SO YOU WON, NOW WHAT? TRANSITION OF OFFICE

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CHAPTER 13

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EDUCATION

J.D., 1984, South Texas College of Law
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Handguns and motorcycles

TABLE OF CONTENTS

I. SOVEREIGN IMMUNITY 1

II. WHO IS "THE KING"? 1

III. TEXAS TORT CLAIMS ACT CONTAINS A LIMITED WAIVER OF SOVEREIGN IMMUNITY 1

IV. SOVEREIGN AND GOVERNMENTAL IMMUNITY DO NOT BAR: 2

V. INDIVIDUAL IMMUNITY 3

VI. FORMAL REQUIREMENTS UPON TAKING OFFICE 3

VII. NEWLY ELECTED? NOW YOU'RE IN THE LAWSUIT 4

VIII. ADVICE TO CONSIDER WHEN ASSUMING AN ELECTED OFFICE 4

IX. FIRST AMENDMENT ISSUES FOR ELECTED OFFICIALS 4

SO YOU WON, NOW WHAT? TRANSITION OF OFFICE

I. SOVEREIGN IMMUNITY

Once you have been elected to office, you and those working for you will have very limited liability pursuant to the doctrine of sovereign immunity. The basic premise is "The King can do no wrong," which is an ancient fiction that now serves the pragmatic purpose of shielding members of the public from the costs and consequences of their governments' improvident actions. *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011).

A. The current rule is that the State may not be sued for damages in its own courts without its consent. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003).
B. Immunity encompasses two distinct but related issues: (1) immunity from liability and (2) immunity from suit. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 93 (Tex. 2012).
C. The State's sovereign immunity from suit defeats a trial court's subject matter jurisdiction. *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).
D. Sovereign immunity protects the State and various divisions of the state government, such as agencies, boards, hospitals, and universities. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).
E. Governmental immunity provides similar protection to subdivisions of the State. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3. (Tex. 2003).

II. WHO IS "THE KING"?

A. The State is the King, *i.e.*, the State and its agencies and various political subdivisions.
B. The Texas Tort Claims Act defines "governmental unit" as

    1. "this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts[;]" Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(A) (West Supp. 2012).
    2. Political subdivisions, which include:

    "any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority[;]" Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(B) (West Supp. 2012).

    3. Emergency service organizations; Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(C) (West Supp. 2012); and
    4. "any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution." Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(D) (West Supp. 2012).

C. The following entities are also recognized by common law as political subdivisions of the State:

    1. Counties -- *Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 705 (Tex. 2003).
    2. Cities -- *Ben Bolt-Palito Blanco Consol. ISD v. Tex. Political Subdivs. Prop/Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323-24 (Tex. 2006).
    3. Housing authorities -- *Gracia v. Brownsville Hous.*, 105 F.3d 1053, 1056 (5th Cir. 1997)).
    4. Municipal utility districts -- *Loyd v. ECO Res.*, 956 S.W.2d 110, 121-22 (Tex. App.—Houston [14th Dist. 1997, no pet.).
    5. Hospital districts and authorities - - *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 31 (Tex. 1983); *Childs v. Greenville Hosp. Auth.*, 479 S.W.2d 399, 400-01 (Tex. App.—Texarkana 1972, writ ref'd n.r.e.).
    6. School districts -- *Braun v. Trustees of Victoria ISD*, 114 S.W.2d 947, 950 (Tex. Civ. App.—San Antonio 1938, writ ref'd).
    7. Improvement districts (navigation, irrigation, levee) -- *Smith v. Harris Cnty.-Houston Ship Channel Nav. Dist.*, 330 S.W.2d 672, 674 (Tex. App.—Fort Worth 1959, no writ)).
    8. Self-insurance pools composed of other political subdivisions -- *Ben Bolt-Palito Blanco Consol. ISD v. Tex. Political Subdivs. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 325 (Tex. 2006)).

