Think before you hit "send": Criminalized Information Transfer

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Accept it – you and the people you advise are potential criminals. Hardworking, honest criminals who are committed to the betterment of their communities, but criminals nonetheless.

Most of what you do every day involves the transmission of information. This transmission is being increasingly criminalized. Many of the targets for these criminal laws are municipal employees.



Texas Public Information Act is, on its face remarkably easy to violate

- More than 700 Texas statutes that declare information to be confidential – listed as appendix to paper
- Hundreds of federal statutes creating confidential information
- Releasing information in violation of the Public Information Act's confidentiality statutes is a Class B misdemeanor

Texas Gov't Code § 552.352. Distribution or Misuse of Confidential Information

(a) A person commits an offense if the person distributes information considered confidential under the terms of this chapter.

Texas Gov't Code § 552.352 (cont'd)

(a-1) An officer or employee of a governmental body who obtains access to confidential information under Section 552.008 commits an offense if the officer or employee knowingly:

(1) uses the confidential information for a purpose other than the purpose for which the information was received or for a purpose unrelated to the law that permitted the officer or employee to obtain access to the information, including solicitation of political contributions or solicitation of clients; (2) permits inspection of the confidential information by a person who is not authorized to inspect the information; or (3) discloses the confidential information to a person who is not authorized to receive the information.

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Texas Gov't Code § 552.352 (cont'd)	
(a-2) For purposes of Subsection (a-1), a member of an advisory committee to a governmental body who obtains access to	
confidential information in that capacity is considered to be an officer or employee of the governmental body.	
(b) An offense under this section is a misdemeanor punishable by:	
(1) a fine of not more than \$1,000; (2) confinement in the county jail for not more than six months; or	
(3) both the fine and confinement.	
(c) A violation under this section constitutes official misconduct.	
What is effect of phrase "official misconduct"	
Sec. 87.031. IMMEDIATE REMOVAL. (a) The conviction of a county officer by a petit jury for any felony or for a	
misdemeanor involving official misconduct operates as an immediate removal from office of that officer	
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Art. 4.05. JURISDICTION OF DISTRICT COURTS. District courts and criminal district courts shall have	
original jurisdiction in criminal cases of the grade of felony, of all misdemeanors involving official misconduct, and of misdemeanor cases transferred to the district court under	
Article 4.17 of this code.	
Section 552.352 is rarely used directly.	
Instead, criminal prosecutions in Texas for releasing information are normally	
attempted under Texas Penal Code §	
39.06. Misuse of Official Information	

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Texas Penal Code § 39.06	
(b) A public servant commits an offense if with intent to obtain a benefit or with intent to harm or defraud another,	
he discloses or uses information for a nongovernmental purpose that:	
(1) he has access to by means of his office or employment; and(2) has not been made public.	
(c) A person commits an offense if, with intent to obtain a	
benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that: (1) the public servant has access to by means of his office	
or employment; and (2) has not been made public.	
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Texas Penal Code § 39.06 (cont'd)	
(d) In this section, "information that has not been made public" means any information to	
which the public does not generally have access, and that is prohibited from disclosure	
under Chapter 552, Government Code.	
(e) Except as provided by Subsection (f), an offense under this section is a felony of the	
third degree.	
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Maintenant Official Information (TDC20.06)	
Misuse of Official Information (TPC39.06) is used by District Attorneys in lieu of	
using Tex. Gov't Code § 552.352 because TPC § 39.06:	
 allows for felony prosecution of releases of confidential information, 	
 allows District Attorneys to effectively 	
obtain indictments for releasing confidential information without	
proving information is confidential	

•	Section 39.06 Indictments often fail to
	allege confidentiality because the
	confidentiality is contained in a separate
	definition in 39.06.

- This failure to allege confidentiality can result in:
 - Overreaching by DA's They charge what they cannot prove
 - · Quashed indictments

State v. Ford & State v. Newton

Two attorneys indicted after they questioned and subpoenaed grand jurors during their pursuit of a civil rights suit against a prosecutor, a county, and an investigator.

The Court dismissed the indictment because the information that was released was excluded from coverage under the Texas Public Information Act (PIA), making it impossible for it to be "information prohibited from disclosure" under the PIA. See *State v. Ford*, 179 S.W.3d 117, 122 (Tex.App.—San Antonio 2005) and *State v. Newton*, 179 S.W.3d 104, 106 (Tex. App. San Antonio 2005).

In State v. Delgado, a DWI defendant was indicted for misuse of official information after he filed a civil suit against the officer who had arrested him. In Delgado, the Edinburg Police Department mistakenly included the criminal history information of another person with the same name in a document it gave to Delgado. The Grand Jury then indicted Delgado for presenting this information (which had been provided to him by the Police) after he pointed out that another person's criminal history was mixed up with his own history. The Trial Court applied a "presumption of vindictiveness" when it dismissed the appeal of the dismissal of the indictment.

