NEW DEVELOPMENTS REGARDING THE TEXAS OPEN MEETINGS ACT AND TEXAS PUBLIC INFORMATION ACT

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Present Position:

Partner, *Thomas, Hudson & Nelson L.L.P.*, an Austin firm specializing in local government and corporate representation, including general counsel and litigation. Founded in June, 2001, the firm provides full service litigation and representation to its government and non-governmental clients.

Former Positions:

Of Counsel, *Barney Knight & Associates*, a small Austin-based law firm specializing in representation of local governments statewide, including municipalities, counties and special districts. Legal services ranged from representation as general counsel or city attorney to complex matters involving virtually all areas of local government law, including litigation and representation of local governments before state administrative bodies.

Partner, *Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.* - Austin, Texas. Six-year partner in 45+ attorney Austin-based law firm specializing in representation of local governments throughout Texas in complex legal matters. Practice included positions as General Counsel, City Attorney, and County Attorney Pro-Tem for several municipalities, counties and special districts.

Education:

- University of Texas at Austin (B.B.A. - Finance, 1983)
- University of Texas School of Law (J.D., 1987) Member, Texas Law Forum
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Licensed to Practice:

- United States District Court for the Western District of Texas
- United States District Court for the Southern District of Texas
- United States District Court for the Eastern District of Texas
- United States Court of Appeals for the Fifth Circuit
- The Supreme Court of Texas

Papers & Presentations:

- Strategies for Local Government Seminar – “Pitfalls In The Competitive Bidding Process”
- 9th Annual Local Government Seminar – “Subdivision Regulation In Texas – Clarity or Confusion?”
- 13th Annual Local Government Seminar – “Internet Filtering in Public Libraries – A Legal And Technological Dilemma”
- 12th Annual Suing And Defending Government Entities Course – “New Developments Regarding The Texas Open Meetings Act”
- Texas Leadership Institute – “Intergovernmental Relations”
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I. INTRODUCTION

The Texas Open Meetings Act ("Act"), Ch. 551, Tex. Gov’t Code, provides that all meetings of governmental bodies shall be open to the public unless they come under one of the specific exceptions listed in the Act. Since the Act’s original enactment in 1967, numerous cases and Attorney General opinions have interpreted most of the substantive provisions of the Act, notably the exceptions allowing for closed sessions of the local governing body or agency. At any given time, the press, interested individuals and local governments are involved in civil litigation involving alleged violations of the Act. There have also been several high profile criminal prosecutions under the Act brought by local prosecutors, and in some instances, the Attorney General.

In addition to rulings by the Attorney General regarding the interpretation of various provisions of the Act, the Texas Legislature continues to amend the Act each legislative session. This “legislative tinkering” oftentimes creates a quagmire, whereby previous Attorney General rulings can no longer be relied upon. Therefore, it is best for the local government attorney to see the Act evolving, rather than static.

Fortunately, the Texas Attorney General has compiled a fairly comprehensive resource detailing the provisions of the Act, as well as the reported cases and Attorney General opinions interpreting specific provisions of the Act. The Attorney General’s Open Meetings Handbook is produced in hardcopy form, but also may be downloaded at http://www.oag.state.tx.us/newspubs/publications.html/open. The Attorney General also maintains a fairly detailed question and answer section regarding the Act on his website at http://www.oag.state.tx.us/opinopen/og_faqs.shtml/om a. Again, although the Attorney General periodically updates these resources, it is unwise to rely upon them as a sole source. Rather, the local government attorney should use this resource as a starting place, supplemented by reviewing the relevant cases, recent opinions and legislative changes to ensure the information in the handbook remains accurate.

This section of this paper is intended to provide the local government official with an update of recent substantive amendments to the Act by the 78th Legislature, as well as several of the recent and more important cases and Attorney General opinions interpreting various provisions of the Act. As of the date of this paper, the 78th Legislature had adjourned and several amendments to the Act are awaiting signature by Governor Perry. This paper assumes Governor Perry will sign such measures into law.

In some instances, the 78th Legislature addressed issues where previous opinions were considered to be too restrictive or burdensome on the local government, or in light of new terrorist threats, additional exceptions authorizing executive sessions were promulgated. Attorney General Abbott, similar to his predecessor General Cornyn, is an open government advocate and has taken a hard-line, literal approach to his Office’s interpretation of the Act.

While the Act has been somewhat successful in its attempt to open the business and deliberations of elected officials to the scrutiny of the public, it has simultaneously evolved into a trap for the unwary, sometimes causing significant expense and embarrassment to the local governing body. Again, local government attorneys should stay abreast of changes to the Act, whether by legislative act, or by court rulings and Attorney General interpretations.

II. AMENDMENTS TO THE OPEN MEETINGS ACT BY THE 78TH LEGISLATURE

During the 2003 legislative session, the Texas Legislature considered and debated numerous amendments to the Act, resulting in the passage of several amendments. Highlighted below are those that are most important:

H.B. 9 – HOMELAND SECURITY

Sec. 418.183. DISCLOSURE OF CERTAIN CONFIDENTIAL INFORMATION

(a) This section applies only to information that is confidential under Sections 418.175-418.182 (Texas Government Code).

