

# Municipal Law 101

Texas City Management Association  
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Effective Local Government Series

Presented by: Zindia Thomas, Clarissa M.  
Rodriguez and Charles E. Zech



Zindia Thomas

## **PUBLIC INFORMATION ACT AND ETHICS**



# Public Information Act

## Government Code Chap. 552



"I'm quite certain I'm not going to be able to produce that document."



## Definition of Public Information

### Gov. Code § 552.002

- means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
  - (1) by a governmental body;
  - (2) for a governmental body and the governmental body:
    - (A) owns the information;
    - (B) has a right of access to the information; or
    - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
  - (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.
- Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.
- The definition of "public information" provided by Subsection (a) 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.





- **Form of Public Information**

- Information recorded in any form is subject to the PIA.
  - Gov't Code § 552.002 (b) & (c)



### **Governmental Body Defined Gov't Code § 552.003**

Encompasses all public entities supported in whole or in part by public funds. Including:

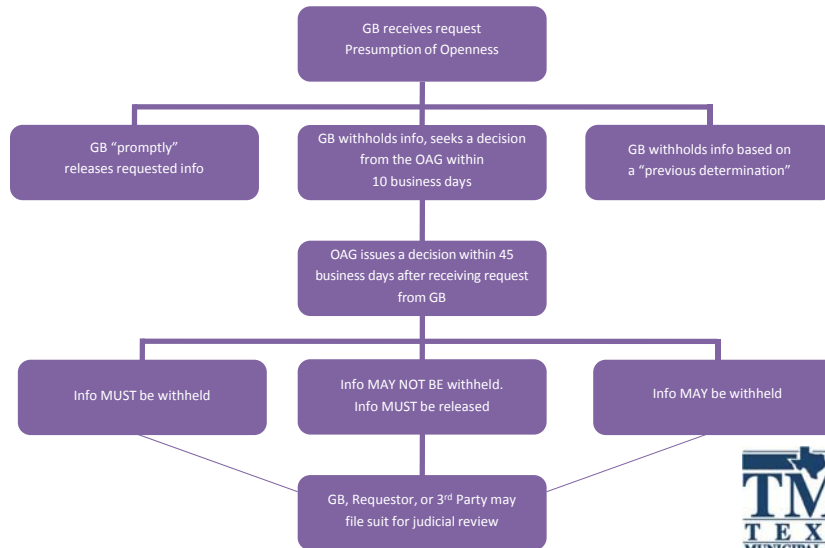
- ❖ State agencies county commissioners court
- ❖ City councils
- ❖ School district board of trustees
- ❖ Governing bodies of Special district (i.e. municipal utility districts, public utility districts)
- ❖ Local workforce development boards

- ❖ **Does not include the Judiciary**

- ❖ Gov't Code § 552.0035
- ❖ Other organizations that do not meet the definition are subject to the PIA because their enabling statute makes them subject to the PIA.



## Basic Process for Governmental Bodies



## Question

According to the Public Information Act (PIA), what triggers the PIA?

- A. Verbal Request
- B. Written Request
- C. Verbal or Written Request
- D. Verbal and Written Request



## ANSWER

### B. Written Request



- ✓ Only Written Request trigger the PIA.
- ✓ Any Written Request triggers the PIA.
- ✓ PIA does not require that the public direct its written request to any specific employee or officer, *except for E-mail request or Faxed request.*
- ✓ E-mail or Faxed Request: GBs can designate a particular email address or fax number. Gov't Code § 552.301(c)



- ✓ CANNOT ask why, but can ask request to clarify or narrow their request.
- ✓ **If releasing information**, must do so *“promptly, depending on the circumstances with in a reasonable time”*, but by the 10<sup>th</sup> business day you have to inform the requestor about their request.
- ✓ **If withholding information**, must request ruling from OAG within 10 business days.



## Withholding Information

### By the 10<sup>th</sup> business day:

1. Request an open records ruling (ORR) from Open Records Division (ORD) of the Attorney General's office stating which exceptions apply to the requested information.
2. Notify the requestor the GB is asking for an ORR.
3. Provide copy of ORR request to the requestor.
4. Make a good faith attempt to notify any affected 3<sup>rd</sup> parties concerning the request.

