes or make a recording of each open meeting.

A "meeting" means a deliberation between a quorum of the body, or between a quorum and another person, during which public business is discussed or considered or formal action is taken. A "deliberation" means a verbal exchange during a meeting between a quorum of the body, or between a quorum and another person, concerning an issue within the body's jurisdiction or any public business.

Under sec. 551.143, a member or group of members of a governmental body commits an offense if the member or group knowingly conspires to circumvent the Open Meetings Act by meeting in numbers less than a quorum for the purpose of secret deliberations. An offense is a misdemeanor punishable by jail for at least one month but not more than six months and/or a fine of at least \$100 but not more than \$500.

DIGEST: SB 1640 would revise the conduct constituting an offense under Government Code sec. 551.143. Under the bill, a member of a governmental body would commit an offense if the member knowingly engaged in at least one communication among a series of communications that each occurred outside of a meeting authorized by the Open Meetings Act and that concerned an issue within the jurisdiction of the governmental body in which the members engaging in the individual communications constituted fewer than a quorum.

At the time the member engaged in the communication, the member also would have to have known that the series of communications involved or would involve a quorum and would constitute a deliberation once a quorum engaged in the series of communications.

The bill would revise the definition of "deliberation" to mean a verbal or written exchange 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.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2019, and would apply only to an offense committed on or after the bill's effective date.

SUPPORTERS SAY: SB 1640 would restore the "walking quorum" prohibition to the Texas Open Meetings Act by addressing constitutional issues found by the Texas Court of Criminal Appeals. In February 2019, the court concluded in *State v. Doyal* that Government Code sec. 551.143, commonly referred to as the

"walking quorum" prohibition, was unconstitutionally vague on its face. The court took issue with "knowingly conspires to circumvent this chapter," concluding that current statute requires a person to envision actions that are like a violation of the act without actually being a violation and refrain from engaging in them. That issue, along with the absence of a clear definition of the concept of a walking quorum, reinforced the court's conclusion that the current language is broad and lacks any reasonable degree of clarity on what it covers.

Restoring this prohibition is essential to ensure that the public's business is conducted in the open. The original intent of the prohibition was to prevent members of a governmental body from skirting requirements of the Open Meetings Act by meeting in a series of small, private gatherings to avoid a quorum. Without a walking quorum prohibition, there is nothing to stop governmental bodies from meeting in smaller groups to obscure government business from the public, thereby avoiding the spirit and intent of the act.

The bill would address the court's concerns by making the conduct that constituted an offense more specific, precise, and clear. It also would help governmental bodies better understand the limits of the law, ensuring transparency and accountability to the public they serve. Officials would have to knowingly engage in a series of exchanges outside of a public meeting that involved or would eventually involve a quorum. The bill would specify that the prohibition would apply only to issues within a governmental body's jurisdiction and that deliberations could take place in verbal or written exchanges.

**OPPONENTS
SAY:**

No concerns identified.

NOTES:

The House sponsor intends to offer a floor amendment that would specify that an offense occurred if the members engaging in the series of communications constituted a quorum.