(b) At any time during a state of disaster, the executive or administrative head of the governmental entity may voluntarily disclose or otherwise make available all or part of the confidential information to another person or another entity if the executive or administrative head believes that the other person or entity has a legitimate need for the information.

(c) The executive or administrative head of a port, port authority, or navigation district created or operating under Section 52, Article III, or Section 59, Article XVI, Texas Constitution, may voluntarily disclose or otherwise make available all or part of the confidential information to another person if the information:
(1) is shared in connection with a security network or committee, including a federal or state security committee or task force;
(2) consists of data, video, or other information on an information-sharing device that is shared with a security network; or
(3) is shared with an emergency operations center.

(d) The disclosure or making available of confidential information by a hospital district to a national accreditation body does not waive or affect the confidentiality of the information.

(e) The disclosure or making available of confidential information under Subsection (b) or (c) does not waive or affect the confidentiality of the information.

(f) A governmental body subject to Chapter 551[0] is not required to conduct an open meeting to deliberate information to which this section applies. Notwithstanding Section 551.103(a), the governmental body must make a tape recording of the proceedings of a closed meeting to deliberate the information.

Comment: H.B. 9 allows a closed meeting of a governmental body to deliberate information: 1) for purposes of preventing, investigating, or responding to an act of terrorism or related criminal activity and involving emergency response providers, their staffing, contact information and tactical plans; 2) that relates to the risk or vulnerability of persons or property, including infrastructure, to an act of terrorism; 3) that relates to the assembly of an explosive weapon, the location of a material that may be used in a chemical, biological or radioactive weapon, or unpublished information pertaining to vaccines or devices to detect biological agents or toxins; 4) that relates to details of the encryption codes or security keys for a public communication system; 5) that relates to a terrorism-related report to an agency of the United States; 6) that relates to technical details of particular vulnerabilities of critical infrastructure to an act of terrorism; and 7) that relates to information regarding security measures or security systems intended to protect public and private property from an act of terrorism.

H.B. 1088 – MUNICIPAL DISCUSSION OF SALES TAX REPORTS TO COMPTROLLER

Subsection (i):

“Notwithstanding Chapter 551, Government Code, the governing body of a municipality is not required to confer with one or more employees or a third party in an open meeting to receive information or question the employees or third party regarding the information received by the municipality under this section.”

Comment: H.B. 1088 authorizes a City Council of a city of less than 275,000 persons to confer with its employees or third parties outside of an open meeting to receive information or ask questions regarding local sales taxes paid by entities of over $25,000.

H.B. 1226 - PERSONALLY IDENTIFIABLE INFORMATION ABOUT PUBLIC SCHOOL STUDENT

SECTION 1. Subchapter D, Chapter 551, Government Code, is amended by adding Section 551.0821 to read as follows:

Sec. 551.0821. SCHOOL BOARD: PERSONALLY IDENTIFIABLE INFORMATION ABOUT PUBLIC SCHOOL STUDENT.

(a) This chapter does not require a school board to conduct an open meeting to deliberate a matter regarding a public school student if personally identifiable information about the student will necessarily be revealed by the deliberation.

(b) Directory information about a public school student is considered to be personally identifiable information about the student for purposes of Subsection (a) only if a parent or guardian of the student, or the student if the student has attained 18 years of age, has informed the school board, the school district, or a school in the school district that the directory information should not be released without prior consent. In this subsection, “directory information” has the meaning assigned by the federal Family Educational Rights and Privacy Act of 1974 (20 U.S.C. Section 1232g), as amended.

(c) Subsection (a) does not apply if an open meeting about the matter is requested in writing by a parent or guardian of the student or by the student if the student has attained 18 years of age.

Comment: H.B. 1226 creates an additional exception allowing a closed meeting or deliberation of a matter regarding a public school student if the deliberation involves personally identifiable information about the student. The parent may request an open meeting on such matters if the student is 18 years of age or older.
H.B. 1512 – LOCAL MEETINGS TO DISCUSS EMERGENCY MANAGEMENT PLANS REGARDING PIPELINE SAFETY

SECTION 1. Section 418.106, Government Code, is amended by adding Subsections (d) and (e) to read as follows:

(d) Each local or interjurisdictional agency shall conduct at least one public meeting each calendar year to exchange information about its emergency management plan. Each agency shall provide written notice of the date, time, and location of the meeting, not later than the fifth day before the meeting, to the pipeline safety section of the gas services division of the Railroad Commission of Texas.

(e) An emergency management plan of an agency is excepted from the requirements of Subsection (d) if:

(1) the emergency management plan contains sensitive information relating to critical infrastructures or facilities; and

(2) the safety or security of those infrastructures or facilities could be jeopardized by disclosure of the emergency management plan.

Comment: H.B. 1512 allows for closed meetings of local entities to discuss emergency management plans involving pipeline safety and/or security of pipeline infrastructures or facilities.

H.B. 2004 – MEETINGS OF COMMISSIONERS COURT IN COUNTIES OF 400,000 OR MORE REGARDING CONTRACTS UNDER NEGOTIATION

Sec. 551.0725. COMMISSIONERS COURTS: DELIBERATION REGARDING CONTRACT BEING NEGOTIATED; CLOSED MEETING.

