

TMCCP Presents

Legislative Update Seminar

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HANDOUT FOR

“Open Government”

with speaker Frank Garza

Attorney, Shareholder, Davidson Troilo Ream & Garza, PC

TEXAS MUNICIPAL CLERKS CERTIFICATION PROGRAM

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Legislative Update Open Government

Texas Municipal Clerks Certification Program

August 17, 2017
Frank J. Garza
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1

Open Meetings Law Introduction

- IT IS ESSENTIAL THAT ALL MUNICIPAL OFFICIALS AND EMPLOYEES UNDERSTAND THE RESTRICTIONS OF THE OPEN MEETINGS ACT.
- FAILURE TO COMPLY MAY RESULT IN CITY'S ACTIONS BEING DECLARED VOID AND CRIMINAL CHARGES BEING FILED AGAINST VIOLATORS.

2

Basic Rule – Meetings are Open

- “[E]very regular, special, or called meeting or session of every governmental body shall be open to the public. . . .”
Sec. 551.002 GC



3

Open Meetings Act

- “Governmental body” means any board, commission, department, committee, or agency . . . which is under the direction of . . . any city council. . . .



4

Open Meetings Act

- “Meeting” means *any deliberation* between a **quorum of members** . . . at which any public business . . . is discussed or considered, or at which any formal action is taken.



5

Deliberation-Essential Element

- “A verbal exchange during a meeting between a **quorum** of a governmental body, or between a **quorum** and another person, concerning an issue within the jurisdiction of the body or any public business.”
- Must be very careful. General Law C city.

6

Deliberation

- Does not have to be a verbal communication.
- Any type of communication that attempts to have the Council agree on a matter of public concern outside of an open meeting.
- Email and texting



7

Walking Quorum

- The Act applies to meetings of groups of less than a quorum where a quorum or more of a body attempted to avoid the purposes of the Act by deliberately meeting in groups less than a quorum in closed sessions to discuss and/or deliberate public business, and then ratifying their actions as a quorum in a subsequent public meeting.

8

Email

- With new technology, officials and /or staff are sometimes unintentionally violating the Open Meetings Act.
- Sending an email to all Council members and they hit "reply all," such a communication could be a violation.



9

2013 Legislation

- HB 2414 amended the Open Meetings law. It allows for a member of a governmental body to participate in a meeting of the body by means of a videoconference call if the video and audio feed of the member's participation, is broadcast live at the meeting.
- Must meet certain conditions.



10

2013 Legislation

- The Mayor or presiding officer **must be present** at that physical location of the meeting;
- The location of the meeting shall have two-way audio & video communication with each member who is participating by videoconference.
- Each participant shall be clearly visible and audible to each other participant and to the public in attendance.

11

2017 Legislation

H.B. 3047 – Open Meetings:

Provides that a member of Council who participates in a meeting by videoconference call shall be considered absent from any portion of the meeting during which audio **or** video communication with the member **is lost or disconnected and, in such instance,** the City may continue the meeting **if a quorum is present or participating.**



12

2017 Legislation

- Meetings do not include social functions, conventions, press conferences
- Public business can still not be discussed by a quorum of the Council at these events.
- **S.B. 1440 – Open Meetings:** provides that the term “meeting” does not include the attendance by a quorum of a governmental body at a **candidate forum, appearance or debate** to inform the electorate, if formal action is not taken and any discussion of public business is incidental to the forum, appearance, or debate.

13

Notice Requirements

- Notice must be sufficient to apprise the public of the subjects to be considered during the meeting.
- **Who, What, When & Where** are basic questions that the notice should answer
- **Notice for Executive Sessions** have to be included on the agenda.
- **The Chair must identify the specific reasons for holding an Executive Session.**

14

Open Sessions

- A meeting may not be convened unless a quorum of the Council is present in the room.
- This requirement is the same for Executive Session. Cannot start unless meeting is called to order in public.
- The law requires the meeting to take place at the **location, date and time** identified on the notice.

15

Open Sessions

- Council is limited to taking action on items posted.
- Council may discuss items not on agenda, but discussion is limited as to when to place the item on the agenda.
- Public may raise any matter not on agenda but Council can not discuss.

