

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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DIANA ASGEIRSSON, ANGIE BERMUDEZ,)
JEFF BROWNING, JACQUES DUBOSE,)
JAMES FITZGERALD, JIM GINNINGS,)
VICTOR GONZALEZ, RUSSELL C. JONES,)
MEL LEBLANC, LORNE LIECHTY,)
A.J. MATHIEU, JOHANNA NELSON,)
CINDY O'BRYAN, TODD PEARSON,)
CHARLES WHITECOTTON, HENRY WILSON,)
KEVIN WILSON,) PE:09-CV-00059-RAJ
Plaintiff,)
VS.) AUSTIN, TEXAS
GREG ABBOTT, Texas Attorney General)
and THE STATE OF TEXAS,)
Defendant.) NOVEMBER 23, 2010

TRANSCRIPT OF BENCH TRIAL

BEFORE THE HONORABLE ROBERT A. JUNELL

VOLUME 1 OF 1

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12:58:04 1 (Open Court)

12:58:04 2 THE CLERK: The Court calls Pecos 09-CV-59, Diana
12:58:11 3 Asgeirsson v. Texas Attorney General for bench trial.

12:58:16 4 THE COURT: All right. And would the attorneys for
12:58:20 5 each side make announcements, please.

12:58:22 6 MR. PONTON: Rod Ponton and Dick DeGuerin for the
12:58:25 7 plaintiffs, and we're ready for trial, Your Honor.

12:58:28 8 MR. DEGUERIN: Good afternoon, Your Honor.

12:58:30 9 MR. PONTON: We're also joined by William McKamie and
12:58:32 10 Adolfo Ruiz.

12:58:32 11 THE COURT: Mr. DeGuerin, I know you've had a -- is
12:58:38 12 it a Worker's Comp or a car wreck case?

12:58:39 13 MR. DEGUERIN: It's a little misdemeanor political
12:58:41 14 case, and I have to go back there. So I wanted to ask the
12:58:44 15 court for leave.

12:58:45 16 THE COURT: Absolutely. And if you -- someone may
12:58:48 17 have a buzzer or something hooked up to you, that they'll let
12:58:51 18 you know. But we'll understand if you need to leave.

12:58:55 19 MR. DEGUERIN: Actually, I need to leave now.

12:58:57 20 THE COURT: Okay.

12:58:57 21 MR. DEGUERIN: And what I told the marshals
12:58:58 22 downstairs was I was going to be able to say to a Federal
12:59:03 23 Judge, I've got something more important to do.

12:59:05 24 THE COURT: And I certainly understand. So we
12:59:06 25 appreciate you being here and the good work you've done in this

12:59:10 1 case. And thank you very much for your appearance. And it's
12:59:12 2 always a pleasure to have you in the courtroom.

12:59:15 3 MR. DEGUERIN: Thank you very much. If I may be
12:59:15 4 excused?

12:59:16 5 THE COURT: You may.

12:59:17 6 MR. DEGUERIN: Thank you.

12:59:17 7 THE COURT: And who is here for the State of Texas?

12:59:19 8 MR. ECCLES: Good afternoon, Your Honor. James
12:59:22 9 "Beau" Eccles. Joining me is Ms. Erika Kane as well as a
12:59:27 10 Jim Ho and Sean Jordan.

12:59:30 11 THE COURT: Thank you very much. How I would like to
12:59:37 12 do this is I have read all of the briefs and read all of the
12:59:45 13 documents and papers. Is there any real need to invoke the
12:59:48 14 Rule in this case? I know that the plaintiffs want to offer
12:59:51 15 some testimony. It seemed like just the nature of the
12:59:54 16 testimony I'm not sure lend itself. I'll leave that to you.

12:59:56 17 MR. ECCLES: Well, surely the plaintiffs as parties
13:00:00 18 would be able to remain in the room. I'm only concerned if
13:00:03 19 they are -- because we do have some objection to the witnesses
13:00:06 20 that have been late identified and quasi-expert witnesses that
13:00:10 21 they've tossed into the mix. I don't know if they're planning
13:00:12 22 on offering them.

13:00:13 23 THE COURT: Okay.

13:00:14 24 MR. ECCLES: But if they are, I would like to invoke
13:00:16 25 the Rule.

13:00:17 1 THE COURT: All right, Mr. Ponton?

13:00:23 2 MR. PONTON: Your Honor, we're not planning on
13:00:24 3 offering expert witnesses. The witnesses we propose to offer
13:00:28 4 would be Jim Ginnings.

13:00:33 5 THE COURT: Hold on just a second. Let me turn to my
13:00:34 6 Plaintiffs' Second Amended Witness List Revised Standard
13:00:38 7 Version, if I could, please. Okay. Let me find -- say the
13:00:49 8 name again, please?

13:00:50 9 MR. PONTON: It's number 3, Jim Ginnings,
13:00:53 10 Wichita Falls.

13:00:54 11 THE COURT: Okay.

13:00:56 12 MR. PONTON: Number 4, Victor Gonzales from
13:00:59 13 Pflugerville; number 5, Mel LeBlanc from Arlington; number 6,
13:01:01 14 Henry Wilson from Hurst; number 8, Diana Asgeirsson from
13:01:07 15 Alpine; number 10, Scott Houston from TML; number 11, Terry
13:01:13 16 Keel from Austin; and a person not named in this list but he's
13:01:17 17 been previously named, Avinash Rangra, the lead plaintiff in
13:01:22 18 the first case.

13:01:22 19 And in response to Mr. Eccles' question about expert
13:01:28 20 witnesses, we're not proposing that Scott Houston testify as an
13:01:32 21 expert witness. We have previously tendered an article he
13:01:37 22 wrote. We're just going to introduce his article into evidence
13:01:41 23 through him, and that's the testimony -- that's all we plan to
13:01:44 24 use him for as a witness.

13:01:46 25 THE COURT: Okay. Mr. Eccles?

13:01:47 1 MR. PONTON: And Mr. -- excuse me, Your Honor.
13:01:49 2 Mr. Keel is not really an expert witness. Through him we're
13:01:53 3 going to tender a House Journal proceedings.

13:01:56 4 THE COURT: You know, Mr. Keel's background I'm
13:01:58 5 certainly aware of. Mr. Keel and I were coconspirators in the
13:02:02 6 Texas legislature for a number of years. And so I'm a little
13:02:07 7 concerned about that. So why don't we take them one by one.
13:02:13 8 Is that all right with you, Mr. Eccles? What's your position?

13:02:16 9 MR. ECCLES: Well, I can shortcut Representative
13:02:19 10 Keel's testimony. I'm certainly not going to object to the
13:02:22 11 tendering of a couple of pages of the House Journal. I did
13:02:26 12 have an objection to his affidavit, as I would have an
13:02:28 13 objection to an affidavit being submitted as trial testimony or
13:02:32 14 trial evidence in any trial. And I presented those objections
13:02:38 15 to the Court and I'm happy to go through those.

13:02:40 16 As to Mr. Houston taking the stand to introduce an
13:02:43 17 article of his, again, I have presented objections to law
13:02:51 18 review articles essentially being used as evidence in this case
13:02:55 19 because whether you're calling Mr. Houston an expert or not,
13:02:59 20 that is certainly the intent, is to put in an article that is
13:03:02 21 going to wind up being a roundabout testimony as to conclusions
13:03:05 22 of law of Mr. Houston in this case. So that's inadmissible as
13:03:12 23 well as any sort of affidavit testimony.

13:03:13 24 THE COURT: Let's take up first the issue of invoking
13:03:15 25 the Rule. Do you want to invoke the Rule on any of those

13:03:18 1 people that were named? It seems like Mr. Keel, Mr. Rangra and
13:03:23 2 Mr. Houston are the only non-parties that they may call.

13:03:26 3 MR. ECCLES: I do have an objection to Mr. Rangra
13:03:30 4 testifying in this matter. He's not a party in this case.

13:03:33 5 THE COURT: Let's just ask to the Rule, and then
13:03:35 6 we'll take up the issue as to whether he testifies or not.

13:03:38 7 MR. ECCLES: Understood, Your Honor. I would prefer
13:03:41 8 that he be excluded.

13:03:42 9 THE COURT: From the courtroom while the others
13:03:44 10 testify?

13:03:44 11 MR. ECCLES: Yes, Your Honor.

13:03:44 12 THE COURT: All right. The Rule has been invoked.
13:03:45 13 Mr. Rangra -- Dr. Rangra, will you go outside in the hallway,
13:03:50 14 and there's a witness room.

13:03:52 15 MR. PONTON: Also Mr. Keel and Mr. Houston.

13:03:56 16 THE COURT: I believe that I heard -- I didn't here
13:03:59 17 the State say they needed to be excused. How about Mr. -- and
13:04:02 18 we'll take up the issue of whether or not their testimony will
13:04:06 19 be accepted or not. But as far as Mr. Keel and Mr. Houston, do
13:04:10 20 you have any objection to them staying in the courtroom?

13:04:12 21 MR. ECCLES: If we're not going to limit their
13:04:14 22 testimony, as I was trying to give a shortcut to that, to
13:04:18 23 actually eliminate the need for their testimony, if it was just
13:04:21 24 to support an article and to support the introduction of a
13:04:24 25 couple of pages of House Journal, then I present my

13:04:28 1 objections. If they're going to testify as to anything more
13:04:31 2 than just that, then, yes, I would.

13:04:33 3 THE COURT: Mr. Ponton?

13:04:35 4 MR. PONTON: I guess I might proffer their testimony
13:04:38 5 depending on the Court's ruling. If you don't want to let the
13:04:41 6 article in, I might want to ask them a couple of questions.
13:04:43 7 It's something that would depend upon you, Judge.

13:04:47 8 THE COURT: Okay. Well, why don't we excuse Mr. Keel
13:04:53 9 and Mr. Houston. The State invokes the Rule as to them.

13:04:56 10 MR. PONTON: That's fine.

13:04:57 11 THE COURT: All right. If I could have all those
13:04:59 12 persons, Mr. Ginnings, Mr. Gonzales, Mr. LeBlanc, Mr. Wilson,
13:05:04 13 Ms. Asgeirsson. Am I pronouncing that correctly?

13:05:07 14 MR. PONTON: Asgeirsson.

13:05:09 15 THE COURT: Asgeirsson. Come up here and let the
13:05:13 16 clerk swear you as witnesses in this case.

13:05:32 17 MR. PONTON: Your Honor, Mr. Gonzales is not here.
13:05:34 18 He's running late.

13:05:36 19 THE COURT: Okay.

13:05:37 20 (Witnesses sworn)

13:05:47 21 THE COURT: And, Mr. Ponton, call your first witness.

13:05:51 22 MR. PONTON: I'll call Jim Ginnings.

13:05:54 23 THE COURT: Mr. Ginnings. And the parties have an
13:06:11 24 hour to put on their case. And I've got my handy dandy chess
13:06:16 25 clock here. If you'll give me just a second to set it on an

13:06:21 1 hour. All right. Mr. Ponton, you may proceed.

13:06:58 2 MR. PONTON: Thank you, Your Honor.

13:07:01 3 JIM GINNINGS,

13:07:01 4 having been first duly sworn, testified as follows:

13:07:01 5 DIRECT EXAMINATION

13:07:01 6 BY MR. PONTON:

13:07:01 7 Q. State your name for the record and where you live and
13:07:03 8 what you do, sir.

13:07:05 9 A. My name is Jim Ginnings. I live in Wichita Falls, Texas,
13:07:11 10 and I'm an independent oil and gas producer.

13:07:13 11 Q. How long have you lived in Wichita Falls?

13:07:15 12 A. Fifty years.

13:07:16 13 Q. Have you had an occasion to be a public servant in
13:07:21 14 Wichita Falls?

13:07:22 15 A. Yes, sir, I have.

13:07:23 16 Q. And what office have you held in the past and what office
13:07:26 17 do you presently hold?

13:07:28 18 A. I served two terms on the City Council of Wichita Falls,
13:07:32 19 and I presently am the president of the 4B Corporation.

13:07:36 20 Q. For his Honor's benefit, a 4B Corporation is an economic
13:07:41 21 development corporation; is that right?

13:07:43 22 A. Well, yes, sir. It is an incentive corporation. We have
13:07:47 23 two corporations: A 4A, which we consider our primary
13:07:52 24 development corporation, and the other is quality of life
13:07:58 25 incentives and such.

13:07:59 1 Q. The 4B corporation?

13:08:01 2 A. That's 4B.

13:08:02 3 Q. I'm sorry?

13:08:03 4 A. That's the 4B. The latter.

13:08:05 5 Q. The 4B corporation is subject to the restrictions of the
13:08:08 6 Texas Open Meetings Act; is that correct?

13:08:10 7 A. Yes, sir, it is.

13:08:11 8 Q. Okay. And for how many years did you serve on the
13:08:14 9 Wichita Falls City Council?

13:08:15 10 A. Four.

13:08:15 11 Q. While you were on the City Council and presently on the 4B
13:08:19 12 corporation, have you had any instruction or training in the
13:08:24 13 Texas Open Meetings Act?

13:08:25 14 A. Yes, sir.

13:08:26 15 Q. And what kind of training was that?

13:08:28 16 A. Well, it's pretty much ad hoc, I would say. We were made
13:08:33 17 aware of it when I first went on the council by our City
13:08:39 18 Attorney, and he stayed awfully close to us. And then we would
13:08:44 19 be made aware of certain violations or at least issues that
13:08:49 20 arose with -- about the State over this and we would be coached
13:08:55 21 on that. And in the course of our duties, well, oftentimes we
13:09:01 22 would be instructed in certain procedures in order to comply
13:09:05 23 with open meetings.

13:09:08 24 Q. Because of the training you had and because of the Open
13:09:13 25 Meetings Law, have you ever felt like you've been unable to

13:09:17 1 communicate with your fellow City Council Members or the
13:09:22 2 members of the public who elected you to office?
13:09:24 3 A. Yes, sir.
13:09:24 4 Q. Please tell the Judge specifics about instances like that
13:09:30 5 that troubled you in the past.
13:09:31 6 A. Initially, of course, on the council and any governmental
13:09:39 7 elected office, you get a lot of invitations. We have a
13:09:44 8 military air force base there in Wichita Falls, and they're
13:09:48 9 constantly inviting us to their various functions. Civic
13:09:53 10 groups do that. And all of the Council Members would get those
13:09:56 11 invitations. And I guess, you know, you like to sit with your
13:10:00 12 friends because you never know who they are when you're elected
13:10:04 13 to office.
13:10:05 14 But, anyhow, we would gather at the same table and quite
13:10:08 15 often we'd have a full seven-member council at one table. And
13:10:12 16 so we were made aware that we had to be careful about what we
13:10:18 17 discussed. And occasionally a citizen might come up and pose a
13:10:25 18 question to us and, quite frankly, I would have a tendency to
13:10:29 19 let my guard down in instances like that and try to address the
13:10:38 20 concerns of that citizen. And so we just had to be very
13:10:41 21 careful that we didn't violate or cross any lines on open
13:10:47 22 meetings.
13:10:47 23 Q. Did your open meetings -- did your open meetings training
13:10:51 24 instruct you that a quorum of the Council receiving information
13:10:57 25 about public matters at a forum like -- like you're describing

13:11:01 1 could be a criminal violation of the Open Meetings Act?

13:11:04 2 A. Yes, sir.

13:11:05 3 Q. Are you a man who likes to violate the law?

13:11:08 4 A. No, sir.

13:11:08 5 Q. Did that --

13:11:09 6 A. When I took my office -- oath of office, I swore to uphold
13:11:13 7 the law. And I took that seriously.

13:11:14 8 Q. Have there been times when you did not communicate with
13:11:18 9 either the public or your fellow City Council Members because
13:11:21 10 you were afraid that doing so might make you subject to going
13:11:24 11 to jail?

13:11:24 12 A. Well, afraid -- I wouldn't use that word for myself. But
13:11:28 13 concerned and certainly trying to stay on the south side of the
13:11:33 14 boundary that -- so that, you know, I didn't endanger myself in
13:11:39 15 any manner. I don't -- I don't think that's a good way to
13:11:43 16 live, frankly.

13:11:45 17 Q. But were there times when you didn't communicate because
13:11:47 18 you wanted to stay on the, as you describe it, the south side
13:11:50 19 of the boundary? In other words, were there times when you
13:11:54 20 didn't communicate with your fellow Council Members or the
13:11:58 21 public because you were afraid of TOMA?

13:12:00 22 A. Concerned about that, yes, sir.

13:12:05 23 MR. PONTON: Thank you, sir.

13:12:10 24 THE COURT: There may be some -- Mr. Ginnings, there
13:12:12 25 may be some cross-examination.

13:12:15 1 THE WITNESS: Okay.

13:12:16 2 THE COURT: Does the State have any
13:12:17 3 cross-examination?

13:12:21 4 MR. ECCLES: Very briefly, Your Honor.

13:12:24 5 CROSS-EXAMINATION

13:12:26 6 BY MR. ECCLES:

13:12:26 7 Q. Good afternoon, sir.

13:12:27 8 A. Good afternoon.

13:12:30 9 Q. When did you receive your Texas Open Meetings Act
13:12:33 10 training?

13:12:34 11 A. Well, as I told Mr. Ponton, it was somewhat ad hoc. It
13:12:38 12 was just sort of continuous training beginning in 2005. And I
13:12:45 13 guess it's still in existence because we have our City Attorney
13:12:49 14 present with us when we have 4B meetings since I'm no longer on
13:12:54 15 the Council.

13:12:54 16 Q. Okay. So you have -- you have been a member of a
13:13:14 17 governmental body for how many years, approximately?

13:13:19 18 A. Five.

13:13:19 19 Q. Five years. How many meetings would you say that you've
13:13:22 20 been involved in?

13:13:23 21 A. Let's see, two times a month for four years, 24 times 4 is
13:13:37 22 96. And then maybe a half a dozen or so 4B meetings. So
13:13:44 23 somewhat over 100.

13:13:45 24 Q. Now, you said that there was an instance that you were
13:13:48 25 troubled. You said that you had been invited and were sitting

13:13:52 1 at a table with the entire Council and a citizen came up and
13:13:56 2 asked you a question. And you were troubled by whether you
13:13:59 3 could respond to the citizen's question; is that correct?

13:14:02 4 A. With respect, I think you've combined two questions. I
13:14:06 5 was giving an example of how we were advised that we could be
13:14:13 6 in violation when we were all sitting at one table. But the
13:14:17 7 other instance was just sort of hypothetical, although at least
13:14:25 8 that's the way I took the question.

13:14:28 9 I would be -- I would be troubled if we had a quorum
13:14:33 10 present and a citizen came and asked us a question that would
13:14:37 11 be discussed by all of us. And, as a matter of fact, as I
13:14:43 12 said, I would probably let my guard down and try to address the
13:14:46 13 citizen's request. But that might not be the thing to do.

13:14:49 14 Q. But that didn't actually happen, did it?

13:14:52 15 A. I don't recall that happening to me.

13:14:54 16 Q. Okay. Did you actually give an instance where you did not
13:14:58 17 communicate because of fears of the Open Meetings Act?

13:15:03 18 A. No, sir. I did not.

13:15:06 19 Q. Okay.

13:15:06 20 A. Let me tell you, though, that I constrained myself because
13:15:11 21 of instances like the situation at Alpine that's the reason
13:15:19 22 we're here today, that these are things that would make us less
13:15:25 23 communicative, let's say.

13:15:26 24 Q. Did you actually review the Rangra file? Do you know what
13:15:31 25 the actual offense was that got the indictment?

13:15:34 1 A. What I read was in the newspaper, and it probably wouldn't
13:15:37 2 stand the test of this Court. But I feel like I know the gist
13:15:41 3 of it. It was a series of E-mails that were passed back and
13:15:45 4 forth.

13:15:45 5 Q. Do you know if it was between a quorum of the Members of
13:15:48 6 that City Council?

13:15:49 7 A. I'm sorry. I don't hear you.

13:15:51 8 Q. Do you know if those E-mails were between a quorum of
13:15:55 9 the -- of the City Council?

13:15:57 10 A. I'm sorry. I still missed a couple of words there.

13:15:59 11 THE COURT: Do you know if the communication was
13:16:01 12 between a quorum of the City Council?

13:16:06 13 A. That was my understanding. That during the whole course
13:16:09 14 of the event, that it included a quorum.

13:16:12 15 Q. Would you say that you believe in open government?

13:16:15 16 A. Yes, sir.

13:16:17 17 Q. Hypothetical: Your 4B corporation, a quorum of them meet,
13:16:24 18 and the -- the example used to be a smoke-filled room. But
13:16:30 19 let's go with a more contemporary version. They're in a
13:16:33 20 Starbucks. A quorum of them are at Starbucks. They're going
13:16:36 21 through the agenda of the next week's meeting, deciding,
13:16:39 22 deliberating over it, maybe even discussing how they're going
13:16:43 23 to vote. Do you believe that's a violation of the Open
13:16:45 24 Meetings Act?