In Victoria County in 2008, a District Attorney reacted angrily to the release of information concerning criminal allegations that had earlier been leveled against his Chief of Staff.

The Victoria County DA obtained indictments using "misuse of official information" charges. Ultimately, the DA indicted the Mayor, Police Chief, a retired City Attorney, and a police lieutenant.

The indictments omitted the element that the released

information must be confidential pursuant to the Texas Public Information Act, which ultimately led to the dismissal and quashing of the indictments based on "misuse of official information" charges.

Winkler County nurse whistleblower case

In 2009 in Kermit, Texas, a Sheriff & County Attorney (Scott Tidwell) obtained a confidential complaint that two nurses had filed with the Texas Medical Board against a local doctor who was a friend of the Sheriff. The Sheriff & County Attorney then used the confidential information to procure indictments against the two nurses for "misuse of official information." Acting on behalf of the DA (who was absent from office due to health problems) County Attorney Tidwell pursued the cases despite protests from the Texas Medical Board, which feared a chilling effect on potential complainants.

- County Attorney Tidwell dismissed the Misuse of Official Information cases against the nurses one week before trial.
- A grand jury then indicted the Sheriff and County Attorney Tidwell for Misuse of Official Information.
 The Sheriff was convicted of misuse of official information, retaliation, and official oppression, and removed from office.
- A jury found County Attorney Tidwell guilty of misuse of official information, retaliation, and official oppression.
- · Lesson-Broad criminal statutes cut both ways.

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Prosecutions for Transmitting
Non-confidential Information
between/to Members of a
Governmental Body

- Initially, the Texas Open Meetings Act was aimed at prohibiting "meetings" between government officials.
- The scope of the the Texas Open Meetings
 Act has been broadened over time to
 become an avenue for prosecuting the
 transmission of nonconfidential information.
- Eventually, it was declared to be a violation of the OMA to be signing letters between those officials.

- In AG Op DM-95, the AG opined that members of a governmental body could violate the OMA by signing a letter on matters relevant to public business without meeting to take action on the matter in a meeting held pursuant to the Act.
- In AG Letter Op. No. LO-95-055, the AG stated "It is possible for members of a governmental body to violate the Open Meetings Act even [though] they are not physically present in one place, for example, by discussing public business... over the telephone."
- In AG Op JC-0307 (2000), the AG stated that third parties could be prosecuted for making communications to government officials.

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On appeal, the 5 th Circuit panel held: (1) that elected officials are entitled to full First Amendment protection of their speech pursuant to their	
official duties; (2) that the TOMA provisions at issue are content-based restrictions on speech which must be subjected to strict	
scrutiny. Thus, the three-judge panel reversed the district court	
judgment. However, on en banc rehearing, the 5 th Circuit dismissed the appeal as moot because Rangra had completed his term of service and was therefore not subject	
to re-prosecution for future violations. <i>Rangra v. Brown,</i> 584 F.3d 206 (5th Cir. 2009) (en banc).	
After the dismissal of the Alpine case, four Texas	
cities and a number of city council members initiated what has been called "TOMA II."	
 In Asgeirsson v. Abbott, the trial court refused to apply strict scrutiny, holding that TOMA only 	
punishes members of governmental bodies "when those members hide that speech from Texas citizens in closed meetings. [The Act] neither	
suppresses the speakers' viewpoint nor the content of his or her speech. Rather, [the Act]	
protects the compelling interest of government transparency." Asgeirsson v. Abbott, 773 F. Supp.	
2d 684 (W.D. Tex. 2011).	
 The 5th Circuit rejected the appeal of Asgeirsson, holding TOMA was content-neutral and not 	
unconstitutionally overbroad or vague. • The 5 th Circuit described TOMA as a merely a	
"disclosure statute" and applied intermediate scrutiny to the speech regulation of TOMA. • The 5 th Circuit stated the TOMA was no more	
complex than the Tax Code, stating that "perfect clarity and precise guidance have never been	
required even of regulations that restrict expressive activity." Asgeirsson v. Abbott, 696	
F.3d 454, 466 -467 (C.A.5 (Tex.), 2012)	

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Tips for Avoiding Prosecution for Transferring Information	
1. Be familiar with all reasons for confidentiality and timely assert such confidentiality in response to requests for information. Appendix A in the paper is the most comprehensive list I have been able to find.	
2. Ask for subpoenas when you are in agreement that otherwise nonreleasable information related to a case should be released. In Attorney General Opinion LO-95-025 (1995), the AG opined that: The Open Records Act, including its exceptions and its penalty provision, is not applicable to the production of information pursuant to a subpoena duces tecum issued under chapter 24 of the Code of Criminal Procedure.	