III. TEXAS TORT CLAIMS ACT CONTAINS A LIMITED WAIVER OF SOVEREIGN IMMUNITY

A. Sovereign immunity is waived and abolished in section 101.025 of the Texas Tort Claims Act only "to the extent of liability created by this chapter." Tex. Civ. Prac. & Rem. Code Ann. § 101.025 (West 2011). Section 101.021 of the Texas Tort Claims Act contains a limited waiver by the State of immunity from suit in cases involving:

1. "property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if: (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and (B) the employee would be personally liable to the claimant according to Texas law; and"
2. "personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West 2011).
3. The Texas Tort Claims Act does not waive sovereign immunity for a claim: "(1) based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection, or rebellion; or (2) arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities." Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (West 2011).

IV. SOVEREIGN AND GOVERNMENTAL IMMUNITY DO NOT BAR:

A. A suit alleging a violation of the Texas Constitution, such as a claim alleging a taking of property for public use; *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980).

B. A claim asserting a deprivation of due course of law under article 1, section 19 of the Texas Constitution; *see generally Nueces Cnty. v. Ferguson*, 97 S.W.3d 205, 221-22 n.23 (Tex. App.—Corpus Christi 2002, no pet.).

C. A claim for equitable relief under article 1, section 29 of the Texas Constitution for a violation of the Texas Bill of Rights. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148-49 (Tex. 1995);

D. A claim under article 1, section 17 of the Texas Constitution for imposing regulations that deny a landowner all economically viable use of its property or unreasonably interferes with a landowner's rights to use and enjoy its property. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998).

E. Suits that do not seek to impose liability on the State or seek money damages from the State, suits that do not seek to control state action, suits that allege a violation of a self-enacting constitutional provision and seek the relief provided by the provision, or suits that allege performance of an ultra vires act. *Nueces Cnty. v. Hoff*, 105 S.W.3d 208, 211 (Tex. App.—Corpus Christi 2003), *rev'd on other grounds*, 153 S.W.3d 45 (Tex. 2004).

F. Government employees and some governmental entities may be liable for damages resulting from depriving individuals of their constitutional rights under 42 U.S.C. § 1983. *Monell v. N.Y. City Dept. of Soc. Servs.*, 436 U.S. 658, 690-95, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

G. State and local governments, governmental agencies, and political subdivisions are liable for unlawful employment practices under Title VII of the Civil Rights of 1964, and sovereign immunity is not a defense. 42 U.S.C. § 2000e(a), (b).

H. State and Local governmental bodies are liable for taking adverse personnel action against a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement agency. Tex. Gov't Code Ann. § 554.001 (West 2012) (Texas Whistleblower Act). *See, e.g., Galveston Indep. Sch. Dist. v. Jaco*, 331 S.W.3d 182, 184-86 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). "Personnel action" means an action that affects the plaintiff's compensation, promotion, demotion, transfer, work assignment, or performance evaluation. Tex. Gov't Code Ann. § 554.001(3) (West 2012).

1. The elements of a whistleblower claim are jurisdictional. *State v. Lueck*, 290 S.W.3d 876, 883-84 (Tex. 2009).
2. A report of a violation includes any disclosure of information that tends to prove a violation of a criminal or civil law, the state or federal constitution, a statute, an administrative rule, or a regulation. *Llanes v. Corpus Christi ISD*, 64 S.W.3d 638, 642 (Tex. App.—Corpus Christi 2001, pet. denied). An internal policy is not a "law" under the Whistleblower Act. *Dallas Area Rapid Transit v. Carr*, 309 S.W.3d 174, 177 (Tex. App.—Dallas 2010, pet. denied).
3. To be protected, the employee must generally state how he believes the law was violated, but he need not identify a specific law or provision. *Llanes v. Corpus Christi ISD*, 64

S.W.3d 638, 642 (Tex. App.—Corpus Christi 2001, pet. denied).

4. The "good faith" standard is both objective and subjective. Good faith means the plaintiff believed the conduct violated the law and the plaintiff's belief was reasonable in light of her training an dexperience. *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 626 (Tex. 2010); *Wichita Cnty. v. Hart*, 917 S.W.2d 779, 784-85 (Tex. 1996).
5. As long as a plaintiff's belief was honest and objectively reasonable, the Whistleblower Act will protect the plaintiff, even if the plaintiff was mistaken and no law was actually violated, the plaintiff harbored malice toward the violator, or the plaintiff participated in the reported conduct. *Dallas Area Rapid Transit v. Carr*, 309 S.W.3d 174, 177 (Tex. App.—Dallas 2010, pet. denied); *Wichita Cnty. v. Hart*, 917 S.W.2d 779, 786 (Tex. 1996); *Gold v. City of College Station*, 40 S.W.3d 637, 649 (Tex. App.—Houston [1st Dist.] 2001, judgm't vacated w.r.m.).

