



Ethics and Liability in Open Government

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Views expressed are those of the presenters, do not constitute legal advice, and are not official opinions of the Office of the Texas Attorney General.



Background – Government Transparency

- ▶ Federal Freedom of Information Act – Signed into law by President Lyndon Johnson, July 4, 1966.

- ▶ Sharpstown Scandal, 1971—1972
 - Stock fraud scandal in Houston involving highest levels of state government.

- ▶ Watergate, June 17, 1972
 - Break-in and cover-up led to resignation of President Richard Nixon.

- ▶ Texas Legislature responds, 1973
 - Reform agenda
 - Financial disclosure requirements
 - Open Meetings Act
 - Open Records Act



The Open Meetings Act in a Nutshell

Chapter 551, Government Code

- Every regular, special, or called meeting of a governmental body shall be open to the public, except when a statute expressly provides otherwise.
- A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body.
- When closed meetings are authorized, discussions in those meetings must be limited to the authorized topics, and the statutory procedures must be followed.
- Civil remedies and criminal penalties exist for failure to comply with the requirements of the Act.



The Public Information Act in a Nutshell

Chapter 552, Government Code

- Any public information held by, or maintained for, a governmental body must be released to the public unless an exception to disclosure applies.
- Information must be released “promptly.”
- A governmental body that seeks to withhold information from disclosure generally must obtain a ruling from the Office of the Attorney General, adhering to the 10- and 15-business-day deadlines.
- Civil remedies and criminal penalties are available if a governmental body fails to comply with the requirements of the Act.



That's the background...

What does this mean for me?



A Lawyer's Ethical Responsibility

- ▶ Preamble to Texas Disciplinary Rules of Professional Conduct ("TDRPC"):
 - As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of ***honest dealing with others***.
 - A lawyer should use the law's procedures only for legitimate purposes and ***not to harass or intimidate others***.
 - A lawyer should demonstrate ***respect for the legal system*** and for those who serve it, including judges, other lawyers and public officials.



Revision to Lawyer's Oath

- ▶ SB 534 amended section 82.037(a) of the Government Code.
- ▶ “Each person admitted to practice law shall . . . ***conduct oneself with integrity and civility in dealing and communicating with the court and all parties.***”



Timeliness – Ethical Requirement

- ▶ In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. TDRPC Rule 4.04.



Representations to the OAG – Ethical Requirements

- ▶ In representing a client, a lawyer shall not:
 - Neglect a legal matter entrusted to the lawyer; or
 - Frequently fail to carry out completely the obligations that the lawyer owes to a client or clients. TDRPC 1.01

- ▶ In the course of representing a client a lawyer shall not knowingly:
 - Make a false statement of material fact or law to a third person[.]
TDRPC 4.01



Representing Your Client – Ethical Requirements

- ▶ A client is entitled to straightforward advice expressing the lawyer's honest assessment . . . It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. TDRCP 2.01

- ▶ When a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client may require that the lawyer act if the client's course of action is related to the representation. TDRCP 2.01

- ▶ A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:
 - The lawyer is a partner or supervising lawyer and orders, encourages, or knowingly permits the conduct involved[.] TDRPC 5.01



Acting as a Lawyer's Representative

▶ TDRPC Rule 5.03

- A lawyer who has direct supervision over a non-lawyer must take reasonable steps to ensure the employee's conduct is compatible with the professional obligations of the lawyer.
- A lawyer can be subject to discipline if an employee engages in behavior that would be considered a violation of the rules.
- Comment: "A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment[.]"



Municipal Codes of Ethics (San Antonio)

- ▶ A City official or employee shall not intentionally, knowingly, or recklessly disclose any confidential information gained by reason of said official's or employee's position concerning the property, operations, policies or affairs of the City. This rule does not prohibit:
 - (1) Any disclosure that is no longer confidential by law; or
 - (2) The confidential reporting of illegal or unethical conduct to authorities designated by law.



Texas Police Chiefs Association

- ▶ Members of TPCA shall encourage friendly and courteous service and strive to improve communications with all members of the community, at all times seeking improvement in the quality and image of public service.
- ▶ Members shall not disclose to others or use to further the personal interest of themselves or others, confidential information acquired by them in the course of their official duties.



Texas City Management Association

- ▶ **Tenet 1** -- Be dedicated to the concepts of effective and democratic local government by responsible elected officials and believe that professional general management is essential to the achievement of this objective.
- ▶ **Tenet 9** -- Keep the community informed on local government affairs; encourage communication between the citizens and all local government officers; emphasize friendly and courteous service to the public; and seek to improve the quality and image of public service.
- ▶ **Tenet 12** -- Seek no favor; believe that personal aggrandizement or profit secured by confidential information or by misuse of public time is dishonest.