### By the 15<sup>th</sup> business day:

1. Submit brief explaining how the claim exceptions apply.
2. Submit a copy of the written request for information.
3. Submit a signed statement or evidence sufficient to establish the date the request was received.
4. Submit copies of the documents requested or a representative sample labeled to show which documents or part of the documents are subject to the claimed exceptions.
5. Provide the requestor with a copy of your brief.



## Common Exceptions

- 552.101 Information Confidential by Law
- 552.103 Information Related to Litigation
- 552.107 Certain Legal Matters (Attorney-Client Privilege)
- 552.108 Certain Law Enforcement Records
- 552.111 Agency Memoranda (Attorney Work Product)
- 552.117 Confidentiality of Certain Employee Information
- 552.130 Confidentiality of Certain Motor Vehicle Records
- 552.137 Confidentiality of Certain E-Mail Addresses
- 552.147 Social Security Numbers



## Cost

1 Tex. Admin. Code § § 70.1 – 70.12

**Pages (Standard):** 10¢ per page

**Personnel Cost:** \$15 per hour (only if more than 50 pgs)

**Overhead Cost:** 20% of Personnel cost (only if more than 50 pgs)

**Postage/Shipping:** any related postal or shipping expenses which are necessary.



## Civil Penalties

- **Declaratory Judgment / Injunctive Relief:**  
Gov't Code § 552.3215
- **Writ of Mandamus:**  
Gov't Code § 552.321



## Criminal Penalties

- **Destruction, Removal, or Alteration of Public Information:**  
Gov't Code § 552.351
- **Failure/Refusal of Officer for Public Information to Provide Access to or Copy of Public Information:**  
Gov't Code 552.353
- **Distribution/Misuse of Confidential Information:**  
Gov't Code § 552.352(a)



## Open Government Training

### Gov't Code § 552.012

- **One-hour minimum requirement:** must have a minimum of one hour of PIA training, but no more than two hours
- **Compliance deadlines:** Officials who are elected or appointed have 90 days within which to complete the required training.
- **Who must obtain the training?** The statute requires the top elected and appointed officials from governmental bodies subject to the PIA to complete a PIA training course.
- Additionally, designated public information coordinators are required to complete a PIA training course.



## Ethics

- **Nepotism** – Government Code Chapter 573
- **Conflict of Interest**
  - Local Government Code Chapter 171
  - Local Government Code Chapter 176





## What is Nepotism?

Gov. Code § 573.041

Prohibits a *public official* from:

- Appointing,
- Confirming the appointment of, OR
- Voting on the appointment of

a *close relative* of certain public officials to a *paid public position or employment*



## Nepotism: Government Code Chapter 573

### Which Public Officials Does Nepotism Apply To?

- Public official who has final hiring authority or member of the governing body that has final hiring authority.
- Final Hiring Authority means the individual or entity that has control over hiring decisions.

Gov. Code § 573.001(3)



## Nepotism: Government Code Chapter 573

### Who is Considered a Close Relative?

Close relative is a relative who is either in the:

#### 1st, 2<sup>nd</sup> or 3<sup>rd</sup> degree of Consanguinity (blood)

- **1<sup>st</sup> degree:** mother, father, son, daughter
- **2<sup>nd</sup> degree:** brothers, sisters, grandparents, grandchildren
- **3<sup>rd</sup> degree:** aunts, uncles, nieces, nephews

*Adopted children and half brothers/sisters are considered full blooded under consanguinity.*

*Step brothers/sisters are not.*

#### 1<sup>st</sup> or 2<sup>nd</sup> degree of Affinity (marriage)

- **1<sup>st</sup> degree:** wife, husband, stepchildren, son-in-law, daughter-in-law
- **2<sup>nd</sup> degree:** brother-in-law, sister-in-law, spouse's grandparents, spouse's grandchildren



## Nepotism: Government Code Chapter 573

### What Happens if a Public Official has a Nepotism Conflict?

Neither the public official nor the other members of the governing body can hire the close relative, unless a specific statutory exception applies.

