



**ETHICS CONSIDERATIONS FOR CITY OFFICIALS**

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# ETHICS CONSIDERATIONS FOR CITY OFFICIALS

## I. INTRODUCTION

When representing a governmental entity, the myriad of laws that apply to elected officials and public entities bring ethical responsibilities to the forefront of most daily interactions and considerations. Attorneys for cities and other public entities work with elected officials and staff to continually reiterate the importance of ethics laws and responsibilities to ensure that ethics laws are a constant consideration in the daily operations of a governmental entity.

Although public officials typically are aware of the ethics obligations that their offices entail, it is important that these obligations are reinforced over time to serve both as a reminder of these requirements as well as to provide updates on periodic changes.

## II. Nepotism

A governmental body may not appoint, confirm the appointment of, or vote to place an individual in a position that is to be compensated from public funds or fees of office if the individual is related to any board member within the third degree by consanguinity or within the second degree by affinity.<sup>1</sup> This prohibition applies to all elected officials on the governing body, and the related elected official may not simply abstain from the vote for the appointment or placement (as is the case in conflict of interest situations).

## III. Conflicts of Interest

Conflicts of interest regulations can apply to both elected officials and executive employees in certain circumstances. It is important to understand the application of these conflicts of interest statutes to ensure that they apply to the appropriate individuals and that the correct actions are taken to maintain compliance.

### A. Texas Local Government Code Chapter 171

Under Chapter 171 of the Texas Local Government Code, a “local public official”<sup>2</sup> must file an affidavit if he or she has a substantial interest in a business entity or in real property. An official has a “substantial interest” in a business entity if:

- (1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or

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<sup>1</sup> TEX. GOV'T CODE § 573.041.

<sup>2</sup> A “local public official” is defined as “a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature.” TEX. LOC. GOV'T CODE ANN. § 171.001(a).

- (2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.<sup>3</sup>

An official has a “substantial interest” in real property if the “interest is an equitable or legal ownership with a fair market value of \$2,500 or more.”<sup>4</sup>

The filed affidavit must state the nature and extent of the interest and the official shall abstain from further participation in the matter if:

- (1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or
- (2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.<sup>5</sup>

The affidavit must be filed with the “official record keeper” of the governmental entity before any vote or decision on any matter involving the business entity or the real property takes place.<sup>6</sup>

An official is considered to have a substantial interest if any person related to that official in the first degree by consanguinity or affinity has an interest,<sup>7</sup> meaning that the official’s parents, children or spouse may not have a substantial interest in the applicable business entity or real property.

## **B. Texas Local Government Code Chapter 176**

Texas Local Government Code requires that a “conflicts disclosure statement” be filed with the official record keeper of the governmental entity by a local government officer when:

- (1) An officer of the governmental body, or his/her family member have an employment or business relationship with a person who must file a questionnaire, and these individuals receive more than \$2,500 from this relationship; or
- (2) An officer of the governmental body, or his/her family member has received (in the 12-month period preceding the business relationship) gifts totaling more than \$100 from an affected person who has executed a contract with the governmental

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<sup>3</sup> TEX. LOC. GOV’T CODE ANN. § 171.002(a).

<sup>4</sup> *Id.* at § 171.002(b).

<sup>5</sup> *Id.* at § 171.004 (a)

<sup>6</sup> TEX. LOC. GOV’T CODE ANN. § 171.004 (a), (b).

<sup>7</sup> *Id.* at § 171.002(c).

body, or that the governmental body is considering doing business with.<sup>8</sup>

Food accepted as a guest and political donations subject to Title 15 of the Texas Election Code are excepted from the \$100 gift limitation,<sup>9</sup> but lodging, transportation, and entertainment are included in the Chapter 176 definition of a gift and subject to the \$100 limit.

Chapter 176 differs from Chapter 171 as the filing requirement applies to a “local government official,” which, in addition to an elected official, may include “a director, superintendent, administrator, president, or other person designated as the executive officer of the local governmental entity”<sup>10</sup> or an “agent of a local governmental entity who exercises discretion in the planning, recommending, selecting, or contracting of a vendor.”<sup>11</sup> In other words, only elected officials must comply with Chapter 171, whereas Chapter 176 may be applicable to key city staff and their family.

In addition to the requirement that the local government officer, a vendor must also submit a conflicts questionnaire with the governmental entity if the vendor has a business relationship with, or has exceeded the gift threshold to, a local government officer or applicable family member as detailed in Section 176.003(a), or has a family relationship<sup>12</sup> with a local government officer.<sup>13</sup>

#### **IV. Open Meetings Laws**

The Texas Open Meetings Act is of particular importance to city officials, as it not only governs the conduct of open meetings, but could also have implications as to how officials conduct the business of their public office.

