

Council Member Conduct
Do Council Members Have a Special Right to Access Confidential Information?

Ethics (.5 hours)

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Thomas is a Fellow in the Society for Legal Scholars. He has taught attorneys, school trustees, and city council members at over two dozen local, regional and state-wide conferences, and he is the published author of several works, including his weekly newsletter *The Executive Summary*, and his book, *Go Home Early: A Practical Guide to Streamlined Meetings*.

Thomas was the City Attorney of Victoria for thirteen years and a staff attorney at the Texas Association of School Boards for five. He formed The Gwosdz Law Firm in 2023; the firm is now the leading local government law firm on the central Gulf coast.

He has spent his professional career in public service, first as a public school teacher. After law school, he represented public school districts for eight years before becoming the in-house City Attorney in Victoria. There, he led a department of three attorneys and a staff of 10 employees, including managing the City Secretary's office and Municipal Court. The City Attorney's office was intimately involved in all aspects of the government operation. He provided full legal services to City Council members, the City Manager, the Chief Financial Officer, two ACMs, all eighteen department heads, and various division managers, boards, and commissions.

Thomas received his Doctor of Jurisprudence from the University of Houston School of Law in 2001, is licensed by the State Bar of Texas, and is a Fellow in the Texas Bar College's Society of Legal Scholars. He is certified in Employee Relations and Investigations by Cornell University and has been awarded the Merit Certification in Municipal Law by the Texas City Attorneys Association.

Outside of work, he enjoys time with his family, including his wife, five kids and three grandkids. He is an avid fisherman and cyclist, and has been Scoutmaster of Troop 364, President of the Kiwanis Club of Victoria, Chair of the Riverside Ride, and "beanmaster" for Our Lady of Victory Cathedral's annual church festival.

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Special Right of Access by Council Members

Historical Special Access

Prior to 2025, members of city council did not have a statutory special right of access to information. However, attorneys have long interpreted the TPIA to allow members to access information similar to having a special right of access. In 1983, Attorney General Mattox opined that a government official, requesting information in his official capacity, is not subject to the public information act, because that official is not acting as a member of the public when they make that request.

[T]he Act controls the availability of information to members of the general public as such. It cannot, in our view, control the right of access of a member of a governmental body to information in that governmental body's possession. Since the governmental body -- in this instance, the board of trustees of the district -- at least constructively maintains records in the district's possession, we believe it logically follows that a member of that board has an inherent right of access to such records, at least when he requests them in his official capacity. Tex. Att'y Gen. Op. No. JM-119 (1983).

Attorney General Morales clarified and expanded this opinion in 1993 to specifically include confidential information, when requested by a member of the governing body in their official capacity.

Board members may reasonably require access to the personnel files of the board to oversee the executive director's administration of the act or to employ and compensate other employees of the board. Thus, we conclude here that members of the board have an inherent right of access to all information in the personnel files of the board including confidential information, when they request access to the files in their official capacity. Tex. Att'y Gen. LO-93-69.

Nothing in H.B. 4301, discussed below, overturns those two opinions. City Council members, acting in their official capacity and exercising their oversight responsibilities, still have the right to access governmental records outside of the public information act. The change in law discussed below does not eliminate that right, it merely provides guardrails.

H.B. 4310 – New Texas Government Code §§ 552.401-407

During the 2025 regular session of the Texas Legislature, Representative Cody Vasut (Angleton), filed H.B. 4310, seeking to codify this statutory right of access. The Bill Analysis for H.B. 4310 states:

The Public Information Act ensures public access to government records. However, the bill author has informed the committee that members of governing boards have faced challenges in accessing certain public information necessary for informed decision-making, especially when the information is deemed confidential or is otherwise excepted from required disclosure.

Indeed, a city's public information officer could lawfully argue that the TPIA's inspection and release requirements, timelines, and even AG review provisions don't apply to a request made by a council member in their official capacity, since they are not making the request as a member of the public.

H.B. 4310, therefore, amends the Government Code to authorize a member of the governing board of a governmental body or nongovernmental entity to inspect, duplicate, or inspect and duplicate public information maintained by the governmental body or the nongovernmental entity if the member is acting in the member's official capacity. The bill requires public information requested under the bill's provisions to be provided to the member promptly and without charge. This change effectively codifies the previous understanding that councilmembers hold a special right of access, and adds "prompt and free."

Govt. Code § 552.403.