13:16:46 25 A. No, sir.

13:16:47 1 Q. You don't?

13:16:48 2 A. I don't think so. Because it has no standing, what they
13:16:52 3 say they might do in an informal setting like that. They might
13:16:57 4 change their mind. But when they -- when the meeting is
13:17:00 5 official and before the public and according to the agenda,
13:17:04 6 that's the vote that counts. And I don't -- I mean, that's the
13:17:10 7 one that -- that they'd have to stand up and swear to.

13:17:14 8 Q. Okay. You said that you've been a public official for
13:17:17 9 about five years?

13:17:18 10 A. Yes, sir. Not counting military service, if you want to
13:17:22 11 eliminate that.

13:17:23 12 Q. Understood. An elected governmental body member?

13:17:29 13 A. Yes, sir.

13:17:29 14 Q. In that time would you say that it's -- you know, in most
13:17:32 15 of its applications, you've been able to adhere and live under
13:17:35 16 comfortably the Open Meetings Act?

13:17:38 17 A. I believe so, sir. I do not recall ever violating that
13:17:44 18 Act.

13:17:45 19 Q. Okay.

13:17:46 20 MR. ECCLES: Pass the witness.

13:17:48 21 THE WITNESS: Yes, sir.

13:17:48 22 THE COURT: Mr. Ponton, anything else on redirect?

13:17:55 23 REDIRECT EXAMINATION

13:17:55 24 BY MR. PONTON:

13:17:55 25 Q. Sir, you've stated that you don't recall violating the

13:17:58 1 Act, but earlier you said that there were times when you didn't
13:18:04 2 talk or didn't communicate because of the Act?

13:18:08 3 A. All right.

13:18:08 4 Q. Is that true?

13:18:09 5 A. Yes, sir.

13:18:09 6 Q. Both of those statements are true?

13:18:11 7 A. Yes, sir.

13:18:11 8 Q. So you have chosen to operate within the Act by not
13:18:17 9 communicating at times; is that correct?

13:18:19 10 A. That's correct.

13:18:20 11 Q. Even though you would like to, but for the Act?

13:18:24 12 A. Yes, sir.

13:18:27 13 MR. PONTON: Nothing further, Your Honor?

13:18:28 14 THE COURT: Okay. Mr. Eccles, anything else from
13:18:33 15 this witness?

13:18:41 16 MR. ECCLES: Just one quick question.

13:18:44 17 **RECROSS-EXAMINATION**

13:18:44 18 BY MR. ECCLES:

13:18:44 19 Q. Do you believe that the Open Meetings Act is always wrong
13:18:53 20 or you can't understand it or is it just in a couple of
13:18:58 21 instances?

13:18:58 22 A. Sir, I believe it is so broad that it is probably going to
13:19:07 23 be wrong more than it is right because it's subject to -- if
13:19:11 24 you will, I'll use the word "whim" but not trying to use it
13:19:16 25 disrespectfully -- of the district attorney and political

13:19:20 1 affiliations. So I just think it not only vests too much
13:19:26 2 discretion in one person or persons, the district attorneys,
13:19:33 3 plus I don't think it's fair that we're subject to restrictions
13:19:39 4 that the State Legislature is not subject to. They've exempted
13:19:44 5 themselves.

13:19:44 6 MR. ECCLES: I'm going object to the
13:19:47 7 non-responsiveness of your answer.

13:19:48 8 THE COURT: I'll sustain the portion about the
13:19:49 9 Legislature and that sort of information. The statement would
13:19:54 10 be struck from the record.

13:19:56 11 MR. ECCLES: I pass the witness. Thank you.

13:19:57 12 THE COURT: Anything else, Mr. Ponton?

13:19:59 13 MR. PONTON: No, Your Honor.

13:19:59 14 THE COURT: Mr. Ginnings, we appreciate you being
13:20:01 15 here all the way from Wichita Falls, Texas. You're excused.

13:20:06 16 THE WITNESS: Thank you, Judge.

13:20:06 17 THE COURT: Mr. Ponton, call your next witness,
13:20:08 18 please.

13:20:08 19 MR. PONTON: Mel LeBlanc.

13:20:10 20 THE COURT: Mr. LeBlanc. And I didn't ask the
13:20:24 21 witnesses whether or not they had been sworn earlier, and I
13:20:27 22 didn't ask their names when they were up here being sworn. But
13:20:30 23 let the record reflect that Mr. Ginnings was a witness that was
13:20:33 24 sworn and just testified. Mr. LeBlanc, you were sworn by the
13:20:36 25 clerk just a few minutes ago; is that correct?

13:20:39 1 MR. LEBLANC: Yes, sir.

13:20:39 2 THE COURT: You may proceed, Mr. Ponton.

13:20:42 3 MEL LEBLANC,

13:20:42 4 having been first duly sworn, testified as follows:

13:20:42 5 DIRECT EXAMINATION

13:20:42 6 BY MR. PONTON:

13:20:42 7 Q. State your name for the record, where do you live, and

13:20:44 8 what you do?

13:20:45 9 A. My name is Mel LeBlanc. I live in Arlington, Texas. I'm

13:20:48 10 a businessman, and I'm on the Arlington City Council

13:20:51 11 representing the North Arlington District 1.

13:20:53 12 Q. How long have you been a member of the City Council in

13:20:56 13 Arlington?

13:20:56 14 A. Going on five years.

13:20:57 15 Q. As a member of the City Council in Arlington, are you

13:21:00 16 subject to the Texas Open Meetings Act?

13:21:03 17 A. Yes.

13:21:03 18 Q. Have you had training in the Texas Open Meetings Act?

13:21:06 19 A. Yes, I have.

13:21:07 20 Q. Do you have some understanding of what is allowed and not

13:21:15 21 allowed under the Texas Open Meetings Act?

13:21:17 22 A. Based on the wording the subject readings of the wording,

13:21:21 23 I know the intent and spirit. But in terms of specifically --

13:21:24 24 specific cases, it's a little vague.

13:21:27 25 Q. Now, do you understand that the Texas Open Meetings Act

13:21:32 1 has criminal penalties that could put you in jail for six
13:21:35 2 months for violating some parts of the Act?
13:21:37 3 A. I think that and a \$500 fine, yes.
13:21:40 4 Q. And do you understand that that can apply if a quorum of
13:21:45 5 a -- of your City Council receives political information about
13:21:50 6 Arlington without doing it at a public meeting?
13:21:54 7 A. Yes. And the question is: What is a quorum and is it a
13:21:59 8 quorum of the Council or quorum of specific committees that
13:22:02 9 Council people are on. So going through that, you kind of have
13:22:05 10 to decipher through all those sorts of things.
13:22:08 11 Q. Have you gotten instruction from your City Attorney, for
13:22:12 12 instance, about what you can and can't do?
13:22:13 13 A. Yes. Yes. On specific cases -- specific situations, yes.
13:22:18 14 Q. Have there been times when the TOMA has made you afraid to
13:22:24 15 communicate with your fellow City Council Members except at a
13:22:28 16 meeting?
13:22:28 17 A. It's always hanging over our head. I mean, I heard of the
13:22:31 18 Open Meetings Act before I got into office. It wasn't until I
13:22:35 19 got into office that I heard about it just about every day
13:22:37 20 initially. And even from friends and constituents and what
13:22:42 21 have you, kind of in a joking way. Oh, we can't have you over
13:22:46 22 now because we also like so and so and we'd be violating a
13:22:48 23 quorum, et cetera. So all kinds of kind of jocular type stuff
13:22:53 24 going on. But, in reality, it's always kind of hanging there.
13:22:55 25 We're not really sure exactly when it applies or how it

13:22:59 1 applies, et cetera.

13:22:59 2 Q. When you say it's hanging, over you, because it's hanging
13:23:02 3 over you, does it keep you from talking to other Council
13:23:05 4 Members or the public about matters?

13:23:07 5 A. It does do that, certainly. It puts a muzzle on us. And
13:23:10 6 my main concern and the reason I got involved in this
13:23:13 7 particular case is because when I was talking to Mr. Guerra and
13:23:17 8 yourself and others, what you were describing in terms of the
13:23:19 9 potential verbiage in his lawsuit was just a spitting image of
13:23:23 10 what I had experienced in the real world out there. That's why
13:23:26 11 I was excited someone was really looking at this and starting
13:23:30 12 to do something about it.

13:23:31 13 Q. Before you took office in Arlington, did you engage in
13:23:35 14 political speech in the Arlington area, talk about public
13:23:38 15 matters?

13:23:39 16 A. Yeah. I was involved. I've been president of the board
13:23:41 17 of directors of five different organizations. You know, a
13:23:44 18 homeless shelter and substance abuse organization, all
13:23:47 19 different types of organizations in Arlington and throughout
13:23:50 20 the metroplex. So I've been inevitably involved or interacting
13:23:54 21 with public officials. That's when I would hear about the Open
13:23:57 22 Meetings Act, from them, but not really know the details of it,
13:24:01 23 you know.

13:24:02 24 Q. After you took office, as a City Council Member, did you
13:24:04 25 learn that your ability to engage in political speech was

13:24:07 1 restricted as a public official as opposed to what you could
13:24:10 2 have done before you took office?
13:24:11 3 A. Oh, absolutely. Absolutely. Not only that. It's used as
13:24:16 4 a weapon. The vagueness of the law is really, I found, used as
13:24:20 5 a weapon with people in higher positions of authority --
13:24:22 6 political authority over people in lower position, using the
13:24:25 7 vagueness to scare us into not talking.
13:24:27 8 Q. Has that happened to you personally?
13:24:29 9 A. Oh, yes. Absolutely.
13:24:31 10 Q. And has it happened to other people that you know in the
13:24:34 11 metroplex area?
13:24:34 12 A. Sure. Sure.
13:24:35 13 Q. And the fear of being prosecuted like that makes people
13:24:38 14 shut up or not participate?
13:24:40 15 A. Without a doubt. It puts a cloud on discussions --
13:24:43 16 MR. ECCLES: Objection. Calls for speculation.
13:24:46 17 THE COURT: Just a second. Ask your question again.
13:24:48 18 Restate your question.
13:24:49 19 Q. (BY MR. PONTON) Do you know if the threat of such
13:24:51 20 prosecution has kept you or other public officials --
13:24:55 21 THE COURT: He can talk about himself. He can't talk
13:24:58 22 about other public officials.
13:24:59 23 MR. PONTON: Let me rephrase it, if I could,
13:25:01 24 Your Honor.
13:25:02 25 Q. (BY MR. PONTON) Do you know if the threat of prosecution

13:25:04 1 has kept you from speaking out -- the threat of prosecution by
13:25:08 2 a prosecutor under this vague law?

13:25:10 3 A. You know, I would say it's tempered, my speaking out. It
13:25:14 4 hasn't stopped me. I tend to be rather outspoken, let's say,
13:25:24 5 in terms of political issues and what have you. So I don't
13:25:26 6 hold back. But as I'm actually -- literally sometimes as I'm
13:25:27 7 talking, I wonder, Am I getting in trouble with the Open
13:25:30 8 Meetings or whatever? There's always, again, that kind of
13:25:33 9 cloud -- that kind of black cloud hanging over us where we're
13:25:36 10 not really sure what it means and doesn't mean. And it's
13:25:39 11 always there when you're in public office.

13:25:41 12 Q. And does that black cloud pull you back from talking?

13:25:43 13 A. Sure. Sure. Yeah. Yeah. Myself less than others,
13:25:47 14 because, again, I tend to be outspoken on issues and I don't
13:25:52 15 have any fear of expressing my opinion. And I always say, you
13:25:55 16 know, I'll express my opinion and ask forgiveness later if I
13:25:58 17 do, you know, run into these issues.

13:26:00 18 So far nobody's questioned me relative to the open
13:26:05 19 meetings act. Whether I violate it or not, it's so vague I
13:26:07 20 don't know. It's not just the act itself and the wording.
13:26:10 21 It's the interpretation by the Attorney General subsequently
13:26:12 22 that I read that scared me.

13:26:13 23 Q. But has the threat of that prosecution kept you pulling
13:26:15 24 back --

13:26:16 25 A. Sure.

13:26:16 1 Q. -- or kept you from communicating at times?

13:26:19 2 A. Yes.

13:26:19 3 MR. PONTON: Pass the witness, Your Honor.

13:26:27 4 THE COURT: Mr. Eccles?

13:26:30 5 CROSS-EXAMINATION

13:26:30 6 BY MR. ECCLES:

13:26:30 7 Q. Listening to your testimony, you said sometimes that
13:26:34 8 you're outspoken so you don't really -- you'll ask for
13:26:38 9 forgiveness later. You haven't been actually asked about or
13:26:42 10 threatened with prosecution under the Open Meetings Act, have
13:26:48 11 you?

13:26:48 12 A. Jokingly, sure.

13:26:49 13 Q. Jokingly?

13:26:50 14 A. It's -- I mean, you know, you can walk into a restaurant
13:26:53 15 and there will be three or four of us sitting there, you know,
13:26:56 16 talking about baseball -- three or four elected officials
13:27:00 17 talking about baseball. And somebody will walk up and say,
13:27:01 18 Boy, I'm going to have to call the police. It looks like a
13:27:02 19 quorum here. You guys are violating the Act. Just in a joking
13:27:05 20 way. So yeah. It's, you know ...

13:27:06 21 Q. And this is the black cloud you were talking about?

13:27:08 22 A. That's the jocular aspect of the black cloud, yeah.

13:27:13 23 Q. Can you give me an instance when you actually didn't speak
13:27:17 24 because you were afraid of being prosecuted under the Open
13:27:19 25 Meetings Act?

13:27:20 1 A. Sure. I can recall one I didn't think about until a
13:27:22 2 question was brought up with the previous witness. But I don't
13:27:25 3 understand what a walking quorum is. I don't understand if I
13:27:28 4 can -- if I can -- because I've got different interpretations
13:27:34 5 on this -- if I can kind of check out other Council People
13:27:37 6 relative to their position on a particular issue, if I can do
13:27:40 7 that with more than one, for example. You know, I don't know.

13:27:42 8 So when we were dealing with a major project, a billion --
13:27:47 9 \$1.2 billion project, actually in Arlington, called Glorypark,
13:27:50 10 the financing of that we met with our bond attorney on the
13:27:53 11 financing. And the financing on that, as you can imagine, is
13:27:56 12 very, very complex. And I wanted to talk to other Council
13:28:01 13 People by phone the night before the meeting, the night before
13:28:03 14 we were going to vote on that. And I didn't make all the phone
13:28:06 15 calls because I wasn't quite sure on something as important as
13:28:09 16 that and something that was under such scrutiny by the public,
13:28:13 17 I thought, you know, if I talk to them and it's discovered and
13:28:16 18 it is a violation of the Open Meetings Act, I better hold off.

13:28:19 19 So in that case I did not make those phone calls. I did
13:28:21 20 not talk to other Council People about what they thought about
13:28:24 21 the funding -- the funding of the project, the bond funding.
13:28:27 22 Was it leveraged or not. It seemed to me it was leveraged. It
13:28:30 23 was hedged, I thought. I wasn't really sure. I wanted to talk
13:28:33 24 to somebody. But I couldn't or didn't because of my fear of
13:28:37 25 the Open Meetings Act.

13:28:37 1 Q. Now, that was the day before the meeting?

13:28:39 2 A. The night before or two nights before. Something like
13:28:40 3 that.

13:28:40 4 Q. Fair enough. Did you discuss it at the meeting?

13:28:43 5 A. We -- I think we discussed -- sure, we discussed some of
13:28:48 6 the financing, yeah. In fact, I remember asking the question
13:28:51 7 of the bond attorneys, you know, was it hedged? So, yes, I did
13:28:54 8 ask those questions the next day.

13:28:55 9 Q. Okay. Did you consider ever in any instance where you had
13:28:58 10 a question of the application of the Open Meetings Act asking
13:29:03 11 the City Attorney for written opinion?

13:29:06 12 A. A written opinion? Interesting. No. But the Mayor, he
13:29:09 13 is always, you know, referring to the City Attorney asking him
13:29:13 14 when he directs us with something that, you know, I don't want
13:29:16 15 y'all talking about this or be careful with that or whatever.
13:29:18 16 He would always turn to the City Attorney and say, Right, Jay?
13:29:22 17 Is that correct? And then City Attorney Jay Doegey would then
13:29:25 18 weigh in on that particular issue. And sometimes he would say,
13:29:29 19 you know, Yes, Mr. Mayor. To the best of my interpretation of
13:29:31 20 the Open Meetings Act.

13:29:33 21 Q. You understand that a written opinion from your City
13:29:36 22 Attorney is actually -- will serve as an affirmative defense to
13:29:40 23 your prosecution of the Open Meetings Act?

13:29:42 24 A. Yeah. But, you know, it's not logistically possible to do
13:29:45 25 that as many times as it would be necessary to protect myself

13:29:49 1 because it happens, I mean, all the time in terms of -- you
13:29:52 2 know, it would happen all the time. If we asked the City
13:29:55 3 Attorney to give us a written opinion on every question we had
13:30:00 4 on the Open Meetings Act, there would be no other business in
13:30:00 5 the City Government.

13:30:00 6 Q. Actually, I'm just talking about these instances where --
13:30:03 7 and we don't really have an exhaustive list yet. But these
13:30:07 8 instances where you're saying that you felt that you couldn't
13:30:10 9 speak because you had this fear of being prosecuted under the
13:30:14 10 Open Meetings Act.

13:30:16 11 A. I gave you one clear example with the Glorypark financing.

13:30:20 12 Q. You did. Is there any other that you wouldn't say
13:30:23 13 either -- well, let's go one at a time.

13:30:26 14 A. Yeah. The NFL came to town with the Super Bowl. They've
13:30:30 15 got a Youth Education Center they want to bring into town.
13:30:34 16 It's quite controversial with us in the City Council. We would
13:30:36 17 like to talk to each other about that to find out precisely
13:30:38 18 what's going on. And I venture to say that others and
13:30:42 19 certainly myself don't have all these discussions because we're
13:30:45 20 concerned about the Open Meetings Act.

13:30:48 21 Q. Could you put it on the agenda at the next Council Meeting
13:30:51 22 and discuss it?

13:30:51 23 A. Again, well, you know, what's more important, you know?
13:30:56 24 Having that discussion in public where maybe there's some
13:31:00 25 things that, you know, not all the I's are dotted and the T's

13:31:03 1 are crossed? You know, there might be something that we would
13:31:06 2 rather do in Executive Session, for example. That's a
13:31:09 3 possibility, sure.

13:31:10 4 Q. So you would prefer that those type of deliberations
13:31:14 5 before they're fully formed in your mind actually take place in
13:31:17 6 secret?

13:31:17 7 A. No. Not all deliberations by any means. But that
13:31:20 8 particular one relative to the NFL we have had in Executive
13:31:24 9 Session before. You know, Executive Session is reserved for
13:31:27 10 personnel matters and real estate matters that you need to
13:31:30 11 maintain confidentiality relative to the market situation or
13:31:35 12 personal privacy issues relative to personnel. But other than
13:31:38 13 that, most things are in open forum.

13:31:40 14 I have no problem with the -- I don't like secret
13:31:42 15 meetings. We have nothing to hide. Everything is vetted
13:31:45 16 publicly. You know, I have no problem with -- you know,
13:31:49 17 against secret meetings and those sorts of things. But it's,
13:31:53 18 again, that black cloud, that muzzling, that fear of speaking
13:31:57 19 is what I'm concerned about.

13:31:59 20 And what's worse, again, is it being used as a tool by
13:32:03 21 people to muzzle other people in government. and that's
13:32:06 22 rampant because of -- that's an unintended negative consequence
13:32:12 23 of the Open Meetings Act as far as I'm concerned.

13:32:15 24 Q. Tell me -- I hate to interrupt you, but my time is limited
13:32:17 25 as well.

13:32:17 1 A. Okay.

13:32:18 2 Q. Tell me of when you were "muzzled" by a threat of
13:32:21 3 prosecution under the Open Meetings Act?

13:32:23 4 A. Well, you said -- you added threat of prosecution. I --
13:32:26 5 you know, I said that happened in a jocular way once or twice.
13:32:31 6 But in terms of muzzling, you know, I would say, you know, the
13:32:37 7 ECC Center is an example where an individual would want to ask
13:32:41 8 us not to talk amongst ourselves on this particular issue. Ask
13:32:44 9 for clarification from the City Attorney and not get a
13:32:47 10 clear-clear classification.