##### **A. Meeting Definitions and Quorum Issues**

A meeting is defined as a deliberation by a quorum of a governmental body at which public business or public policy over which the governmental body has control is discussed.<sup>14</sup> The Texas Open Meetings Act requires that every regular, special or called meeting of a governmental body be open to the public,<sup>15</sup> and that 72 hours’ notice be given that the meeting is being held. A “deliberation” is defined as a “verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.”<sup>16</sup> A deliberation includes verbal discussions, as well as the exchange of written

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<sup>8</sup> See *id.* at § 176.003(a).

<sup>9</sup> *Id.* at § 176.003(a-1).

<sup>10</sup> *Id.* at § 176.001(4)(B).

<sup>11</sup> *Id.* at § 176.001(4)(C).

<sup>12</sup> A “family relationship” is defined as a relationship within the third degree by consanguinity or the second degree by affinity. TEX. LOC. GOV’T CODE § 176.001(2-a)

<sup>13</sup> TEX. LOC. GOV’T CODE § 176.006 (a).

<sup>14</sup> TEX. GOV’T CODE § 551.001(4)(A).

<sup>15</sup> *Id.* at § 551.002).

<sup>16</sup> *Id.* at § 551.001(2)

material or communications through electronic means.<sup>17</sup> It is important to remember that such communications could include electronic messages, including text messaging, message boards and social media outlets (ie. Twitter and Facebook). An open meeting may also occur if a quorum of a governmental body receives information from a third party,<sup>18</sup> such as when a quorum of a governmental body hears input from the public in a public comment session or town hall meeting.<sup>19</sup>

Outside of traditional open meetings, city officials need to be aware of avoiding “walking quorums”. In February 2019, the Texas Court of Criminal Appeals in *State v. Doyal*<sup>20</sup> struck down the previous language in Section 551.143 of the Texas Open Meetings Act for being “unconstitutionally vague on its face.”<sup>21</sup> The definition of a walking quorum was addressed in the 86<sup>th</sup> Regular Session of the Texas Legislature, where Senate Bill 1640 updated Section 551.143 of the Texas Government Code to state that a member of a governmental body commits an offense if the member:

(1) knowingly engages in at least one communication among a series of communications that each occur outside of a meeting authorized by this chapter and that concern an issue within the jurisdiction of the governmental body in which the members engaging in the individual communications constitute fewer than a quorum of members but the members engaging in the series of communications constitute a quorum of members; and

(2) knew at the time the member engaged in the communication that the series of communications:

(A) involved or would involve a quorum; and

(B) would constitute a deliberation once a quorum of members engaged in the series of communications.<sup>22</sup>

An example of a walking quorum is telephone polling among city officials regarding an item of public business.

## **B. Access to the Meetings**

The Texas Open Meetings Act requires that every regular, special or called meeting of a governmental body be open to the public.<sup>23</sup> Although the Act does not mandate where or at what type of location a meeting must be held, the statutory requirement that meetings be “open to the public” has been interpreted by the Attorney General to mean that the meeting must be in a location physically accessible to the public<sup>24</sup> and that public is “permitted to attend.”<sup>25</sup> The issue

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<sup>17</sup> Tex. Att’y Gen. Op. Nos JC-0307 (2000) at 5-6, DM-95 (1992) at 5.

<sup>18</sup> TEX. GOV’T CODE § 551.001(4)(B).

<sup>19</sup> See Tex. Att’y Gen. Op. No. JC-0248 (2000) at 2.

<sup>20</sup> *State v. Doyal*, No. 0254-18 (Tex. Crim. App. Feb. 27, 2019).

<sup>21</sup> *Id.* at 1.

<sup>22</sup> TEX. GOV’T CODE § 551.143(a).

<sup>23</sup> *Id.* at § 551.002 (Vernon 2008).

<sup>24</sup> Tex. Attn’y Gen. Op. JC-0487(2002) at 2; Tex. Attn’y Gen. Op. JC-0053 (1999) at 5-6.

of whether a meeting location is accessible to the public is a question of fact, and the Attorney General has concluded that resolution of the question may depend upon several factors such as the type of governmental body, the nature of the interested public, the meeting location, and the distance from the governmental body's jurisdiction.<sup>26</sup>

## **C. Exceptions to the Texas Open Meetings Act**

### **1. Exceptions to the 72 Hours' Notice Requirement**

The Texas Open Meetings Act provides that a governmental body may meet to address an emergency issue or item of “urgent public necessity.”<sup>27</sup> An issue counts as an emergency item if immediate action is required because of an (1) imminent threat to public health or safety; or (2) a reasonably unforeseeable situation.<sup>28</sup> What constitutes an “emergency” is very strictly construed and will likely only apply only to a limited number of circumstances. However, Senate Bill 494, which went into effect on September 1, 2019, amends the Texas Open Meetings Act to clarify that a “reasonably unforeseeable situation” includes: (A) fire, flood, earthquake, hurricane, tornado, or wind, rain, or snow storm; (B) power failure, transportation failure, or interruption of communication facilities; (C) epidemic; or (D) riot, civil disturbance, enemy attack, or other actual or threatened act of lawlessness or violence.<sup>29</sup>

