

# City of McKinney Boards and Commissions Training

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# Objective

It is the City of McKinney's stated policy to make training on open government procedures and expectations for ethical conduct available to all Board and Commission members on an annual basis.

# Objective

To prepare you for service on a City of McKinney Board or Commission, by giving you:

- an overview of the City policies and state laws (TOMA and PIA) that govern conduct and promote open government;
- an understanding of how these laws and policies differ from standard practices in the private sector; and
- to satisfy State law requirements on open government topics.

# Topics

1. City of McKinney Board and Commission Appointment
2. Conflicts of Interest /Disclosure
3. Nepotism
4. Texas Open Meetings Act \*
5. Texas Public Information Act \*
6. Other Ethical and Legal Considerations



**\* State required topics**



# TOPIC 1:

## City of McKinney Board and Commission Appointment Process



# City of McKinney

## Policy on Board and Commission Member Appointment and Eligibility

- Governed by City policy adopted by City Council and last amended August 28, 2017;
- Purpose: “to offer citizens an extraordinary opportunity to participate in the City’s governmental affairs and influence public policy in many areas;”
- Boards and Commissions address a wide range of subjects including planning and zoning, transportation, parks, libraries, buildings and economic development;
- Boards and commissions provide “an invaluable service to the City” and address many topics that eventually come before the City Council.



# City of McKinney

## Policy on Board and Commission Member Appointment and Eligibility

### Eligibility

- **Must have a current City application on file;** (valid for one year) No lapsed application will be considered after the third Friday in June of each year. (III.a)
- **Must be a qualified voter,** registered to vote in the City of McKinney unless Board authorizing ordinance provides exception; then must be a qualified voter in the precinct of residency; (III.b)
- **Must continuously reside in the City of McKinney;** unless authorizing ordinance provides exception. (III.b)
- Term Limits: **Three consecutive full terms;** (III.g)
- Annual Review: **Board member performance is reviewed annually** and appointments and removals may be made based on reviews. (III.c)



# City of McKinney

## Policy on Board and Commission Member Appointment and Eligibility

### Attendance Requirements

- Members must attend 75% of board or commission meetings to be eligible for continuation of term or re-appointment. (III.e,k)
- City Council may remove any board or commission member with or without cause, including failure to attend 75% of board or commission meetings. (III.k)





# City of McKinney

## Policy on Board and Commission Member Appointment and Eligibility

### Board/Commission Member Practices

- Must make annual disclosures of any vendor relationship with the City (TEXAS LOC. GOV'T CODE Chapter 176);
- Shall not participate or vote on a matter involving any entity on whose board the appointee serves or who employs appointee;
- Cannot appear before any board or commission on behalf of a business, client, or other private or public interests, except for an appearance concerning a business or property owned in whole or part by the member. (IV.(a)-(c)).



# City of McKinney

## Policy on Board and Commission Member Appointment and Eligibility

### Board/Commission Member Practices

- Appointee is prohibited from contracting with or doing business with any board or commission during term; and
- Members shall not use board title/position in public forum, either written or oral. Purpose: to avoid confusion regarding the attribution of the member's statements to the City. Remedy: upon notice of violation, CM shall place an item on next available City Council agenda for consideration of removal of member. (Section IV(d)-(e)).



TOPIC 2:  
**Conflicts of Interest and  
Disclosure**  
(TEX. LOC. GOV'T CODE Chapter 171)

# 1. What conflict of interest laws apply to elected Texas city officials?

- The general conflict of interest law for Texas city officials is found in Chapter 171 of the TEXAS LOCAL GOVERNMENT CODE.
- This law establishes the standard for determining when a city official has a conflict of interest that would affect his or her ability to discuss or vote on a particular item.
- Chapter 171 conflict of interest provisions apply to all local public officials. Within a city, “local public officials” are defined to include:
  - 1) elected city officials such as the members of the city council (whether paid or unpaid); and
  - 2) appointed city officials (paid or unpaid) who exercise responsibilities that are more than advisory in nature.

## 2. The Texas conflict of interest statute addresses two types of conflicts:

- Business Entity Conflicts: conflicts due to a city official's substantial interest in a "business entity" that has an issue before the city; or
- Real Property Conflicts: conflicts due to a city official's substantial interest in "real property" that would be affected by a city action.
- If an item is being considered by a city official that does not involve a business entity or real property, then chapter 171 conflict of interest laws would not be applicable.

### 3. What is considered a “substantial interest” in a business entity?

- **Stock Interest**: official owns 10 percent or more of the total voting stock .
- **Other Ownership Interest**: official owns 10 percent or more or \$15,000 or more of the fair market value of the business entity.
- **Income Interest**: official received 10 percent or more of her gross income for the previous year.
- **Close Family Member with any of the Above Interests**: If a close relative of the city official has any of the above types of interest in a business entity. Close relatives are those persons within the first degree by consanguinity (blood) or within the first degree by affinity (marriage).

# 4. What is considered a “substantial interest” in real property?

- A person has a substantial interest in real property if he has:
  - A \$2,500 Ownership Interest in the Real Property: If the official has a \$2,500 or more legal or equitable interest in real property that would be affected by the city action.
  - A Close Family Member with a \$2,500 Ownership Interest in the Real Property: Close relatives are those persons within the first degree by consanguinity (blood) or within the first degree by affinity (marriage).



## 5. Conflict of Interests: Relatives

Is there a conflict of interest if a city official's close relative has a substantial interest in a business entity or in real property that is before the city council?