Special Right of Access for Member of Governing Board

(a) A member of the governing board of a governmental body or nongovernmental entity may inspect, duplicate, or inspect and duplicate public information maintained by the governmental body or the nongovernmental entity if the member is acting in the member's official capacity.

(b) Public information requested under this section shall be provided to the member promptly and without charge.

Prompt Response

Section 552.403(b) now requires public information requested under the bill's provisions to be provided to the member promptly and without charge. This provision applies the TPIA's "prompt" response requirement to a request made by a public official. Prior to the H.B. 4310, a councilmember requesting information in their official capacity did not have the right to a prompt response, because their request was not covered by the TPIA.

Protection of Confidential Information

The new law recognizes that some governmental information is confidential, and includes provisions to protect the confidentiality of that information.

Redaction of confidential information

Section 552.403 (c) provides that confidential information may be redacted at the request of the councilmember, and that if such a request is made, the city shall redact the information "without charge":

(c) If requested by the member, public information requested under this section that is confidential under law shall be redacted from the information provided to the member without charge. TEX. GOV'T CODE ANN. § 552.403 (West).

This section is poorly worded. It could be interpreted to mean that if a council member requests confidential information, then *all* the requested confidential information *shall* be redacted. However, I don't think that interpretation was intended. Considering that the legislature simultaneously authorized the cities to offer confidentiality agreements intended to protect the confidential information being released to a councilmember, I think the proper interpretation of this section is that a council member may request that confidential information be redacted and thus avoid being offered a confidentiality agreement. Indeed, the opposite interpretation would entirely abrogate the need for Section 552.404.

Confidentiality Agreements

Section 552.404 authorizes a city to request that the council member receiving confidential public information sign a confidentiality agreement covering the information. The statute does not provide much guidance regarding the terms of that confidentiality agreement, but it does require that the agreement include provisions protecting the confidential information through it promised not to disclose, a requirement that the information be labeled as confidential, a requirement that the information be kept securely, and or the destruction of additional copies of the confidential information. Release of confidential information to the requesting council member under a confidentiality agreement does not waive or the confidentiality of that information.

Govt. Code § 552.404.

Confidential Information

(a) A governmental body or a nongovernmental entity that has been requested to provide information under this subchapter may request the member of a governing board who is receiving public information that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

- (1) the information not be disclosed;
- (2) the information be labeled as confidential;
- (3) the information be kept securely; or
- (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned remaining confidential and subject to the confidentiality agreement.

(b) A governmental body or nongovernmental entity, by providing public information under this subchapter that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information

for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future.

A sample form of a confidentiality agreement is attached to this paper as Attachment “A,”

Attorney General Review

Section 552.405 permits a councilmember who has been requested to sign a confidentiality agreement to seek a decision from the Attorney General’s Office about whether the information covered by the agreement is confidential under law. The Attorney General is required to establish procedures and deadlines for receiving information necessary to decide the matter. As of the date of this writing, no rules have been published in the Texas Administrative Code, and no proposed rules have been published in the Texas Register.

The councilmember or a person with a proprietary interest in the information may appeal the Attorney General’s decision to the district court in Travis County.

Govt. Code § 552.405.

Determination by Attorney General

(a) A member of a governing board who has received a request under Section 552.404(a) to sign a confidentiality agreement may seek a decision about whether the information covered by the confidentiality agreement is confidential under law. A confidentiality agreement signed under Section 552.404(a) is void to the extent that the agreement covers information that is determined by the attorney general or a court to not be confidential under law.

(b) The attorney general by rule shall establish procedures and deadlines for receiving information necessary to decide the matter and briefs from the member of a governing board, the governmental body or nongovernmental entity, and any other interested person.

(c) The attorney general shall promptly render a decision requested under this section, determining whether the information covered by the confidentiality agreement is confidential under law, not later than the 45th business day after the date the attorney general received the request for a decision under this section. The attorney general shall issue a written decision on the matter and provide a copy of the decision to the member, the governmental body or nongovernmental entity, and any interested person who submitted necessary information or a brief to the attorney general about the matter.

(d) The member or the governmental body or nongovernmental entity may appeal a decision of the attorney general under this section to a Travis County district court. Any other person may appeal a decision of the attorney general under this

section to a Travis County district court if the person claims a proprietary interest in the information affected by the decision or a privacy interest in the information that a confidentiality law or judicial decision is designed to protect.