The emergency exception includes adding an emergency item to an already posted agenda, where items of urgent public necessity that are subject to the exception may be added to an existing agenda with only one (1) hour of notice.<sup>30</sup> However, non-emergency items must still have 72 hours' notice before they may be considered by the governmental body. It is important to note that even though a municipality may be in the midst of an emergency, each item on a meeting agenda may not itself constitute an emergency.

### **2. Use of Conference Call Technologies**

The Texas Open Meetings Act allows governmental bodies to conduct meetings by conference call in certain limited circumstances that constitute an emergency situation.

A governmental body may hold an open or closed meeting by conference call only if (1) an “emergency or public necessity”<sup>31</sup> exists; and (2) convening at one location of a quorum is impossible; or (3) the meeting is held by an advisory board.<sup>32</sup> If holding a conference call, the meeting is subject to the notice requirements of any other meeting of the governing body, and the

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<sup>25</sup> Tex. Attn’y Gen. Op. M-220 (1968) at 5.

<sup>26</sup> JC-0053 at 6 (determining that it would be “highly unlikely” for a meeting of a Texas governmental body that is held at an underwriter’s office in New York City to be accessible to the public under the Open Meetings Act).

<sup>27</sup> TEX. GOV’T CODE § 551.045(a).

<sup>28</sup> *Id.* at § 551.045(b).

<sup>29</sup> *Id.* At § 551.0045(b)(2).

<sup>30</sup> *Id.* at § 551.045(a). This provision was changed from 2 hours of notice to 1 hour of notice with the passage of SB 494, effective September 1, 2019.

<sup>31</sup> Pursuant to Section 551.045(b), an emergency or an urgent public necessity exists only if “immediate action is required of a governmental body because of: (1) an imminent threat to public health and safety; or (2) a reasonably unforeseeable situation.”

<sup>32</sup> TEXAS GOV’T CODE § 551.125(b).

notice must specify the location where meetings of the governing body are typically held.<sup>33</sup> The open portions of the telephone meeting shall be audible to the public at the location specified in the notice, and this location must provide two-way communication during the entire conference call meeting.<sup>34</sup> Finally, the call must be recorded and the recording made available to the public.<sup>35</sup> A governmental body may consult with its attorney by conference call in non-emergency situations<sup>36</sup>, provided that the attorney is *not an employee* of the public entity<sup>37</sup>, and that any portions of the meeting the attorney participates in during open session are audible to the public at the meeting location.<sup>38</sup>

## V. Texas Penal Code Provisions

### A. Acceptance of Gifts

A public servant may not solicit, accept or agree to accept an honorarium in consideration for “services that the public servant would not have been requested to provide but for the public servant’s official position or duties.”<sup>39</sup> However, a public official may accept meals, lodging and transportation expenses in connection with an event in which the official provides services, so long as these services are not “merely perfunctory.”<sup>40</sup>

The prohibitions in Texas Penal Code § 36.08 do not apply to fees or benefits to which the public servant is lawfully entitled or gives consideration for in a capacity other than as a public servant, or a gift conferred based on a personal, professional or business relationship independent of his or her official status.<sup>41</sup>

In addition to these Penal Code prohibitions, the public official must still take into account conflicts of interest laws detailed in Chapters 171 and 176 of the Texas Local Government Code even if acceptance of a gift is lawful.

### B. Bribery

A person commits an offense if he or she “intentionally or knowingly” offers, confers, solicits, accepts, or agrees to accept or confer on another any benefit in consideration for the exercise of the elected official’s discretion as a public servant.<sup>42</sup> A “benefit” is defined as “anything reasonably regarded as pecuniary gain or pecuniary advantage” and includes a benefit to another person in whose welfare the public official has a “direct and substantial interest.”<sup>43</sup>

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<sup>33</sup> *Id.* at § 551.125 (c), (d).

<sup>34</sup> *Id.* at § 551.125 (e), (f). Each party must be clearly identified prior to speaking in the telephone conference meeting. TEXAS GOV’T CODE § 551.125(f).

<sup>35</sup> TEXAS GOV’T CODE § 551.125 (e)

<sup>36</sup> *Id.* at § 551.129(a).

<sup>37</sup> *Id.* at § 551.129(d).

<sup>38</sup> *Id.* at § 551.129(b).

<sup>39</sup> TEX. PENAL CODE § 36.07(a).

<sup>40</sup> *Id.* at § 36.07(b).

