Litigation Under the Public Information Act

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Overview

- Introduction to the Public Information Act
- Litigation Provisions
- Case Studies
- Lagniappe

Introduction to the Public Information Act

Background

- Freedom of Information Act (July 4, 1966) – Amendments to the Administrative Procedure Act; signed into law by President Johnson
- Sharpstown Scandal (1971-1972) – Two dozen state officials implicated
- Watergate (June 17, 1972) – Break-in and cover-up
- Reform Legislature (1973) – Personal financial disclosures, campaign finance disclosures, open records, open meetings. Found in Government Code, Title 5, Open Government & Ethics

Chapter 552, Government Code

"Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that

each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees[.]"

In Plain English

Your City must release all public information requested by a member of the public, unless a specific provision of law allows that information to be withheld and the City has permission to withhold it.

Common Exceptions to Disclosure

- **552.101** – Confidentiality provisions
- **552.103** – Pending, anticipated litigation
- **552.104** – Competitive bidding information
- **552.107** – Attorney-client privilege
- **552.108** – Law enforcement records
- **552.111** – Certain policymaking matters
- **552.116** – Audit working papers

Typical Flow of a Request

Individual submits Public Information Request

10 Business Days

Release Information or Request Ruling from AG

45 Business Days

AG Issues Ruling

30 Calendar Days

Deadline to Challenge AG's Ruling in Court

Typical Flow of a Request

15 Calendar Weeks!

Litigation Provisions

Civil Enforcement (Subchapter H)

Criminal Violations (Subchapter I)

Civil Enforcement – Who can sue?

- *Requestor v. Your City*
- *AG v. Your City*
- *District or County Attorney v. Your City*
- *Third Party v. Your City*
- *Your City v. AG*
- *Third Party v. AG*

- *No one may sue the requestor and the requestor may intervene in any suit.*

Suit for Writ of Mandamus

- Section 552.321 of the Government Code

- Requestor or AG may file suit to compel release if:
  - *Refuses* to request a ruling from the AG. . . or
  - *Refuses* to release public information OR information the AG has ruled must be released.

- Venue:
  - Requestor must file in district court in county where main offices are located
  - AG must file in Travis County district court, unless city population is 100,000 or less.

But Wait! Governmental Immunity!

- Section 552.321 constitutes a waiver of governmental immunity.
- "[T]he Act's waiver of immunity for mandamus relief requires the City to have 'refuse[d] to supply public information. In this context, 'refuse' means 'show or express a positive unwillingness to do or comply with.' Thus . . . A requestor must show that the governmental body is 'unwilling' to supply public information." *City of Galveston v. CDM Smith, Inc.*, 470 S.W.3d at 571 (Houston – 14th Dist., 2015).

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But Wait! There's More!

- *Kallinen v. City of Houston*, 462 S.W.3d 25 (Tex. 2015).
- Requestor Kallinen asked the City of Houston to disclose information regarding red-light camera study.
- City of Houston timely sought AG ruling to withhold some of the responsive information.
- Kallinen sued for mandamus relief, asking court to order disclosure of withheld documents.
- City filed a plea to the jurisdiction, arguing court lacked jurisdiction until the AG ruled.

Kallinen v. City of Houston

- Texas Supreme Court recognizes:
  - AG's office is "staffed with experts" with knowledge of PIA.
  - Legislature has expressly tasked AG with maintaining uniformity in the interpretation of PIA.
  - AG's office is experienced in interpreting and applying exceptions to disclosure.

- Texas Supreme Court concludes:
  - Requestor is not required to defer a suit for mandamus.
  - A court may abate proceedings to await ruling AG's determination would be "beneficial" and delay would not impinge upon requestor's right to information.