Yes, a city official is considered to have the same interest in a business entity or in a piece of real property that his close relatives have in that business entity or real property. In this context, close relatives of a city council member would include persons who are related to the city official within the first degree by consanguinity (blood) or within the first degree by affinity (marriage).

**Father**

**Mother**

**Sons**

**Daughters**

**Spouse**

**Father-in-law**

**Mother-in-law**

**Son-in-law**

**Daughter-in-law**

**Stepsons**

**Stepdaughters**



## 6. What should an official do if a Chapter 171 Conflict of Interest exists?

If a city official has a conflict of interest he or she must take three (3) actions:

- 1) File an Affidavit
- 2) Abstain from Discussion on the Item
- 3) Abstain from Voting on the Item



## 7. May a city official deliberate about an issue for which he has a conflict of interest if he abstains from voting on the issue?

**No.** A city official may not discuss an issue for which he has a conflict of interest even if he abstains from voting on the item. If a conflict of interest exists, the city official must file the required affidavit, and both abstain from discussing the matter and abstain from voting on the item.



# 8. Penalties for Conflict of Interest

## Violations under Chapter 171

### § 171.003. PROHIBITED ACTS; PENALTY

- (a) A local public official commits an offense if the official knowingly:
- (1) violates Section 171.004;
  - (2) acts as surety for a business entity that has work, business, or a contract with the governmental entity; or
  - (3) acts as surety on any official bond required of an officer of the governmental entity.
- (b) An offense under this section is a Class A misdemeanor. (Up to \$4,000 fine and 1 year in jail)

# Disclosure of Certain Relationships

(TEX. LOC. GOV'T CODE Chapter 176)

# TEX. LOC. GOV'T CODE Chapter 176

- HB 914 (effective June 18, 2005) added chapter 176 to the Local Government Code.
- Legislators sought an Attorney General Ruling regarding the statute. This led to Attorney General Ruling GA-0446 (2006) (issued August 2, 2006).
- HB 1491 (effective May 25, 2007) amended various problematic provisions of the statute.
- **HB 23 (effective September 1, 2015 made further changes.**
- Applies to City Council, City Manager, P&Z, BOA, Type A, Type B, and boards and commissions appointed by the Mayor or City Council. § 176.001(3).



# TEX. LOC. GOV'T CODE Chapter 176

- Requires a “local governmental officer” to file a conflicts disclosure statement with respect to a vendor if the vendor enters into a contract with the City; or the City is considering entering into a contract with the vendor; and the vendor has an employment or other business relationship with the “local governmental officer” or a family member of the “local governmental officer” which:
  - Results in the City official or family member receiving **taxable income**, other than investment income, that exceeds **\$2,500** during the applicable 12-month period; or

# TEX. LOC. GOV'T CODE Chapter 176

- Results in the City official or family member receiving one or more gifts that have an aggregate value of more than \$100 during the applicable 12-month period. § 176.003 (lowered from \$250 on 9/1/15)(gift = benefit, including food, lodging, transportation, and entertainment).
- Not required to file conflicts disclosure statement in relation to a gift accepted by the officer or family member if the gift is: (1) given by a family member; (2) a political contribution; or (3) food, lodging, transportation, or entertainment accepted as a guest. § 176.003(a-1).
- (H.B. 23 changes eff. Sept. 1, 2015)

# TEX. LOC. GOV'T CODE Chapter 176

Q: What close family members does this apply to?

A: Applies to those related within the first degree by consanguinity or affinity for reception of gifts.

(§176.001(2)).

- Includes: father, mother, son, daughter, husband, wife, spouse's son, spouse's daughter, son-in-law, daughter-in-law, father-in-law, and mother-in-law.



# When must the conflicts disclosure statement be filed?

- A local government officer shall file the conflicts disclosure statement with the City Secretary not later than 5 p.m. on the seventh (7<sup>th</sup>) business day after the date on which the officer becomes aware of the facts that require the filing of the statement. (§ 176.003(b)).
- A local government officer commits an offense if the officer knowingly violates this section. An offense under this subsection can be a **Class C misdemeanor to a Class A misdemeanor**, depending on contract size.
- It is an exception to the application of Subsection (c) that the person filed the required conflicts disclosure statement not later than the seventh business day after the date the person received notice from the City of the alleged violation. (§ 176.003(d)).



TOPIC 3:  
Nepotism  
(TEX. LOC. GOV'T CODE Chapter 573)

# 1. What is nepotism?

- Nepotism refers to the prohibition against a governmental entity hiring certain “close relatives” of a public official to paid positions.
- The nepotism statute prohibits a city official from appointing, confirming the appointment, or voting on the appointment of a “close relative” to a paid public position.
- This provision is applicable if the individual is related to the city official within a prohibited degree of consanguinity (relationship by blood) or a prohibited degree of affinity (relationship by marriage).

## 2. What types of city officials are subject to the nepotism law?

The nepotism statute applies to any city official who is the “final hiring authority” or is a member of the governing body that has final hiring authority.