Gov. Code § 573.041



## Nepotism: Government Code Chapter 573

### Are there Exceptions?

There are a few exceptions, but the most common ones are:

- **Prior Continuous Employment Exception:** Gov. Code § 573.062
  - Employee may continue employment if the employee has been continuously employed (uninterrupted) for a **sufficient time period immediately prior** to the appointment or election of the close relative.
    - *30 days* if public official is appointed
    - *Six months* if public official is elected in an election other than the general county and state election
    - *One year* if public official is elected in the general county and state election
- **Cities under 200:** Gov. Code § 573.061 (7)
  - Nepotism prohibitions do not apply to cities with a population less than 200.



## What is Conflict of Interest in Local Government Code Chapter 171?

Prohibits *local public officials* from:

- Discussing,
- Deciding, OR
- Voting on

Issues that the local public official has a *Substantial Interest in a Business Entity or Real Property*.

Two Part Test:

1. Substantial Interest Analysis
2. Special Economic Effect



## Nepotism: Government Code Chapter 573

### Consequences for Violating The Nepotism Law

- Public official commits official misconduct
- Fine not less than \$100 nor more than \$1000
- Public official can be removed from office if convicted and the conviction is final
- Employment contract is void

Gov. Code §§ 573.081 – 573.084



## Conflict of Interest: Local Gov. Code Chapter 171

### Substantial Interest in a Business Entity

#### Two Part Test

Local Gov. Code § 171.004(a)(1)

#### 1. Substantial Interest Analysis

Local Gov. Code § 171.002(a) & (c)

A person has a substantial interest in a business entity if the person has:

- Stock Interest: owns 10% or more of the total voting stock or shares
- Other Ownership Interest: owns either 10% or more, or \$15,000 or more, of the fair market value of the business entity
- Income Interest: received more than 10% of his/her gross income from the previous year from the business entity
- Close Relative w/any of the above interests: close relative within the 1<sup>st</sup> degree of consanguinity (blood) or affinity (marriage)

**Business Entity** means sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust or any other entity recognized by law. Gov. 171.001(2)

#### 2. Special Economic Effect Analysis

Determine whether the action the local governmental body is considering would have a special economic effect on the business entity that is distinguishable from its general effect on the public



## Conflict of Interest: Local Gov. Code Chapter 171

### Substantial Interest in Real Property Two Part Test

Local Gov. Code § 171.004(a)(2)

1. Substantial Interest Analysis

Local Gov. Code § 171.002(b) & (c)

A person has a substantial interest in real property if the person has:

- \$2,500 Ownership Interest: a legal or equitable interest in real property worth \$2,500 or more
- Close Relative w/ \$2,500 Ownership Interest: close relative within the 1<sup>st</sup> degree of consanguinity (blood) or affinity (marriage)

2. Special Economic Effect Analysis

Determine whether the action the local governmental body is considering would have a special economic effect on the value of the property that is distinguishable from its general effect on the public



## Conflict of Interest: Local Gov. Code Chapter 171

### Consequences for Violating Conflict of Interest Law

Local Gov. Code § 171.003

1. **Civil:** Action taken is voidable

2. **Criminal:** Four situations in which a public official may be prosecuted for action or inaction that is a *Class A misdemeanor punishable by a fine not to exceed \$4,000 and/or up to one year in jail:*

- a. Failure to file an affidavit
- b. Participating in discussion regarding an item when there is a conflict
- c. Serving as surety for a business entity that has work, business, or a contract with the governmental body
- d. Serving as surety on any official bond required for an official of a governmental body

3. **Possible Removal from office**



## What is Conflict of Interest in in Local Government Code Chapter 176?

- Requires a vendor or a local government officer of a local governmental entity to disclose certain business relationships.
- Fill out:
  - Local Government Officer: Conflicts Disclosure Statement
  - Vendor: Conflict of Interest Questionnaires

Local Gov. Code § 176.003

Local Gov. Code § 176.006



## Conflict of Interest: Local Gov. Code Chapter 176

### What Triggers Chapter 176?

Three things:

1. A **LGO** (or LGO's close family member\*) has an **employment or business relationship** with a vendor resulting in taxable income that is more than **\$2,500** in the preceding twelve months before becoming aware that person was/is vendor. [\*A person within the first degree by blood or marriage.]
2. A **LGO** (or LGO's close family member\*) accepts from a vendor in the preceding twelve months one or more **gifts** (including transportation, lodging, and entertainment) that have an aggregate value of more than **\$100**. [\*A person related to another person within the first degree by blood or marriage.]
3. A **LGO** has a **family relationship\* with a vendor**. [\*A person within the third degree by blood or second degree by marriage.]