V. INDIVIDUAL IMMUNITY

A. A government employee has sovereign or governmental immunity when the employee acts as a representative of the government. *See Herring v. Houston Nat'l Exch. Bank*, 253 S.W.813, 814 (Tex. 1923).

B. A government employee sued in his official capacity enjoys the same immunity afforded to the government. *Nueces Cnty. v. Ferguson*, 97 S.W.3d 205, 214 (Tex. App.—Corpus Christi 2002, no pet.).

C. The governmental entity need not be a party for the employee to invoke sovereign immunity. *Nueces Cnty. v. Ferguson*, 97 S.W.3d 205, 215 n.11 (Tex. App.—Corpus Christi 2002, no pet.).

D. Official immunity is a common-law defense available to government officials and employees sued in their individual capacity. *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994).

E. Official immunity shields a defendant from liability, but does not make a defendant immune from suit. *Eastland Cnty. Coop. Dispatch v. Poyner*, 64 S.W.3d 182, 192 (Tex. App.—Eastland 2001, pet. denied). Therefore, official immunity must be raised as an affirmative defense. *See Telthorster v. Tennell*, 92 S.W.3d 457, 460 (Tex. 2002).

F. Elements of official immunity are:

1. the defendant was a government official or employee,
2. the defendant was sued for performing a discretionary act governmental act,
3. defendant performed the act in good faith,
4. the performance of the act was within the scope of the defendant's authority, and
5. the defendant was sued in his individual capacity. *Harless v. Niles*, 100 S.W.3d 390, 395-96 (Tex. App.—San Antonio 2002, no pet.).

G. An act is discretionary if it involves personal deliberation, decision, and judgment. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994). Discretionary acts include, for example, a law enforcement officer's decision concerning when and how to arrest a suspect, rendering assistance at the scene of an accident, or responding to an emergency. *Kistner v. Pfannstiel*, 107 S.W.3d 7, 10-11 (Tex. App.—San Antonio 2002, no pet.); *Harless v. Niles*, 100 S.W.3d 390, 395-96 (Tex. App.—San Antonio 2002, no pet.); *Junemann v. Harris Cnty.*, 84 S.W.3d 689, 693 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

H. Ministerial acts are not protected by official immunity. *Cloud v. McKinney*, 228 S.W.3d 326, 335 (Tex. App.—Austin 2007, no pet).

1. Ministerial acts are those in which the actor's duty is so precisely described or defined by law that the actor has no discretion or judgment in performing the acts. *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 425 (Tex. 2004).
2. An example of a ministerial act is the act of making official reports and providing copies as required by law. *Govant v. Houston Cmty. Coll. Sys.*, 72 S.W.3d 69, 74 (Tex. App.—Houston [14th Dist.] 2002, no pet.).
3. Other types of immunity pertinent to elected officials include legislative immunity, which is available to individuals who are sued in their individual capacity for performing a legislative act (*Joe v. Two Thirty Nine Jt.V.*, 145 S.W.3d 150, 157 (Tex. 2004)); and judicial immunity, which is a common-law defense available to judges and certain individuals who are sued in their individual capacity for performing judicial acts (*Bradt v. West*, 892 S.W.2d 56, 69 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

VI. FORMAL REQUIREMENTS UPON TAKING OFFICE

A. The Secretary of State, members of the Legislature, and all other elected and appointed

officers are constitutionally required by Article XVI, § 1 of the Texas Constitution to take an oath and a "bribery statement" (which is also an oath) and must file the oath and the "bribery statement" with the Secretary of State. Tex. Const. Art. XVI, § 1. The required contents of the oath are set forth in Art. XVI, § 1.

B. All other (local) officers must retain the signed statement with the official records of the office. Tex. Const. Art. XVI, § 1(c). The oath must be administered by someone qualified under Texas law to administer oaths, as set forth in section 602.002 of the Government Code. Tex. Gov't Code Ann. § 602.002 (West 2012).