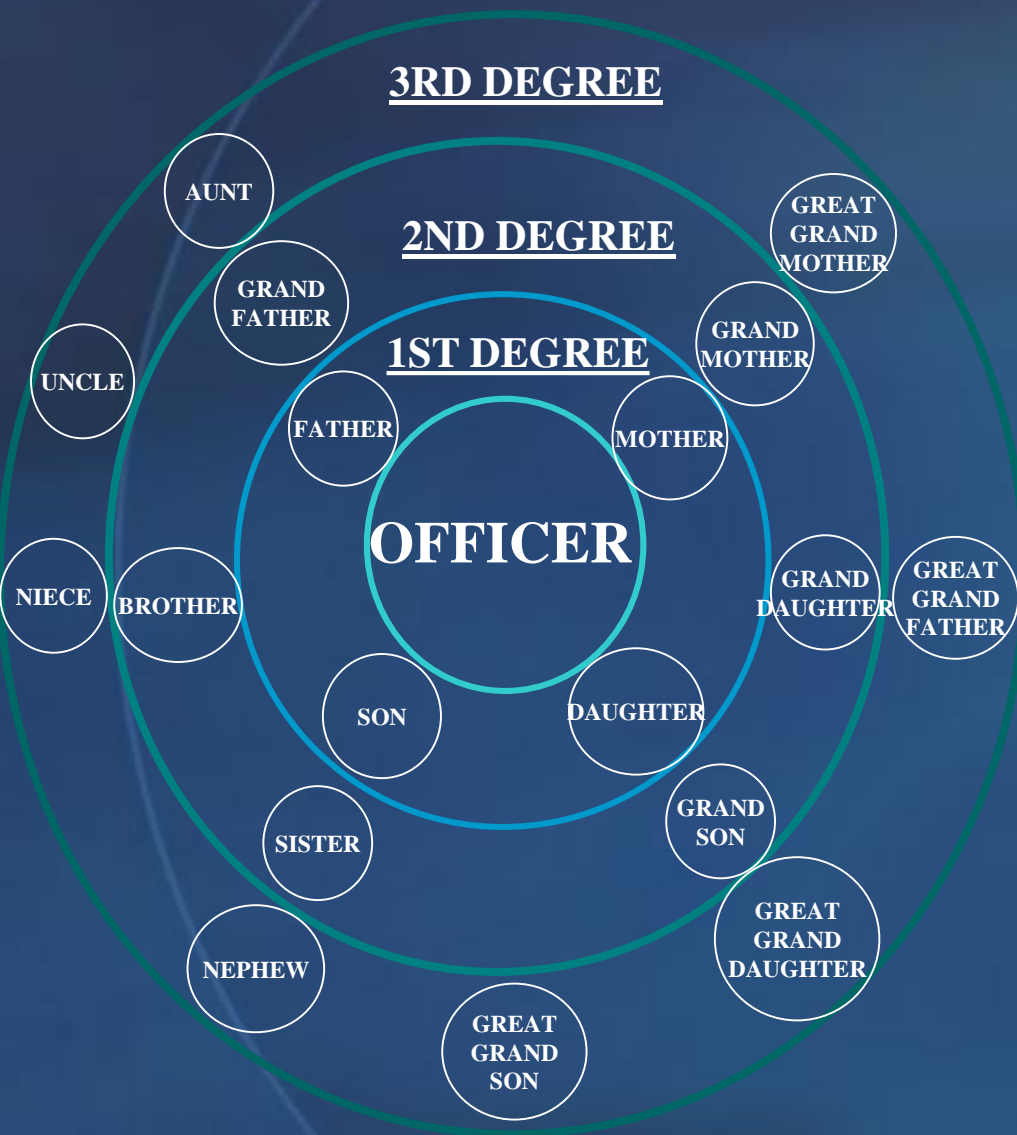
### 3. What relatives of a city official are covered by the nepotism limitations for relationships by “blood” (consanguinity)?

- A city official may not vote on the appointment of an individual who is related to a city official within the first, second, or third degree by consanguinity (relationships by “blood”).
- 1st degree - mother, father, sons, and daughters.
- 2nd degree - brothers, sisters, grandmothers, grandfathers, grandsons, and granddaughters.
- 3rd degree - great grandfathers, great grandmothers, aunts, uncles, nephews, nieces, great grandsons, and great granddaughters.

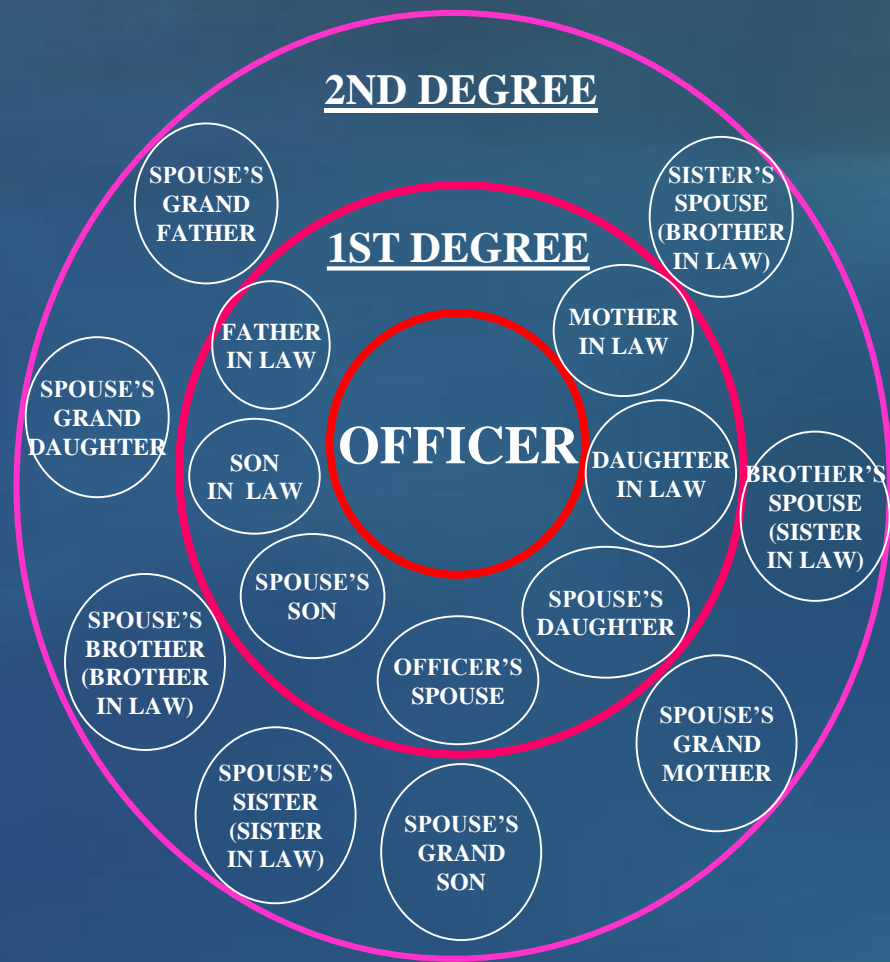
## 4. What relatives of a city official are covered by the nepotism limitations for relationships by marriage (affinity)?