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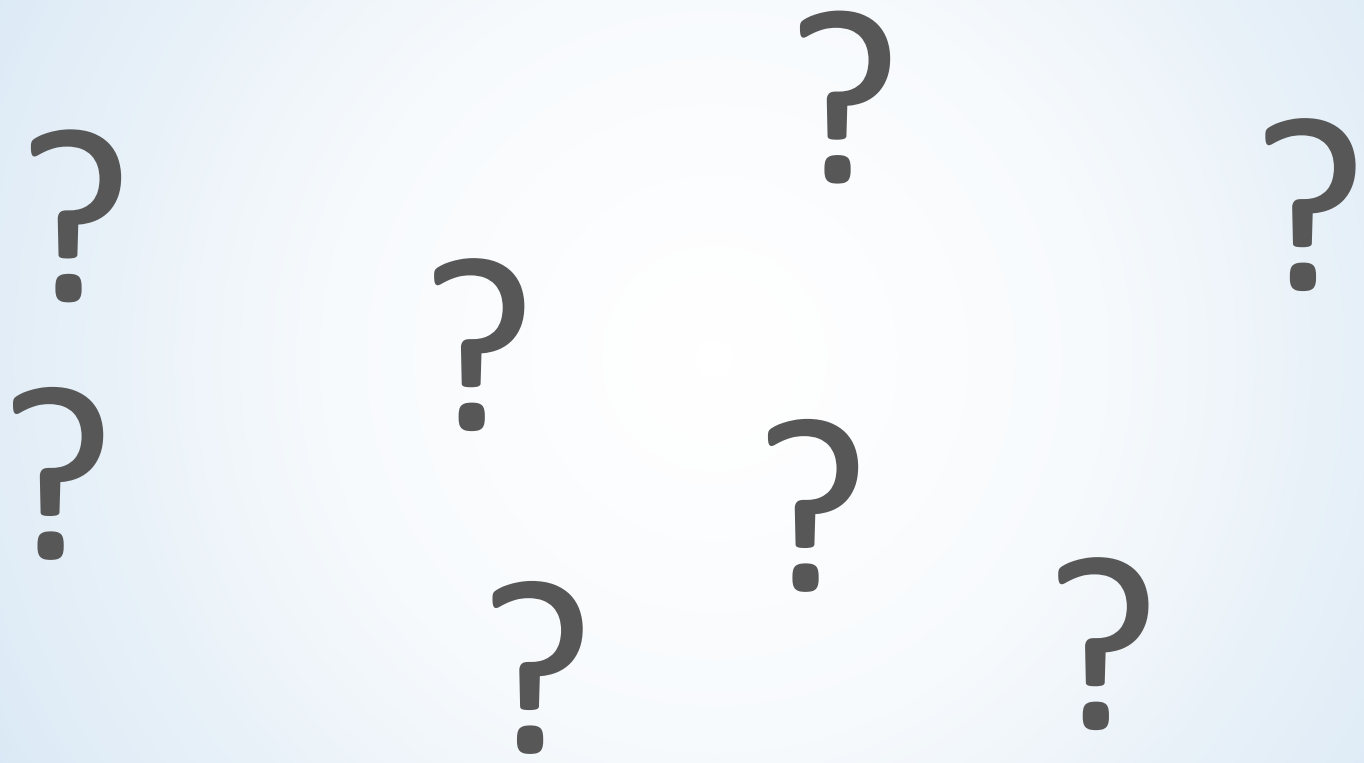
Declaratory Judgment or Injunctive Relief

- Section 552.3215 of the Government Code
- Action may be brought by district or county attorney for a violation of chapter 552.
- Requestor must comply with complaint requirements and timelines.
- AG may take up complaint if district or county attorney declines.

Mandamus v. Declaratory Judgment or Injunctive Relief



Your City as a Plaintiff

- The only lawsuit your city can file is one to withhold information that AG has ruled must be released.
- Suit is against the AG; must be filed in Travis County.
- Suit must be filed no later than 30 calendar days after receipt of AG ruling.
- Limited to raising exceptions properly raised in AG ruling, federal law, individual property/privacy interests.
- Must notify requestor or the suit and of requestor's right to intervene.