13:32:48 11 You know, when that happens, the -- the advice given by
13:32:52 12 people who we have to go to advice for is, you know, err on the
13:32:59 13 conservative side. You know, "don't talk outside this room"
13:33:03 14 kind of thing. That would be the best way to handle it.
13:33:05 15 That's our advice to you as City Attorney or the Mayor or
13:33:08 16 whatever, because we're not really sure how the meeting comes
13:33:11 17 down on this particular issue.

13:33:12 18 And that again is the nebulousness and the confusion.
13:33:15 19 That happened with the ECC Center. It happened with
13:33:17 20 Glorypark. Those are two examples I gave you. You know, I'm
13:33:20 21 sure I can think of more.

13:33:21 22 Q. So you've be given conservative advice by your City
13:33:24 23 Attorney, then, on how to stay within the safety zone, if you
13:33:29 24 will, of the Open Meetings Act?

13:33:30 25 A. Yeah. Conservative to the point that we know that can't

13:33:33 1 be the way -- I mean, you can't go to jail for talking to two
13:33:37 2 people instead of one. That's kind of what they're saying.
13:33:39 3 You know, don't talk to more than one person outside the room
13:33:43 4 or don't talk to anybody outside the room. We would still -- I
13:33:46 5 would still do whatever it takes to get the job done.

13:33:49 6 Q. You've been on the City Council for five years?

13:33:51 7 A. Right.

13:33:52 8 Q. Would you say in that time that the -- the majority of
13:33:56 9 instances of the applications of the Open Meetings Act you've
13:34:03 10 been comfortable with and you've been able to live with?

13:34:05 11 A. Well, in fact, I've been to I don't know how many hundred
13:34:08 12 or thousands of meetings in five years? Yeah. It works. All
13:34:11 13 our meetings are open. You've got to take notes. They're
13:34:13 14 taped. They're televised. Certainly the Open Meetings Act,
13:34:17 15 which is, you know, Sunshine comes in most of our meetings. In
13:34:21 16 fact, all or meetings except what's in Executive Session. So,
13:34:25 17 yeah, it works in that respect. But it doesn't work because of
13:34:27 18 the wording of the law. It works because that's the way
13:34:31 19 democracy works. You'd like to have things in the open and
13:34:33 20 public input.

13:34:34 21 MR. ECCLES: Pass the witness.

13:34:35 22 THE COURT: Mr. Ponton, anything else?

13:34:36 23 MR. PONTON: No further questions, Your Honor.

13:34:38 24 THE COURT: We sure appreciate you being here,
13:34:40 25 Mr. LeBlanc. Thank you very much.

13:34:43 1 Call your next witness.

13:34:44 2 MR. PONTON: Terry Keel.

13:35:08 3 THE COURT: I don't believe Mr. Keel has been sworn.
13:35:12 4 Come on up here.

13:35:23 5 (Witness sworn)

13:35:23 6 THE COURT: Good to see you again.

13:35:25 7 MR. KEEL: Good to see you again, too, Judge. It's.
13:35:26 8 an honor to be in your courtroom. I didn't anticipate being
13:35:29 9 here.

13:35:29 10 THE COURT: Just for the full disclosure, Mr. Keel
13:35:31 11 and I served in the Legislature together. And we're not only
13:35:35 12 colleagues, we were members of opposite parties. But we were
13:35:38 13 good friends as well. So I remember the very first time
13:35:41 14 Mr. Keel got up to bat and distinguished himself very much. So
13:35:48 15 I appreciate you being here.

13:35:50 16 THE WITNESS: Yes, sir.

13:35:50 17 THE COURT: You may proceed, Mr. Ponton.

13:35:52 18 TERRENCE KEEL,
13:35:52 19 having been first duly sworn, testified as follows:

13:35:52 20 DIRECT EXAMINATION

13:35:52 21 BY MR. PONTON:

13:35:52 22 Q. State your name for the record and what you do, please.

13:35:55 23 A. Yes. My name is Terrence McCall Keel. I'm the executive
13:35:59 24 director for the Texas Facilities Commission.

13:36:01 25 Q. And that's a state agency here in Texas?

13:36:04 1 A. It is.

13:36:04 2 Q. And you're -- you're appearing here pursuant to subpoena?

13:36:08 3 A. Yes.

13:36:08 4 Q. And did you -- as the Judge just related to us, you had
13:36:12 5 occasion to serve in the House of Representatives?

13:36:16 6 A. I did.

13:36:16 7 Q. For how many years?

13:36:17 8 A. Ten years as an elected member and then as a
13:36:21 9 Parliamentarian after that.

13:36:23 10 Q. And you were a member from here in Travis County?

13:36:24 11 A. I was. District 47, Austin.

13:36:27 12 Q. And while you were at the Legislature, you were also named
13:36:31 13 by the Speaker of the House of Representatives to be
13:36:38 14 Parliamentarian?

13:36:38 15 A. Following my elected service, yes.

13:36:41 16 MR. PONTON: And I -- if I could approach, I'm
13:36:45 17 referring to Plaintiff's Exhibit P-7.

13:36:47 18 THE COURT: You may.

13:36:48 19 Q. (BY MR. PONTON) I want to show you what you've tendered to
13:36:52 20 me, which is certified copy of the Texas House Journal
13:36:57 21 Proceedings from 2005; is that correct?

13:37:00 22 A. That's correct.

13:37:01 23 Q. And that journal proceedings does what? What does that
13:37:06 24 explain?

13:37:06 25 A. The journal proceedings is a recording -- the official log

13:37:10 1 recording of the proceedings of the House of Representatives on
13:37:13 2 that day.

13:37:13 3 Q. And that's an official public record of the State of
13:37:16 4 Texas?

13:37:16 5 A. It is an official public record, yes.

13:37:18 6 Q. And that's available Online and that's ...

13:37:20 7 A. It's available Online and for examination in a hard copy.

13:37:24 8 Q. Okay. And that particular exhibit -- explain to the Court
13:37:30 9 what that exhibit states or what it -- what occurred in that
13:37:36 10 journal proceeding that day?

13:37:37 11 MR. ECCLES: Your Honor, I'm going to object. This
13:37:39 12 is public record. It speaks for itself. And Mr. Keel is going
13:37:43 13 to soon stray into his interpretations and theories as to the
13:37:47 14 meaning and possibly legislative intent, which is absolutely
13:37:52 15 prohibited for a member of the legislature to, in and of
13:37:58 16 itself, speak to the legislative intent.

13:38:01 17 THE COURT: Mr. Ponton.

13:38:04 18 MR. PONTON: I'm asking him -- I'm not going to ask
13:38:06 19 him about legislative intent. I'm going to ask him what the
13:38:09 20 document states and if the document states that the Legislature
13:38:13 21 exempts itself from TOMA. Basically explaining what the
13:38:16 22 document says.

13:38:17 23 THE COURT: Well, why don't we do this: Why don't we
13:38:18 24 just let him read it and not explain it. It will be up to the
13:38:21 25 Court to decide what it means. Okay?

13:38:22 1 MR. PONTON: That's fine, Your Honor.

13:38:23 2 THE COURT: So if you want to read it, Mr. Keel, into
13:38:26 3 the record.

13:38:27 4 A. What would you like me to read?

13:38:29 5 Q. Just read the task journal proceedings that you have
13:38:32 6 there.

13:38:32 7 A. The entire entry?

13:38:34 8 MR. PONTON: If I could approach, Your Honor?

13:38:35 9 THE COURT: You may.

13:38:45 10 A. Yes. I can do that.

13:38:48 11 I'll go slow for the court reporter. These are the
13:38:53 12 Thursday January 13th, 2005 House Journal Proceedings.

13:38:56 13 THE COURT: Can I stop you for just a sec. Is there
13:38:59 14 any -- do you offer Plaintiff's Exhibit 7?

13:39:01 15 MR. PONTON: I do, Your Honor.

13:39:02 16 THE COURT: Any objection to Plaintiff's Exhibit 7?

13:39:04 17 MR. ECCLES: No, Your Honor.

13:39:05 18 THE COURT: Plaintiff's Exhibit 7 is admitted. Go
13:39:07 19 ahead now, Mr. Keel.

13:39:09 20 A. HR5 -- Consideration continued. HR5, as amended, was
13:39:13 21 adopted. Statement by Representative Keel:

13:39:19 22 In adopting its rules for the 79th Legislative Session, as
13:39:22 23 in previous sessions, the Texas House of Representatives and
13:39:25 24 Texas Senate place themselves under the exclusive authority of
13:39:28 25 their own rules. Those same rules exclusively govern the

13:39:33 1 remedies for their violation. Observers should take note that
13:39:36 2 the Texas Open Meetings Act is inapplicable to the Texas
13:39:41 3 Legislature. This point warrants clarification because the
13:39:44 4 incorrect notion that the Act applies to interaction among
13:39:47 5 Legislators occasionally gets raised.

13:39:51 6 The open meetings law was originally enacted in 1967 by
13:39:55 7 the 60th Legislature. It has been amended many times by
13:40:01 8 subsequent Legislatures. In 1969 the Legislature amended the
13:40:04 9 Act to recognize that the Legislature has the authority to set
13:40:07 10 the rules for the notice of Legislative Committee Meetings,
13:40:10 11 Section 551.056.

13:40:13 12 In 1993 the law was codified as Chapter 551. Texas
13:40:18 13 Government Code, Section 551.003 reads, quote: In this
13:40:23 14 chapter, the Legislature is exercising its powers to adopt
13:40:27 15 rules to prohibit secret meetings of the Legislature,
13:40:31 16 committees of the Legislature, and other bodies associated with
13:40:34 17 the Legislature, except as specifically amended by -- in the
13:40:38 18 Constitution, unquote.

13:40:40 19 Article 3, Section 11 of the Texas Constitution grants
13:40:43 20 independent authority to each House for each session of the
13:40:47 21 Legislature to determine the rules of its own proceedings. It
13:40:51 22 is the generally accepted rule of law that one Legislature may
13:40:55 23 not bind a subsequent Legislature by enactment of laws, whether
13:41:00 24 a substantive law or a procedural limitation.

13:41:08 25 Although the 60th Legislature chose to prescribe rules

13:41:10 1 relating to legislative meetings in the adoption of the Open
13:41:15 2 Meetings Act and other Legislatures followed suit by refining
13:41:19 3 those rules, more recent Legislatures used the power granted by
13:41:23 4 Article 3, Section 11 of the Constitution to enact rules
13:41:27 5 governing legislative operations and proceedings.

13:41:30 6 The rules that govern each House of the current
13:41:33 7 Legislature, and, as noted, most Legislatures in contemporary
13:41:38 8 history, include a statement of authorization and precedence
13:41:42 9 citing Article 3, Section 11 of the Constitution. The House
13:41:45 10 rules state, quote: Pursuant to and under the authority of
13:41:49 11 Article 3, Section 11, Texas Constitution, and notwithstanding
13:41:54 12 any provision of statute, the House of Representatives adopts
13:41:58 13 the following rules to govern its operation and procedures.
13:42:02 14 The provisions of these rules shall be deemed the only
13:42:06 15 requirements binding on the House of Representatives under
13:42:10 16 Article 11, Section 11 -- excuse me -- under Article 3,
13:42:14 17 Section 11, Texas Constitution, unquote.

13:42:16 18 On its face, Chapter 551 of the Texas Government Code
13:42:23 19 could be argued to apply to the Legislature. By using the
13:42:26 20 power granted it in the Constitution, each House of the
13:42:31 21 Legislature instead adopted a body of rules to govern its
13:42:34 22 operations and place procedural limitations on its meetings,
13:42:38 23 whether meeting as bodies as a whole or in committees. Those
13:42:43 24 rules provide the exclusive requirements and remedies that bind
13:42:46 25 each House.

13:42:47 1 Included in the rules is Rule 4, Section 12, which states,
13:42:51 2 quote: All meetings of a committee or subcommittee, including
13:42:55 3 a calendars committee, shall be open to other members, the
13:42:59 4 press, and the public unless specifically provided otherwise by
13:43:03 5 resolution adopted by the House, unquote. It should be noted
13:43:06 6 that implicit in this rule is the fact that the House, if it
13:43:09 7 were to choose to do so, could at any time by resolution close
13:43:13 8 its committee meetings. Indeed, the House Rules also provide
13:43:18 9 for certain committees to meet in secret. This plainly
13:43:22 10 corroborates the fact that Government Code Section 551.003
13:43:26 11 limits the statute's applicability to the legislature. See
13:43:31 12 also Texas Senate rules. Furthermore, Article 3, Section 16 of
13:43:36 13 the Texas Constitution provides: The sessions of each House
13:43:39 14 shall be open, except the Senate when in Executive Session,
13:43:45 15 unquote.

13:43:46 16 An attempt to apply the literal provisions of the Open
13:43:50 17 Meetings Act to the House and Senate would conflict with the
13:43:56 18 competing provisions of the Texas Constitution because the
13:43:58 19 rule-making authority given to the Legislature by the
13:44:01 20 Constitution would have no meaning. Nonpublic meetings, such
13:44:05 21 as those authorized by rules adopted by the House for the
13:44:09 22 General Investigating Committee, or for the impeachment or
13:44:13 23 punishment of a Member of the House, or any other matter of a
13:44:17 24 quasi-judicial nature -- Rule 4, Section 12, authorizing closed
13:44:21 25 meetings to examine witnesses, deliberate, or consider or

13:44:25 1 debate a decision -- would be illegal.

13:44:30 2 Such meetings might also be construed as an illegal
13:44:34 3 attempt to circumvent the Open Meetings Act under section
13:44:38 4 551.143. Thus, every time a legislator meets with other
13:44:44 5 legislators to secure a majority vote on an issue before a
13:44:46 6 committee or the full House, that legislator would be violating
13:44:50 7 the Open Meetings Act. Attempting such a misapplication of the
13:44:54 8 Act leads to absurd results, given that the conduct described
13:44:58 9 is universally recognized as proper and necessary for
13:45:03 10 legislators in a representative democracy.

13:45:06 11 Furthermore, Rule 4, Section 13 of the House Rules states,
13:45:10 12 quote: The rules of procedure of the House of Representatives,
13:45:14 13 and to the extent applicable, the rules of evidence and
13:45:17 14 procedure in Civil Courts of Texas, shall govern hearings and
13:45:22 15 operations of each committee, unquote.

13:45:25 16 The Legislature did not adopt the Texas Open Meetings Act
13:45:30 17 or any other statute as applicable to its committee
13:45:33 18 operations. The remedy for a violation of the House Rules is
13:45:38 19 therefore contained exclusively within the rules. For example,
13:45:41 20 where a point of order is sustained for a violation of Rule 4,
13:45:45 21 Section 12, the remedy is to knock the bill off the floor and
13:45:48 22 send it back to committee. Trepidation about gatherings of
13:45:52 23 legislators -- such as committee dinners, which is one of the
13:45:56 24 more inane concerns that frequently gets raised -- is
13:45:59 25 unfounded.

13:46:01 1 There are two rulings some might cite as authority for
13:46:04 2 applying the Open Meetings Act to the Legislature. One is, *In*
13:46:11 3 *Re, Texas Senate*, 36 S.W. 3d 119 (Texas 2000), in which the
13:46:16 4 Texas Supreme Court considered the application of the open
13:46:19 5 meetings law to the election of the Lieutenant Governor.
13:46:23 6 Preliminary to its holding, the Court stated that the Open
13:46:26 7 Meetings -- that the Open Meetings Act, quote, clearly covers
13:46:30 8 the Committee of the whole Senate, unquote. In saying this,
13:46:34 9 however, the Court did not consider and did not address
13:46:37 10 arguments that the statute is inapplicable. The Court held
13:46:40 11 that a provision of the Texas Constitution expressly authorized
13:46:44 12 the secret ballot. The Court's statement regarding the Texas
13:46:48 13 Open Meetings Act was therefore dictum. It is important to
13:46:52 14 note, however, that the competing constitutional provision
13:46:55 15 prevailed regarding the procedural issue.

13:46:58 16 An attorney general opinion, Number JM-122 (1983), found
13:47:03 17 that the Open Records Act expressly applies to the Legislature
13:47:08 18 and prevailed over conflicting legislative rules adopted by the
13:47:12 19 House that purported to make certain committee records
13:47:14 20 confidential. Yet the confidentiality of legislative records
13:47:19 21 is hardly a procedural issue. It presents clearly substantive,
13:47:23 22 as opposed to procedural, matters. The opinion did not address
13:47:26 23 meetings, which is just as plainly a procedural issue.

13:47:29 24 Particular note should be taken that there is no criminal
13:47:33 25 exposure for legislators in the face of allegations that their

13:47:37 1 routine legislative actions run afoul of the Open Meetings
13:47:41 2 Act. The Texas Code of Criminal Procedure limits the duties of
13:47:44 3 a grand jury to inquiries of offenses, quote, liable to
13:47:47 4 indictment, unquote. (Texas Code of Criminal Procedure
13:47:52 5 Article 20.09). Because Texas Open Meetings Act does not apply
13:47:56 6 to Legislature, if a prosecutor directed grand jury scrutiny
13:48:00 7 towards meetings of legislators, such as discussions held among
13:48:04 8 members of a House Committee in private, premised solely upon
13:48:08 9 supposed violation of the Open Meetings Act, such would
13:48:10 10 constitute an abuse of the grand jury by that prosecutor, in my
13:48:14 11 opinion.

13:48:14 12 I have discussed with the Travis County District Attorney
13:48:17 13 my observations, and I understand that his own considered
13:48:20 14 opinion and that of his Public Integrity Unit staff on the
13:48:24 15 broader critical issue of the inapplicability of the Texas Open
13:48:28 16 Meetings Act to the Legislature is consistent with the
13:48:30 17 conclusions I have expressed here, period.

13:48:34 18 End of entry.

13:48:38 19 Q. Did the Texas Open Meetings Act apply to the last session
13:48:41 20 of the Legislature?

13:48:42 21 A. No.

13:48:42 22 MR. ECCLES: Objection, Your Honor.

13:48:44 23 Q. Will it apply --

13:48:45 24 THE COURT: Excuse me. The objection is what?

13:48:46 25 MR. ECCLES: Calls for a legal conclusion from this

13:48:47 1 witness.

13:48:48 2 THE COURT: Yeah. And when we're talking about the

13:48:51 3 last session, you're talking about the 2009 session?

13:48:53 4 MR. PONTON: Yes, Your Honor.

13:48:54 5 THE COURT: Objection sustained.

13:48:55 6 Q. (BY MR. PONTON) Do you know if the Texas Open Meetings Act

13:48:59 7 will apply to the session of the Legislature that will begin in

13:49:03 8 January of 2011?

13:49:04 9 MR. ECCLES: Objection, Your Honor. Calls for a

13:49:05 10 legal conclusion.

13:49:06 11 THE COURT: Sustained.

13:49:07 12 MR. PONTON: No further questions.

13:49:08 13 THE COURT: Any cross-examination?

13:49:09 14 MR. ECCLES: No, Your Honor.

13:49:11 15 THE COURT: Mr. Keel, thank you so much for being

13:49:13 16 here. It is certainly good to see you, and I hope things are

13:49:16 17 well with you and your family and everything.

13:49:18 18 THE WITNESS: Thank you, Judge. And you are

13:49:20 19 certainly looking well.

13:49:34 20 THE COURT: Call your next witness.

13:49:36 21 MR. PONTON: Diana Asgeirsson.

13:49:59 22 THE COURT: Pronounce your name for me one more time.

13:49:59 23 MS. ASGEIRSSON: Diana Asgeirsson.

13:49:59 24 THE COURT: Ms. Asgeirsson, you were previously sworn

13:50:00 25 as a witness; is that correct?

13:50:01 1 MS. ASGEIRSSON: Yes, I was.

13:50:03 2 THE COURT: All right. You may proceed.

13:50:03 3 DIANA ASGEIRSSON,

13:50:03 4 having been first duly sworn, testified as follows:

13:50:03 5 DIRECT EXAMINATION

13:50:03 6 BY MR. PONTON:

13:50:03 7 Q. Please state your name and where you live and what you do.

13:50:05 8 A. My name is Diana Asgeirsson, and I live in Alpine, Texas.

13:50:09 9 And I'm a self-employed accountant.

13:50:12 10 Q. And do you hold any public office in Alpine?

13:50:15 11 A. Yes, I do. I represent the City of Alpine Council,

13:50:21 12 Ward 5. I'm and also Mayor Pro-Tem.

13:50:24 13 Q. And do you also sit on another public entity in the

13:50:27 14 Brewster County Area?

13:50:28 15 A. Yes, I do. I sit on the Board for the Southwest Texas

13:50:31 16 Municipal Gas Corporation.

13:50:35 17 Q. And both of those entities are subject to the Texas Open

13:50:38 18 Meetings Act?

13:50:39 19 A. Yes, they are.

13:50:40 20 Q. And you've had some training in the Open Meetings Act?

13:50:43 21 A. Yes, I have.