- A city official is prohibited from voting on the appointment of an individual who is related to the official within the first or second degree by marriage (affinity).
- First degree by affinity - public official's husband, wife, father-in-law, mother-in-law, sons-in-law, daughters-in-law, step son, and step daughter.
- Second degree by affinity - official's sisters-in-law, brothers-in-law, spouse's grandmothers, spouse's grandfathers, spouse's granddaughters, spouse's grandsons, spouse's brothers (brothers-in-law), and spouse's sisters (sisters-in-law).

# Consanguinity Kinship Chart (Relationship by Blood)



# Affinity Kinship Chart (Relationship by Marriage)



5. Can other members of a governing body vote to hire a person who is a close relative of a city official if the city official with the nepotism conflict abstains from deliberating and/or voting?

- **No.** Other members of the governing body may not vote to hire a person who is a close relative of a city official.
- This is different from the conflicts of interest statute.



## 6. What are the consequences of breaking the Nepotism Law?

- This is a criminal matter, and is a misdemeanor punishable by a fine not less than \$100 or more than \$1,000.





TOPIC 4:  
The Texas Open Meetings  
Act  
(TEX. GOV'T CODE Chapter 551)

# Texas Open Meetings Act

Passed because: “citizens are entitled . . . not only to know what government decides but to observe how and why every decision is reached.”

*Acker v. Tex. Water Comm'n*,  
790 S.W.2d 299, 300 (Tex. 1990)

# 1. When Does the Open Meetings Act Generally Apply?

- A quorum is present **and** discusses public business.
- Applies to city councils, city boards and commissions and Type A/B Corporation (formerly Section 4A or 4B corporations).
- Does not apply to purely social gatherings, attendance of public officials at conferences or training, ceremonial events, or press conferences, **as long as public business is not discussed!**
- S.B. 1440 (eff. 9/1/2017): Does not apply to a candidate forum, appearance, or debate to inform the electorate.



## 2. What is a “quorum”?

- “Quorum” means “a majority of a governmental body, unless defined differently by applicable law or rule or the charter of the governmental body.” TEX. GOV’T CODE § 551.001(6).
- A quorum must be present to convene a meeting.

# What is a “quorum”?

- **City Council**– 4 members. City of McKinney Home Rule Charter, § 23.
- **Planning and Zoning Commission** – 4 of the 7 members. City of McKinney Home Rule Charter, § 151.
- **Zoning Board of Adjustment** – 5 members required to hear all cases. TEX. LOC. GOV'T CODE § 211.008(d); (each case must be heard by 75% of the members).
- **MEDC** – 4 of the 7 member board. TEX. LOC. GOV'T CODE § 504.053. (majority is quorum).
- **MCDC** – 4 of the 7 member board. TEX. LOC. GOV'T CODE § 505.054. (majority is quorum).

### 3. What is a “meeting”?

- TEX. GOV'T CODE § 551.001(4) – definition of “meeting”
  - 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 act;

OR

# What is a “meeting”?

- a gathering:
  - conducted by the governmental body or for which the governmental body is responsible;
  - a quorum of members is present;
  - called by the governmental body; and
  - members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about public business or public policy over which the governmental body has supervision or control.



# What is a “meeting”?

- The term does not include the gathering of a quorum of a governmental body at
  - a social function unrelated to the public business that is conducted by the body,
  - the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference,
  - **But only if** formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, or press conference.
- The term includes a session of a governmental body, but does not include a candidate forum.

# What is a “meeting”?

(recent changes in legislation)

- TEX. GOV'T CODE § 551.127 allows a governmental body to meet by videoconferencing, with strict procedural requirements depending on circumstances:
  - (1) when a “quorum” is present at a physical location; and
  - (2) when a “quorum” is not present at a physical location .