(a) The commissioners court of a county with a population of 400,000 or more may conduct a closed meeting to deliberate business and financial issues relating to a contract being negotiated if, before conducting the closed meeting:

(1) the commissioners court votes unanimously that deliberation in an open meeting would have a detrimental effect on the position of the commissioners court in negotiations with a third person; and

(2) the attorney advising the commissioners court issues a written determination that deliberation in an open meeting would have a detrimental effect on the position of the commissioners court in negotiations with a third person.

(b) Notwithstanding Section 551.103(a), Government Code, the commissioners court must make a tape recording of the proceedings of a closed meeting to deliberate the information.

Comment: Urban counties were able to obtain an exception to discuss contracts under negotiation if there is a determination in advance by the Commissioners Court and the advising attorney (generally County Attorney) that the deliberation, if held in public, would have a detrimental effect on the County’s position in such negotiations.

S.B. 121 – EXEMPTION FOR HEALTH MAINTENANCE ORGANIZATIONS CREATED UNDER SECTION 281.0515 OF THE HEALTH & SAFETY CODE REGARDING DELIBERATIONS REGARDING PRICING OF SERVICES OR PRODUCT LINES, OR INFORMATION REGARDING A PROPOSED NEW SERVICE

Sec. 551.085. GOVERNING BOARD OF CERTAIN PROVIDERS OF HEALTH CARE SERVICES.

(a) This chapter does not require the governing board of a municipal hospital, municipal hospital authority, hospital district created under general or special law, or nonprofit health maintenance organization created under Section 534.101, Health and Safety Code, to conduct an open meeting to deliberate:

(1) pricing or financial planning information relating to a bid or negotiation for the arrangement or provision of services or product lines to another person if disclosure of the information would give advantage to competitors of the hospital, hospital district, or nonprofit health maintenance organization; or

(2) information relating to a proposed new service or product line of the hospital, hospital district, or nonprofit health maintenance organization before publicly announcing the service or product line.

(b) The governing board of a health maintenance organization created under Section 281.0515, Health and Safety Code, that is subject to this chapter is not required to conduct an open meeting.
to deliberate information described by Subsection (a).

Comment: The amendment in subsection (b) is self-explanatory.

S.B. 984 DELIBERATIONS BY COMMITTEE OF SELF-FUNDED HEALTH PLAN REGARDING MEDICAL RECORDS OF INDIVIDUALS

SECTION 1. Subchapter D, Chapter 551, Government Code, is amended by adding Section 551.0785 to read as follows:

Sec. 551.0785. DELIBERATIONS INVOLVING MEDICAL OR PSYCHIATRIC RECORDS OF INDIVIDUALS. This chapter does not require a benefits appeals committee for a public self-funded health plan or a governmental body that administers a public insurance, health, or retirement plan to conduct an open meeting to deliberate:

(1) the medical records or psychiatric records of an individual applicant for a benefit from the plan; or

(2) a matter that includes a consideration of information in the medical or psychiatric records of an individual applicant for a benefit from the plan.

Comment: SB 984 confirms the privacy of an individual’s medical information during discussions of an appeals committee for a public self-funded health plan.

III. RECENT TEXAS CASES OF INTEREST INVOLVING THE OPEN MEETINGS ACT

Hays County Water Planning Partnership v. Hays County, Texas, No. 03-02-00475-CV, 2003 Tex. App. LEXIS 3965 (May 8, 2003). This decision is the latest in a long-running legal battle between a citizens’ group and the Commissioners Court regarding the development of a regional transportation plan for Hays County. In this instance, the citizens’ group alleged open meetings violations against the Commissioners Court after it was discovered that the transportation plan that was delivered to the regional planning authority had been altered from that approved by the Commissioners Court. It was determined that a single commissioner made the alterations to the transportation plan as a result of confusion as to what the Commissioners Court had actually approved. The Austin court of Appeals correctly held that the actions of a single commissioner in altering the transportation plan did not constitute a violation of the Open Meetings Act.

Animal Connection of Tex. v. Univ. of Tex. Southwestern Med. Ctr. at Dallas, No. 05-01-01371-CV, Court of Appeals, Fifth District, Dallas, 2002 Tex. App. LEXIS 4638, (June 28, 2002, pet. denied). A non-profit animal protection corporation sued the U.T. Dallas Medical Center seeking admission into the meetings of its medical research committee. The University urged that the committee was a "medical committee" under Tex. Health & Safety Code Ann. § 161.032 which, at the time the suit was filed, was excepted from the provisions of TOMA. The appellate court agreed with the university and the trial court. The statutory language was unambiguous and excluded medical committees from the requirements of TOMA.

Friends of Canyon Lake v. Guadalupe-Blanco River Auth., 96 S.W.3d 519 (Tex. App. – Austin 2002, pet. denied). A non-profit corporation filed a declaratory challenge to the River Authority’s issuance of bonds for a water project, challenging among other things, the sufficiency of the public notice for a meeting of the River Authority’s board of directors. The Austin Court of Appeals noted that the notice published by the River Authority, although not explicitly detailed, was sufficient satisfy “the Act's "core purposes" because it informed a reader as a member of the interested public of the topics to be addressed at the board meeting. While it could have provided more, the detail in the notice was adequate to hold that the Authority did not violate the Act.”