13:50:43 22 Q. And you know that there's some criminal provisions of

13:50:45 23 going to jail for up to six months if a quorum of a body

13:50:49 24 receives information or deliberates about anything?

13:50:52 25 A. Most definitely.

13:50:53 1 MR. ECCLES: Objection, Your Honor. Leading.

13:50:54 2 THE COURT: Sustained. Let's don't lead the witness.

13:50:56 3 Q. (BY MR. PONTON) What is your understanding of what the
13:50:58 4 Open Meetings Act says to you?

13:51:01 5 A. You cannot meet with more than one of the appointed
13:51:06 6 officials.

13:51:12 7 Q. Let me stop you. In Alpine the City Council is five. So
13:51:15 8 three would be a quorum?

13:51:17 9 A. Yes.

13:51:17 10 Q. So meeting with just one more would be the only number
13:51:20 11 less than a quorum?

13:51:21 12 A. Yes.

13:51:21 13 Q. Okay. Go ahead. Tell us what it is in your own mind.

13:51:25 14 A. Well, we have occasions -- or I have had occasions where
13:51:32 15 citizens have sent in E-mails to myself and they're addressed
13:51:34 16 to all the City Council People. I know I've asked your opinion
13:51:39 17 on those, and I have not gotten further than reading all the
13:51:48 18 names and I just delete them because I'm scared, you know, that
13:51:51 19 somebody else might answer these people for whatever question
13:51:54 20 they're asking and consequently get more than a quorum involved
13:51:58 21 or a quorum making a decision just on an E-mail and I would not
13:52:03 22 know that somebody else had already answered. So it's a big
13:52:09 23 fear that I have that, if I do something like that, that, you
13:52:12 24 know, I'll be subject to the law.

13:52:17 25 Q. Did you know that in Alpine there was a former City

13:52:19 1 Council Member named Avinash Rangra who got indicted for
13:52:23 2 violating the Open Meetings Act?
13:52:24 3 A. Yes.
13:52:25 4 Q. And do you know what he got indicted for doing?
13:52:27 5 A. It was through E-mails.
13:52:28 6 Q. He sent and received an E-mail among a quorum?
13:52:31 7 A. Yes.
13:52:31 8 Q. Didn't decide anything?
13:52:33 9 A. No. I think it was -- from my understanding, it was they
13:52:37 10 were wanting to put an issue on the agenda.
13:52:40 11 Q. But because of that, those E-mails, he did actually get
13:52:44 12 indicted by the local district attorney?
13:52:45 13 A. Yes, he did.
13:52:46 14 Q. Has that made you afraid to communicate with your fellow
13:52:49 15 City Council Members in Alpine?
13:52:51 16 A. Most definitely.
13:52:52 17 Q. And has it made you afraid to communicate with the public?
13:52:56 18 A. Yes, it has.
13:52:57 19 Q. Afraid that you might get indicted or charged with a
13:52:59 20 crime?
13:53:00 21 A. Yes. Our community is small. It's about 6,000 people.
13:53:02 22 So it's -- you know, I'm always afraid that, you know, there
13:53:06 23 could be where they've gone, you know, like a walking, I guess
13:53:11 24 you would say, quorum.
13:53:13 25 Q. Where somebody might talk to you and then talk to another

13:53:16 1 Council Member and then talk to another one?

13:53:18 2 A. Yes.

13:53:18 3 Q. And you might not even know if they've talked to another
13:53:21 4 one?

13:53:21 5 A. Yes. Correct.

13:53:21 6 Q. But that might make you afraid that you might go to jail
13:53:24 7 for talking to that person?

13:53:25 8 A. For violating, yes.

13:53:26 9 Q. Because of that fear, have you censored yourself, in other
13:53:29 10 words, not communicated to either the public or other members
13:53:32 11 of the City Council?

13:53:33 12 A. Yes, I have.

13:53:34 13 Q. Could you give us an example of that?

13:53:36 14 A. Well, concerning, you know, we have the issue with the
13:53:38 15 animal shelter. Several citizens had sent us out E-mails. And
13:53:45 16 that's -- contacted you on something -- I forget what the issue
13:53:50 17 was. And you said since it was sent to all the City Council
13:53:53 18 Members, not to do anything with it. It would be best just to
13:53:58 19 delete it.

13:53:58 20 Q. Would you have preferred to be able to communicate back
13:54:01 21 with those members?

13:54:02 22 A. Yes, I would have. In fact, the person that did send the
13:54:06 23 E-mail came by my office and said that, you know, I was elected
13:54:11 24 to office to represent the people and why hadn't I responded.

13:54:17 25 Q. Did you explain to them that the Texas Open Meetings Act

13:54:20 1 had you afraid of going to jail for responding?

13:54:24 2 A. Yes, I did. I asked him -- I preferred him not send
13:54:27 3 E-mails like that. If he wanted something, just to come to my
13:54:30 4 office and try to seek me out. And even then, you know, I'm
13:54:34 5 still kind of afraid that, you know, like, had they already
13:54:37 6 talked to another Council Person or, you know, what have they
13:54:40 7 responded? And, you know, it could be that they come back and
13:54:43 8 say something at a City Council Meeting saying, Well, you -- I
13:54:47 9 contacted so and so and so and so and so and so and you agreed
13:54:50 10 at that time, but now you're disagreeing or whatever.

13:54:55 11 Q. Do the criminal provisions of the Texas Open Meetings Act,
13:54:58 12 are they so strict that it makes it hard for you to effectively
13:55:02 13 represent your constituents in Alpine?

13:55:07 14 MR. ECCLES: Objection, Your Honor. Leading.

13:55:08 15 THE COURT: Sustained.

13:55:09 16 Q. (BY MR. PONTON) Explain to us in your own mind how the
13:55:12 17 criminal provisions of the Open Meetings Act affect your
13:55:16 18 ability to represent your constituents?

13:55:20 19 A. Well, they're so broad that you really don't know whether
13:55:22 20 the actions you're doing are going to violate the Texas Open
13:55:24 21 Meetings Act. And, consequently, you know, I just hold back a
13:55:29 22 lot.

13:55:29 23 Q. When you say hold back, you don't communicate?

13:55:31 24 A. Communicate, yes.

13:55:32 25 Q. Have you self-censored?

13:55:35 1 A. Yes.

13:55:35 2 MR. PONTON: Pass the witness.

13:55:41 3 THE COURT: Any questions, Mr. Eccles?

13:55:42 4 MR. ECCLES: Yes, Your Honor.

13:55:43 5 CROSS-EXAMINATION

13:55:43 6 BY MR. ECCLES:

13:55:43 7 Q. You testified that the terms of the Open Meetings Act are
13:55:46 8 so broad that you don't understand them?

13:55:48 9 A. Uh-huh.

13:55:49 10 Q. When was the last time that you actually reviewed the
13:55:51 11 terms of the Open Meetings Act?

13:55:55 12 A. Well, we've had training at Texas TML conferences. Also
13:55:59 13 when I was elected to office, our City Secretary made sure that
13:56:06 14 we did go through training on live on -- over the computer.

13:56:11 15 Q. What terms exactly do you think are broad or so broad --

13:56:14 16 A. Well, it's not so much, you know --

13:56:14 17 Q. -- that you don't quite understand?

13:56:16 18 THE COURT: Excuse me. Let him finish his question
13:56:19 19 before you answer because the court reporter is the fastest
13:56:22 20 court reporter in Travis County, but she can't get you both at
13:56:26 21 the same time.

13:56:26 22 THE WITNESS: I'm sorry.

13:56:28 23 Q. What terms of the Open Meetings Act that you find so broad
13:56:31 24 that you can't quite get your hands around?

13:56:35 25 A. Well, it -- the Texas Open Meetings Act I guess states

13:56:41 1 that, you know, you should not have a quorum, you know, making
13:56:44 2 a decision outside a meeting. Okay. And I made an example
13:56:50 3 like when you get an E-mail -- or I got an E-mail where it's
13:56:53 4 addressed to all of City Council People. And they're, you
13:56:58 5 know, asking direct questions. I'm afraid to even answer those
13:57:01 6 questions because if another member of our City Council has
13:57:06 7 already answered that person, it could be two or three more,
13:57:11 8 and then they bring these papers to a City Council and say,
13:57:16 9 Well, you've already said this and this and that. In essence,
13:57:21 10 they've already gotten more than -- you know, they've got a
13:57:25 11 quorum.

13:57:25 12 Q. So you believe that an individual -- if you respond to an
13:57:31 13 individual, you could accidentally be creating a closed
13:57:35 14 meeting? Is that what your fear is?

13:57:38 15 A. Yes. To a certain extent, yes.

13:57:41 16 Q. Do you think if I gave you a copy of the Open Meetings
13:57:43 17 Act, you could find where in the statute what you actually say
13:57:49 18 and you're afraid of is present as being something that is
13:57:52 19 illegal?

13:57:52 20 A. That's what I mean. It's so broad it doesn't really say
13:57:56 21 that. But it could be that, you know, you created a quorum.

13:58:00 22 Q. You could have created a quorum by responding to --

13:58:03 23 A. Responding.

13:58:04 24 Q. -- an E-mail not to your other Members but just responding
13:58:09 25 directly to that individual?

13:58:11 1 A. Yes.

13:58:11 2 Q. And you believe that the Open Meetings Act specifically

13:58:16 3 prohibits that?

13:58:17 4 A. Yes. To -- yes.

13:58:20 5 Q. Okay. You mentioned the term "walking quorum" with your

13:58:28 6 counsel. Where did you learn that term?

13:58:31 7 A. Well, it's been mentioned. So kind of -- I make the

13:58:36 8 example of the E-mail, you know. It's, like, you know, more

13:58:42 9 than two people have already answered the same questions, so

13:58:45 10 you've got a quorum.

13:58:47 11 Q. Even without you knowing that they've answered?

13:58:49 12 A. Yes.

13:58:50 13 Q. Okay. You mention the Rangra case. And I was wondering,

13:58:58 14 did you actually read the E-mails that were the subject of the

13:59:02 15 indictment?

13:59:04 16 A. Yes. It's been some time ago. Yes.

13:59:06 17 Q. Okay. You said that it was your understanding that the

13:59:09 18 E-mails were just to put an issue on the agenda?

13:59:13 19 A. Yes. I believe so. I think they were trying to change

13:59:16 20 engineers for the City of Alpine, I believe.

13:59:18 21 Q. Would it surprise you if those E-mails are actually coming

13:59:22 22 to the conclusion as to who should be awarded that contract?

13:59:31 23 A. No. The way I understood it, they were recommending a

13:59:35 24 certain engineer, yes.

13:59:36 25 Q. Well, how about this: If there was a communication among

13:59:40 1 a quorum of the members of a governmental body actually coming
13:59:44 2 to a conclusion as to who should be awarded a contract, and
13:59:47 3 this was just away from a public meeting, would you agree that
13:59:51 4 that is a violation of the Open Meetings Act?

13:59:54 5 A. Well, I don't think that, you know, when you -- I can make
14:00:06 6 a decision before a meeting that's -- you know, I think it's
14:00:09 7 going to go one way. But when I get to the meeting, there's
14:00:13 8 other things that are presented that may make my decision not
14:00:17 9 be what I thought it was going to be.

14:00:19 10 Q. So you believe that you should be allowed to engage in
14:00:22 11 discussions and deliberations and maybe even tell other members
14:00:26 12 of a quorum of your body how you're planning on voting before
14:00:30 13 the public meeting; is that what you're saying?

14:00:33 14 A. I think you should be able to gather facts, yes, but not
14:00:38 15 entirely make a decision, no.

14:00:41 16 Q. And you believe that the Open Meetings Act makes it so
14:00:44 17 that you cannot gather facts individually?

14:00:47 18 A. Yeah. Discuss, yes.

14:00:50 19 Q. It's not even related to having a quorum of members?

14:00:53 20 A. Well, yes. I am scared, you know, if there's other people
14:01:00 21 present in the room -- you know, all the other City Council
14:01:03 22 Members, yes. I will not discuss anything to do with the
14:01:07 23 meeting.

14:01:07 24 Q. Did you ever ask your City Attorney for a written opinion
14:01:16 25 as to whether these actions you've described actually do

14:01:22 1 violate the Open Meetings Act?

14:01:24 2 A. Not a written. But I have a verbal, yes.

14:01:26 3 Q. Why didn't you ask for a written opinion?

14:01:28 4 A. Alpine is small. You just pick up the phone.

14:01:31 5 Q. Fair enough. Are you aware that a written opinion from

14:01:35 6 your City Attorney is something you could rely on as an

14:01:38 7 affirmative defense to prosecution under the Open Meetings Act?

14:01:41 8 A. I never thought about that. He gave me a verbal. Then if

14:01:44 9 I got in trouble, his word is as good as gold.

14:01:47 10 Q. So you really weren't inhibited particularly. You felt

14:01:50 11 that you could just go ahead and call the City Attorney. And

14:01:53 12 if it was okay, then you could just go ahead and have whatever

14:01:59 13 communications you wanted?

14:02:00 14 A. Yes.

14:02:00 15 Q. Okay. You've been a City Council member and a member of

14:02:06 16 this other governmental entity for how long?

14:02:09 17 A. I've been on the City Council four years.

14:02:11 18 Q. Four years? I'm sorry. Four years?

14:02:14 19 A. Yes.

14:02:14 20 Q. And in that time, would you agree with me that for the

14:02:17 21 vast number of instances and applications of the Open Meetings

14:02:20 22 Act, you haven't had any sort of problem of adhering to it?

14:02:25 23 A. No. But it's always, you know, like, trying to make sure

14:02:32 24 that I don't violate it, yes.

14:02:33 25 Q. Okay.

14:02:34 1 A. There have been instances where there have been public
14:02:38 2 gatherings and gone to our City Secretary and made her aware
14:02:42 3 that, you know, there's going to be such and such thing going
14:02:47 4 on. Do we need to post it because, since it's a small city, we
14:02:51 5 have to make sure that, you know, not all of us are there at
14:02:54 6 one time.

14:02:55 7 Q. You believe that you cannot have a quorum present at a
14:02:58 8 social gathering?

14:03:00 9 A. No. That's -- I mean, not like that, no. But if we're
14:03:04 10 there and it's a place where there's going to be discussions
14:03:09 11 going on, I would rather, you know, it be posted so that, you
14:03:15 12 know, if we do say something in public and all the other people
14:03:18 13 answer or the other Council Members answer, we're not
14:03:20 14 violating.

14:03:21 15 Q. Essentially creating an open meeting out of it --

14:03:25 16 A. Yes.

14:03:25 17 Q. -- rather than running foul of the Open Meetings Act?

14:03:30 18 A. Yes.

14:03:30 19 MR. ECCLES: Okay. Pass the witness.

14:03:31 20 THE COURT: Mr. Ponton?

14:03:35 21 MR. PONTON: Nothing further, Your Honor.

14:03:36 22 THE COURT: Ms. Asgeirsson, we appreciate you very
14:03:39 23 much from being here today. You've come a long way from
14:03:42 24 Alpine. Thank you very much.

14:03:43 25 Your next witness, Mr. Ponton?

14:03:49 1 MR. PONTON: Avinash Rangra.

14:03:49 2 MR. ECCLES: I'm going to renew my objection,
14:03:51 3 Your Honor. This is a nonparty.

14:03:52 4 THE COURT: Let's hear --

14:03:53 5 MR. ECCLES: And late identified.

14:03:56 6 THE COURT: Okay.

14:03:57 7 MR. ECCLES: I don't believe his testimony could
14:03:58 8 possibly be relevant in this case.

14:04:01 9 THE COURT: Why -- first of all, why was he not
14:04:03 10 designated earlier than this?

14:04:04 11 MR. PONTON: He had been designated on our first
14:04:07 12 witness list, I believe. He was not designated on our latest
14:04:12 13 amended witness list, Your Honor. We have -- through him all
14:04:17 14 we intend to do is tender the transcript and official record of
14:04:22 15 the proceedings in *Rangra v. Brown*, which was tried before
14:04:26 16 Your Honor and appealed to the Fifth Circuit.

14:04:29 17 THE COURT: Okay.

14:04:30 18 MR. PONTON: And so we -- at first I wasn't sure he
14:04:34 19 could be here because he had family matters -- a family
14:04:37 20 vacation he was going to in Minnesota, I believe. But he
14:04:42 21 changed his plans so he could be here. That's why it's a late
14:04:45 22 designation. But I don't think it's a surprise because the
14:04:48 23 transcript has always been designated in our list of exhibits.
14:04:54 24 The copies of the transcript have been tendered to the Attorney
14:04:57 25 General and he was previously listed.

14:05:00 1 THE COURT: On the transcript, Mr. Eccles, does the
14:05:03 2 government -- does the State have any objection to the
14:05:09 3 transcript of Mr. Rangra's testimony in *Rangra v. Brown*?

14:05:15 4 MR. ECCLES: Your Honor, again, I'm struggling with
14:05:17 5 relevance to this case. The Rangra case dealt with an
14:05:22 6 indictment of Dr. Rangra of particular offenses, none of which
14:05:32 7 are present in this case. He's a nonparty. If what we are
14:05:35 8 trying to say here is there was a case called *Rangra* and that
14:05:38 9 there was, for instance, an indictment, there were E-mails,
14:05:42 10 there was a dismissal by the prosecutor and wasn't prosecuted,
14:05:48 11 there was a motion to reinstate the indictment filed by
14:05:51 12 Plaintiff's Counsel and that was denied, what exactly does that
14:05:55 13 get us towards any facial constitutional challenge to the Open
14:05:58 14 Meetings Act?

14:05:59 15 THE COURT: And it's my understanding, at least in
14:06:02 16 rereading for numerous times, the Panel's -- the original
14:06:08 17 Panel's decision for which I might take by saying I've read
14:06:11 18 that, the real issue on it appeared to me was an issue of
14:06:16 19 standing was the relevancy of his testimony being there, I
14:06:20 20 guess harm. I'm going to admit provisionally, if there's such
14:06:28 21 a way of doing this, admit provisionally the transcript. And
14:06:31 22 this is just of Dr. Rangra's testimony; is that correct?

14:06:35 23 MR. PONTON: I would like to introduce the transcript
14:06:37 24 of the entire record -- the official transcript from the --
14:06:41 25 that I received from the U.S. District Clerk in Pecos in

14:06:45 1 P:05-CV-59. It went on Appeal to the Fifth Circuit and came
14:06:52 2 back.

14:06:52 3 THE COURT: Now, the witness isn't -- I remember we
14:06:55 4 had the professor from Tech in that case and we had
14:06:58 5 Mr. Rangra. Who else testified in that case?

14:07:01 6 MR. PONTON: We had Scott Houston testify. We had
14:07:07 7 the City Attorney from El Paso testify. And we've been living
14:07:17 8 with this a long --

14:07:18 9 THE COURT: Well, what's the relevancy of having the
14:07:20 10 Tech professor, who was qualified as an expert witness in that
14:07:23 11 case, as I recall?

14:07:24 12 MR. PONTON: The primary -- the thrust of what I'm
14:07:27 13 trying to get is Dr. Rangra's testimony. But there's more than
14:07:31 14 just his testimony. There's trial exhibits. There's
14:07:34 15 indictment. There's dismissals. There's the factual basis
14:07:35 16 that proves that there was a criminal prosecution for E-mails
14:07:41 17 under the Texas Open Meetings Act.

14:07:43 18 THE COURT: I'm going to grant in part and overrule
14:07:45 19 in part the State's objection. The portion of Dr. Rangra's
14:07:49 20 testimony that he gave, that he made in Court under oath,
14:07:57 21 cross-examined by the State's attorney is admitted -- is
14:08:01 22 provisionally admitted with regards to the topic. I will
14:08:06 23 listen to arguments in writing on the issue of relevancy and
14:08:10 24 how it applies to the case later.

14:08:12 25 But I think it qualifies under the hearsay exceptions

14:08:15 1 to coming into Court or not even being here, say, since it was
14:08:19 2 made under oath and in Court. But the issue is relevancy. So
14:08:22 3 for the purposes of this hearing, I'm going to provisionally
14:08:26 4 admit it, preserving the right to disallow it subject to
14:08:32 5 written objections from the party or statements from the
14:08:36 6 parties concerning relevancy.

14:08:38 7 MR. PONTON: That's fine, Your Honor.

14:08:39 8 THE COURT: That would be a matter Mr. Rangra would
14:08:43 9 not need to testify.

14:08:43 10 MR. PONTON: And regarding also, if I could ask the
14:08:45 11 Court to clarify, what about the documents associated with his
14:08:49 12 testimony, his indictments and that kind of stuff?

14:08:50 13 THE COURT: That's part of -- if that came in as part
14:08:52 14 of his testimony were admitted during the course of his
14:08:55 15 testimony, then, there again, they would be provisionally
14:09:00 16 admitted with the issue of relevancy.