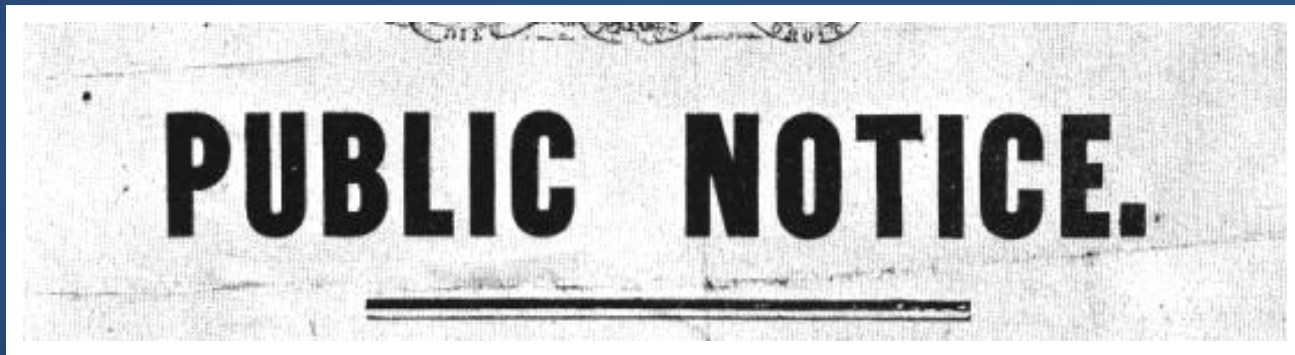
## 4. Where can a meeting be held?

- A meeting must be held in a location accessible to the general public.
  - *See, Op. Tex. Att’y Gen. No. JC-0487 (2002) (University of Texas System Board of Regents could not hold a meeting in Mexico).*
- Type A and Type B corporations must conduct their meetings within the City limits pursuant to the Development Corporation Act.
  - TEX. LOC. GOV’T CODE, §§ 504.054 and 505.055

## 5. How long before a meeting must an agenda be posted?

“The notice of a meeting of a governmental body must be posted in a place readily accessible to the general public at all times for *at least 72 hours before the scheduled time of the meeting. . . .*”

--TEX. GOV'T CODE § 551.043



## 6. Where must an agenda be posted?

“A municipal governmental body shall post notice of each meeting on a bulletin board at a place convenient to the public in the city hall.”

-- TEX. GOV'T CODE § 551.050



## 7. Must an agenda be posted on the City's website?

- TEX. GOV'T CODE § 551.056
- Applies to the City or economic development corporation that maintains a website (or for whom website is maintained).
- In addition to posting at City Hall an entity must also concurrently post notice of a meeting on the entity's website.

# Must an agenda be posted on the City's website?

- In addition, City and Type A and Type B economic development corporations in a city with a population of 48,000 or more must post the agenda for the meeting on the website.
- There is a good faith exception if the failure to post on the Internet “is due to a technical problem beyond the control of the governmental body or economic development corporation.”

## 8. How specific must the wording be for an agenda item?

You must give written notice of the date, hour, place, and subject of each meeting held by your governmental body.

The courts have ruled that the more important a particular issue is to the community, the more specific the posted notice must be.

Avoid generic descriptions of topics.





## 9. Is an agenda posting indicating “Public Comment” adequate notice?

The Attorney General has concluded “public comment” provides sufficient notice under the Open Meetings Act of the subject matter of “public comment” sessions where the general public addresses governmental body about its concerns.

- Texas Attorney General Opinion JC-169 (2000)

# 10. Is an agenda posting indicating “City Manager’s report” adequate notice?

- **A: It is now.** In Texas Attorney General Opinion GA-0668 (2008) the Attorney General concluded the following agenda postings were inadequate as a matter of law:
  - “City Manager’s Report”
  - “Mayor’s Update”
  - “Council and Other Reports”
- “The general and generic nature of the notice does not sufficiently notify a reader, as a member of the interested public, of the subjects of the update and reports to be discussed at any particular meeting.”

**However . . .**

# 11. Can a city council comment on or receive a report about items of community interest without the item being placed on the agenda?

- The AG's opinion was overruled by the Legislature:
- TEX. GOV'T CODE § 551.0415 – allows items of community interest on which no action will be taken.
- A quorum of City Council may receive from city staff or another council member a report about items of “community interest” during a meeting without posting the item, provided no action is taken.



# Can a city council comment on or receive a report about items of community interest without the item being placed on the agenda?

- “Community Interest” items include:
  - Expression of thanks, congratulations, or condolence;
  - Information regarding holiday schedules;
  - An honorary or salutary recognition of a public official, public employee or other citizen, excluding a discussion regarding the change in the status of a person’s public office or public employment; Reminder of upcoming event sponsored by the city;



# Can a city council comment on or receive a report about items of community interest without the item being placed on the agenda?

- “Community Interest” items include:
  - Information regarding a social, ceremonial, or community event organized or sponsored by another entity, that was attended or scheduled to be attended by a member of city council, or an official or employee of the city; and
  - Announcements involving an imminent threat to public health and safety of people in the city that has arisen after the posting of the agenda.



# 12. Can You Change the Date/Time of an Open Meeting Within 72 hours of the Meeting Time?

No. The Texas Open Meetings Act requires literal compliance. A governmental body generally does not have authority to change the date/time of its meeting without posting the new date for at least 72 hours in advance of the meeting.



# 13. Can You Change the Location of an Open Meeting Within 72 hours of the Meeting Time?

**No.** On the day of the meeting, you may be able to move to a bigger room within the same building to accommodate a large crowd. However, it is not clear whether such a change would constitute literal compliance with the Act.



# 14. Can We Continue a Meeting to the Immediate Next Day Without Reposting?

- A governmental body can recess an open meeting to the following regular business day provided the action is taken in good faith and not to circumvent the Open Meetings Act.  
TEX. GOV'T CODE § 551.0411.