City of San Angelo, Texas and Menard County Water Control and Improvement District No. 1 v. Texas Natural Resource Conservation Commission, 92 S.W. 3d 624 (Tex. App. – Austin 2002, no writ). The City of San Angelo and the Menard County Water Control and Improvement District No. 1 sued the TNRCC on the basis that the notice of a meeting in which the TNRCC took action did not specify that the TNRCC would take such action. The notice simply listed that the TNRCC would consider certain legal issues posed by the parties. The City contended that the TNRCC posting used the term “consideration” and that this was not sufficient to apprise the public that the agency would take action on the matter. The Austin Court of Appeals held that the term “consideration” was sufficient to put the public on notice that the TNRCC might take action on the matter. The Court held that the TNRCC did not have to list all of the potential outcomes from its “consideration” of a matter, but that such could include action. Arguments were also made that the public notice was too broad, and not as specific as certain notices mailed by the agency; however, the Court held that the public notice was sufficient to put the public on notice of the broad topics to be addressed at the meeting.
IV. RECENT ATTORNEY GENERAL OPINIONS OF INTEREST INVOLVING THE OPEN MEETINGS ACT

Tex. Att’y Gen. Op. No. GA – 0019 (2003). The Interagency Council on Pharmaceuticals Bulk Purchasing, a council created by the Legislature in 2001, is subject to the Open Meetings Act due to the fact that it is a committee within the executive branch of the government. It is directed by at least five members appointed by the administrative head of at least five agencies. Further, the Committee cannot meet in executive session to discuss drug pricing, as there are no applicable exceptions under the Act to all for a closed meeting for discussion of such matters. Even though such information would be protected from disclosure under the Texas Public Information Act, the Public Information Act does not create additional exceptions under the Open Meetings Act.

Tex. Att’y Gen. Op. No. JC – 506 (2002). The Smith County Auditor was permitted to attend an executive session with the Commissioners Court in which it heard from its attorney on a pending litigation matter, including a discussion of settlement options. The Attorney General, relying on previous opinions, determined that the commissioners court may include the county auditor in a closed discussion of litigation or settlement offers if it determines that the auditor is necessary to the discussion, that the auditor's interests are not adverse to the county's, and that the auditor's presence is consistent with the attorney-client privilege. If, however, a court subsequently finds that, because of the auditor's presence, the communications are not privileged, then the commissioners court may also be found to have violated section 551.071 of the Government Code. A governmental body has limited discretion as to the attendance of nonmembers to an executive session; generally, it is required that the person's interests are aligned with the governmental body's and that the person's presence in the executive session is necessary to the matter that will be considered. In the case of a closed deliberation under 551.071 with the governing body's attorney, the Attorney General stated that with respect to including a nonmember such as the county auditor in a meeting closed to discuss pending litigation or a settlement offer, a commissioners court must consider three things: (1) whether the auditor's interests are adverse to the county's; (2) whether the county auditor's presence is necessary to the issues to be discussed; and (3) whether the court effectively may waive the attorney-client privilege by including the nonmember. Each of these three considerations requires the resolution of fact questions and cannot be determined in the opinion process.

Tex. Att’y Gen. Op. No. JC – 487 (2002). The Board of Regents of the University of Texas System may not hold a public meeting in Mexico under the Texas Open Meetings Act. The Attorney General had previously concluded in Attorney General Opinion JC-0053, that the Act presupposes that a meeting is physically accessible to the public. See Tex. Att'y Gen. Op. No. JC-0053 (1999). Specifically, section 551.002 of the Government Code, which provides that “every meeting of a governmental body must be open to the public except as provided elsewhere in the Act,” see Tex. Gov't Code Ann. § 551.002 (Vernon 1994), requires that a meeting of a Texas state or local governmental body must be physically accessible to the public. The Attorney General’s construction of the statute was based on a number of provisions of the Act that contemplate that meetings are and must be physically accessible to the public. Although no provision of the Act mandates where meetings must be held or expressly prohibits a governmental body from holding a meeting at an inaccessible location, the Act's provisions assume that meetings will be held in locations accessible to the public. A meeting held in an inaccessible location would violate the Act. Whether a meeting location is accessible to the public for purposes of the Open Meetings Act is ultimately a question of fact. The Attorney General concluded that a meeting of the Board of Regents in Mexico would not be physically accessible to the public.

Tex. Att’y Gen. Op. No. JC – 411 (2001). The Attorney General opined that the Board of Trustees of the Risk Pool for the El Paso County Health Benefits Program could not meet in executive session to consider a complaint against the third party administrator for the program. Section 551.074 authorizes a governmental body to meet in executive session to deliberate about a public officer or employee, but it does not authorize closed deliberations about other agents of a governmental body, such as an independent contractor. See Bd. of Trs. v. Cox Enters., Inc., 679 S.W.2d 86, 90-91 (Tex. App.--Texarkana 1984), rev’d in part on other grounds, 706 S.W.2d 956 (Tex. 1986); Tex. Att'y Gen. Op. No. MW-129 (1980) at 2. See also Tex. Att'y Gen. Op. No. DM-149 (1992) The third party administrator was neither an officer nor an employee of the Risk Pool. Nor was the third party administrator an officer of the Risk Pool as he did not exercise any sovereign function.