What Information is Confidential as a Matter of Law?

Compiling a complete list of governmental information that is considered confidential under Texas statutory and common law is beyond the scope of this paper, and will likely change with each future legislative session. However, in the year prior to the legislature's adoption of H.B. 4310, the Attorney General's Public Information Handbook listed several "noteworthy" examples:

- medical records that a physician creates or maintains regarding the identity, diagnosis, evaluation, or treatment of a patient;
- reports, records, and working papers used or developed in an investigation of alleged child abuse or neglect under Family Code chapter 261;
- certain information relating to the provision of emergency medical services;
- communications between a patient and a mental health professional and records of the identity, diagnosis, or treatment of a mental health patient created or maintained by a mental health professional; and
- certain personal information in a government-operated utility customer's account records unless the customer requested that the utility disclose the information.
- originating telephone numbers and addresses furnished on a call-by-call basis by a service supplier to a 9-1-1 emergency communication district established under subchapter D of chapter 772 of the Health and Safety Code;
- any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator;
- information that (1) contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public, when its disclosure would constitute the common-law tort of invasion of privacy through the disclosure of private facts.
- The United States Constitution protects two kinds of individual privacy interests: (1) an individual's interest in independently making certain important personal decisions about matters that the United States Supreme Court has stated are within the "zones of privacy," as described in *Paul v. Davis* and (2) an individual's interest in avoiding the disclosure of personal matters to the public or to the government.

What About a Recording or Certified Agenda of a Closed Meeting?

The Texas Open Meetings Act requires the city to keep a certified agenda or a recording of each closed session, except for private consultations with their lawyer. However, the certified agenda or recording of the closed meeting is not expressly confidential in the statute. Instead, the

statute uses the language that “[t]he certified agenda or recording of a closed meeting is available for public inspection and copying only under a court order issued under subparagraph (b)(3).” TEX. GOV'T CODE ANN. § 551.104 (West).

The Attorney General’s office has long interpreted that language to mean the certified agendas or tapes of executive sessions confidential within the meaning of the Public Information Act. *See e.g.* Tex. Att’y Gen. Op. ORD 495 (1988) (“Thus, certified agendas and tapes are confidential under section 3(a)(1) of the Open Records Act unless a court rules otherwise in an action filed under the Open Meetings Act.”); Tex. Att’y Gen. Op. JM-995 (1988) (“It is suggested that section 2A provides the only means whereby a certified agenda or tape of a meeting closed to the public may be released to the public. We agree.”)

However, the Attorney General has also long interpreted the Public Information Act to allow councilmembers to review the certified agenda of a meeting, whether they attended the meeting or not. *See* Tex. Att’y Gen. Op. JC-0120 (1999). General Cornyn reached concluded that a governmental body may not prevent one or some of its members from performing his or her duties absent authority for doing so in reliance on *Garcia v. Angelina*, 412 S.W.2d 949, 951 (Tex. Civ. App.-Eastland 1967, no writ). Accordingly, General Cornyn concluded “that a member of a governmental body may review the certified agenda or tape recording of a closed meeting, whether or not the member participated in the meeting.” Tex. Att’y Gen. Op. JC-0120 (1999).

That same opinion also reinforced prior Attorney General opinions allowing the city council to adopt reasonable rules for review of the certified agenda:

[W]e do not find our conclusion to be inconsistent with the Open Meeting Act's prohibition only on release of the information to the public. Furthermore, we think it is a logical corollary to the duty of the members of a governmental body to create and preserve the records in accordance with the Act. The members remain subject to the penalties of the Act if they fail to preserve the agenda as required or if they allow the records to be released to the public. *See* Tex. Gov't Code Ann. §§ 551.141, .142, .146 (Vernon 1994). For this reason, we think a governmental body may and should adopt procedures for reviewing the records that will ensure their preservation and confidentiality.

Accordingly, we conclude that a member of a governmental body may review the certified agenda or tape recording of a closed meeting, whether or not the member participated in the meeting. A governmental body may adopt a procedure for reviewing the materials, in light of its duty to preserve the materials and of the penalties for not doing so. But it may not absolutely prohibit review of the records by a member of the body.

Tex. Att’y Gen. Op. JC-0120 (1999).