Discovery

- Court may order the requested information may be discovered only under a protective order.

- In any suit, the information may be filed for *in camera* inspection only.
  - Filing marked with “Information at Issue.”
  - Court must enter an order preventing release or access.
  - Information attached to order and maintained in sealed envelope.
  - Transmitted as part of clerk’s record for any appeal.

Court Costs and Attorney Fees

- Court *shall* award costs and reasonable fees to a plaintiff who substantially prevails.

- Court may not assess costs or fees in a suit by a city unless the suit or defense was groundless in fact or law.
  - Court shall consider whether the city had a reasonable basis in law and whether suit was in good faith.

- Court may not assess costs or fees against a city if city reasonably relied on judgment or court order, published appellate opinion, AG ruling.

Avoiding Court Costs and Attorney Fees

- *Pro se* litigant may not recover attorney fees because the requestor did not incur attorney fees. *Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 300 (Tex. 2011).

- Requestor may not recover attorney fees if city releases information sought prior to judgment because requestor has not "prevailed." *Dallas Morning News v. City of Arlington*, 2011 WL 182886 (2011) (memorandum opinion).

Settlement and Dismissal of AG Suit

- AG must notify the requestor of any proposed settlement when a ruling is challenged.
  - Requestor must be given opportunity to intervene prior to settlement.

- Court may dismiss suit against AG if
  - All parties agree to dismissal
  - AG determines the requestor voluntarily withdrew request or has abandoned the request.

- Settlements considered core public information under section 552.022 of PIA.

Criminal Violations

- Misdemeanor offense to refuse to comply with the PIA; distribute confidential information; or willfully conceal, destroy, or alter public information.
  - Overcharging is not a criminal violation.
- Might constitute an act of official misconduct.
- An offense is punishable by fine or confinement in jail.
- Ethical obligation is to the organization (Rule 1.12)

Case Studies

Cox Texas Newspapers v. City of Austin (2017)

Root v. 2019 Texas Inaugural Committee (2019)

EcoHub v. City of Houston (2017)

Lagniappe

Vexatious Requestor

- Some requestors may present a vexing situation, but there is no legal determination of a “vexatious requestor.”