V. AMENDMENTS TO THE OPEN MEETINGS ACT BY THE 78TH LEGISLATURE

H.B. 13 – MAKING ARREST WARRANTS AND AFFIDAVITS MADE IN CONNECTION WITH ARREST WARRANTS PUBLIC INFORMATION Article 15.26, Code of Criminal Procedure, is amended to read as follows:
Art. 15.26. AUTHORITY TO ARREST MUST BE MADE KNOWN. In executing a warrant of arrest, it shall always be made known to the accused under what authority the arrest is made. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, provided the warrant was issued under the provisions of this Code, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of arrest he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Comment: This revision to art. 15.26 of the Code of Criminal Procedure makes it clear that arrest warrants and supporting affidavits are public information. Prior to this amendment, it was not uncommon for the prosecuting attorneys to seek to protect such information during the pendency of the related criminal matter. A number of legal theories were used by prosecutors seeking to delay the release of this information. This amendment provides the public with immediate access to such information following the execution of the warrant.

H.B. 149 – CONFIDENTIALITY OF TEXAS NO CALL LIST

Sec. 552.141. EXCEPTION: TEXAS NO-CALL LIST. The Texas no-call list created under Subchapter C, Chapter 43, Business & Commerce Code, as added by Chapter 1429, Acts of the 77th Legislature, Regular Session, 2001, is excepted from the requirements of Section 552.021.

Comment: The 78th Legislature clarified that the Texas No-Call List is not public information.

H.B. 298 – RELATING TO THE PROHIBITION OF THE DISCLOSURE OF PERSONAL INFORMATION BY THE PARKS AND WILDLIFE DEPARTMENT

Section 11.030, Parks and Wildlife Code, is amended by amending Subsections (a) and (c) and adding Subsection (c-1) to read as follows:

(a) The name, address, e-mail address, telephone number, social security number, driver's license number, bank account number, credit card number, or charge card number of a person who purchases customer products, licenses, or services from the department may not be disclosed except as authorized under this section or Section 12.0251.

(c-1) The policies adopted by the commission under Subsection (c) must prohibit the sale of a mailing list that contains any customer information described by Subsection (a) that relates to a person who does not hold a commercial license issued by the department. Notwithstanding Subsection (d), the policies adopted by the commission may not be construed to restrict access to customer information described by Subsection (a) by a person who is entitled to receive the information under this section or other applicable law. In this subsection and Subsection (d), "mailing list" means one or more items of customer information described by Subsection (a) relating to more than one person.

Comment: This amendment protects personal information of individuals purchasing licenses from the Parks & Wildlife Department from having such information subject to public disclosure.

H.B. 500 – CONFIDENTIALITY OF INFORMATION SUBMITTED IN APPLICATIONS FOR AD VALOREM TAX EXEMPTIONS

Sec. 11.48. CONFIDENTIAL INFORMATION. (a) A driver's license number, personal identification certificate number, or social security account number provided in an application for an exemption filed with a chief appraiser is confidential and not open to public inspection. The information may not be disclosed to anyone other than an employee of the appraisal office who appraises property, except as authorized by Subsection (b).

(b) Information made confidential by this section may be disclosed:

(1) in a judicial or administrative proceeding pursuant to a lawful subpoena;
(2) to the person who filed the application or to the person's representative authorized in writing to receive the information;
(3) to the comptroller and the comptroller's employees authorized by the comptroller in
writing to receive the information or to an assessor or a chief appraiser if requested in writing:

(4) in a judicial or administrative proceeding relating to property taxation to which the person who filed the application is a party; or

(5) if and to the extent the information is required to be included in a public document or record that the appraisal office is required by law to prepare or maintain.

(c) A person who legally has access to an application for an exemption or who legally obtains the information from the application made confidential by this section commits an offense if the person knowingly:

(1) permits inspection of the confidential information by a person not authorized by Subsection (b) to inspect the information; or

(2) discloses the confidential information to a person not authorized by Subsection (b) to receive the information.

(d) An offense under Subsection (c) is a Class B misdemeanor.

Comment: This amendment to the Tax Code protects personal information submitted in an application to the chief appraiser for ad valorem tax exemptions. Selected disclosure of such information is allowed in judicial proceeding and in other limited circumstances.

H.B. 545 – MILITARY DISCHARGE RECORDS IN THE POSSESSION OF A GOVERNMENTAL BODY

SECTION 1. Subchapter C, Chapter 552, Government Code, is amended by adding Section 552.140 to read as follows:

Sec. 552.140. MILITARY DISCHARGE RECORDS.

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

(b) The record is confidential for the 75 years following the date it is recorded with or otherwise first comes into the possession of a governmental body. During that period the governmental body may permit inspection or copying of the record or disclose information contained in the record only in accordance with this section or in accordance with a court order.