For the purpose of Section 552.404, the certified agenda is a confidential record. *See* Tex. Att’y Gen. Op. ORD 495 (1988). Although council members have a right to review certified agendas, the council may adopt reasonable procedures for reviewing the certified agenda. *See* Tex. Att’y Gen. Op. JC-0120 (1999). Accordingly, a city council could adopt a policy or procedure

requiring a council member to sign a confidentiality agreement under Section 552.404 before reviewing the certified agenda or recording of a closed session.

Is Information that is Subject to Discretionary Withholding “Confidential?”

The authority to offer a confidentiality agreement only extends to information that is confidential under law. Not all information subject to discretionary withholding is considered confidential under law. But placing a line between the two categories isn’t as clear or easy as our clients might like.

As one example, the Attorney General’s website lists several classes of information that are confidential, and others that it considers discretionary. The “discretionary” list includes information protected by the attorney-client privilege. Most attorneys – and indeed several court opinions – would consider that information confidential.

Drawing a clear line for our clients is made more complicated by the number of discretionary withholdings that don’t require an attorney general opinion before redaction. Five categories of information are described in the statute itself, and several more are the result of previous determinations. Much of this information is not considered confidential under law, including many discretionary exceptions which include the words “confidentiality of…” in their section title.

Attorney-Client Privileged Information

The special right of access does not apply to information subject to the attorney client privilege, unless the attorney client privilege applies to the member requesting the information on an individual basis. Section 552.403(d) expressly exempts attorney-client privileged information and requires the city only to inform the member if information responsive to the request is subject to the attorney-client privilege.

Govt. Code § 552.403.

Special Right of Access for Member of Governing Board

...

(d) Information subject to attorney-client privilege is not subject to disclosure to a member of a governing board under this section unless the attorney-client relationship upon which the privilege is based applies to the member. A governmental body or nongovernmental entity shall inform the member if information responsive to a request made under Subsection (a) is withheld under this subsection.

What about Attorney Work Product?

While the Attorney General examines the attorney-client privilege under §552.101 and generally considers it confidential, the same is not true of the work-product privilege. Information that is solely within the definition of “core work product” of Rule 192.5(b)(1) is generally reviewed under § 552.111 and considered a discretionary withholding. *See* Open Records Decision No. 677 (2002).

If, however, a governmental body seeks to withhold information on the sole basis that the information is work product, section 552.103 is not the proper exception to claim. Rather, such an assertion is properly made under the section 552.111 exception.

Under this framework, work-product privileged information is not confidential. The city's authority to redact information or to offer a confidentiality agreement would not extend to information protected solely by the attorney work-product privilege.

Councilmember Confidentiality Agreements

If a city has been asked to provide information to a council member, the city may request that the council member sign a confidentiality agreement that covers the information provides guardrails to protect the confidentiality of the information. The code allows four methods to protect the information, including requirements that the information not be disclosed, be marked as confidential, be kept securely, or that the number of copies be controlled.

A copy of a sample form document is attached to this paper as Attachment "A."

Govt. Code § 552.404.

Confidential Information

(a) A governmental body or a nongovernmental entity that has been requested to provide information under this subchapter may request the member of a governing board who is receiving public information that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

- (1) the information not be disclosed;
- (2) the information be labeled as confidential;
- (3) the information be kept securely; or
- (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned remaining confidential and subject to the confidentiality agreement.

(b) A governmental body or nongovernmental entity, by providing public information under this subchapter that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future.

Limitations on Confidentiality Agreements

Separate and apart from Representative Vasut's efforts to clarify the TPIA, an effort began in the 2025 Texas senate to restrict confidentiality agreements that might obscure information related to sexual abuse to any other person. Senate Bill 835, authored by Senator Angela Paxton

(McKinney), became effective September 1, 2025. S.B. 835, sometimes called “Trey’s Law,” added a provision to the Civil Practice and Remedies Code that makes void and unenforceable any provision of a nondisclosure or confidentiality agreement, such as a provision of an employment agreement, settlement agreement, or any other agreement, to the extent that it prohibits the disclosure of an act of sexual abuse or facts related to an act of sexual abuse.

§ 129C.002.

Certain Provisions Unenforceable

Any provision of a nondisclosure or confidentiality agreement or nondisclosure or confidentiality provision of an employment agreement, settlement agreement, or any other agreement is void and unenforceable as against the public policy of this state to the extent the provision prohibits a person, including a party, from disclosing an act of sexual abuse or facts related to an act of sexual abuse to any other person. Nothing in this section may be construed to prohibit a person, including a party, from agreeing to keep confidential any other provision of a settlement agreement, including the amount or payment terms of a settlement.