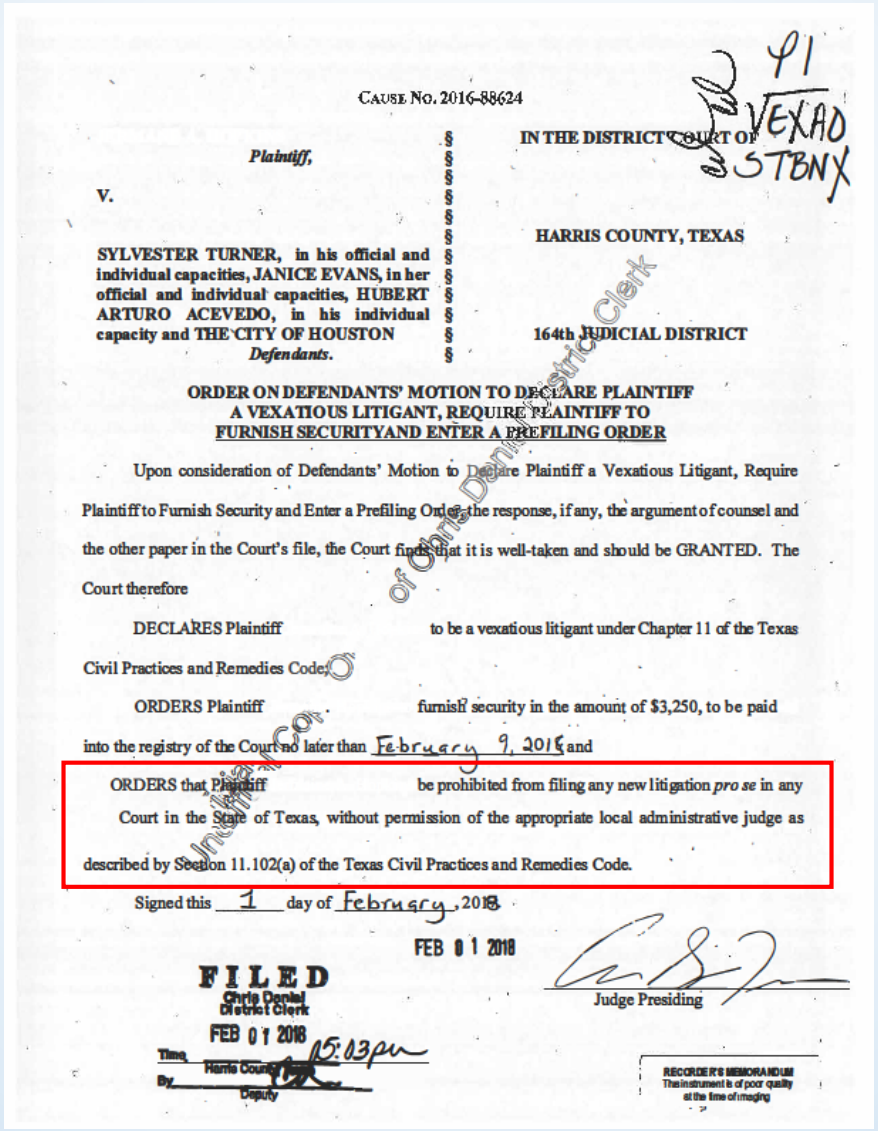
- Even annoying people are allowed to make public information requests.

- Tools are available to manage requestors who vex you.

Vexatious Litigator

- Chapter 11, Civil Practice and Remedies Code
- Motion for Order Determining Vexatious Litigant
- Criteria for Finding Plaintiff a Vexatious Litigant
  - Section 11.054 – Within past 7 years, plaintiff has commenced, prosecuted, or maintained at least 5 litigations as *pro se* litigant.
- Court may issue order prohibiting a person from filing new *pro se* litigation.

Does this really work in PIA litigation?



CAUSE NO. 2016-88624

Plaintiff,	§	IN THE DISTRICT COURT OF
V.	§	
	§	HARRIS COUNTY, TEXAS
SYLVESTER TURNER, in his official and individual capacities, JANICE EVANS, in her official and individual capacities, HUBERT ARTURO ACEVEDO, in his individual capacity and THE CITY OF HOUSTON *Defendants.*	§	164th JUDICIAL DISTRICT

ORDER ON DEFENDANTS' MOTION TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT, REQUIRE PLAINTIFF TO FURNISH SECURITYAND ENTER A PREFILING ORDER

Upon consideration of Defendants' Motion to Declare Plaintiff a Vexatious Litigant, Require Plaintiff to Furnish Security and Enter a Prefiling Order, the response, if any, the argument of counsel and the other paper in the Court's file, the Court finds that it is well-taken and should be GRANTED. The Court therefore

DECLARES Plaintiff to be a vexatious litigant under Chapter 11 of the Texas Civil Practices and Remedies Code;

ORDERS Plaintiff furnish security in the amount of $3,250, to be paid into the registry of the Court no later than February 9, 2018 and

ORDERS that Plaintiff be prohibited from filing any new litigation *pro se* in any Court in the State of Texas, without permission of the appropriate local administrative judge as described by Section 11.102(a) of the Texas Civil Practices and Remedies Code.

Signed this 1 day of February, 2018.

FEB 01 2018

Judge Presiding

FILED
Chris Daniel
District Clerk
FEB 01 2018
Time 5:03pm
Harris County
By
Deputy

RECORDER'S MEMORANDUM
This instrument is of poor quality at the time of imaging

Questions?