(c) On request and the presentation of proper identification, the following persons may inspect the military discharge record or obtain from the governmental body free of charge a copy or certified copy of the record:

(1) the veteran who is the subject of the record;

(2) the legal guardian of the veteran;

(3) the spouse or a child or parent of the veteran or, if there is no living spouse, child, or parent, the nearest living relative of the veteran;

(4) the personal representative of the estate of the veteran;

(5) the person named by the veteran, or by a person described by Subdivision (2), (3), or (4), in an appropriate power of attorney executed in accordance with Section 490, Chapter XII, Texas Probate Code; or

(6) another governmental body.

(d) A court that orders the release of information under this section shall limit the further disclosure of the information and the purposes for which the information may be used.

(e) A governmental body that obtains information from the record shall limit the governmental body's use and disclosure of the information to the purpose for which the information was obtained.

Comment: This section is a new addition to Chapter 552 and prohibits the release of military discharge records except in very limited circumstances.

H.B. 1027 – CONFIDENTIALITY OF CRIME VICTIM INFORMATION

(f) An employee of a governmental body who is also a crime victim under Subchapter B, Chapter 56, Code of Criminal Procedure, regardless of whether the employee has filed an application for compensation under that subchapter, may elect whether to allow public access to information held by the attorney general's office or other governmental body that would identify or tend to identify the crime victim, including a photograph or other visual representation of the victim. An election under this subsection must be made in writing on a form developed by the governmental body, be signed by the employee, and be filed with the governmental body before the third anniversary of the latest to occur of one of the following: (1) the date the crime was committed;
(2) the date employment begins; or (3) the date the governmental body develops the form and provides it to employees. If the employee fails to make an election, the identifying information is excepted from disclosure until the third anniversary of the date the crime was committed. In case of disability, impairment, or other incapacity of the employee, the election may be made by the guardian of the employee or former employee.

Comment: This amendment to 552.132 provides governmental employees who are also crime victims an election of whether to allow public access held by the governmental body or the Attorney General’s office that would identify the employee victim.

H. B. 1863 – VOTER REGISTRATION INFORMATION

SECTION 2. Section 13.004, Election Code, is amended by adding Subsection (c) to read as follows:

(c) A social security number, Texas driver's license number, or number of a personal identification card issued by the Department of Public Safety furnished on a registration application is confidential and does not constitute public information for purposes of Chapter 552, Government Code. The registrar shall ensure that a social security number, Texas driver's license number, or number of a personal identification card issued by the Department of Public Safety is excluded from disclosure.

Comment: This amendment to the Election Code protects social security numbers, driver’s license numbers, or identification numbers on voter registration applications from disclosure. The voter registrar is charged with the responsibility for protecting such information from disclosure.

H. B. 2032 – CONFIDENTIALITY OF PERSONAL EMAIL ADDRESSES

SECTION 1. Section 552.137, Government Code, is amended to read as follows:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) Except as otherwise provided by this section, an [An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor’s agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an email address for any reason to another governmental body or to a federal agency.

SECTION 2. Section 552.352, Government Code, is amended by adding Subsections (a-1) and (a-2) to read as follows:

(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.

(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
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capacity is considered to be an officer or employee of the governmental body.

Comment: The amendments to section 552.137 of the Act provide for limited instances wherein a person’s email address is not protected from disclosure, for example, when the email address is on the person’s letterhead or other printed document made available to the public, or when the person has a contractual relationship with the local government.

H.B. 2455 – RELATING TO RECORDS OF GOVERNMENTAL ENTITIES UNDER SUNSET REVIEW

SECTION 7.01. CONFIDENTIALITY. Chapter 325, Government Code, is amended by adding Section 325.0195 to read as follows:

Sec. 325.0195. RECORDS PROTECTED FROM DISCLOSURE.

(a) A working paper, including all documentary or other information, prepared or maintained by the commission staff in performing its duties under this chapter or other law to conduct an evaluation and prepare a report is excepted from the public disclosure requirements of Section 552.021.

(b) A record held by another entity that is considered to be confidential by law and that the commission receives in connection with the performance of the commission’s functions under this chapter or another law remains confidential and is excepted from the public disclosure requirements of Section 552.021.

Comment: This amendment protects from disclosure the working papers maintained by the Sunset Commission staff in performing sunset review of state agencies. It also protects information that is confidential by law that is shared with the Sunset Commission in connection with its official functions.

H.B. 2819 – HOME ADDRESS INFORMATION HELD BY APPRAISAL DISTRICTS

SECTION 1. Section 25.025(a), Tax Code, is amended to read as follows:

(a) This section applies only to:

1. a peace officer [officers] as defined by Article 2.12, Code of Criminal Procedure;
2. a county jailer [jailers] as defined by Section 1701.001, Occupations Code;
3. an employee [employees] of the Texas Department of Criminal Justice; and
4. a commissioned security officer [officers] as defined by Section 1702.002, Occupations Code; and
5. a victim of family violence as defined by Section 71.004, Family Code, if as a result of the act of family violence against the victim, the actor is convicted of a felony or a Class A misdemeanor.

Comment: The amendment protects from disclosure by appraisal districts of the home address of certain victims of family violence, if the perpetrator is convicted.