16

Final Action

- Council's final action, decision or vote on any matter must be held in open session.
- Public has right to know how Council members vote.
- Votes have to be recorded.
- Discussion should be heard



17

Executive Session

- Executive session (most common):
 - Attorney consultation
 - Deliberations of Real Property
 - Personnel matters
 - Economic Development
- Out of Executive Session:
“Consideration and Possible Action of Items Discussed in Closed Meeting”

18

Executive Session



- **S.B. 564 – Executive Sessions:** provides that a Council may conduct an executive session to deliberate:
 - 1) security assessments or deployments relating to information resources technology;
 - 2) network security information; or
 - 3) the deployment or specific occasions for implementations of security personnel, critical infrastructure, or security devices.

19

Executive Session

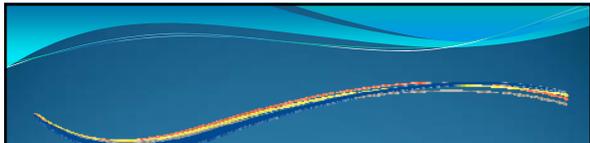
- Vote must occur in open session unless it falls under Competitive matter exception.
- Okay to express opinion, but may not take official vote in Executive Session.
- A **certified agenda or tape recording** must be made of each executive session.
- Agenda and/or tape may only be released with court order.

20

Executive Session

- Tape may be turned off during attorney consultation.
- Only the members of governmental bodies have a right to attend.
- Any staff person or consultant necessary to provide information.
- **Don't let anyone in that will waive your privilege.**

21



OPEN RECORDS

Texas Municipal Clerks Certification Program

22

Attorney General

- TGC authorizes AG to prepare, distribute and publish materials regarding the interpretation of the Act.
- AG is required to construe the Act “liberally” in favor of open government, in other words, releasing the info.
- Balancing Act that leans toward the person requesting the information.



Attorney General
Ken Paxton

23

Basic Rule – Records are Open



- “Public Information is available to the public at a minimum during the normal business hours” of the City or any governmental entity.

Sec. 552.021 TGC

24

Public Information

- Means information collected, assembled or maintained . . . by City or...it owns or has a right of access to the information. *Sec. 552.002 TGC*
- Recorded information in any medium, paper, file, photo, film, tape, microfiche, sound recording, map, drawing, e-mail, Internet posting, text message, instant message, other electronic communication.
 - E-MAILS ARE OPEN RECORDS

25

2013 Legislation

- SB 1368 states that the definition of "public information" applies to and includes any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.
- "Official business" means any matter which city has any authority, administrative duties, or advisory duties.

26

PDA Information

- Any information on a city issued mobile device is subject to Open Records
 - Emails
 - Internet Searches
 - Apps on the PDA
- Information will have to be released unless it falls under exception.
- What about personal phone communications?



27

2017 Legislation

H.B. 3107 – Vexatious Requestors:

- A request is considered to have been withdrawn if the requestor fails to inspect or duplicate the public information in the office of the governmental body on or before the 60th day after the date the information is made available or fails to pay the postage and any other applicable charges accrued on or before the 60th day after the date the requestor is informed of the charges;
- All PIA requests received in one calendar day from an individual may be treated as a single request for purposes of calculating costs;
- A City may **not combine** multiple requests from separate individuals who submit requests on behalf of an organization;



28

2017 Legislation

H.B. 3107 – Vexatious Requestors (cont.)

- A City may establish reasonable monthly and yearly limits on the amount of time that personnel are required to spend producing public information for inspection, duplication or providing copies **without recovering its cost** attributable to that personnel time.
 - yearly time limit not less than 36 hours during a 12-month period corresponding to the fiscal year; and
 - monthly time limit not less than 15 hours for a one-month period;

29

2017 Legislation

H.B. 3107 – Vexatious Requestors (cont.)

If a requestor has made previous request that has not been withdrawn and the City has sent a cost estimate statement that **has remained unpaid** on the date the requestor submits a new request, the **City is not required** to locate, compile, produce or provide copies of documents or prepare a cost statement in response to the new request until the date the **requestor pays** each unpaid statement in connection with a previous request **or withdraws** the previous request to which the cost statement applies;

30

2017 Legislation

H.B. 3107 – Vexatious Requestors (cont.)

