

In defense of open government

By James C. Ho, Special Contributor



It's been a bumpy year for supporters of open government.

Last Christmas Eve, the U.S. Senate passed sweeping health care reform — without the public debates that the president promised to air on C-SPAN.

No legal reasons were invoked for refusing those broadcasts — just a concern that publicity would harm the bill's chances for passage.

A few weeks later, however, a team of Texas lawyers took things one step further: They filed a lawsuit arguing that open meeting laws are unconstitutional.

A group of local officials, represented by noted criminal lawyer Dick DeGuerin, are challenging the criminal penalties of the Texas Open Meetings Act as a violation of the First Amendment.

The lawsuit is not just meritless — it turns the Constitution on its head.

The First Amendment protects citizens against government oppression, not government against citizen oversight. The purpose of the First Amendment is simple: to empower ordinary citizens to engage in free, informed discourse about their government, its officials and the policies they adopt on their behalf.

Open meetings laws further, rather than frustrate, basic First Amendment values, by enabling the public and the press to observe the conduct of public business. In fact, courts have repeatedly invoked the First Amendment to guarantee public access to certain government proceedings. The First Amendment does not forbid what, in many contexts, it requires.

Without the Texas Open Meetings Act, officials could conceal their deliberations, without the American people ever even finding out about it. Just negotiate everything in advance behind closed doors — and then, after the deal is done, hold an open meeting to ratify the pre-arranged deal.

The only way to prevent such a charade, and ensure true open government, is to enact laws that prohibit this kind of “meeting before the meeting.”

That is precisely what the Texas Open Meetings Act does: It forbids a quorum of public officials from discussing public business in a closed meeting.

The local officials behind the suit complain that the act forces them to censor themselves. But the same could be said about any effective open meetings law. Indeed, the same could be said about laws that criminalize bribery.

Open meeting laws are even easier to defend than bribery laws. Unlike bribery laws, open meeting laws do not restrict speech — they simply require disclosure. Open meeting laws do not forbid free speech — just secret speech.

To use another analogy: Any lawyer who represents a client in court is forbidden from having *ex parte* conversations with the judge — that is, the lawyer cannot talk to the judge about the case, unless opposing counsel has the opportunity to observe the discussion.

So, too, for elected officials: Open meeting laws forbid officials from talking to a quorum of their colleagues about public business, unless all of their colleagues (and the people they represent) have the opportunity to observe the discussion.

One official behind the lawsuit recently insisted he does not oppose open government. He is suing, he says, not to protect secret meetings, but to secure his right to engage in other activities — such as talking about public issues on the radio when his colleagues might hear.

It is difficult to imagine a court misconstruing the Texas open meetings law so badly as to criminalize a radio broadcast. But if that is really his fear, he can obtain a legal opinion from the city or county attorney, or from the attorney general. He can also ask the Legislature to amend the law, rather than pursue litigation.

Moreover, if radio broadcasts and the like are truly his only fear, he should prove it by dropping his lawsuit. After all, his suit, if successful, would not clarify the meaning of Texas law — it would simply strike down the law in its entirety.

Open government is a First Amendment virtue — not a First Amendment violation. It's no wonder, then, that every state in the nation has adopted an open meetings law — and that every court to have confronted a First Amendment challenge to an open meeting law has rejected the challenge, and upheld the law.

Here's hoping that 2011 is a better year for open government.

Ho, a partner with Gibson, Dunn & Crutcher in Dallas, defeated a lawsuit against the Texas Open Meetings Act when he served as solicitor general of Texas.