**Attachment “A”
Sample Form of Confidentiality Agreement**

[Pages to follow]

Confidentiality Agreement

This agreement is executed between the City of _____, a Texas Municipal Corporation, (the “City”) and _____, a natural person and member of the City’s governing board (the “Member”), pursuant to the authority granted to the City by Section 552.404 of the Texas Government Code.

Recitals

Whereas the City is a governmental body pursuant to Section 552.003 of the Texas Government Code, and subject to the authorities, limitations, restrictions, and obligations contained in the Texas Public Information Act, Texas Gov’t Code §§ 552.001, *et seq.*; and

Whereas the Member is an individual appointed, designated, or elected to direct or serve on a board or other group of individuals that directs a governmental body pursuant to Section 552.401 of the Texas Government Code; and

Whereas the Member, acting in their official capacity, has requested from the City certain public information that is confidential under law and which is otherwise required by Section 552.403 of the Texas Government Code to be provided to the Member promptly and without charge; and

Whereas Section 552.404 of the Texas Government Code authorizes the City to request that the Member sign a confidentiality agreement which covers the confidential information and requires that the confidentiality of the information be protected;

Now therefore, in consideration of the mutual promises contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

Article 1 Obligations of the City

1.1 **Provide Requested Information.** The City shall provide the requested information that is not confidential under law to the Member promptly and without charge.

1.2 **Mark Confidential Information.** The City shall clearly mark documents or parts of documents that contain information that is confidential under law (the “Confidential Information”) and provide the marked documents to the Member promptly and without charge.

Article 2 Obligations of the Member

2.1 **Keep the Confidential Information Securely.** The Member shall hold the Confidential Information in strict confidence and protect it using at least the same degree of care

it uses for its own confidential information of like importance, and in no event less than a reasonable degree of care.

2.2 **Not Disclose Confidential Information.** The Member shall:

(a) Use the Confidential Information solely for the official business of the City and the obligations of the Member to the City;

(b) The member shall not disclose the Confidential Information to any third party except to City employees, officers, directors, advisors, and agents who have a need to know it for the legitimate governmental purposes of the City and who are bound by confidentiality obligations at least as protective as those in this Agreement.

2.3 **Return the Confidential Information.** Within thirty (30) days after the City delivers a written request to the Member or within thirty (30) days after expiration or termination of this Agreement, the Member shall return all Confidential Information, including copies thereof made by any person, to the City.

Article 3. Term

3.1 **Initial Term.** The term of this Agreement shall commence on the date of its final execution and attestation by the parties below and shall continue until the earlier occurrence of (a) the Member returning the confidential information and all copies thereof to the City, (b) the conclusion of the Member's then-current term of office.

3.2 **Renewal Term.** This Agreement may be extended for one or more renewal terms which shall run concurrently with any immediately subsequent term of office held by the Member in the same capacity as the Member held during the initial term of this Agreement, on mutual written agreement by the Parties executed within fifteen (15) calendar days after the Member's re-election or reappointment to the immediately subsequent term of office.

Article 4 Miscellaneous Provisions

4.1 **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without regard to conflict of law principles. Venue for any action brought to enforce this Agreement shall be in the District Court for the county containing the largest portion of the city limits of the City.

4.2 **Trey's Law.** Pursuant to the requirements of Section 129C.002 of the Texas Civil Practice and Remedies Code, nothing contained in the definition of "Confidential Information" or elsewhere in this Agreement shall be construed to prohibit a party to this Agreement from disclosing an act of sexual abuse or facts related to an act of sexual abuse to any other person.

4.3 **Amendment and Assignment.** Neither party may amend or assign this Agreement without the written consent of the other party.

4.4 **Notice.** Any notice or communication permitted or required by this Agreement shall be deemed effective when personally delivered or deposited, postage prepaid, in the first class

mail of the United States, or international mail properly addressed to the appropriate party at the address set forth below:

If to the City:

If to the Member

4.5 **Merger.** This Agreement constitutes the entire understanding between the parties regarding the subject matter and supersedes all prior discussions or agreements.

In Witness Whereof this Agreement has been executed on the ___ day of _____, 2026.

[CITY NAME]

[MEMBER NAME]

[Name, Title]

[Name, Title]

Date

Date

Attest:

Attest:

[Name, Title]

[Name, Title]

Date

Date