S.B. 84 – PROMPT PRODUCTION OF PUBLIC INFORMATION

SECTION 1. Subsection (a), Section 552.221, Government Code, is amended to read as follows:

(a) An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer. In this subsection, "promptly" means as soon as possible under the circumstances, that is, within a reasonable time, without delay.

Comment: The amendment clarifies existing authority that public information must be produced “promptly” that is as soon as possible under the circumstances, without delay.

S.B. 174 – CERTAIN INFORMATION SUBMITTED FOR A MARRIAGE LICENSE

SECTION 1. Subchapter C, Chapter 552, Government Code, is amended by adding Section 552.141 to read as follows:

Sec. 552.141. CONFIDENTIALITY OF INFORMATION IN APPLICATION FOR MARRIAGE LICENSE.

(a) Information that relates to the social security number of an individual that is maintained by a county clerk and that is on an application for a marriage license, including information in an application on behalf of an absent applicant and the affidavit of an absent applicant, or is on a document submitted with an application for a marriage license is confidential and may not be disclosed by the county clerk to the public under this chapter.

(b) If the county clerk receives a request to make information in a marriage license application available under this chapter, the county clerk shall...
redact the portion of the application that contains an individual’s social security number and release the remainder of the information in the application.

SECTION 2. Section 552.141, Government Code, as added by this Act, applies only to an application for a marriage license that is filed on or after September 1, 2003.

Comment: This is one of many amendments intended to protect the confidentiality of social security numbers, in this instance on marriage licenses and license applications.

S.B. 653 – REGARDING CHARGES FOR PUBLIC RECORDS

[Intentionally omitted due to length]

Comment: S.B. 653 makes certain clarifications and non-substantive amendments to the provisions of the Act regarding charges for duplication of public records.

S.B. 919 – REGARDING TYPES OF MAIL SERVICE USED UNDER PUBLIC INFORMATION ACT.

Sec. 552.308. TIMELINESS OF ACTION BY UNITED STATES MAIL, [OR] INTERAGENCY MAIL, OR COMMON OR CONTRACT CARRIER.

SECTION 2. Subsection (a), Section 552.308, Government Code, is amended to read as follows:

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the requirement is met in a timely fashion if the document is sent to the person by first class United States mail or common or contract carrier properly addressed with postage or handling charges prepaid and:

(1) it bears a post office cancellation mark or a receipt mark of a common or contract carrier indicating a time within that period; or

(2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail or with a common or contract carrier within that period.

Comment: The amendments allow for governmental bodies to use other contract mail carriers as an alternative to the United States mail.

S.B. 1015 – INFORMATION REGARDING CRIME VICTIMS

Sec. 552.1325. CRIME VICTIM IMPACT STATEMENT: CERTAIN INFORMATION CONFIDENTIAL.

(a) In this section:

(1) "Crime victim" means a person who is a victim as defined by Article 56.32, Code of Criminal Procedure.

(2) "Victim impact statement" means a victim impact statement under Article 56.03, Code of Criminal Procedure.

(b) The following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential:

(1) the name, social security number, address, and telephone number of a crime victim; and

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

Comment: This amendment protects identifying information contained in a victim impact statement regarding crime victims.

S.B. 1147 – WORKING PAPERS OF STATE OFFICE OF ADMINISTRATIVE HEARINGS

SECTION 1. Subchapter C, Chapter 552, Government Code, is amended by adding Section 552.141 to read as follows:

Sec. 552.141. EXCEPTION: WORKING PAPERS OF ADMINISTRATIVE LAW JUDGES AT STATE OFFICE OF ADMINISTRATIVE HEARINGS. The following working papers of an administrative law judge at the State Office of Administrative Hearings are excepted from the requirements of Section 552.021:

(1) notes recording the observations, thoughts, or impressions of an administrative law judge;

(2) drafts of a proposal for decision;

(3) drafts of orders made in connection with conducting contested case hearings; and

(4) drafts of orders made in connection with conducting alternative dispute resolution procedures.

Comment: New section 552.141 protects certain internal documents and working papers of the
Administrative Law Judges at the State Office of Administrative Hearings.

S.B. 1581 — AUDIT WORKING PAPERS OF COUNTY AUDITOR OR MUNICIPAL AUDITOR

SECTION 1. Subsection (a), Section 552.116, Government Code, is amended to read as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an [se] institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

Comment: Section 552.116 of the Act has been amended to except from public disclosure the working papers of an audit conducted by a county or municipal auditor.

VI. RECENT TEXAS CASES OF INTEREST UNDER THE PUBLIC INFORMATION ACT

Lisson v. Univ. of Tex. Inv. Mgmt. Co., NO. 03-02-00465-CV, COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN, 2003 Tex. App. LEXIS 4610, May 30, 2003. UTIMCO provided investment services for the State University System. The petitioner requested information from the Company in 1997 regarding certain investments made by the Company for the Board of Regents. The Attorney General issued a letter opinion on September 30, 1997, stating that the Company could withhold the information. A copy of the opinion was sent to the petitioner, but the petitioner did not file his suit until March 18, 2002. The Austin Court of Appeals upheld the trial court’s dismissal of the case due to the running of the four-year limitations period under Tex. Civ. Prac. & Rem. Code §16.051. The Court noted that the Act does not contain a limitations period, therefore the four year limitations period prescribed by §16.051 applies.