14:09:02 17 MR. PONTON: I don't have it in front of me. It may
14:09:04 18 have been introduced as exhibits to a pleading and referred to
14:09:08 19 in his testimony, but I can't recall.

14:09:10 20 THE COURT: Do you recall -- well, what I'll let you
14:09:13 21 do, without -- without -- let me start over.

14:09:18 22 I'll allow those documents related to the Rangra
14:09:21 23 prosecution, that being the indictment and the dismissal, which
14:09:25 24 I think were the only two documents related that I recall to
14:09:29 25 the prosecution.

14:09:30 1 MR. PONTON: I think that's correct. Although
14:09:32 2 there -- the E-mails are probably included within the context
14:09:36 3 of what he was testifying about.

14:09:38 4 THE COURT: I think that was probably within the
14:09:40 5 context of the indictment as well, was it not?

14:09:42 6 MR. PONTON: I think it was.

14:09:43 7 MR. ECCLES: I think that from the Rangra criminal
14:09:45 8 matter there was the E-mails, indictment, dismissal, motion to
14:09:51 9 reinstate indictment, order denying reinstatement of the
14:09:56 10 indictment. I think those were the documents.

14:09:58 11 THE COURT: Okay. Those five documents are
14:10:00 12 provisionally admitted. How have you numbered those documents
14:10:04 13 for purposes of this hearing?

14:10:06 14 MR. PONTON: I have to defer to my co-counsel.

14:10:09 15 THE COURT: All right. Mr. McKamie, do you have the
14:10:12 16 numbers for those documents, sir?

14:10:14 17 MR. MCKAMIE: They're all part of P-3. It's a group
14:10:16 18 exhibit.

14:10:16 19 THE COURT: Okay. Those five documents taken out of
14:10:18 20 Plaintiff's Exhibit 3 are provisionally admitted, pending final
14:10:22 21 admission after the Court receives written briefing on the
14:10:26 22 issue of relevancy of those documents, along with the relevancy
14:10:29 23 of Dr. Rangra's trial testimony in *Rangra v. Brown*.

14:10:34 24 MR. MCKAMIE: Your Honor, if I may, P-2 is the
14:10:36 25 record -- also part of the record. P-2 and -3 are the entire

14:10:39 1 record, including the appellate record. So they would be in
14:10:42 2 both of those.

14:10:43 3 THE COURT: Okay. So P-2 for purposes of this
14:10:45 4 hearing and only that portion that deal with Mr. Rangra's
14:10:48 5 testimony is provisionally admitted.

14:10:50 6 MR. PONTON: Could I have moment to confer?

14:10:56 7 THE COURT: You may.

14:10:56 8 MR. PONTON: That's fine, Your Honor. I won't call
14:10:58 9 Dr. Rangra, then, because of the Court's ruling.

14:11:01 10 THE COURT: Okay. Do you have another witness you'd
14:11:04 11 like to call?

14:11:04 12 MR. PONTON: I do.

14:11:05 13 MR. MCKAMIE: Your Honor, could we inquire on time?

14:11:07 14 THE COURT: Yes, sir. You have -- the Plaintiffs
14:11:08 15 have 29 minutes and 34 seconds. And Bobby Fischer and the
14:11:12 16 State have 38 minutes and 24 seconds.

14:11:15 17 MR. PONTON: We were searching for that.

14:11:17 18 THE COURT: The reason I say that is this is the
14:11:18 19 first time in my life I've ever had a chess clock. So I
14:11:23 20 promised myself I would use the name of the only person that I
14:11:26 21 know that plays chess, and that being Bobby Fischer. I saw the
14:11:31 22 movie, I think. Who is this?

14:11:47 23 MR. PONTON: Henry Wilson, Your Honor, from Hurst,
14:11:50 24 Texas.

14:11:50 25 THE COURT: All right. Mr. Wilson, come on down.

14:12:03 1 Mr. Wilson, state your name for me please.

14:12:05 2 MR. WILSON: Henry Wilson.

14:12:06 3 THE COURT: And, Mr. Wilson, you were sworn as a
14:12:09 4 witness earlier this afternoon; is that correct?

14:12:10 5 MR. WILSON: Yes, I was.

14:12:12 6 THE COURT: All right. Mr. Ponton, you may proceed.

14:12:15 7 HENRY WILSON,

14:12:15 8 having been first duly sworn, testified as follows:

14:12:15 9 DIRECT EXAMINATION

14:12:15 10 BY MR. PONTON:

14:12:15 11 Q. Tell us your name and where you live and what you do,
14:12:17 12 sir.

14:12:18 13 A. Henry Wilson. I live in Hurst, Texas. I'm Chief of
14:12:20 14 Airframe Structures for Bell Helicopter.

14:12:23 15 Q. Hurst is a bedroom community between Fort Worth and
14:12:26 16 Dallas?

14:12:27 17 A. We like to think of Fort Worth as our suburb.

14:12:30 18 Q. There you go. And how big is Hurst?

14:12:32 19 A. Hurst is a population of about 28,000 -- 38,000.

14:12:35 20 Q. All right. And do you hold a public office in Hurst?

14:12:39 21 A. I have been on the Hurst City Council for 25 years and
14:12:42 22 seven months.

14:12:43 23 Q. Wow. That's a long time.

14:12:45 24 A. It pays so well.

14:12:54 25 Q. What education do you have, sir.

14:12:56 1 A. I have a Bachelor's in Aerospace Engineering and I have a
14:12:58 2 Master's in Engineering Mechanics and a Master's in Management
14:13:01 3 Science.

14:13:02 4 Q. Okay. And how long have you been working with Bell
14:13:04 5 Helicopter?

14:13:05 6 A. Forty-one years and 14 -- 4 months.

14:13:10 7 Q. Now, are you familiar with a law called the Texas Open
14:13:15 8 Meetings Act?

14:13:17 9 A. Yes, sir, I am.

14:13:18 10 Q. Have you received instruction to it and learned about it
14:13:20 11 during 25 years on the City Council?

14:13:22 12 A. I have received the Attorney General's certification in
14:13:25 13 open meetings as well as open records, and I have conducted
14:13:29 14 seminars for other City Councils on that. I was president of
14:13:33 15 TML in 2005, and I traveled the State and some of the different
14:13:39 16 areas. We did open meetings training for the elected
14:13:43 17 officials. Plus I've received counsel from Scott Houston, the
14:13:47 18 TML attorney, members of the Board of Directors of TML, as well
14:13:52 19 as my own lawyer -- or the City Attorney.

14:13:55 20 Q. For the record and for the Court, TML stands for what?

14:13:58 21 A. Texas Municipal League.

14:14:00 22 Q. And Texas Municipal League is what?

14:14:03 23 A. It is a collection of cities and towns in the State of
14:14:05 24 Texas, roughly about 1,100, that come together to train to City
14:14:13 25 Council and to lobby issues with the legislature that affect

14:14:17 1 cities.

14:14:17 2 Q. TML also provides insurance services for cities?

14:14:21 3 A. It's a separate entity from the Texas Municipal League.

14:14:24 4 The risk pools are separate bodies, but we license use of our
14:14:28 5 name to those bodies.

14:14:30 6 Q. And the Texas Municipal League also has a legal department
14:14:34 7 that helps city attorneys provide legal advice?

14:14:38 8 A. Yes, they do. As well as elected officials provide legal
14:14:42 9 advice.

14:14:42 10 Q. Right. Now, does the Texas Open Meetings Act let you
14:14:49 11 communicate freely with your fellow City Council Members about
14:14:52 12 any public matter in Hurst?

14:14:54 13 A. I really think we're restricted in that, and I have some
14:14:58 14 examples of that is.

14:15:00 15 Q. Tell us how you think you're restricted, and give us some
14:15:04 16 examples in your own words.

14:15:05 17 A. I'm going to give you three instances. One did not deal
14:15:09 18 with a quorum but dealt with an item that was on our agenda
14:15:13 19 that was scheduled for a public hearing. I had a citizen call
14:15:17 20 me at home and want to discuss it. Since it was scheduled for
14:15:21 21 public hearing, I felt like I would be getting privileged
14:15:24 22 information and referred that to that citizen and told him I
14:15:27 23 would not discuss it with him. But to attend the Council
14:15:30 24 meeting and present their case in open meetings so all elected
14:15:34 25 officials could receive it. He was a little upset that I put

14:15:37 1 him off. But I told him, I'm sorry. But that's my
14:15:40 2 interpretation of the law, particularly for something that's
14:15:44 3 scheduled to be brought for the public.

14:15:46 4 The second one -- two other ones dealt with potential --
14:15:48 5 both of them potential ordinances. One fairly recently, we had
14:15:52 6 some concerns of control of -- an uncontrolled but would like
14:15:58 7 to be a controlled substance. That is a synthetic drug called
14:16:01 8 K2. And we wanted to -- a couple of us kind of would like to
14:16:07 9 have discussed where and how it's being sold in the City, what
14:16:10 10 the ramifications were if we should consider controlling this
14:16:13 11 via ordinance, if the Legislature was going to do it, and we
14:16:18 12 felt like we just couldn't talk about it at all. And we felt
14:16:21 13 like it was a public safety issue.

14:16:24 14 We didn't want to talk about it in a public forum because
14:16:27 15 it would disclose the locations in town that was being sold,
14:16:31 16 who was buying it, how it was being used, and what we felt like
14:16:34 17 the public dangers. And we just didn't feel comfortable
14:16:37 18 exposing those areas to the public.

14:16:39 19 Q. So you -- and the issue of the synthetic drug K2, you and
14:16:44 20 other Members of the Hurst City Council would have liked to
14:16:48 21 have been able to discuss the matters amongst yourselves before
14:16:52 22 there was a meeting?

14:16:53 23 A. We would like to have discussed the potential dangers that
14:16:56 24 it may have had to the citizens and then issue a request to our
14:17:00 25 staff to look at and draft an ordinance. Not discuss what the

14:17:03 1 ordinance ought to be, the tenets of the ordinance, or how we
14:17:07 2 would vote on it. But just what the potential public safety
14:17:11 3 issues dealing with it might have been.

14:17:12 4 Q. Because of your training in the Texas Open Meetings Act,
14:17:17 5 did you decide not to have those meetings with your fellow City
14:17:19 6 Council Members on the K2 issue?

14:17:21 7 A. I don't discuss anything dealing with City Council Members
14:17:25 8 anymore with other City Council Members.

14:17:27 9 Q. For -- because of why?

14:17:29 10 A. Because of the open meetings law. And it's not so much
14:17:34 11 fear of prosecution. I've taken an oath to uphold the law of
14:17:39 12 the State of Texas, and I take that very serious.

14:17:41 13 Q. And you're afraid, if you talk to anybody, it could be
14:17:45 14 violating TOMA?

14:17:46 15 A. It could be. The potential is there. And when the
14:17:48 16 potential is there, it's best to err on the side of not
14:17:52 17 violating.

14:17:53 18 Q. So that keeps you from communicating except in a meeting?

14:17:56 19 A. Yes.

14:17:56 20 Q. Would you like to be able to communicate, not decide, with
14:17:59 21 fellow Council Members outside of a meeting?

14:18:02 22 A. On some issues it would be nice to talk about it,
14:18:05 23 particularly public safety issue.

14:18:08 24 Q. But TOMA keeps your hands tied on that?

14:18:10 25 A. I would say it does.

14:18:11 1 Q. So, in other words, it makes you censor yourself or shut
14:18:15 2 up?

14:18:15 3 MR. ECCLES: Objection, Your Honor. Leading.

14:18:16 4 THE COURT: Sustained. Let's don't lead.

14:18:18 5 Q. (BY MR. PONTON) Does TOMA make you censor yourself or not
14:18:21 6 regarding those kind of issues?

14:18:23 7 A. TOMA does censor. It censors E-mails. I also -- I work
14:18:29 8 fairly technically oriented. You can send a blanket E-mail to
14:18:34 9 the whole Council and do blind copies so the receiver of the
14:18:38 10 E-mail does not know it's going to the whole Council. So I've
14:18:41 11 asked our Council don't send me any E-mails.

14:18:44 12 Q. You don't want to receive any communications?

14:18:46 13 A. I don't want to violate the law.

14:18:48 14 Q. So the reason you don't want to receive any communications
14:18:50 15 is why?

14:18:51 16 A. I don't want to violate the law.

14:18:52 17 Q. The TOMA?

14:18:54 18 A. The TOMA. The open meetings law.

14:18:56 19 Q. And you know that TOMA could -- a violation of TOMA could
14:19:00 20 subject you to criminal penalties?

14:19:03 21 A. Yes, I do.

14:19:03 22 Q. Up to six months in jail?

14:19:05 23 A. Yes, I do.

14:19:06 24 Q. Give us another example of how TOMA has kept you from
14:19:12 25 communicating.

14:19:12 1 A. We have currently on the books an ordinance dealing with
14:19:16 2 gas well drilling and fracking within our city limits. Of
14:19:20 3 late, some issues have come to light that there could be some
14:19:24 4 potential health hazards both with the drinking water as well
14:19:29 5 as with the air quality. We wanted to discuss those potential
14:19:32 6 hazards and what they were amongst ourselves to see if it was
14:19:35 7 necessary to maybe revise the ordinance.

14:19:38 8 At the same time we wanted to form a partnership with the
14:19:41 9 gas companies that were going to be doing the drilling rather
14:19:45 10 than be adversarial. But what ended up, since we did not
14:19:48 11 discuss any of that, we did argument in a forum and we
14:19:51 12 generated a very severe adversarial relationship with the
14:19:57 13 drilling company that we were really looking at doing business
14:20:00 14 with because the City had sold a lot of their mineral rights or
14:20:04 15 given permission to the companies. So we wanted to form that
14:20:07 16 partnership. But some of the safety items we did not discuss
14:20:11 17 privately, we waited and did it, and it presented a problem in
14:20:16 18 our relationship with the -- with the Chesapeake.

14:20:22 19 Q. And that -- and what caused the problem was TOMA -- the
14:20:26 20 criminal provisions of TOMA keeping you from --

14:20:28 21 A. We ended up having to air all our concerns and be on the
14:20:32 22 opposite side of the issues in the public with them. And
14:20:35 23 before we really got an understanding, we ended up with four or
14:20:38 24 five work sessions that we went through to get all of the
14:20:42 25 information. And we will be revising the ordinance, but it's

14:20:45 1 all being done through the open meetings. But it ended up, in
14:20:50 2 my opinion, creating a bad relationship with a company that we
14:20:54 3 were trying to form a partnership with.

14:20:57 4 Q. The -- does the Texas Open Meetings Act apply to people in
14:21:06 5 Hurst that are not public officials?

14:21:08 6 A. No.

14:21:09 7 Q. So they can talk to you and other City Council Members and
14:21:13 8 other people freely?

14:21:14 9 A. It depends on the situation, in my opinion. If it's an
14:21:18 10 item that's scheduled for public hearing, I feel like if I
14:21:22 11 listen to them, I'm violating the law. And so I refuse to
14:21:25 12 listen to them. They can bring their concerns in the public
14:21:29 13 forum rather than getting privileged information from them.

14:21:33 14 Q. Does that make it hard for you to do your job as public
14:21:36 15 official representing these people?

14:21:37 16 A. I don't think that I'm able to execute the duties of my
14:21:41 17 job for the citizens as best as I can.

14:21:43 18 Q. Are you familiar -- are you aware of any public officials
14:21:48 19 in your part of north Texas who either been threatened with or
14:21:52 20 prosecuted for violations -- criminal violations of TOMA?

14:21:56 21 A. No, I have not.

14:21:57 22 Q. You understand that TOMA applies not just to secret
14:22:08 23 decisions. It --

14:22:09 24 MR. ECCLES: Objection, Your Honor. Leading.

14:22:11 25 THE COURT: Sustained.

14:22:12 1 Q. (BY MR. PONTON) Do you understand whether or not TOMA
14:22:14 2 applies to just secret decisions or also receiving information
14:22:18 3 among the quorum?

14:22:20 4 A. My interpretation of the law -- of course, the secret
14:22:26 5 decisions, I have never discussed in 20 -- over 25 years with
14:22:31 6 anybody how I'm going to vote on an issue, including my wife.
14:22:36 7 I feel like that's only for the public to know at the time we
14:22:39 8 take the vote.

14:22:40 9 But as far as receiving information, my interpretation is
14:22:43 10 that it depends on the situation. It depends on the matters.
14:22:47 11 If it's scheduled for public hearing, I assume that I should
14:22:51 12 not receive any information unless it's given collectively to
14:22:54 13 the whole body.

14:22:56 14 MR. PONTON: Thank you. Pass the witness.

14:22:59 15 THE COURT: Okay. Mr. Eccles?

14:23:02 16 CROSS-EXAMINATION

14:23:02 17 BY MR. ECCLES:

14:23:02 18 Q. The first instance that you gave, you said that it wasn't
14:23:13 19 a quorum, but that a citizen called you at home about a matter
14:23:17 20 that was coming up on an upcoming Council agenda and you told
14:23:21 21 them that they should go ahead and attend the Council Meeting?

14:23:28 22 A. Yes.

14:23:28 23 Q. You had said that you felt like you couldn't listen or
14:23:32 24 respond to information that was being given to you when there
14:23:39 25 was a matter on a posted agenda because that would be

14:23:41 1 divulging --

14:23:41 2 A. Posted agenda for a public hearing.

14:23:42 3 Q. Right. And that would be divulging privileged

14:23:47 4 information?

14:23:47 5 A. I would be receiving privileged information that the whole

14:23:50 6 body did not receive on that item that was scheduled for public

14:23:54 7 hearing.

14:23:54 8 Q. Okay. Where in the Open Meetings Act --

14:23:57 9 A. I do not have the Act in front of me, sir. I'm sorry.

14:24:00 10 Q. Okay.

14:24:01 11 A. It was my understanding from discussions with Mr. Houston

14:24:03 12 with TML and from the training that I received from the

14:24:10 13 Attorney General.

14:24:10 14 Q. Okay. When did you receive that Attorney General

14:24:13 15 training?

14:24:13 16 A. My certificates are dated January the 19th, 2006.

14:24:18 17 Q. Okay. So you can't really direct us to where in the Act

14:24:24 18 this privileged information --

14:24:26 19 A. No, sir.

14:24:27 20 Q. -- portion of the statute is?

14:24:29 21 A. No, sir.

14:24:29 22 Q. Okay. Are you saying that if you had, for instance,

14:24:37 23 discussed with this citizen the citizen's concerns there on the

14:24:44 24 phone one on one, that it's your belief that you violate --

14:24:47 25 would be violating the Open Meetings Act?

14:24:49 1 A. It's my belief I would be violating the Act because I
14:24:52 2 would have been receiving something privileged that the whole
14:24:55 3 body should receive as a whole.

14:24:57 4 Q. Okay. And you do believe -- just one last time, you do
14:25:00 5 believe that is actually codified in the Open Meetings Act?

14:25:03 6 A. It's my understanding that it was. Whether it's in the
14:25:06 7 law or not, it's the way I understood it to be.

14:25:08 8 Q. From talking to Mr. Houston?

14:25:10 9 A. And attending the training.

14:25:13 10 Q. Okay. Did you ever perhaps inquire as to -- which county
14:25:18 11 is Hurst in?

14:25:20 12 A. Tarrant.

14:25:21 13 Q. Did you ask perhaps the Tarrant County Attorney's
14:25:24 14 Office --

14:25:24 15 A. No.

14:25:24 16 Q. -- is that a violation?

14:25:26 17 A. No.

14:25:26 18 Q. Okay. And you never requested perhaps even through the --
14:25:30 19 well, scratch that.

14:25:31 20 Second instance, couple of Members wanted to discuss the
14:25:37 21 substance K2. And they felt they couldn't discuss it because
14:25:41 22 you guys didn't feel comfortable discussing it in public.

14:25:47 23 Is --

14:25:47 24 A. It's a public health issue and safety issue. We did not
14:25:55 25 want to talk about the areas you could buy the drug, how it was

14:25:58 1 being used by the people within the town. It would be almost
14:26:02 2 like advertising for those particular places that were selling
14:26:05 3 it legally. And we felt uneasy talking about that in a public
14:26:12 4 forum to know how deep the problem was, if you want to consider
14:26:17 5 that a problem, how many areas it was, and whether we really
14:26:23 6 had a problem in the town or not.

14:26:25 7 Q. And you didn't feel comfortable discussing this public
14:26:28 8 health issue in an open meeting?

14:26:30 9 A. No. Because we didn't want to advertise the places that
14:26:34 10 the drug was being sold.

14:26:35 11 Q. Okay. Is it possible that you could have just put it on
14:26:39 12 the agenda and not discuss those particular matters?

14:26:42 13 A. That's what we did.

14:26:43 14 Q. Okay.

14:26:45 15 A. We're voting on that ordinance tonight.