3. Review executive session notices on agendas and stay within the scope of the executive session notice.	
The Court of Criminal Appeals effectively established strict criminal liability for all matters other than calling, aiding, closing or participating in the meeting when it stated:	
the term "knowingly" in the act only modified the verbs calls, aids, closes or participates, and	
no other term of mental state modified the phrase "if a closed meeting is not permitted." Tovar v. State, 978 S.W.2d 584 (Tex.Crim.App. 1998)	
This removing of an element of mens rea is an	
especially dangerous opinion when it is coupled with the expansion of Open Meetings jurisprudence to include mere emails or letters.	
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4. When in doubt about whether a topic on the executive session	
notice may be discussed, provide an opinion that can cloak members of the governmental body with an additional defense to prosecution. Texas Government Code § 551.144(c) provides:	
(c) It is an affirmative defense to prosecution under Subsection (a) that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation	
of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body.	
An easy way to add this protection to your agenda is with the following boilerplate: The description of an item in "Executive Sessions" constitutes the written	
interpretation by the City Attorney of Chapter 551 of the Texas Government Code and further constitutes the City Attorney's determination that said item may be legally discussed in Closed Meeting in compliance with Chapter 551 the Texas Government Code.	
5. Review or draft the agendas of executive sessions. The certified agenda of an executive	
sessions. The certified agential of all executive session notice in the agenda of the open meeting. A variance	
between those two documents may simply reflect a different way of describing information. However,	
with strict liability attaching to matters discussed in closed meetings, a conviction for participating in a	· · · · · · · · · · · · · · · · · · ·
closed meeting could be based on a certified agenda.	

6. Never put a majority of members of a governmental body in the "To" or "cc" line of an email. It is too easy for one of the recipients to hit "Reply to All" thereby making all participants simultaneous members of a deliberation in the email chain. This can make all participants, including the original sender potential fodder for an Open Meetings prosecution. A relatively innocent and routine matter, such as deciding whether to put an item on an agenda for future discussion, can become the subject of criminal prosecution.	
6.(cont'd) The case of Avinash Rangra, Anna Monclova, and All Other Public Officials in Texas, Plaintiffs v. Frank D. Brown, 83rd Judicial District Attorney, Greg Abbott, Texas Attorney General, and the State of Texas, Defendants arose from an ultimately dismissed prosecution of a City Councilmember who had sent an email to four other councilmembers asking if they felt that a particular item should be placed on a future agenda. See 2006 WL 3327634 (W.D. Tex., November 07, 2006). Instead, when sending email updates, use "bcc".	
7. Do not poll a majority of members of a governmental body, even when using "bcc". Seeking a decision of the governmental body on an issue looks like an attempt to circumvent the Open Meetings Act. Instead give statements to enable you to maintain the position that you are simply sending information to members of the group with no expectation of "deliberation" or "discussion."	

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8. Remember the "Interagency Transfer Doctrine": information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies. The "interagency transfer" doctrine is inapplicable where a statute enumerates specific entities to which the release of confidential information is authorized and the potential receiving governmental body is not among the statute's enumerated entities. See Op. Tex. Att'y Gen. Nos. DM-353 (1995), JM-590 (1986).	
 9. Be ready to deal with fiscal issues of prosecution. If a member of your governmental entity is wrongly prosecuted for transmitting information to another entity, the governmental entity may, if it chooses, decide to pay for the defense of those public officials. In GA-0523 and KP-0016, the Attorney General approved the reimbursement of officials for their legal fees incurred in unsuccessful prosecutions involving their performance of their duties. In Victoria, the City Council obtained an outside legal opinion to create "outsider" protection (Art Pertile of Olson & Olson) 	
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10. Develop a good working relationship with the District Attorney's office. All of the cases of prosecution for releasing or transmitting information that I reviewed involved the personal interest of a District Attorney or his friends and supporters. Of course, you may be the subject of prosecution merely because you are associated with a political enemy of the District Attorney or are providing valuable advice to a perceived enemy of the District Attorney.	

11. Preserve evidence and instruct your fellow officials to preserve evidence. Prosecutors recognize that most criminal cases involving the transmission of information	
from government officials will fail. Accordingly, they often bolster their cases with allegations of tampering with	
evidence, obstruction of justice, or other broad charges. Criminal statutes of limitations are almost always shorter than the minimum time that one has to maintain	
information pursuant to the records retention schedules for a particular type of information. Therefore, attorneys	
for governmental entities should scrupulously maintain information in accordance with the longest	
interpretations of retention obligations.	
12. Avoid all statements to prosecutors and law enforcement that are not 100% verifiably true and backed	
up by solid documentation. If you believe that someone will testify in a manner counter to you, avoid testifying as long as possible. If you believe that someone is	
attempting to prosecute you, plead the 5 th . As we saw earlier, all 39.06 (Misuse of Official Information)	
prosecutions that reached the appellate stage involved a conflict of interest on the part of the district attorney. A DA with a reason to get you will look for any inconsistent	
testimony to use in a perjury or obstruction of justice prosecution. If you are targeted, you should maximize your	
prosecution. If you are targeted, you should maximize you	
defense advantage by using the 5 th Amendment until trial.	