**Conflict of Interest: Local Gov. Code Chapter 176**

**Possible Offenses for Knowingly Failing to file  
the Statement or the Questionnaire**

Local Gov. Code § 176.013(c)

1. Class C misdemeanor if the contract amount is less than \$1 million or if there is no contract amount for the contract;
2. Class B misdemeanor if the contract amount is at least \$1 million but less than \$5 million; or
3. Class A misdemeanor if the contract amount is less than \$5 million.



**Conflict of Interest: Local Gov. Code Chapter 171**

**What Does Local Public Official Do if He/She  
has a Conflict of Interest?**

Local Gov. Code § 171.004(a) & (b)

1. File an Affidavit stating the nature and extent of the official's interest with the governmental body's record keeper;
2. Abstain from discussion or other proceedings regarding the item; and
3. Abstain from voting on the item.



Clarissa M. Rodriguez

## PERSONNEL MATTERS

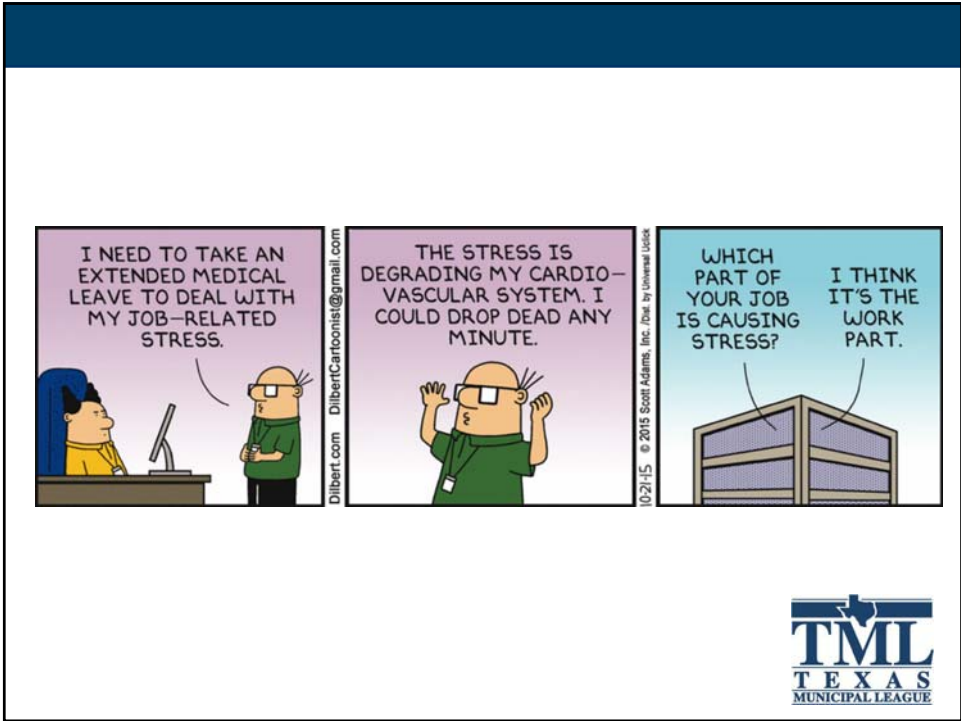


## Employment Law Hot Topics









## ADA Title II – Accommodations in Facilities



## Background Check Updates



## Drug Testing



Charles E. Zech

## TEXAS OPEN MEETINGS ACT AND PROCUREMENT



## Open Meetings Act Government Code Chap. 551



## What is a Meeting?

### Definition #1

#### Gov. Code § 551.001(4)(A)

- A deliberation
- Between a quorum of a governmental body, or between a quorum of a governmental body and another person,
- During which public business or public policy over which the governmental body has supervision or control
- Is discussed or considered or during which the governmental body takes formal action