C. Officials who are required by law to give an official bond must file the bond with the officer's oath of office. Tex. Gov't Code Ann. § 604.001 (West 2012).

VII. NEWLY ELECTED? NOW YOU'RE IN THE LAWSUIT

A. With respect to litigation in federal court, Rule 25(d) of the Federal Rules of Civil Procedure provides that "[a]n action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party." Fed. R. Civ. P. 25(d).

B. There is not a Texas Rule of Civil Procedure analogous to Rule 25(d) of the Federal Rules of Civil Procedure. However, Rule 37 provides that "[b]efore a case is called for trial, additional parties, necessary or proper parties to the suit, may be brought in, either by the plaintiff or the defendant, upon such terms as the court may prescribe; but not at a time nor in a manner to unreasonably delay the trial of the case." Tex. R. Civ. P. 37. As the successor to an elected office, a newly elected official is subject to being added to pending civil lawsuits as a necessary or proper party.

C. With respect to pending appeals, Rule 7.2(a) of the Texas Rules of Appellate Procedure provides that when a public officer is a party in an official capacity to an appeal or original proceeding and ceases to hold office before the proceeding is finally disposed of, the public officer's successor is automatically substituted as a party "if appropriate." Tex. R. App. P. 7.2(a). If the case is an original proceeding, "the court must abate the proceeding to allow the successor to reconsider the original party's decision. In all other cases, the suit will not abate, and the successor will be bound by the appellate court's judgment or order as if the successor were the original party." Tex. R. App. P. 7.2(b).

VIII. ADVICE TO CONSIDER WHEN ASSUMING AN ELECTED OFFICE

A. Try to attend available training opportunities designed for your particular office.

B. Familiarize yourself with any continuing education requirements for your office and make sure you comply.

C. Obtain a copy of the budget for your office or department to familiarize yourself with the resources available to you to get your job done.

D. Spend time meeting with your staff and getting to know them. If at all possible, avoid "housecleaning" (firing everyone who worked for your predecessor) when you take office. Experienced employees may prove invaluable to you and will likely shorten the time it will take for you to learn how your office functions and how best to efficiently perform your duties. Spend several months getting to know your team and evaluating their strengths and weaknesses before making personnel changes. Doing so will build goodwill and also might help you avoid litigation.

E. Carefully research any new projects that you propose to learn whether they have been suggested before, whether they are legal, and whether they will infringe upon the rights of others.

F. Network with other officials in positions identical to or similar to yours. Join any relevant city, county, statewide, or national associations that might provide networking opportunities for your particular office.

G. Avoid the appearance of impropriety. Avoid nepotism, conflicts of interest, and using government equipment for non-governmental purposes. Never accept any type of benefit from anyone who is subject to your jurisdiction. Always consult the rules of ethics that govern your particular office. Do not commingle personal and public funds.

H. Lead by example.

IX. FIRST AMENDMENT ISSUES FOR ELECTED OFFICIALS

A. The First Amendment, which is made applicable to the states by the Fourteenth Amendment, prohibits the government from infringing on the rights of religion, speech, press, assembly, and petition. Employees of private entities have no protection from adverse employment action taken as a result of their exercise of free speech because

the First Amendment only limits the government's ability to limit free speech. However, employees of the government do have protection from retaliation for exercising their First Amendment rights. Courts balance "the interests of the [employee] as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

B. Public employees who make statements pursuant to their official duties rather than as private citizens are not speaking as citizens for purposes of the First Amendment; therefore, the Constitution does not protect their communications from employer discipline. *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

C. Texas Open Meetings Act (TOMA) may limit an elected official's speech. *See* Tex. Gov't Code Ann. §§ 551.001-551.146 (West 2012).