# 15. What if an Unposted Issue is Raised at an Open Meeting?

You may not deliberate or make any decision about an unposted issue at the meeting. If an unposted item is raised, you have four options:

- 1) respond with a statement of specific factual information or recite the governmental body's existing policy on the issue;
- 2) direct the person making the inquiry to visit with staff;
- 3) offer to place the item on the agenda at a future meeting; or
- 4) post the matter as an emergency item if it meets the criteria.



## 16. What Right Does the Public Have to Speak on a Particular Agenda Item?

- The Open Meetings Act allows the public to observe the open portion of a meeting.
- The Open Meetings Act does not give members of the public a right to speak on items considered at an open meeting, unless it is a public hearing.



# 17. Is there a Distinction Between a Public Hearing and an Open Meeting?

- A governmental body is generally not required by the Open Meetings Act to allow members of the public to speak on regular agenda items at an open meeting.
  - However, during a public hearing, members of the public must be given a reasonable opportunity to speak.
    - Examples: Hearings for the budget, annexation and zoning – all governed by specific statutes.

# 18. What Duty Does a Governmental Body Have to Produce Minutes of Open Meetings?

- TEX. GOV'T CODE § 551.021: a governmental body shall prepare and keep minutes or make a recording of each open meeting of the body.
  - The minutes must:
    - (1) state the subject of each deliberation; and
    - (2) indicate each vote, order, decision, or other action taken.

# 19. How long is the city required to keep minutes or a tape of a meeting?

- Approved minutes must be maintained permanently by the city.
- A tape of a meeting for the purpose of preparing minutes must be maintained for 90 days following the approval of the minutes by the governmental body.



## 20. What is an Executive Session?

- A limited exception from the general Open Meetings Act rule that all governmental business must be conducted in the presence of the public.
- Executive sessions are limited to discussion, not action or voting.
- May not be available for all boards and commissions.

## 21. What are the generally permissible Executive Session subjects ?

- Common exceptions are:

- personnel matters;
- certain consultations with an attorney;
- discussions about the value or transfer of real property;
- discussion of certain economic development matters; and
- deployment or implementation of security personnel or devices or a security audit.

## 22. What are the procedures to convene into an executive session?

- **When authorized to convene a closed meeting the presiding officer must take the following steps:**
- (1) In open session state that a closed meeting will be held and identify the exceptions of the Open Meetings Act which authorize the executive session.
- (2) In the executive session, the presiding officer states the date and time.
- (3) Discuss the executive session matter within the confines of the statutory exception. (No voting can occur in the executive session).
- (4) At the conclusion of the executive session, the presiding officer states the date and time.
- (5) Reconvene in open session. Voting on the subject matter must occur in open session.



## 23. When can a governmental body hold an executive session using the exception for consultation with an attorney?

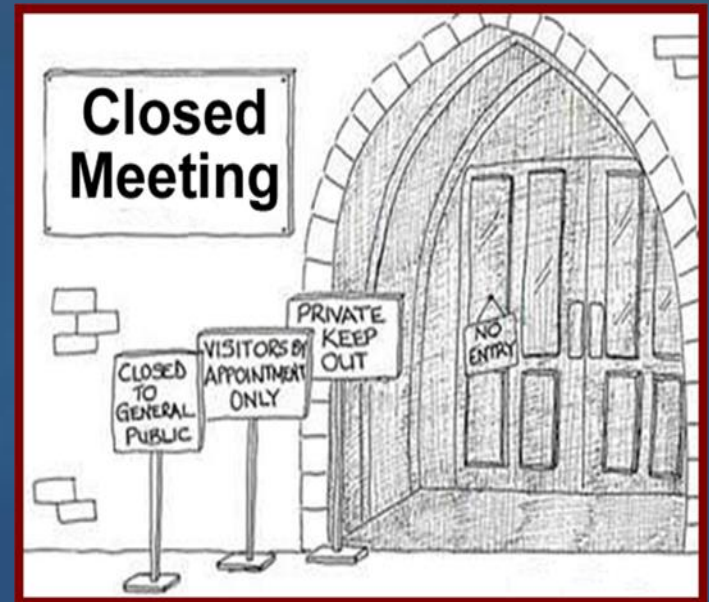
- TEX. GOV'T. CODE § 551.071: allows a governmental body to meet with its attorney to receive legal advice about pending or contemplated litigation or about settlement offers.
  - may also meet with its attorney to receive legal advice on any matter on the agenda.

## 24. Can a City Council discuss potential business incentives and other economic development issues in executive session?

- An executive session can be convened:
  - to discuss or deliberate commercial or financial information the governmental body received from a business prospect that the governmental body seeks to have locate, stay, or expand in or near the city and with which the governmental body is conducting economic development negotiations;  
*or*
  - to deliberate the offer of a financial or other incentive to a business prospect described above.

# 25. Can the city discuss real property in executive session?

- A governmental body may deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with third parties. TEX. GOV'T CODE. § 551.072.



## 26. Can a governmental body discuss personnel matters in executive session?

- Section 551.074 of the Government Code authorizes an executive session to discuss “the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee;” or “to hear a complaint or charge against an officer or employee.”

# 27. Who is permitted to attend an Executive Session?

- The Open Meetings Act does not specify who may or may not attend an executive session.
- **Texas Attorney General Opinion JC-0375 (2001):**
  - concluded the governmental body has discretion to determine who may attend executive sessions. However, the governmental body may not admit those whose attendance is contrary to the legal basis for the executive session.
- **Texas Attorney General Opinion GA-0511 (2007):**
  - citizens could not be invited into an executive session to discuss the school superintendent. To do so would cause the meeting to be an unauthorized closed meeting.