6) if a City provides a cost statement and the requestor **has exceed the monthly or yearly time limits without recovering costs**, the City is not required to produce public information for inspection or duplication or provide copies to the requestor unless on or before the 10th day after the date the City provided the cost statement, the requestor submits payment or the amount stated in the cost statement provided;

7) if requestor fails or refuses to submit payment under (6), above, **the request is withdrawn**;



31

2017 Legislation

H.B. 3107 – Vexatious Requestors (cont.)

- The rules for vexatious requestors **do not apply** to a requestor if an individual whose substantial livelihood or financial gain is from gathering or publishing news for: (a) dissemination by a new medium or communication service provider, including:
 - (i) an individual who supervises or assists in gathering, preparing, and disseminating the news or information; or
 - (ii) an individual who is a **journalist**, scholar, or researcher employed by an institution of higher education at the time the person made the request for information;

32

2017 Legislation



H.B. 3107 – Vexatious Requestors (cont.)

- If a person complains to the district or county attorney concerning a violation of the PIA and the district or county attorney does not bring action on the complaint on or after 90th day after the complaint was filed, the complainant may file the complaint with the office of the attorney general.

33

Exceptions to Disclosure

Exceptions to Disclosure

552.101 to 552.142 Govt. Code

- Information Confidential by Law
- Personal family information
- Information related to bidding or competition
- Certain Commercial Information
- Audit Working Papers
- Personnel Information
- Certain Legislative Documents
- Certain Legal Document

35

2017 Legislation

- **H.B. 1278 – Public Information:**
 - 1) The home address, home telephone number, emergency contact information, SSN, and family member information of a **current or former city attorney** and current or former employee of a city attorney whose **jurisdiction includes any criminal law or child protective services** matters is confidential and excepted from disclosure under the Public Information Act; and
 - 2) A person described in (1) may choose to keep their home address in appraisal records confidential.

(Effective immediately)

CONFIDENTIAL

36

2017 Legislation



S.B. 256 – Address Confidentiality Program

- 1) Victims of sexual assault, sexual abuse, or stalking are eligible participants in the address confidentiality program administered by the AG. The AG may disclose a participant's true residential, business, or school address **to a law enforcement agency only for the purpose of conducting an investigation;**
- 2) The residence address of an applicant for voter registration is confidential if the applicant, applicant's child, or another person in the applicant's household is a victim of family violence and the applicant provides certain information to the voter registrar; and

37

2017 Legislation

S.B. 256 – Address Confidentiality Program (cont.)

- 3) A participant in the AG's address confidentiality program or an individual who shows that they, their child, or another person in the individual's household is a victim of domestic violence, sexual assault, sexual abuse, stalking, or trafficking could elect to have their home address information be kept confidential **in appraisal records.**

(Effective immediately)

38

2017 Legislation

S.B. 79 – Public Information:

provides that an officer for public information for a governmental body complies with production of public information by referring a requestor to an exact Internet location or URL address on the governmental body's website if the requested information is identifiable and readily available on that website.



39

2017 Legislation



- **H.B. 3237 – Search Warrant Affidavits:**

provides that a search warrant affidavit becomes public information when the search warrant for which the affidavit was presented **is executed**.

(Effective immediately)

40

2017 Legislation

- **H.B.1861–Cybersecurity:**

provides that information directly arising from a City's routine efforts to prevent, detect, investigate, or mitigate a computer security incident, including information contained in or derived from an information **is confidential under the PIA**.



41

2017 Legislation

S.B. 532 – Cybersecurity: in relation to the PIA, that:

- 1) information directly arising from a City's routine efforts to prevent, detect, investigate, or mitigate a computer security incident, including information contained in or derived from an information security log **is confidential**;
- 2) confidentiality provided by (1) does not relieve a City from consumer notification that is required by other law; and
- 3) **each state agency** must prepare and submit to the Texas Department of Information Resources a detailed information technology infrastructure report related to cybersecurity vulnerabilities.

42