<sup>41</sup> *Id.* at § 36.10(a)(1)-(2).

<sup>42</sup> TEX. PENAL CODE § 36.02(a).

<sup>43</sup> *Id.* at § 36.01(3).



The difference between bribery and the improper acceptance of a gift is that the benefit in bribery is assumed to influence an act by a public official, but an honorarium confers a benefit for something that the public official is doing as a component of his or her public duties. For example, a public official may accept a meal when participating as a keynote speaker at a TCAA conference, but may not accept that same meal if it is intended to persuade the public official to act or vote a certain way on a city issue. As stated above in Section VI.A., the acceptance of any benefit or gifts is also subject to conflict of interest statutes detailed in Section IV.

## VI. The Public Information Act

Public information is defined as information that is “collected, assembled, or maintained under a law or ordinance or in connection with a transaction or official business” by a governmental body or on behalf of a governmental body, and the governmental body owns or has a right of access to the information.<sup>44</sup> Documents under the control of a governmental entity are presumed to be open to the public, and may exist as paper, microfilm, video, audio tape, e-mail and other similar forms.<sup>45</sup> If requested for disclosure, a public document may be withheld only if it is in a category of information specifically excepted from disclosure under the Texas Public Information Act.<sup>46</sup>

In 2019, the Texas Legislature passed Senate Bill 944 both clarifying provisions in the Texas Public Information Act as well as adding new requirements. SB 944 amended Section 552.203 of the Texas Government Code to require a public information officer to make reasonable efforts to obtain public information from a temporary custodian if the information has been requested from the governmental body.<sup>47</sup> A “temporary custodian” is defined as an officer or employee of a governmental body who, in the transaction of official business, creates or receives public information that the officer or employee has not provided to the officer for public information of the governmental body or the officer's agent. The term includes a former officer or employee of a governmental body who created or received public information in the officer's or employee's official capacity that has not been provided to the officer for public information of the governmental body or the officer's agent.<sup>48</sup>

SB 944 also addressed information maintained on personal electronic devices. The Texas Public Information Act was amended to provide that a “current or former officer or employee of a governmental body who maintains public information on a privately owned device shall:(1) forward or transfer the public information to the governmental body or a governmental body server to be ... or (2) preserve the public information in its original form in a backup or archive and on the privately owned device” as required by state law.<sup>49</sup> SB 944 also adds Section 552.233 regarding ownership of public information. This new statutory provision states that “a current or former officer or employee of a governmental body does not have, by virtue of the officer's or employee's position or former position, a personal or property right to public information the

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<sup>44</sup> TEX. GOV'T CODE § 552.002(a)(1)-(2).

<sup>45</sup> See *id.* at § 552.001(a); 552.002(b).

<sup>46</sup> See generally TEX. GOV'T CODE, Ch. 52, Subch. C.

<sup>47</sup> *Id.* at § 551.203(4).

<sup>48</sup> *Id.* at § 551.003(7).

<sup>49</sup> *Id.* at 552.004(b).

officer or employee created or received while acting in an official capacity.”<sup>50</sup> Further, a temporary custodian with “possession, custody, or control of public information” must provide such information to the governmental body within 10 days from the date “the officer for public information of the governmental body or the officer's agent requests the temporary custodian to surrender or return the information”.<sup>51</sup>

Additionally, the Texas Public Information Act was updated by Senate Bill 494, effective September 1, 2019, to allow a governmental body to suspend the Act during a catastrophe. If the governmental body is subject to a catastrophe, the body may submit to the Attorney General a prescribed notice stating that the entity is subject to a catastrophe, and has opted to suspend the application of the Texas Public Information Act for a designated period.<sup>52</sup> This initial period of suspension may not exceed seven (7) days,<sup>53</sup> but may be extended for up to an additional seven (7) days.<sup>54</sup> The governmental body must provide public notice similar to meetings posting during the suspension period.<sup>55</sup> Public information requests received during the suspension period will be considered “received” the first business day after the suspension period ends,<sup>56</sup> and deadlines for requests received before the suspension period are tolled during the suspension period.<sup>57</sup>

## VII. Conclusion

With the myriad of ethical obligations public officials are required to comply with, it is important that all public officials periodically review these requirements to not only reinforce ongoing obligations, but to stay aware of changing regulations.

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<sup>50</sup> *Id.* at 552.233(a).

<sup>51</sup> *Id.* at 552.233(b).

<sup>52</sup> *Id.* at 552.233 (c).

<sup>53</sup> *Id.* at 552.233 (d).

<sup>54</sup> *Id.* at 552.233 (e).

<sup>55</sup> *Id.* at 552.233 (f).

<sup>56</sup> *Id.* at 552.233 (g).

<sup>57</sup> *Id.* at 552.233 (h).