## 28. Can a governmental body approve items or vote in an executive session?

- Can you vote in executive session?
- **No.** “a final action, decision, or vote on a matter deliberated in a closed meeting . . . may only be made in an open meeting.” TEX. GOV'T CODE § 551.102



## 29. Is a governmental body required to record or create a certified agenda of discussions held in executive session?

TEX. GOV'T CODE § 551.103 requires a governmental body to produce a “certified agenda” or make a tape recording of every executive session, unless the closed session is being held under the exception for consultation with an attorney. A governmental body may turn off the tape or stop taking notes during the portion of a closed meeting that involves consultations with an attorney.



## 30. What is required in a certified agenda?

- The Open Meetings Act requires the certified agenda of a closed meeting to contain the following information:
  - (1) statement of the subject matter of the deliberation;
  - (2) a record of any further action taken;
  - (3) an announcement by the presiding officer at the beginning and the end of the meeting indicating the date and time; and
  - (4) must be certified by the presiding officer that the certified agenda is a true and correct record of the proceeding.



# 31. Can a member of the governmental body or staff release a copy of a certified agenda to the public?

- **No.** A certified agenda or tape kept during an executive session may only be disclosed to a member of the public under a court order. In fact, there are criminal penalties for releasing a copy of the certified agenda to the public without a court order.
  - TEX. GOV'T CODE § 551.146: makes the release of a certified agenda a **class B misdemeanor**.

## 32. How long must a city maintain a certified agenda or tape from an executive session?

- A City must maintain a certified agenda or tape of an executive session for two (2) years after the date of the meeting.
- If an action involving the meeting is brought within that period, the city shall preserve the certified agenda or tape while the action is pending.



# 33. Open Meetings Act Training

- Each elected or appointed public official of a governmental body shall complete a one to two hour training course on the Open Meetings Act within 90 days after the date the member
  - Takes the oath of office or
  - Assumes responsibilities as a member of the governmental body.
    - TEX. GOV'T CODE § 551.005



# 34. Can less than a quorum of a board or City Council visit over the phone/text/ in person without violating the Open Meetings Act?



- The mere fact that two (2) members of a governmental body visit over the phone does not in itself constitute a violation of state law.
- However, if the members are using individual telephone conversations to poll the members on an issue or are making such telephone calls to conduct their deliberations about public business, there may be a potential criminal violation. *See Harris County Emerg. Srvs Dist. #1 v. Harris County Emerg. Corps*, 999 S.W.2d 163 (Tex. App. – Houston [14th Dist.] 1999, no pet.)

# Can less than a quorum of a board or City Council visit over the phone/text/ in person without violating the Open Meetings Act?

- A “walking quorum” can result from sequential text, phone, or personal conversations between Council or board members. For example, in *Esperanza Peace and Justice Center v. City of San Antonio*, the City Council was sued when funding for controversial arts projects was discontinued.
- San Antonio City Council members had a series of meetings on budget issues where the Mayor met with less-than-quorum groups of council members and made a series of telephone calls to other members, while the City Manager kept track of the number of members present or on phone so that formal quorum would not occur.

# Can less than a quorum of a board or City Council visit over the phone/text/ in person without violating the Open Meetings Act?

- “If a quorum of a governmental body agrees on a joint statement on a matter of governmental business or policy, the deliberation by which that agreement is reached is subject to the . . . Open Meetings Act, and **those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time.**”  
*Esperanza Peace and Justice Center v. City of San Antonio*, 316 F. Supp. 433, 474 (W.D. Tex. 2001).

# 35. When TOMA Compliance Goes Wrong:

*Acker v. Texas Water Commission,*  
790 S.W.2d 299 (Tex. 1990)

Two (of three) Texas Water Commission members discuss a pending permit while in a bathroom. Applicant files suit alleging TOMA violation. The Court:

“the vital issue in this case is whether the decision making of a state agency in a contested administrative case should be done openly or secretly. We believe the law requires openness.”

# 35. When TOMA Compliance Goes Wrong:

**Austin, 2012.** Travis County DA investigates Austin City Council for TOMA violations, including one-on-one meetings to formulate policy positions prior to Council Meetings via “walking quorums.”

*Austin American Statesman:* “Since early last year, the City of Austin has hired three private law firms to advise the council on open meetings issues and the investigation. The city has paid those firms about \$344,000 so far....”

The City also had Texas Public Information Act issues that will be covered in Topic 5.



## 36. TOMA CRIMINAL PENALTIES have been held to be Constitutional at federal trial and appellate levels.

### *Asgeirsson v. Abbott* (5<sup>th</sup> Cir. 2012)

- **Section 551.144 of Texas Gov't Code:**
- (a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
  - (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
  - (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
  - (3) participates in the closed meeting, whether it is a regular, special, or called meeting.
- (b) [Penalty Range: \$100 to \$500 fine; 1 month to 6 months in county jail or both]
- (c) [Affirmative Defense: acted in reasonable reliance on a court order, written interpretation, an opinion of a court of record, the attorney general, or the attorney for the governmental body.]



TOPIC 5:  
Texas Public Information  
Act  
(TEX. GOV'T CODE Chapter 552)

# 1. Texas Public Information Act

- Adopted in 1973 by the 63<sup>rd</sup> Legislature as a reform measure.
- Purpose is to “maintain the people’s control over the instruments [of government] they have created.” *Public Information Handbook*, (2016 ed.)
- Act requires the Attorney General to construe the Act liberally in favor of open government.