### Definition #2

#### Gov. Code § 551.001(4)(B)

- A gathering
- That is conducted by the governmental body or for which the governmental body is responsible;
- A quorum of members of the governmental body is present;
- Called by the governmental body; AND
- Members of the governmental body:
  - Receive information from
  - Give information to
  - Ask questions of, OR
  - Receive questions from a third party (this includes staff)
- About public business or public policy which the governmental body has supervision or control



## Notice Requirements

- The Act requires **written notice** of the **date, hour, place, and subject** of each meeting – **both** open meetings **and** executive sessions
  - **Specificity:** The notice must be **sufficient to apprise the general public** of the subject matter to be discussed – legal sufficiency depends on and can vary based on the facts.
  - **Accessibility:** A governmental body must post its notice in a place that is **“readily accessible to the general public for all times for at least 72 hours”** before the meeting is scheduled to start (e.g., bulletin board/kiosk outside of city hall or on the door of city hall)
- **Internet posting:** Cities are now **required** to post notice on the city’s Internet Web site
  - when a city **posts notice on its Internet Web site**, the physical notice has to be readily accessible to general public **only during normal business hours** instead of at “all times.”



## Executive Sessions

- A few general exceptions to requirement that meetings be open:
  - Real Property Deliberations
  - Personnel Matters
  - Economic Development
  - Consultation with Attorney
  - Homeland Security Measures



## Recordkeeping

- A governmental body must ***prepare and keep minutes*** of a meeting ***or a recording*** of each open meeting.
  - The minutes must:
    - State the subject of each deliberation; and
    - Indicate each vote, order, decision, or other action taken.
- A governmental body must keep a ***certified agenda*** or a ***recording*** of the closed meeting.
  - The certified agenda must include a ***statement of the subject of each deliberation*** and a ***record of any further action taken***.
  - The certified agenda or recording is ***confidential*** and may not be released absent court action.



## Procurement



- Traditional Procurement
- Alternative Methods
- Professional Services
- Financial Considerations



## Traditional Municipal Procurement

- **Chapter 252 bid requirements**
  - Before a municipality may enter into a contract that requires an expenditure of more than \$50,000.00 the municipality must:
    - Competitively bid;
    - Use the reverse auction procedure (2155.62 Government Code); or
    - Comply with Texas Government Code Chapter 2269



## Traditional Municipal Procurement

- **Charter provisions**
  - Home Rule Charter controls in case of a conflict with Chapter 252.
- **Local Ordinances**
  - Always review locally adopted ordinances for more restrictive processes.



## Traditional Municipal Procurement

- **§ 252.043 (d) – Must use lowest responsible bidder for construction of:**
  - highways, roads, streets, bridges, utilities, water, wastewater facilities, airport runways, drainage projects and certain other civil engineering related projects.
- **§ 252.043 (e) – Contracts for construction of facilities (defined by Texas Government Code § 2269.001) must be awarded to lowest responsible bidder or pursuant to Texas Government Code Chapter 2269.**





## Traditional Municipal Procurement

- Exemptions - § 252.022
  - Public Calamity
  - Preserve or Protect the Public Health or Safety
  - Unforeseen damage to public machinery, equipment, or other property
  - Work that is performed and paid for by the day as the work progresses
  - Purchase of land or a right of way
  - Items available from only one source
  - Rare books, papers and library materials



## Alternative Delivery Systems

- “Best Value” Procurement for Goods/Services
  - Awarding a competitive at the bid amount offering the best value to the city according to weighted selection criteria established by the city - § 252.043(a) – (c)
    - Factors which can be considered:
      - The purchase price
      - Reputation of the vendor and it's goods or services
      - Quality of the vendor's goods and service
      - Extent to which the goods and services meet government's needs
      - Past relationships with the governmental entity
      - Any other relevant factor specifically listed in the request for bids or proposals.