1. TOMA requires that "[e]very 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 2012).
2. TOMA 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; or . . . except as otherwise provided by this subdivision, a gathering . . . that is conducted by the governmental body or for which the governmental body is responsible;" "at which a quorum of members of the governmental body is present;" "that has been called by the governmental body; and" "at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control." Tex. Gov't Code Ann. § 551.001(4) (West 2012).
3. TOMA defines "deliberation" as "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." Tex. Gov't Code Ann. § 551.001(2) (West 2012).
4. TOMA concerns may arise in the context of discussing public business with other members of a governmental body outside of a properly-posted meeting, since any gathering of members of a governmental body is subject to the requirements of TOMA if a quorum is present and public business is discussed. Tex. Gov't Code Ann. § 551.001(4) (West 2012) (definition of a "meeting"). The Code Construction Act defines "quorum" as "a majority of the number of members fixed by statute" for the public body in question. Tex. Gov't Code Ann. § 311.013(b) (West 2013). TOMA defines a quorum as a majority of the governing body, unless otherwise defined by applicable law or the governing body's charter. Tex. Gov't Code Ann. § 551.001(6) (West 2012).
5. Meetings of less than a quorum of a governmental body are generally not subject to TOMA. *See Hays Cnty. v. Hays Cnty. Water Planning P'ship*, 106 S.W.3d 349, 356 (Tex. App.—Austin 2003, no pet.).
6. TOMA contains an exception for expressly authorized closed sessions. Tex. Gov't Code Ann. § 551.101 (West 2012). Deliberations in closed session are authorized for the following deliberations:

   a. consultations between the governmental body and its attorney,
   b. about real property,
   c. certain commissioners courts and the Texas Facilities Commission about a contract currently being negotiated,
   d. regarding gifts and donations,
   e. about personnel matters,
   f. by commissioners court about a county advisory body,
   g. investments and potential investments,
   h. regarding security devices or security audits,
   i. involving individuals' medical or psychiatric records,
   j. by the Texas Department of Insurance,
   k. by the Board of Pardons and Paroles,
   l. deliberations by the Credit Union Commission,
   m. deliberations by the Finance Commission of Texas,
   n. certain school board deliberations involving discipline of a child or a

complaint or charge against a district employee by another employee,

o. by certain providers of health care services,
p. by certain public power utilities,
q. regarding economic development negotiations, and
r. regarding items to be included in a test that the governmental body administers to individuals seeking to obtain or renew a license or certificate that is necessary to engage in an activity,
s. the Department of Information Resources, when meeting to deliberate certain security issues.

Tex. Gov't Code Ann. §§ 51.071-551.089 (West 2012).

7. Section 551.005 of TOMA requires each elected or appointed public official who is a member of a governmental body subject to TOMA to complete a course of training that addresses the member's responsibilities under TOMA. Tex. Gov't Code Ann. § 551.005(a) (West 2012). The training must be completed not later than the 90th day after the member takes the oath of office, or, if an oath of office is not required, otherwise assumes responsibilities as a member of the governmental body. Tex. Gov't Code Ann. § 551.005(a) (West 2012).
8. TOMA broadly defines "governmental body" in section 51.001(3). Tex. Gov't Code Ann. § 551.001(3) (West 2012). Governmental body means "a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members;" "a county commissioners court in the state;" "a municipal governing body in the state;" "a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;" "a school board of trustees;" "a county board of school trustees;" "a county board of education" "the governing board of a special district created by law;" "a local workforce development board . . .;" "a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and" "a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation . . . ." Tex. Gov't Code Ann. § 551.001(3) (West 2012).
9. The definition of "governmental body" only includes entities within the executive and legislative departments of the state; therefore, the judiciary is excluded from the Act. *See* Tex. Gov't Code Ann. § 551.001(3)(A) (West 2012); *Beasley v. Molett*, 95 S.W.3d 590, 605 (Tex. App.—Beaumont 2002, pet. denied).
10. TOMA concerns may even arise from informal communications, such as speaking on the telephone and email, if a quorum exists. *Hitt v. Mabry*, 687 S.W.2d 791, 795-96 (Tex. App.—San Antonio 1985, no writ). The Act's definition of "meeting" expressly excludes gatherings of a "quorum of a governmental body at a social function unrelated to the public business that is conducted by the body[.]" Tex. Gov't Code Ann. § 551.001(4)(B) (West 2012).
11. The requirement for an elected official to comply with TOMA does not unconstitutionally abridge his right to freedom of speech. *Hays Cnty. Water Planning Partnership v. Hays Cnty., Tex.*, 41 S.W.3d 174, 181-82 (Tex. App.—Austin 2001, no pet.).