# Texas Public Information Act

**Public Information:** “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 . . .

# Texas Public Information Act

...or...

(C) 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.

- TEX. GOV'T CODE § 552.002(a)

2. The default Texas PIA rule is that information must be disclosed to the public, unless it falls within an exception to disclosure. Common exceptions include:

1. Information deemed confidential by law;
2. Personnel file information (if protected by privacy);
3. Litigation information;
4. Protected bidding information;
5. Real property information (prior to public announcement);
6. Pending law enforcement investigation/prosecution;
7. Security sensitive information; and
8. Trade secrets

### 3. Procedure for Retaining Documents Under Claimed Public Information Act Disclosure

1. Aside from certain narrow exceptions (motor vehicle information, email addresses of the public, dates of birth, etc., materials must either be: (1) released to the requestor; or (2) sent to the Attorney General's office for review by an Asst. AG within 10 business days of the receipt of request.
2. A ruling is typically issued by the AG's office within 45 business days.

## 4. Texas Public Information Act

- E-mail: Cases and Legislation

- *City of Dallas v. Dallas Morning News*, 281 S.W.3d 708 (Tex. App. — Dallas, 2009 no pet.)

Facts: The *Dallas Morning News* and others requested Mayor Laura Miller's e-mails regarding official city business, including e-mails from a Blackberry device that did not pass through City servers.

Trial Court Holding: The e-mails are “public information, [and] must be disclosed.”



# Texas Public Information Act

- *City of Dallas v. Dallas Morning News*, 281 S.W.3d 708 (Tex. App. — Dallas, 2009, no pet.)

Appeals Court Holding: Fact issues exist and it thus wasn't proper for trial court to rule at this point; reversed and remanded back to trial court for further proceedings.

# Texas Public Information Act

- Legislature: S.B. 1368, eff. September 1, 2013
  - makes electronic information regarding public business “public information” under the Texas PIA, regardless of whether sent on personal device or personal e-mail account.
  - resolves the questions remaining from *City of Dallas* and other cases.

# Texas Public Information Act

- *Adkisson v. Abbott*, 459 S.W.3d 761 (Tex. App. --- Austin, 2015)
  - Hearst Newspapers, LLC and private requestors sought Bexar County Commissioner's e-mails regarding County matters sent on personal and county e-mail accounts.
    - Trial and appeals court both concluded e-mails are public information and must be disclosed.

# Texas Public Information Act

- *Adkisson v. Abbott*, (cont.)
- “We conclude that the information in the...  
...official capacity e-mails is necessarily connected with the transaction of the County’s official business. . . [and] satisfies the PIA’s definition of ‘public information.’”
- Bexar County held liable for requestor’s attorney’s fees.

# Texas Public Information Act

- *Adkisson v. Abbott*, (cont.)
- “[T]he Attorney General explained that information in a public official’s personal records may be subject to the PIA if the public official uses the records to conduct public business: “A governmental body may not circumvent the applicability of the [PIA] by conducting public business in a private medium.””

# Texas Public Information Act

- Lesson from *Adkisson v. Abbott* and recent Legislation:
- If it concerns City board or commission business, it is likely required to be disclosed under the Texas Public Information Act;
- One recommended practice is to either use a unique, “City business only” e-mail account or folder for all City board or commission matters;
- May want to limit use of business or work e-mail addresses for board or commission contact.

## 5. TPIA Compliance Gone Wrong:

In addition, be aware that any communication concerning City matters may be disclosed to the public:

**Austin, 2012.** In addition to the TOMA violations, and the six figure legal fee penalties, PIA requests showed several embarrassing exchanges: **E-mails among council members showed exchanges among multiple members about city issues and votes. PIA requests revealed that Mayor had described the female fire chief as “a company man,” and Council members referred to two top city officials as “jokes.”** *Austin American Statesman*, June 17, 2012.

**TOPIC 6:**  
**Other Ethical and Legal  
Considerations**



# Gift Statute

## Texas Penal Code § 36.08:

- “A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.”
- Violation is a Class A misdemeanor.

# Abuse of Official Capacity

## Texas Penal Code § 39.02 :

- (a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly:

- (1) violates a law relating to the public servant's office or employment; or

- (2) misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.

- Violation ranges from Class C misdemeanor to first degree felony.

# Official Oppression

## Texas Penal Code § 39.03 :

Use of official office to:

- (1) subject another to arrest, detention, or seizure;
- (2) deprive or impede another of any right, privilege or immunity (with knowledge of unlawful conduct); or
- (3) subject another to sexual harassment.

- Violation is a Class A misdemeanor.

# Avoid the “Appearance of Impropriety”

- Good advice from the *Code of Conduct for United States Judges*, Canon 2:
- “An appearance of impropriety occurs when reasonable minds, with knowledge of all of the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. . . A judge must avoid all impropriety and appearance of impropriety.”

# Additional Training Resources

Texas Attorney General's Open Government website.

1. **Training Videos:** <https://www.texasattorneygeneral.gov/faq/og-open-government-training-information>

Includes 1-hr videos on TOMA and PIA that will satisfy training requirements.

2. **Handbooks:** <https://www.texasattorneygeneral.gov/og/open-government-resources>

*Texas Open Meetings Handbook* and *Texas Public Information Act Handbook* available in PDF Format (2016 ed.)

# 2018 City of McKinney Boards and Commissions Training

**Thank you for your service to the City of McKinney!**

## QUESTIONS?

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