Texas Municipal Clerks Association

- ▶ To be ever mindful of my neutrality and impartiality, rendering equal service to all and to extend the same treatment I wish to receive myself.
- ▶ To record that which is true and preserve that which is entrusted to me as if it were my own.



The Golden Rule

- ▶ Treat others as you would like to be treated.



Open Meetings Act Criminal Violations

- ▶ Conspiracy to Circumvent the Act (Gov't Code § 551.143)
- ▶ Unauthorized Closed Meeting (Gov't Code § 551.144)
- ▶ Failure to Keep a Certified Agenda or Recording of Closed Meeting (Gov't Code § 551.145)
- ▶ Disclosure of Certified Agenda or Recording of Closed Meeting (Gov't Code § 551.146)
- ▶ Consequence: Any action taken by a governmental body in violation of the Act is voidable. *Ferris v. Texas Board of Chiropractic Exam'rs*, 808 S.W.2d 514, 518-19 (Tex. App.—Austin 1991, writ denied).
- ▶ Ratification of an invalid action in a meeting that complies with the Act will be effective from the date of the valid meeting.



Public Information Act Criminal Violations

- ▶ Destruction, Removal, or Alteration of Public Information (Gov't Code § 552.351)
- ▶ Distribution or Misuse of Confidential Information (Gov't Code § 552.352)
- ▶ Failure or Refusal of Officer for Public Information to Provide Access to or Copying of Public Information (Gov't Code § 552.353)
- ▶ Affirmative defense available (Gov't Code § 552.353)



Public Information Act Civil Remedies (Slide 1 of 4)

Gov't Code § 552.321 Suit for Writ of Mandamus

- ▶ Used to compel a governmental body to make information available for public inspection
- ▶ Filed by requestor or Attorney General
- ▶ Examples of potential mandamus situations
 - GB refuses to provide copies or access to information that is clearly public.
 - GB refuses to request an AG ruling.
 - GB refuses to release information as required by an unchallenged AG ruling.



Public Information Act Civil Remedies (Slide 2 of 4)

Gov't Code § 552.3215

Declaratory Judgment or Injunctive Relief

- ▶ Complaint filed by requestor with district attorney or county attorney in county where governmental body is located
 - Local governmental bodies: district attorney or county attorney for the county may bring action only in district court for that county where the governmental body is located
 - State agencies: Travis County District Attorney or OAG may bring action only in district court in Travis County

- ▶ Before the 31st day after the date the complaint was filed, district or county attorney shall determine:
 - Whether the violation was committed
 - Whether an action will be brought
 - Notify complainant in writing their determination



Public Information Act Civil Remedies (Slide 3 of 4)

Gov't Code § 552.323

Assessment of Costs of Litigation and Reasonable Attorney Fees

- ▶ A court **shall** assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails . . .



Public Information Act Civil Remedies (Slide 4 of 4)

Kallinen v. City of Houston, 462 S.W.3d 25 (Tex. 2015)

- ▶ City timely requested a ruling on applicability of exceptions. Requestor filed suit for mandamus under Gov't Code § 552.321(a).
- ▶ Court of appeals held trial court lacks subject matter jurisdiction over mandamus suit until the Attorney General rules.
- ▶ **Reversed.** Attorney General does not possess exclusive jurisdiction over open records matters and requestor is not required to wait until a open records ruling is issued.
- ▶ But court has discretion to abate proceeding until AG rules.



Complaints to OAG

▶ Most common complaints:

- “I made a request but have not received a response.”
- “I received a bunch of documents with redactions and no explanation.”
- “You ordered them to release information and I haven’t received anything.”
- “They sent me a really expensive cost estimate so I would go away.”



Responding to Complaints

- ▶ Informal complaints
 - Review internal response.
 - Return certification form or call hotline to discuss with an enforcement attorney.
 - May require additional written explanations.

- ▶ Cost complaints
 - Answer questions asked by OAG.
 - Conduct a sample test if needed.
 - OAG will make a determination.
 - Don't be afraid to ask for help.



Bonus Topic – Dealing with Customers

- ▶ Responding to members of the public is a job requirement for any public employee working with the Public Information Act.
- ▶ Dealing honestly and fairly with the public enhances public trust in government.



Tips and Tricks

- ▶ Smile, even when talking on the phone.
- ▶ Listen. Let the other person do the talking.
- ▶ Stand in the other person's shoes, and consider how much the information means to them.
- ▶ Acknowledge the other person's position and don't argue with the requestor.
- ▶ Working with the requestor early will pay off in the end.



More Resources

- ▶ “Rights and Responsibilities” Poster

- ▶ Public Information Act Handbook, 2016
 - Free PDF download, www.texasattorneygeneral.gov

- ▶ Open Government Hotline (PIA Legal Questions)
 - (877) 673-6839