## Alternative Delivery Systems

- **Texas Government Code Chapter 2269 Alternative Construction Procurement**
  - Generally Applicable to All public entities
  - Evolved over the last few sessions
    - Gradually expanded
    - Some differences between horizontal (civil) and vertical projects
    - Differences based on population



## Ch. 2269 Delivery Methods

- **Competitive Bidding – Lowest Responsible Bidder**
  - Limited ability to negotiate
  - Similar to standard low bid procurement
- **Competitive Sealed Proposals**
- **Construction Manager Agent**
- **Construction Manager At-Risk**
- **Design-Build**



## Competitive Bidding

- For construction, alteration, rehabilitation, or repair of a facility by awarding to the lowest responsible bidder
  - Facility means improvement to real property
  - Does not specify civil or horizontal



## Competitive Sealed Proposals

- Owner requests proposals, ranks offerors, negotiates as prescribed, and contracts for construction of facility
- Design/Bid/Build
- Must have A/E prepare construction documents



## Competitive Sealed Proposals

- Request for Proposal must include:
  - construction documents
  - selection criteria and the weighted value for each criterion
  - estimated budget
  - project scope
  - estimated project completion date
  - and other information



## Construction Manager - Agent

- Construction Consultancy
- CM-Agent cannot build the Project
- CM-Agent serves as Agent for Owner
  - Oversees design process with A/E
  - Facilitates budgeting
- May not also serve as the designer unless hired for both under two separate procurements
- Represents Owner in fiduciary capacity



## Construction Manager At-Risk

- CMAR provides both consulting and construction services to an owner
- Works as consultant during design phase
  - Helps with material selections
  - Estimating
  - Scheduling



## Design-Build

- Owner contracts with one team to perform both design and construction
- Can provide efficiencies to schedule and delivery of final project
- Consolidates contracting process in the event of claims by owner
- Can provide cost savings if performed well



## Procurement Process for D/B

- Vertical structures
  - Follow Subchapter G
  - No limitation on number of projects that can be procured using D/B
  - Process is similar to CMAR
- Horizontal projects
  - Follow Subchapter H
  - Limitations on number of projects
  - Selection process differs from vertical & CMAR



## Professional Services

- **Professional Services Procurement Act**
  - Provides that professional services contracts be awarded on the basis of demonstrated competence and qualifications and for a fair and reasonable price.
  - City must first select the most highly qualified provider and then attempt to negotiate a contract
    - Accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, or professional nursing



## Professional Services

- **Engineers Act requirements**
  - **City may not construct a public work involving engineering in which the public health, welfare, or safety is involved, unless:**
    - The engineering plans, specifications, and estimates have been prepared by an engineer; and
    - The engineering construction is to be performed under the direct supervision of an engineer



## Professional Services

- **Architects Act requirements**
  - **Registered Architects must prepare the architectural plans and specifications for:**
    - a new building that is to be constructed and owned by a public entity if the building will be used for education, assembly, or office occupancy and the construction costs exceed \$100,000; or
    - any alteration or addition to an existing building that is owned by a public entity if costs of the alteration or addition exceed \$50,000, and requires the removal, relocation, or addition of any walls or partitions or the alteration or addition of an exit.



## Financial Considerations

- **Payment/Performance bonds**
  - **A city entering into a public works contract must require the contractor, before beginning the work, to:**
    - execute a payment bond to the city if the contract is in excess of \$50,000 in order to protect subcontractors and suppliers providing goods or services to the prime contractor.
    - execute a performance bond to the city if the contract is in excess of \$100,000. In order to protect the interests of the city by ensuring the contractor's faithful performance of his obligations under the contract.



## Questions?

- TML Legal Department
  - [legalinfo@tml.org](mailto:legalinfo@tml.org)
  - (512) 231-7400
- [www.tml.org](http://www.tml.org)
- Charles E. Zech
  - [charles.zech@rampage-sa.com](mailto:charles.zech@rampage-sa.com)
  - (210) 227-3243
- Clarissa M. Rodriguez
  - [clarissa.rodriguez@rampage-sa.com](mailto:clarissa.rodriguez@rampage-sa.com)
  - (210) 227-3243