City of Fort Worth v. Cornyn, 86 S.W.3d 320 (Tex. App. – Austin, 2002 no writ). In interviewing a prospective applicant for the City’s police force, the City of Fort Worth conducted a background investigation and administered tests to the applicant. The City notified the applicant of its decision not to hire him as a police officer. Thereafter, the prospective officer submitted an open records request to the City asking for copies of documents or information to determine the basis for the City’s determination. The city believed that the information was exempt from disclosure. The Austin Court of Appeals concluded that the Texas Public Information Act did not authorize the withholding of information from the public, except as expressly provided. Tex. Gov’t Code Ann. § 552.108(b)(1) (Supp. 2002) did not exempt from disclosure to the prospective officer the requested background and reference information obtained from third parties.

Abbott v. City of Corpus Christi, NO. 03-02-00785-CV, COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN, 2003 Tex. App. LEXIS 4600, May 30, 2003. In a declaratory judgment action, the City obtained a summary judgment against the Attorney General keeping confidential certain investigation files regarding complaints against police officers and police office misconduct. The City contended that the investigation files had been transferred into a civil service commission file and that certain portions of this information were protected under Loc. Gov’t. Code § 143.089(g). The Austin Court of Appeals overruled the trial court, stating that when an investigation is made into an officer's misconduct, all investigatory materials—including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity—must be placed in the subsection (a) file (Loc. Gov’t. § 143.089) if the misconduct results in disciplinary action and that such files are subject to disclosure under the Act.

Heidenheimer v. Tex. DOT, NO. 03-02-00187-CV, COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN, 2003 Tex. App. LEXIS 279, January 16, 2003, writ denied. An individual requested that the Department of Transportation release the parcel numbers of land the Department intended to buy for certain road projects as well as the names and addresses of the owners of those parcels. The trial court denied the individual’s request for a writ of mandamus on the basis that the information was within an exception to disclosure under the Act, namely Tex. Gov’t Code Ann. § 552.105(2). The individual argued that once the project was announced, the only information that could be withheld from public disclosure is the purchase price and/or appraisal of the property. The Court of Appeals held that the release of the location of property to be purchased and the names and addresses of the owners could affect the purchase price of those properties by altering the owners' negotiating stance and strategy. Therefore, the requested information related to the purchase price and was within the exception to the Open Records Act. Tex. Gov’t Code Ann. § 552.105(2).

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was to review adverse determinations of medical necessity in insurance matters). The particular information sought was information regarding the applicants’ applications for certification as IRO’s. The IROs’ sought protection from disclosure of their application materials. Specifically the IROs’ sought protection of the description of their personnel and credentialing, and the completed profile for each physician and provider. In addition, the IROs’ sought protection of certain commercial and/or financial information. The Court of Appeals denied such requests in both instance, holding the the names of the physicians serving on the IRO panels were not protected, nor did the IROs’ submit evidence showing they would be harmed from a release of their commercial and/or financial information.

VII. RECENT ATTORNEY GENERAL DECISIONS OF INTEREST INVOLVING THE PUBLIC INFORMATION ACT

Tex. Att’y Gen. ORD – 678 (2003). The issue presented in this Open Records Decision was whether personal information of a police officer could be disclosed on a voter registration list submitted to the Secretary of State, when the police officer had signed a form indicating he did not want the local governmental body to release such information. Section 552.1175 of the Act authorizes peace officers to make an election as to whether they desire certain personal information to be disclosed to the public. The Attorney General ruled that the request to withhold such information must be honored by the local voter registrar, but is not binding on the Secretary of State unless a separate notice is furnished by the officer to the Secretary of State. In such instance, section 552.1175 conflicts with section 18.066(a) of the Election Code, but since section 552.1175 was enacted after section 18.066(a), pursuant to the rules of statutory construction section 552.1175 prevails, and the voter registration list maintained by the Secretary of State must be redacted to omit the restricted personal information.

Tex. Att’y Gen. ORD – 677 (2002) - The Attorney General reconsidered the scope of information excepted from disclosure under the Public Information Act as work product in light of the repeal of Texas Rule of Civil Procedure 166(b) and the adoption of Rule 192.5. The Attorney General ruled that attorney-work product, under Rule 192.5 constituting “core work product” is perpetually confidential; however “other work product” that may be discoverable under Rule 192.5 and subject to 552.022 of the Act is generally not protected from disclosure under the Act.

VIII. SUMMARY

The legal principles under the Open Meetings Act and Public Information Act are subject to continuous refinement by the legislature, the courts and the Attorney General. As reflected by the above authorities, it is incumbent that the local government attorney stay abreast of the ever-changing nature of these Acts, acting with prudence as unaddressed issues arise. Fortunately, there exists a fairly substantial body of reported court and Attorney General decisions interpreting both Acts. Also, the handbooks and publications from the Attorney General’s Office are helpful. The penalties for violations of the Acts are not insignificant, and can be a trap for the unwary. Proceed with caution.