14:26:49 16 Q. I think that you testified that you have never engaged in
14:26:57 17 a secret meeting to discuss -- or deliberations prior to the
14:27:05 18 actual vote. Is that accurate?

14:27:06 19 A. That I never discussed, I said, how I would vote on any
14:27:09 20 issue.

14:27:10 21 Q. Hypothetical: You meet with your Council -- or a quorum
14:27:18 22 of your Council -- Hurst City Council at a Starbucks and you
14:27:25 23 discuss with them --

14:27:25 24 A. Discuss what?

14:27:26 25 Q. You discuss with them the agenda that's coming up in the

14:27:29 1 next week.

14:27:29 2 A. Never do it.

14:27:30 3 THE COURT: Let him finish his question.

14:27:32 4 THE WITNESS: Oh. I'm sorry.

14:27:34 5 Q. (BY MR. ECCLES) Would you agree with me that that would be
14:27:37 6 a violation of the Open Meetings Act?

14:27:39 7 A. I don't discuss the agenda items for fear that I may be
14:27:45 8 violating the Act. Whether it violates it or not, I do not
14:27:48 9 know. But, like I said before, I err on the side of making
14:27:51 10 sure I don't break the law. So ...

14:27:53 11 Q. And on erring on the side that you don't break the law,
14:27:58 12 you're not saying that, for instance, what you are not engaging
14:28:01 13 in by erring on the side of caution is actual illegal? For
14:28:05 14 instance --

14:28:06 15 A. I just don't discuss the agenda items.

14:28:08 16 THE COURT: Let him finish his question.

14:28:10 17 THE WITNESS: I apologize.

14:28:11 18 THE COURT: Thank you.

14:28:12 19 Q. (BY MR. ECCLES) When you say that you're erring on the
14:28:15 20 side of caution, you're not saying that these actions you're
14:28:19 21 not engaging in -- for instance, talking to one other Council
14:28:23 22 Member or addressing a concern from a citizen -- when you err
14:28:29 23 on the side of caution, you're not saying that would actually
14:28:34 24 violate the Open Meetings Act. What you're saying is that you
14:28:37 25 just don't want to get anywhere near violating the Open

14:28:41 1 Meetings Act?

14:28:42 2 A. If there's a quorum present, there is a fear that we're
14:28:45 3 violating the law.

14:28:47 4 Q. Okay.

14:28:47 5 A. Yes. It's -- I agree with your statement, that -- that if
14:28:53 6 I think I might be violating the law, then I don't do it.

14:28:56 7 Q. Or even coming close to violating the law?

14:28:59 8 A. Or even coming close to it.

14:29:00 9 Q. Or coming close of an area where you may not have a solid
14:29:05 10 understanding of the law?

14:29:06 11 A. That's right. It does restrict our conversations because
14:29:09 12 of that.

14:29:09 13 Q. Okay. Would you agree or disagree that violations of, for
14:29:20 14 instance, having a secret meeting and deliberating how the
14:29:25 15 council would vote, like the hypothetical that I had given you
14:29:28 16 about meeting at Starbucks the week before the Council Meeting
14:29:31 17 and deliberating the agenda, would you agree or disagree that
14:29:35 18 this type of behavior should be criminal?

14:29:39 19 A. If there's a willful intent to -- to decide matters
14:29:50 20 outside of the public forum, whether it's criminal or -- that
14:29:55 21 action is just disallowed. If it's willful, it might be
14:30:02 22 considered criminal. But it's very difficult for me to see
14:30:05 23 that executing your duties as elected officials you should have
14:30:11 24 fear of prosecution being sent to jail.

14:30:14 25 Q. How about if you knowingly engage in a closed meeting with

14:30:18 1 a quorum to deliberate matters that are under the governmental
14:30:22 2 body's control? Should that be criminal?

14:30:24 3 A. I don't think that's for me to decide, if it should or
14:30:27 4 should not be.

14:30:28 5 Q. It's what I'm asking, though?

14:30:30 6 A. I -- I honestly cannot answer you, whether it should or
14:30:34 7 should not be. I mean, I -- I don't know.

14:30:46 8 Q. You've been a City Councilman for 25 years?

14:30:50 9 A. Yes.

14:30:50 10 Q. During that quarter of a century, do you believe that
14:30:55 11 you've been able to live within the -- the Open Meetings Act?
14:31:03 12 Do you believe that you have violated the Open Meetings Act in
14:31:06 13 all of that time?

14:31:07 14 A. I don't think I have violated the Act; so, therefore, I've
14:31:11 15 lived within the Act.

14:31:12 16 Q. Very good. Do you believe that -- you've stated a couple
14:31:16 17 of areas of confusion, perhaps, as to the breadth of the Act.
14:31:19 18 But would you agree with me, in the vast majority of its
14:31:23 19 applications, the Open Meetings Act is understandable and that
14:31:27 20 you've applied it?

14:31:28 21 A. I felt like I have and I very much believe in open
14:31:32 22 government, too.

14:31:33 23 Q. Very good.

14:31:33 24 MR. ECCLES: Pass the witness.

14:31:35 25 THE COURT: Mr. Ponton?

14:31:36 1 MR. PONTON: Couple of questions, please Your Honor.

14:31:39 2 THE COURT: Okay.

14:31:41 3 REDIRECT EXAMINATION

14:31:41 4 BY MR. PONTON:

14:31:42 5 Q. Sir, in your quarter century of being a City Council
14:31:46 6 Member and complying with the Open Meetings Act, have you also
14:31:50 7 during that quarter century had to every year censor yourself
14:31:54 8 or keep from communicating with other Council Members of the
14:31:57 9 public about public matters for fear of violating the Act?

14:32:01 10 A. It has very limited -- it has very much limited some of
14:32:06 11 the discussions I would like to have had with other Council
14:32:09 12 Members because of that. And sometimes the nature of City
14:32:17 13 Council Meetings, some frank discussions that you would like to
14:32:20 14 have that may be embarrassing to some people within the
14:32:23 15 community, it's kept those from being conducted because it has
14:32:27 16 to be in the open meetings. And so it's just not said. It's
14:32:31 17 not discussed. And so I think it has limited the effectiveness
14:32:35 18 of us to govern the City.

14:32:36 19 Q. But you personally, have you limited yourself? Have you
14:32:39 20 not spoken or censored yourself from speaking to fellow Council
14:32:42 21 Members of the public about matters that you would like to
14:32:45 22 communicate about because of the --

14:32:48 23 A. Yes. I think I stated that in the two instances that I
14:32:51 24 gave.

14:32:51 25 Q. Right. Okay. Now, the other thing is, you're -- it

14:32:56 1 sounds like you're a pretty good lay scholar of the Act -- of
14:33:00 2 the Open Meetings Act. Is it your understanding that the
14:33:04 3 ultimate decision on whether you -- you or somebody else in
14:33:09 4 Tarrant County has violated the criminal provisions of the Open
14:33:10 5 Meetings Act, that would be up to the District Attorney in
14:33:14 6 Tarrant County; is that correct?

14:33:16 7 A. Yes, sir.

14:33:16 8 Q. It's not up to the Attorney General or somebody else?

14:33:19 9 A. Yes, sir.

14:33:20 10 Q. And so whatever that attorney -- whatever that District
14:33:24 11 Attorney at Tarrant County at the time decided to do, he could
14:33:27 12 charge somebody with a criminal violation?

14:33:29 13 A. It would be up to the District Attorney.

14:33:31 14 MR. PONTON: All right. Thank you. Nothing further,
14:33:34 15 Your Honor.

14:33:34 16 THE COURT: Anything else, Mr. Eccles?

14:33:37 17 RECROSS-EXAMINATION

14:33:37 18 BY MR. ECCLES:

14:33:37 19 Q. In your 25 years as a City Councilman, have you ever been
14:33:42 20 threatened with prosecution under the Open Meetings Act?

14:33:45 21 A. No, sir.

14:33:46 22 MR. ECCLES: That's all, Your Honor.

14:33:47 23 THE COURT: Mr. Ponton?

14:33:48 24 MR. PONTON: No, Your Honor.

14:33:48 25 THE COURT: Mr. Wilson, thank you so much for being

14:33:51 1 here. You're excused.

14:33:59 2 Mr. Ponton, call your next witness.

14:34:00 3 MR. PONTON: Scott Houston, Your Honor.

14:34:05 4 MR. ECCLES: Your Honor, this is another one of those
14:34:06 5 witnesses who has come late to the party.

14:34:09 6 THE COURT: Okay.

14:34:10 7 MR. ECCLES: And will be used to attempt to bring
14:34:15 8 some expert testimony. But the fact that he was late
14:34:17 9 identified as well as the attempt to proffer expert testimony
14:34:26 10 is the basis of our objection.

14:34:27 11 THE COURT: I'm going to listen to the testimony as a
14:34:29 12 proffer for purposes of either making an appeal. And then I'll
14:34:32 13 listen to -- I'll hear objections prior to the time of entering
14:34:38 14 a judgment in this case, from findings of fact and conclusions
14:34:41 15 of law, whether to consider his testimony or not.

14:34:44 16 (Witness sworn)

14:34:55 17 THE COURT: And as Mr. Houston takes the stand, I
14:34:57 18 think I know I made this disclosure in the first *Rangra v.*
14:35:03 19 *Brown* case, as a lawyer, I represent from time to time
14:35:06 20 cities -- none of the ones that are plaintiffs in this case --
14:35:12 21 as an attorney, some of which were covered by TML insurance,
14:35:18 22 I'm sure. I also did not run for this but was elected to the
14:35:23 23 TML Hall of Fame at some point and did not attend the -- and my
14:35:31 24 jersey number is not up in the Hall of Fame or anything, in
14:35:34 25 Texas Stadium or anywhere else. But I think I made this

14:35:38 1 disclosure once upon a time to all the lawyers before and just
14:35:42 2 make sure that everybody understood.

14:35:44 3 I'm familiar with TML. Obviously, when I was in the
14:35:47 4 Legislature, dealt with legislation and not the Open Meetings
14:35:50 5 Act. I didn't carry any Open Meetings Act legislation when I
14:35:56 6 was in the Legislature.

14:35:56 7 All right. Mr. Ponton, you may proceed.

14:35:59 8 SCOTT HOUSTON,

14:35:59 9 having been first duly sworn, testified as follows:

14:35:59 10 DIRECT EXAMINATION

14:35:59 11 BY MR. PONTON:

14:35:59 12 Q. Mr. Houston, state your name, where you live, and what you
14:36:01 13 do.

14:36:01 14 A. Scott Houston. I'm the General Counsel for the Texas
14:36:06 15 Municipal League. I live in Round Rock.

14:36:07 16 Q. And the Texas Municipal League is what?

14:36:08 17 A. It's a nonprofit association of cities.

14:36:11 18 Q. In Texas?

14:36:11 19 A. Yes.

14:36:12 20 Q. And you represent cities -- the interest of cities, do
14:36:17 21 lobbying, and provide other service to cities?

14:36:19 22 A. Educational services, legal, and lobbying.

14:36:21 23 Q. And how long have you been an attorney for the legal arm
14:36:24 24 of TML?

14:36:25 25 A. A little more than ten years.

14:36:27 1 Q. In that roll have you had occasion -- do you do any
14:36:30 2 training to cities and public officials on the Texas Open
14:36:32 3 Meetings Acts?

14:36:34 4 A. Frequent training.

14:36:35 5 Q. And do you write about this and write articles or magazine
14:36:40 6 articles or legal treatises or TML stuff? All of the above?

14:36:46 7 A. I do.

14:36:47 8 Q. And you've been doing this for the ten years you've been
14:36:50 9 at TML?

14:36:51 10 A. Yes, sir.

14:36:52 11 Q. And is part of your duties at TML to try to tell public
14:36:57 12 officials in Texas what they can and can't do under TOMA?

14:37:00 13 A. Exactly.

14:37:00 14 Q. And what do you tell them that they can or can't do under
14:37:04 15 TOMA?

14:37:04 16 A. Well, the position that we have to provide being
14:37:07 17 conservative organization that wants to ensure that our elected
14:37:10 18 officials don't get sent to jail is that the only 100 percent
14:37:14 19 safe way to stay out of jail as to the Open Meetings Act is to
14:37:18 20 not discuss any items of public business outside of a properly
14:37:22 21 posted meeting.

14:37:23 22 Q. So that means not among one or two members, less than a
14:37:26 23 quorum, or not at all?

14:37:28 24 A. It means not amongst a quorum or one or two.

14:37:31 25 Q. Why do you say that? Why is your conservative opinion

14:37:36 1 that you offer to these Council Members or public officials
14:37:40 2 come down to that?
14:37:41 3 A. I think there's a continuum that you have under the Open
14:37:44 4 Meetings Act. On the one hand, you have blatant illegal closed
14:37:48 5 meetings, what the Attorney General's Office refers to in
14:37:52 6 various publications as backdoor deals and smoked-filled
14:37:57 7 rooms. I think we would all agree those are violations of the
14:37:58 8 Open Meetings Act.

14:38:00 9 MR. ECCLES: Your Honor, at this time I am going to
14:38:01 10 object to the legal conclusions that are now coming from the
14:38:04 11 witness stand.

14:38:05 12 THE COURT: Okay.

14:38:05 13 MR. ECCLES: It's improper to be coming from this
14:38:08 14 witness, who was neither identified as an expert nor is it
14:38:13 15 proper for expert testimony as to the conclusions of this --
14:38:17 16 the constitutionality or the application of this law to be
14:38:21 17 coming from the witness stand.

14:38:22 18 THE COURT: I'll sustain. I'll allow the witness
14:38:24 19 what he talk about what advice he gives to people who call and
14:38:28 20 things of that nature. I'm not going to let him go into his
14:38:34 21 interpretation of the Open Meetings Act.

14:38:37 22 Q. (BY MR. PONTON) Don't tell us whether the TOMA violates
14:38:39 23 the First Amendment or that kind of stuff because that's for
14:38:42 24 Judge Junell to decide. Just tell what opinions you give to
14:38:45 25 public officials, advice you give, and why.

14:38:47 1 A. If a city official calls me -- and they frequently do --
14:38:50 2 and ask me the question of, can I speak to another member of my
14:38:53 3 governmental body outside of a properly posted meeting? the
14:38:57 4 answer I give is, If you do that, you run the risk of going to
14:39:02 5 jail. And I do that based upon several things. There have
14:39:05 6 been indictments of people for -- of city officials for sending
14:39:09 7 E-mails that, in my opinion, weren't discussing public business
14:39:14 8 but those city officials were indicted anyway.

14:39:17 9 We've seen Attorney General opinions over the past years
14:39:20 10 that seem to have broadened the definition of a meeting.

14:39:22 11 MR. ECCLES: Objection, Your Honor. We're going off
14:39:24 12 again into legal conclusions of this witness.

14:39:27 13 THE COURT: Sustained. He just asked you -- the
14:39:29 14 question was: Have you given opinion to people not -- when
14:39:34 15 they ask you a question, and I think you answered that. You
14:39:36 16 went into why you give the opinion. Just stick to have you
14:39:40 17 given advice and what the nature of that advice was.

14:39:43 18 Q. (BY MR. PONTON) Do you feel it's part of your job at
14:39:45 19 TML -- I meant to ask you this: Tell us your educational
14:39:49 20 background and where -- if you're lawyer and that kind of
14:39:52 21 stuff.

14:39:53 22 A. I went to Texas A&M University. I graduated from there in
14:39:56 23 1995. I graduated from St. Mary's University School of Law in
14:40:00 24 1999 and essentially came to TML shortly after law school and
14:40:07 25 been practicing municipal law since.

14:40:08 1 Q. You're a licensed lawyer here in the State of Texas?

14:40:12 2 A. Yes, sir.

14:40:12 3 Q. And so you've been giving this Open Meetings advice for
14:40:15 4 ten years?

14:40:16 5 A. Correct.

14:40:16 6 Q. I see you speak at TML meetings, and you go around the
14:40:20 7 State to give seminars to civics, too, don't you?

14:40:22 8 A. I do. And I'm certified by the Attorney General's Office
14:40:25 9 to give the required meetings training.

14:40:28 10 Q. So, once again, I go back to the question of why is it
14:40:31 11 that you tell public officials not to talk about any public
14:40:34 12 business outside of a meeting, period?

14:40:37 13 A. Because they could go to jail if they do. They could be
14:40:40 14 indicted for doing that.

14:40:41 15 Q. And what's the basis for you believing that? Don't tell
14:40:47 16 us what the law is as far as what Judge Junell has to decide.
14:40:50 17 But just tell us the basis for why you state that to people.

14:40:53 18 A. We've seen it happen.

14:40:54 19 Q. Give us examples.

14:40:56 20 A. We saw a case out of the City of Alpine where one Council
14:41:00 21 Member sent an E-mail to four other Council Members asking
14:41:04 22 whether or not an item should be placed on a future agenda.
14:41:09 23 One of those Council Members received it and replied back to
14:41:13 24 all and said yes and added a little bit of commentary to it.
14:41:16 25 Based on that simple E-mail exchange, they were indicted by

14:41:19 1 their District Attorney for having a criminal closed meeting.

14:41:22 2 Q. Have you had discussions with public officials in Texas

14:41:25 3 over threats of prosecution that haven't resulted in actual

14:41:29 4 indictment but a threat?

14:41:31 5 MR. ECCLES: Objection, Your Honor. Hearsay.

14:41:37 6 THE COURT: Restate your question, Mr. Ponton.

14:41:38 7 Q. (BY MR. PONTON) All right. Have you had discussions with

14:41:41 8 public officials in Texas regarding threats of prosecution that

14:41:44 9 haven't resulted in an indictment?

14:41:46 10 A. I have.

14:41:46 11 Q. Have those threats of indictment had any effect on the

14:41:51 12 public officials that you've conversed with? Without saying a

14:41:55 13 what they said, but it just had an effect on them?

14:41:58 14 A. Yes.

14:41:58 15 Q. And what has that effect been on them?

14:42:01 16 A. It's been to not speak about --

14:42:02 17 MR. ECCLES: Objection, Your Honor. This is calling

14:42:04 18 for speculation.

14:42:05 19 THE COURT: Sustained.

14:42:06 20 Q. (BY MR. ECCLES) Do you believe that the threat of

14:42:08 21 prosecution of public officials keeps public officials from

14:42:13 22 communicating with each other?

14:42:14 23 MR. ECCLES: This calls for speculation as well as a

14:42:16 24 legal conclusion.

14:42:17 25 THE COURT: Sustained.

14:42:25 1 Q. (BY MR. PONTON) Is the threat of prosecution that you've
14:42:27 2 observed in Texas one of the reasons that you give advice to
14:42:30 3 public officials not to communicate outside of a meeting?

14:42:34 4 A. It is.

14:42:34 5 Q. The Open Meetings Act has other provisions besides its
14:42:48 6 criminal provisions, doesn't it?

14:42:49 7 A. It does.

14:42:50 8 Q. It has civil provisions that can let the entity or
14:42:57 9 interested party move to --

14:42:58 10 MR. ECCLES: Objection, leading.

14:42:59 11 THE COURT: Sustained.

14:43:01 12 Q. (BY MR. PONTON) Does it have civil proceeding -- does it
14:43:03 13 have civil provisions that can invalidate actions taken as
14:43:08 14 result of a secret meeting?

14:43:10 15 A. It does.

14:43:11 16 Q. Does it have civil provisions that can result in a fine to
14:43:16 17 members?

14:43:16 18 A. Does the Open Meetings Act?

14:43:18 19 Q. Yes.

14:43:19 20 A. Generally, no. You would end up with either a criminal
14:43:22 21 prosecution or an injunction against further action.

14:43:25 22 Q. But it also has a provision to invalidate actions taken in
14:43:31 23 violation of the Act?

14:43:32 24 A. Correct.

14:43:32 25 Q. But it also has some criminal provisions?

14:43:35 1 A. It does.

14:43:36 2 Q. Do you go around the country to discuss open meetings laws
14:43:41 3 with other city attorney associations around the country?

14:43:45 4 A. I have done that.

14:43:46 5 Q. Is the Texas Open Meetings Act considered to be strict or
14:43:50 6 lenient as far as its criminal provisions as far as around the
14:43:54 7 country when you speak?

14:43:55 8 MR. ECCLES: Objection. Calls for a legal
14:43:56 9 conclusion.

14:43:57 10 THE COURT: Well, I'm not sure about the relevancy
14:43:59 11 either. Sustained. The objection is sustained.

14:44:03 12 Q. (BY MR. PONTON) Okay. In regards to your talking to other
14:44:12 13 attorneys and groups around the country, you've written an
14:44:16 14 article for the international municipal lawyers association?

14:44:19 15 A. I have.

14:44:19 16 Q. And that article discusses your views on why you have to
14:44:24 17 be conservative and what you tell public officials in Texas
14:44:28 18 over what they can and cannot do under the criminal provisions
14:44:31 19 of the Open Meetings Act?

14:44:33 20 A. Correct.

14:44:33 21 MR. PONTON: And that document is Plaintiff's Exhibit
14:44:38 22 1, which I offer at this time.

14:44:43 23 THE COURT: Any objection?

14:44:44 24 MR. ECCLES: Yes, Your Honor. I've actually
14:44:46 25 submitted them to the Court as part of my objections to this

14:44:49 1 exhibit. However, it involves both this witness was not
14:44:56 2 previously designated as an expert. The article itself is
14:45:01 3 hearsay as well as it's purporting legal conclusions, both of
14:45:05 4 which would remove it from admissibility. We do object to this
14:45:11 5 exhibit.

14:45:11 6 THE COURT: The State's objection is sustained.
14:45:14 7 Plaintiff's Exhibit 1 is not admitted. It will be made part of
14:45:18 8 the record for appellate purposes.

14:45:20 9 MR. PONTON: Can we have a moment, Your Honor?

14:45:22 10 THE COURT: You may.

14:45:46 11 MR. PONTON: Pass the witness.

14:45:47 12 THE COURT: Any questions?

14:45:49 13 MR. ECCLES: Very briefly.

14:45:51 14 CROSS-EXAMINATION

14:45:51 15 BY MR. ECCLES:

14:45:51 16 Q. You admit that the advice that you have given to various
14:45:59 17 municipal or governmental body members is decidedly
14:46:03 18 conservative. It doesn't track the contours of the Act itself,
14:46:09 19 correct?

14:46:09 20 A. No. That's not correct.

14:46:13 21 Q. I'm sorry. I thought you had described it as being
14:46:16 22 conservative. What else does conservative mean?

14:46:19 23 A. It is conservative, and it is in accordance with the
14:46:24 24 definitions in the Open Meetings Act.

14:46:26 25 Q. So you believe that the Open Meetings Act -- and this is

14:46:29 1 just from the advice that you've given -- requires governmental
14:46:34 2 body members to not discuss any public matters with other
14:46:37 3 officials outside of open meetings?

14:46:39 4 A. With other members of their governmental body, yes.

14:46:44 5 Q. And it's also your testimony that the E-mail exchange in
14:46:52 6 the Rangra case was purely about getting a matter placed on the
14:46:57 7 agenda?

14:46:59 8 A. Yes.

14:47:01 9 MR. ECCLES: Pass the witness.

14:47:03 10 MR. PONTON: Nothing further, Your Honor.

14:47:04 11 THE COURT: Thank you very much for being here.
14:47:07 12 You're excused.

14:47:12 13 Mr. Ponton, any other witnesses?

14:47:13 14 MR. PONTON: Avinash Rangra, but not to discuss his
14:47:17 15 trial testimony at *Rangra v. Brown*.

14:47:19 16 THE COURT: What it's about? What's the relevancy?

14:47:23 17 MR. PONTON: The relevancy is going to be to discuss
14:47:25 18 the fact that he was told by the Assistant District Attorney in
14:47:31 19 Brewster County that he was under continued threat of
14:47:35 20 prosecution in the -- for the E-mail incident even after the
14:47:38 21 dismissal of the case and that he's still a member of a public
14:47:42 22 body in Brewster County. Both of those issues would go to
14:47:45 23 standing issues and the relevancy of whether or not the Court
14:47:53 24 should consider *Rangra v. Brown* as precedent.

14:47:56 25 THE COURT: Well, what does that have to do with

14:47:58 1 standing? I'm not sure that has anything to do with standing
14:48:01 2 on this case. I think both the Panel decision, which I think
14:48:04 3 was correct, was that there is standing of the plaintiffs you
14:48:08 4 have here. So I don't think that -- Mr. Rangra is not a party
14:48:12 5 to this case. And, quite frankly, I don't find standing by the
14:48:16 6 plaintiffs in the case, at least those that are still Council
14:48:19 7 Members. And so what else was the other thing he was going to
14:48:24 8 speak to.

14:48:25 9 MR. PONTON: Could I have a moment?

14:48:28 10 THE COURT: Sure.

14:48:48 11 MR. PONTON: The testimony he would give, Your Honor,
14:48:52 12 would be that he attended the Court of Appeals here in El Paso
14:49:03 13 on the District Attorney's appeal of the grant of expungement
14:49:06 14 in his criminal case. He was told by the District Attorney at
14:49:10 15 that hearing that, despite the dismissal of the indictment in
14:49:16 16 Brewster County, he was under a continuing threat of
14:49:19 17 prosecution for two years after the end of that. That
14:49:22 18 testimony --

14:49:22 19 THE COURT: What does that have to do with this case
14:49:24 20 that we have right here?

14:49:27 21 MR. PONTON: Just evidence that a continuing threat
14:49:29 22 of prosecution can act as an oppressive use of TOMA. That's
14:49:37 23 all.

14:49:37 24 THE COURT: Okay. Mr. Eccles?

14:49:40 25 MR. ECCLES: It's an amazing demonstration of hearsay

14:49:44 1 as well. Yes, we absolutely object to Dr. Rangra testifying as
14:49:51 2 to what allegedly somebody told him at a hearing, not in this
14:50:00 3 case, but a previous case, about a continuing threat of
14:50:07 4 prosecution which is --I don't know if it's still continuing or
14:50:09 5 not, but I would sincerely doubt it. And certainly standing
14:50:13 6 has absolutely nothing to do with it because he's not a party
14:50:17 7 to this case.

14:50:18 8 MR. MCKAMIE: Your Honor, may I?

14:50:19 9 THE COURT: Mr. McKamie, go ahead.

14:50:22 10 MR. MCKAMIE: Thank you, Your Honor. It really
14:50:23 11 doesn't relate to the standing issue. It relates to the
14:50:27 12 continuing threat of prosecution by sitting public officials.
14:50:29 13 Not just those named as parties plaintiff, but also Dr. Rangra,
14:50:33 14 who is here today, who happened to be a party in the previous
14:50:37 15 suit. And contrary to Counsel's statement, when a prosecutor
14:50:40 16 says something in open court at a hearing, that's something
14:50:43 17 that's an exception to the hearsay rule that Dr. Rangra could
14:50:48 18 testify in this courtroom. And we ask that the Court accept
14:50:51 19 that as proffer, at least.

14:50:52 20 THE COURT: Well, I'll -- you have 7 minutes and
14:50:56 21 43 seconds. So if you want to put Dr. Rangra on, I'll consider
14:51:03 22 later on whether it's admissible or not. So you have 7 minutes
14:51:05 23 and 43 seconds.

14:51:05 24 MR. PONTON: Thank you Your Honor, I'll be brief.

14:51:44 25 THE COURT: You may proceed, Mr. Ponton.

14:51:48 1 AVINASH RANGRA,
14:51:48 2 having been first duly sworn, testified as follows:
14:51:48 3 DIRECT EXAMINATION
14:51:48 4 BY MR. PONTON:
14:51:48 5 Q. State your name and where you live and what you do?
14:51:50 6 A. Avinash Rangra. I am a professor of chemistry at
14:51:54 7 Sul Ross State University in Alpine, Texas.
14:51:57 8 Q. Are you a member of any public body at this time?
14:52:00 9 A. Yes, sir.
14:52:01 10 Q. Is that the Southwest Texas Municipal Gas Corporation?
14:52:04 11 A. Yes, sir.
14:52:05 12 Q. And that's subject to the Texas Open Meetings Act?
14:52:09 13 A. Yes.
14:52:10 14 Q. Were you previously a member of the Alpine City Council?
14:52:14 15 A. Yes, sir.
14:52:15 16 Q. For how many years?
14:52:16 17 A. For six.
14:52:17 18 Q. Although we're not going into the details of it, you had
14:52:26 19 been previously indicted in State Court in Alpine for an open
14:52:30 20 meetings violation?
14:52:30 21 A. That's true.
14:52:31 22 Q. And then that indictment was dismissed?
14:52:33 23 A. Yes.
14:52:34 24 Q. And then your lawyer, Mr. DeGuerin, moved -- set aside
14:52:39 25 that dismissal?

14:52:40 1 A. Right.

14:52:41 2 Q. And that was not granted by the Judge. In other words,
14:52:45 3 the case continued to be dismissed?

14:52:47 4 A. Yes.

14:52:47 5 Q. And then Mr. DeGuerin filed a petition to expunge your
14:52:52 6 arrest record in that case?

14:52:54 7 A. Yes.

14:52:54 8 Q. And that resulted in a ruling that was appealed to the
14:52:57 9 Court of Appeals -- the 8th Court of Appeals, the Civil Court
14:53:01 10 of Appeals in El Paso?

14:53:02 11 A. Yes.

14:53:03 12 Q. And you attended that Appeals Court hearing?

14:53:05 13 A. Right.

14:53:06 14 Q. And who was representing the State of Texas at that
14:53:10 15 hearing?

14:53:11 16 A. Steve Houston, the County Attorney.

14:53:13 17 Q. Steve Houston was the County Attorney in Brewster County
14:53:17 18 and also the Assistant District Attorney in the 83rd District?

14:53:22 19 A. Yes.

14:53:22 20 Q. And he also had previously been the Alpine City Attorney
14:53:25 21 when you were on the City Council?

14:53:27 22 A. That's right.

14:53:27 23 Q. Now, did an issue come up before the Court of Appeals over
14:53:32 24 whether or not you could still be subject to prosecution for
14:53:37 25 the crimes that you were indicted for even though they'd been

14:53:41 1 dismissed?

14:53:42 2 A. That's what I heard Steve Houston say.

14:53:45 3 Q. And what did he say to the Court regarding whether or not
14:53:48 4 you were still subject to indictment even after the dismissal?

14:53:51 5 MR. ECCLES: Objection, hearsay.

14:53:52 6 THE COURT: Sustained.

14:53:57 7 Q. (BY MR. PONTON) Was it your understanding, Dr. Rangra,
14:54:01 8 based on the statements made by Mr. Houston at the Court of
14:54:05 9 Appeals, that you could still be subject to prosecution for an
14:54:09 10 open meetings violation for two years after?

14:54:14 11 MR. ECCLES: Objection, leading.

14:54:15 12 THE COURT: Overruled.

14:54:16 13 Q. (BY MR. PONTON) Explain to us what your understanding
14:54:18 14 was. Don't say what Mr. Houston said. What was your
14:54:20 15 understanding regarding this issue?

14:54:22 16 A. After I heard him say that, I was sitting in Court --

14:54:25 17 MR. ECCLES: Objection, Your Honor. Hearsay.

14:54:27 18 THE COURT: You can't say what he said. What was
14:54:29 19 your understanding.

14:54:29 20 A. My understanding was that, yes, I could be subjected to
14:54:33 21 prosecution. Yes.

14:54:39 22 MR. PONTON: Pass the witness.

14:54:40 23 THE COURT: Any questions?

14:54:43 24 MR. ECCLES: No, Your Honor.

14:54:44 25 THE COURT: All right. Thank you very much,

14:54:46 1 Dr. Rangra.

14:54:48 2 Next witness?

14:54:49 3 MR. PONTON: Could I have a moment to confer? I
14:54:52 4 think we're about done.

14:55:10 5 Your Honor, that's all the witnesses we have. We're
14:55:11 6 going to move for admission of some exhibits whenever
14:55:13 7 Your Honor wants to take that up.

14:55:15 8 THE COURT: We'll go ahead. The exhibits that I show
14:55:17 9 that are admitted right now are Exhibit 7, which was the 2005
14:55:32 10 House Proceedings that Mr. Keel spoke to. Plaintiff's
14:55:43 11 Exhibit 2, and I believe that what that included was
14:55:45 12 Mr. Rangra's -- the portion of that I've admitted is Dr. Rangra
14:55:52 13 testimony in Pecos 05-CV-59 and the documents that made up the
14:56:03 14 indictment, the E-mails, the dismissal. And then there was
14:56:11 15 some subsequent document -- subsequent re-filing of the
14:56:14 16 indictment or something like that and a subsequent dismissal.

14:56:18 17 MR. MCKAMIE: That's right.

14:56:19 18 THE COURT: And I've taken all those in.

14:56:20 19 MR. MCKAMIE: Two and three I think have duplicative
14:56:23 20 documents, but they're both there.

14:56:25 21 THE COURT: And that's -- Plaintiff's Exhibit 1 is
14:56:30 22 excluded but we'll attach it as part of the record for
14:56:33 23 appellate purposes. Anything else, Mr. McKamie?

14:56:40 24 MR. MCKAMIE: That's all that I have that you've
14:56:41 25 ruled on so far, Your Honor. We're going to just move for

14:56:43 1 admission of our previously submitted.

14:56:45 2 THE COURT: Give me those numbers and what they are
14:56:48 3 so I can make a ruling on them, please.

14:56:49 4 MR. MCKAMIE: Number 4 is a research paper prepared
14:56:53 5 by Steven Mulroy with the University of Memphis School of Law
14:56:57 6 regarding open meetings acts. It's a legal research paper,
14:57:04 7 Your Honor.

14:57:05 8 P-5 -- if you want to say with P-4,
14:57:07 9 we can stay there. P-5 is similar. It's by Devon Helfmeyer,
14:57:14 10 another legal treatise, a recent one from spring of 2010 that
14:57:19 11 examines the Texas Open Meetings Act. It's a commentary.

14:57:23 12 THE COURT: Go ahead.

14:57:24 13 MR. MCKAMIE: Affidavit of Professor Mulroy, who is
14:57:28 14 the author of P-4. That's P-6. P-8 is attorneys fees invoices
14:57:36 15 to support a future application for fees after we prevail,
14:57:40 16 Your Honor.

14:57:42 17 THE COURT: All right.

14:57:45 18 MR. MCKAMIE: Although -- although, as the Court's
14:57:47 19 aware under the Declaratory Judgment Act, it could be just
14:57:51 20 equitable to grant them even if we don't.

14:57:53 21 THE COURT: Well, under the Western District of Texas
14:57:56 22 Rules, attorney fees we'll take up after the entry of a Court's
14:57:59 23 judgment at that time. So you'll have an opportunity to maybe
14:58:05 24 resubmit P-8 at that time.

14:58:10 25 MR. MCKAMIE: We'd like to retain that right. That's

14:58:12 1 why we made the deadline, Judge.

14:58:12 2 The Texas Attorney General training materials are in
14:58:15 3 P-9, a CD-ROM, "Tools For Open Government." That's primarily
14:58:19 4 just the Open Meetings Act. But it's training material I think
14:58:22 5 mandated by the Legislature that be created the AG's Office.

14:58:27 6 P-10 and -11 are indictment and judgment of acquittal
14:58:31 7 of a city public official for violation of the Act just
14:58:34 8 submitted as example of threat of prosecution from a real life
14:58:41 9 human being who is serving the public and was indicted and
14:58:45 10 later acquitted.

14:58:47 11 And then P-12 is also training materials by TASB, the
14:58:51 12 Texas Association of School Boards, "Advanced Open Meetings
14:58:53 13 Act."

14:58:54 14 So many of these of course are training materials and
14:58:58 15 other documents, including legal treatises, Your Honor, that we
14:59:02 16 submit just to show not only the overbreadth of the Act and its
14:59:07 17 vagueness but also conflicting -- conflicting views on
14:59:11 18 interpretations of the Act by officials charged with that
14:59:14 19 interpretation.

14:59:15 20 THE COURT: Mr. Eccles, as to Plaintiff's Exhibit 4,
14:59:17 21 what's the State's position? That's the research paper,
14:59:23 22 "Sunlight's Glare: How Overbroad Open Government Laws Chill
14:59:25 23 Free Speech and Hamper Effect Democracy" from Steven Mulroy,
14:59:31 24 University of Memphis School of Law.

14:59:34 25 MR. ECCLES: Well, for the Court's perusal, Document

14:59:36 1 Number 50 filed in this case is plaintiff's -- or Defendants'
14:59:39 2 Objections to Plaintiffs' Exhibits that was filed a week ago
14:59:42 3 Friday. Plaintiffs' Exhibit 1, 4, 5, 6, 7, and 12 all contain
14:59:48 4 these either affidavits or, essentially, legal papers. And
14:59:55 5 they are -- we object on the basis of hearsay under rules 1 --
15:00:03 6 801 and 802, as well as the fact that considering affidavits at
15:00:07 7 all as trial evidence, I've never actually been able to cite to
15:00:15 8 CJS in anything that I've filed in the Court. But it is so
15:00:20 9 axiomatic that it's just -- I felt compelled to put it in.

15:00:24 10 This is just not proper trial testimony. Submitting
15:00:27 11 a law review article or some journal article in telling you how
15:00:32 12 to deal with a facial constitutional attack. It's -- they are
15:00:37 13 inadmissible. As to the other exhibits, you've dealt with the
15:00:45 14 limitations on Plaintiffs' 2, 3. As to 10, we object on the
15:00:53 15 grounds of relevance. Exhibit 9 -- and, mind you, we were
15:01:02 16 supposed to exchange exhibits. We never got more than
15:01:05 17 Plaintiffs' Exhibits 1 through 7. So that's going to be sort
15:01:08 18 of one of our objections, that we haven't actually laid eyes on
15:01:12 19 a few of these exhibits.

15:01:14 20 But, again, I recommend to the Court our doc --
15:01:19 21 Document Number 50, which outlines all of our various
15:01:22 22 objections to the plaintiffs' evidence in this case.

15:01:24 23 THE COURT: Well, go back again. Plaintiff's Exhibit
15:01:27 24 1 has not been admitted and is attached to the record for
15:01:32 25 appellate purposes. Exhibit 2, as I previously -- and 3, as I

15:01:37 1 previously limited in the statements I've have made and the
15:01:41 2 rulings on the record as to Plaintiffs' Exhibits 2 and 3.
15:01:45 3 Plaintiffs' Exhibit 4 is not admitted but will be attached to
15:01:48 4 the record for appellate purposes. Plaintiffs' Exhibit 5 is
15:01:51 5 not admitted. Again, hearsay on both of those documents. And
15:01:55 6 they will be attached to the record for appellate purposes.
15:01:59 7 Same thing as to Plaintiffs' Exhibit 6. It's hearsay and will
15:02:04 8 be attached to the record for appellate purposes. Plaintiffs'
15:02:08 9 Exhibit 7, not the affidavit, but the actual journal was
15:02:12 10 admitted.

15:02:13 11 MR. ECCLES: Indeed. And I just wanted to clarify
15:02:15 12 that the affidavit of Terry Keel would not be.

15:02:19 13 THE COURT: Exhibit 8 is not proper before the Court
15:02:23 14 at this time because of the rules of the Western District of
15:02:24 15 Texas on attorneys fees. Plaintiffs' Exhibit 9. Y'all have a
15:02:30 16 CD-rom titled "Tools For Open Government"?

15:02:35 17 MR. ECCLES: Not that I'm aware of. I, mean the
15:02:37 18 Attorney General, there's the 2010 handbook for training. But
15:02:41 19 I'm not aware of any particular -- it's undated. I can't
15:02:45 20 authenticate it. This is my problem with it.

15:02:49 21 THE COURT: Okay.

15:02:49 22 MR. ECCLES: What are the Attorney General "Tools For
15:02:52 23 Open Government"?

15:02:53 24 THE COURT: And what's the relevancy, Mr. McKamie as
15:02:57 25 9? The law is what the law is under -- I sound like

15:03:03 1 Donald Rumsfeld, don't I?

15:03:03 2 MR. MCKAMIE: We don't know what we don't know.

15:03:05 3 THE COURT: That's it.

15:03:05 4 MR. MCKAMIE: I'll tell you, though, Your Honor --

15:03:07 5 pardon me. If I may, Your Honor.

15:03:09 6 THE COURT: Sure.

15:03:09 7 MR. MCKAMIE: This is also an as-applied claim.

15:03:13 8 Clearly we've made an as-applied challenge. When you're

15:03:17 9 receiving conflicting or overbroad, vague advice from the

15:03:20 10 Attorney General's Office and you're a public official, that

15:03:23 11 threat of prosecution and the uncertainty of whether you might

15:03:31 12 be subject to six months in jail becomes a very real thing.

15:03:34 13 And so we wanted to have these materials that are used for

15:03:36 14 training purposes, prepared by the Attorney General's Office,

15:03:39 15 prepared by TASB, prepared by Scott Houston, to show the Court

15:03:44 16 the conflicting interpretations and overbroad simplifications

15:03:51 17 of some of the Act that can come back to harm these officials

15:03:54 18 and place a chilling effect on their First Amendment rights.

15:03:58 19 So it's part of our as-applied challenge.

15:04:00 20 Now, our records show everything was submitted in

15:04:03 21 copies. I know we had a corrupted CD that I think we resolved

15:04:09 22 late last week on the exhibits. But ...

15:04:15 23 THE COURT: Well here's --

15:04:16 24 MR. MCKAMIE: To me, we're not trying -- excuse me.

15:04:17 25 THE COURT: Here's what we're going to do. I

15:04:19 1 understand everybody's objection and your proffer. I'm going
15:04:22 2 to require you to give Plaintiffs' Exhibit 9 to the -- a good
15:04:26 3 copy of Plaintiffs' Exhibit 9, let them authenticate it and
15:04:29 4 review it. And then I'll make a ruling on the issue of whether
15:04:33 5 or not it's admissible or not.

15:04:36 6 MR. MCKAMIE: All right. Thank you, Your Honor.

15:04:37 7 THE COURT: And then 10 and 11, the indictment of
15:04:40 8 John Moore and acquittal of John Moore, are those certified
15:04:43 9 copies or are they just copies?

15:04:50 10 MR. MCKAMIE: Let me double-check, Your Honor.

15:04:52 11 MR. ECCLES: Even if they are, Your Honor, the
15:04:54 12 relevance to this case, we've heard no witness testify about
15:04:57 13 being scared of this person's indictment. Again, if we're
15:05:01 14 talking a facial constitutional attack, what on earth does this
15:05:08 15 have to do with this case? And do I need to go down how
15:05:11 16 they're -- how they have not pled an as-applied challenge or
15:05:15 17 have we been sufficiently clear on that point? I'm happy to
15:05:18 18 argue it again.

15:05:19 19 THE COURT: Is there -- where are you -- let's first
15:05:21 20 take up whether or not these are certified copies, Plaintiffs'
15:05:24 21 Exhibits 10 and 11.

15:05:26 22 MR. MCKAMIE: Let me make sure of that, Your Honor.
15:05:53 23 Pardon me, Your Honor. Sorry for the delay. I'm not sure I
15:05:56 24 can tell from my copy. I'm not sure we have the certified
15:06:02 25 copy, Your Honor.

15:06:03 1 THE COURT: Ten and 11 are not admitted. They may be
15:06:08 2 made part of the record for appellate purposes.

15:06:10 3 MR. MCKAMIE: Okay.

15:06:10 4 THE COURT: And then Plaintiffs' Exhibit 12, is
15:06:14 5 that -- Mr. Eccles, did you get a copy of that document, the
15:06:19 6 "Advanced Open Meetings Act" from the Texas Association of
15:06:22 7 School Boards?

15:06:23 8 MR. ECCLES: No, Your Honor.

15:06:28 9 THE COURT: Plaintiffs' Exhibit 12 is not admitted,
15:06:30 10 and it will be part of the record for appellate purposes.

15:06:34 11 MR. MCKAMIE: That's all we have, Your Honor.

15:06:35 12 THE COURT: Okay. Let me -- does the government have
15:06:39 13 any evidence they would like to offer?

15:06:40 14 MR. ECCLES: The only evidence that I had proffered
15:06:43 15 to the Court is the current version of Chapter 551 of the Texas
15:06:48 16 Government Code. It's certainly not necessary to have it
15:06:52 17 admitted as an exhibit. But just if any particular questions
15:06:55 18 came up, for the Court's edification, to have a clean copy of
15:06:58 19 the 2010 version.

15:06:59 20 THE COURT: The Court takes judicial notice of the
15:07:02 21 current version of Texas Government Code Section
15:07:05 22 551.001 Et. Seq. for the purposes of this hearing. Let me
15:07:13 23 broach a question. And I really appreciate that there's great
15:07:19 24 briefing on both sides. And, I mean, as a lawyer and as a
15:07:25 25 judge, I thought the briefing on the issue of the Panel's

15:07:36 1 decision and *en banc* -- and *en banc* panel's decision and the
15:07:41 2 status of what weight, if any, the Court should give either to
15:07:47 3 the *en banc* or to that was excellent. I really -- you know,
15:07:53 4 judges do not get cases that go up *en banc* very often. It's a
15:08:01 5 very, very rare thing that happens.

15:08:03 6 Obviously, smart judges wrote the panel decision.
15:08:12 7 Smart judges made the decision to vote *en banc*. Smart judges
15:08:16 8 made a decision -- are you listening to that, Judges of the 5th
15:08:21 9 Circuit? Smart judges wrote -- decided to dismiss the case for
15:08:25 10 the reasons on the standing issue which we were not -- is not
15:08:29 11 an issue at this time in this case. So I really appreciate
15:08:34 12 that. I will make a decision on the -- on what weight, if any,
15:08:41 13 that the Court will give and how it will apply the panel and
15:08:45 14 the *en banc* panel's rulings that they made. Mr. Ponton, you're
15:08:53 15 standing like you had something to say.

15:08:55 16 MR. PONTON: I wanted to give credit where credit is
15:08:57 17 due, Your Honor. Mr. Devon Helfmeyer sitting over here is a
15:09:01 18 third-year law student at the University of Texas --
15:09:04 19 unfortunately he's not Texas Tech. But he's the editor of the
15:09:07 20 *Texas Journal on Civil Rights and Civil Liberties* that wrote
15:09:10 21 one of the articles we cited. And he wrote that brief.

15:09:13 22 THE COURT: Well, he did a very good job. And I take
15:09:15 23 my hat off to you. That was very well done, as was the
15:09:20 24 Attorney General's opinion. That's the quality that I'm
15:09:23 25 blessed to get to see here.

15:09:25 1 Here's a question I have, Mr. Eccles, to the Attorney
15:09:29 2 General's Office: If strict scrutiny is required -- let's just
15:09:38 3 take away whether or not it was the panel or not. If strict
15:09:42 4 scrutiny is applied and, as stated, it shifts the burden --
15:09:53 5 well, first of all, let me go back. Strict scrutiny varies
15:09:57 6 from ordinary scrutiny by imposing three hurdles on the
15:10:01 7 government. One, it shifts the burden of proof to the
15:10:04 8 government. Two, it requires the government to prove that its
15:10:06 9 action or regulation pursues a compelling state interest. And,
15:10:10 10 three, demands the government prove that its action or
15:10:13 11 regulation is, quote, narrowly tailored to further that
15:10:18 12 compelling interest.

15:10:21 13 I know that was not an issue for this trial today.
15:10:26 14 But does the government -- does the State believe that it needs
15:10:32 15 to offer proof in some form as to that issue? Because what --
15:10:39 16 hypothetically, again let's assume -- I mean, this case is
15:10:42 17 going to get appealed by the State or by the plaintiffs, one or
15:10:47 18 the other. It goes up, gets a panel decision, and the issue of
15:10:50 19 strict scrutiny comes up, is there any evidence of -- of the
15:10:57 20 government -- that the action or regulation pursues a
15:11:01 21 compelling state interest or demands the government prove that
15:11:05 22 its action or regulation is narrowly tailored to further that
15:11:09 23 compelling interest? Or can that -- in other words, do you
15:11:12 24 need evidence or can you do that simply by legal argument?
15:11:16 25 MR. ECCLES: Well, I believe we can do that by a

15:11:20 1 legal argument, Your Honor. And I understand the concept of
15:11:23 2 proof, but you can also take into consideration, I believe as
15:11:26 3 our proposed findings and conclusion of law demonstrate, that
15:11:29 4 this is a 40-year-old Act. And the compelling state interest
15:11:32 5 is certainly evident from the development of this act over the
15:11:37 6 last 40 years and how it has become subsequently more and more
15:11:44 7 narrowly tailored through subsequent amendments is evident on
15:11:46 8 the face of the Act itself.

15:11:49 9 THE COURT: So the government is willing to go on the
15:11:53 10 record that we have developed today, with plus what other
15:11:57 11 rulings I may make on other things that have been proffered --
15:12:01 12 other exhibits and testimony and things -- willing to go up on
15:12:04 13 appeal on the issue, if the Court either rules that strict
15:12:09 14 scrutiny is required or as an alternative ruling? The
15:12:16 15 government believes that it has sufficient evidence, law, on
15:12:22 16 it -- for its standpoint for that purpose.

15:12:25 17 MR. ECCLES: Well, if I could have 30 seconds to
15:12:27 18 confer with the guy who is going to be writing the brief.

15:12:30 19 THE COURT: Why don't we do this. Why don't we
15:12:32 20 take -- we've been here for over a couple of hours. Why don't
15:12:36 21 we take about a 10-, 15-minute break and then we'll come back.
15:12:39 22 And I don't know how many of the people here today get to hear
15:12:43 23 or see good lawyers, but these are good lawyers. It is a quite
15:12:51 24 interesting subject that we're dealing with, very important
15:12:57 25 subject, I think -- very, very important subject from both the

15:13:01 1 plaintiffs' standpoint and from the State's side.

15:13:04 2 So let's take about a 15-minute recess. And while we
15:13:10 3 do that, let me see -- let me have two lawyers from each side
15:13:16 4 rather than the whole tables come back and I'd like to visit
15:13:17 5 with y'all in Chambers for just a second. Let's take a quick
15:13:20 6 recess, and let me see two lawyers with me back there in
15:13:22 7 Chambers just a second, please.

15:13:24 8 (Recess)

15:13:24 9 (Open Court)

15:31:23 10 THE COURT: All right. We're back on the record, and
15:31:24 11 it's about 3:31. As I understand, the State does not wish to
15:31:31 12 offer anything else -- any evidence; is that correct?
15:31:36 13 Mr. Eccles, the State did not wish to offer any evidence?

15:31:40 14 MR. ECCLES: We may supplement based on the strict
15:31:45 15 scrutiny question that you asked.

15:31:47 16 THE COURT: Okay. All right. Then what I'm going to
15:31:49 17 order is, and I want to -- because we're coming up on the
15:31:53 18 holiday season. I know everybody has got other things to do.
15:31:57 19 Let's -- I'd like to have a brief from the State. And,
15:32:01 20 Mr. Eccles, give me a reasonable date for you to get me a brief
15:32:05 21 on strict scrutiny, one, whether it applies and, two, if it
15:32:09 22 does apply, what would -- what's the State's position on that
15:32:15 23 or the element -- the three elements. What's a reasonable
15:32:17 24 time? In less than ten pages.

15:32:26 25 Mr. Ho, it needn't be -- don't worry about my stuff.

15:32:33 1 Worry about your schedule. What I'm saying is, make it a
15:32:37 2 schedule that y'all can work with. I know we're fixing to hit
15:32:39 3 Thanksgiving and everything. We're hitting Christmas and the
15:32:42 4 Legislature is coming in. So when would be a reasonable time
15:32:45 5 for y'all to get me something on that?

15:32:47 6 MR. HO: We do want to accommodate the Court's
15:32:49 7 schedule. Would December 15th be reasonable from your
15:32:52 8 standpoint?

15:32:52 9 THE COURT: I'm not going to read it. I'm going to
15:32:55 10 tell you that --

15:32:55 11 MR. HO: We'll take more time.

15:32:56 12 THE COURT: Why don't we do it -- why don't we do it
15:32:59 13 the second Monday in January, which I believe is the 10th.
15:33:03 14 That way we can do that. And if you'll get to me by January
15:33:07 15 10th. And then I'll give the defendants -- is 14 days or 30
15:33:11 16 days enough to respond?

15:33:12 17 MR. MCKAMIE: Fourteen is enough.

15:33:14 18 THE COURT: Okay. Fourteen days to respond. So that
15:33:16 19 would with the 28th.

15:33:17 20 MR. MCKAMIE: Of course, it could determine whether
15:33:19 21 the Court is going to read it or not.

15:33:21 22 THE COURT: I will read it then.

15:33:23 23 MR. MCKAMIE: Okay. Fourteen days is plenty,
15:33:25 24 Your Honor.

15:33:25 25 THE COURT: Fifteenth of December I'm shutting my

15:33:27 1 brain down for a while. But why don't we -- that way the 28th,
15:33:33 2 and I'll -- we'll get it then.

15:33:36 3 MR. MCKAMIE: Okay.

15:33:36 4 THE COURT: So we'll do that. Mr. Baker, what was
15:33:39 5 another -- is that the issue we had on dates.

15:33:42 6 THE CLERK: It's about the Plaintiffs' Exhibit 2
15:33:45 7 and 3. You wanted the parties to brief.

15:33:47 8 THE COURT: And the same thing, give you the same
15:33:49 9 dates on Plaintiffs' Exhibits 2 and 3 -- the government's
15:33:52 10 reasons for keeping it out Plaintiffs' 2 and 3 -- I mean, the
15:33:57 11 Plaintiffs give me the reason for it coming in, and we'll just
15:34:00 12 switch those dates. You'll have January the 3rd and give
15:34:03 13 them -- gave them 'til the 14th, I believe. So we'll give you
15:34:06 14 'til the 14th and y'all have the 28th.

15:34:08 15 So let me say that again. On Plaintiffs' 2 and 3,
15:34:12 16 written reasons why they should come in, relevancy, and any
15:34:17 17 admissibility issues. Let me have that by the 14th of January.

15:34:23 18 MR. MCKAMIE: Okay.

15:34:23 19 THE COURT: And then I'll get the State's reply to
15:34:28 20 that by the 28th.

15:34:31 21 MR. HO: So the 14th and the 28th for both sets of
15:34:34 22 deadlines?

15:34:34 23 THE COURT: Yes, sir. Except you do your first on
15:34:37 24 the scrutiny. They're first on the exhibits. And I say by
15:34:40 25 "they," the plaintiffs are first on getting the exhibit briefs

15:34:43 1 in. You're first on getting the strict scrutiny brief in.

15:34:47 2 MR. HO: Thank you.

15:34:47 3 THE COURT: Anything else? Anything else, Steven?
15:34:51 4 Any dates or anything?

15:34:53 5 THE CLERK: No, sir.

15:34:54 6 THE COURT: Yes, sir, Mr. McKamie -- Mr. Ponton?

15:34:56 7 MR. PONTON: We'd like to delete A.J. Mathieu as a
15:34:59 8 plaintiff.

15:34:59 9 THE COURT: Give me that name one more time.

15:35:02 10 MR. PONTON: A.J. Mathieu, M-a-t-h-i-e-u

15:35:05 11 THE COURT: Okay. And have they agreed to be
15:35:06 12 withdrawn?

15:35:07 13 MR. PONTON: Yes, Your Honor.

15:35:08 14 THE COURT: So Mathieu is ordered to be withdrawn as
15:35:14 15 a plaintiff at this time.

15:35:15 16 Okay. I'd be glad to hear a short closing statement
15:35:18 17 by both sides. I'll give you some time to do that.

15:35:25 18 MR. PONTON: May it please the Court?

15:35:26 19 THE COURT: Yes, sir.

15:35:27 20 MR. PONTON: Counsel for the State, Your Honor, the
15:35:33 21 First Amendment was enacted as the first of the ten Bill of
15:35:38 22 Rights because it was felt to be the most important to the
15:35:42 23 founders of our Republic. Many of them had been imprisoned or
15:35:47 24 had family members imprisoned by the British authorities for
15:35:52 25 political speech. That was one of the reasons we had the

15:35:54 1 American Revolution.

15:35:55 2 When we go back into Texas history, one of the
15:35:58 3 reasons we had the Texas revolution was because Stephen F.
15:36:02 4 Austin was imprisoned for nine months in Mexico City for
15:36:04 5 political speech. We also have a State First Amendment in the
15:36:07 6 Texas Bill of Rights.

15:36:08 7 The First Amendment is supposed to apply to everyone,
15:36:12 8 and the U.S. Supreme Court in the recent opinion of *Citizens*
15:36:17 9 *United* made clear that it applies to everyone. It applies to
15:36:20 10 corporations. It applies to individuals. It applies to anyone
15:36:24 11 regardless of the identity of the speaker. And that is what
15:36:27 12 the First Amendment means to the United States.

15:36:34 13 But here in this courtroom today we've had public
15:36:37 14 officials of Texas, like Dr. Rangra and some of the other
15:36:40 15 witnesses who testified -- and it's funny that in Texas, the
15:36:44 16 First Amendment gives everyone in Texas the right to political
15:36:47 17 speech, to freely discuss political matters with one exception,
15:36:51 18 and that's public officials. Once you become a public official
15:36:55 19 in Texas, the Texas Open Meetings Act singles you out based on
15:37:00 20 the identity of the speaker, that you're a public official, and
15:37:04 21 says you cannot engage in political speech unless it's at a
15:37:09 22 public forum, that the City Council Meeting that's got a duly
15:37:13 23 noticed agenda and everything else. If you talk outside of
15:37:17 24 that meeting, and you heard the testimony, you can go to jail.

15:37:20 25 THE COURT: You agree with me that *Garcetti v.*

15:37:23 1 *Ceballos*, even though Panel made a distinction between this,
15:37:28 2 also limited public employees freedom of speech?

15:37:32 3 MR. PONTON: It did, Your Honor. And the Panel
15:37:34 4 opinion in *Rangra* did say that the public employee cases don't
15:37:38 5 apply to public officials.

15:37:42 6 THE COURT: So your statement that nobody's speech is
15:37:44 7 limited is not correct. There are groups, and the Supreme
15:37:46 8 Court has recognized those groups, and that being public
15:37:50 9 employees have -- their first amendment rights are limited.

15:37:56 10 MR. PONTON: That's correct, Your Honor. And in a
15:37:58 11 case which we gave Your Honor a brief on the three recent
15:38:02 12 Supreme Court decisions, one of them was *U.S. v. Stevens* that
15:38:05 13 talked about the dog bite videos. And in that case there was a
15:38:09 14 great discussion on the classes of speech that don't get First
15:38:12 15 Amendment protection. You know, obscenity is one of them.
15:38:15 16 Fire in a crowded theatre is another one, public safety --
15:38:19 17 certain narrow exceptions. The *Garcetti v. Ceballos* public
15:38:22 18 employee cases are a little footnote or little thing.

15:38:25 19 But, in general, if you're a law-abiding citizen in
15:38:29 20 Texas, you and I and the lawyers here, we all have the right to
15:38:34 21 political speech. But the people who don't have that same
15:38:37 22 right are the public officials who, by virtue of the Open
15:38:40 23 Meetings Act, can go to jail for engaging in that political
15:38:44 24 speech.

15:38:45 25 THE COURT: Well, couldn't any of these people go out

15:38:48 1 and get on the front steps of this courthouse or the front
15:38:50 2 steps of their city hall and say whatever they want to say?
15:38:53 3 They can say it about public issues? They can say -- nobody
15:38:56 4 limits what they have to say.

15:38:59 5 MR. PONTON: Right. But the Supreme Court has stated
15:39:01 6 that political speech includes what politics -- what public
15:39:06 7 officials say, the reasons for their votes is what they're
15:39:08 8 saying.

15:39:08 9 THE COURT: What prohibits them from going out to the
15:39:11 10 city hall before -- before or after a vote and saying whatever
15:39:16 11 they -- from going to a news reporter, going to a radio
15:39:18 12 station, being on TV, and saying, I'm going to vote this way
15:39:22 13 because of A, B, and C. Or I believe that this position that
15:39:26 14 the City Council is taking is wrong. Or I think that Bob Smith
15:39:30 15 ought to get the contract. Or something like that?

15:39:32 16 MR. PONTON: They can do that. And I agree with
15:39:34 17 Your Honor on that.

15:39:35 18 THE COURT: Okay.

15:39:36 19 MR. PONTON: But they can also -- they should also be
15:39:38 20 able to communicate with their fellow Council Members outside
15:39:41 21 of a meeting. Not decide, not cut a secret deal, no
15:39:46 22 smoked-filled room with cigar smoking cronies cutting deals.
15:39:52 23 But they should be able to communicate about public matters
15:39:55 24 with members of the public and each other without fear of going
15:39:58 25 to jail.

15:39:59 1 And that's what TOMA does. It singles out a class in
15:40:02 2 Texas -- public officials -- threatens them with jail, and the
15:40:05 3 Court has evidence in front of it that, because of that, they
15:40:09 4 self-censor. The self-censorship violates the First
15:40:13 5 Amendment. And I'd like to point the Court to our pleadings
15:40:16 6 that we do have pled facial and as-applied.

15:40:20 7 THE COURT: Thank you very much.

15:40:21 8 MR. PONTON: Thank you, Your Honor.

15:40:22 9 THE COURT: Does the State wish to make a closing
15:40:25 10 argument?

15:40:25 11 MR. ECCLES: No, Your Honor.

15:40:26 12 THE COURT: Okay. Well, I've always wanted to say
15:40:28 13 this, as Justice Roberts would now say: The case is submitted,
15:40:34 14 and I am going to ask everybody to join with me -- we can go
15:40:36 15 off the record now. I appreciate the court reporter.

15:40:39 16 (End of transcript)

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1 UNITED STATES DISTRICT COURT)

2 WESTERN DISTRICT OF TEXAS)

3 I, Arlinda Rodriguez, Official Court Reporter, United
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