MUNICIPAL LAW 101

Basic Municipal Laws and Issues for Texas City Officials

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Introduction

The purpose of this paper is to provide City Managers and other city officials in Texas with a useful tool for the basic understanding of various laws, rulings, and regulations with which all Texas cities and city officials must comply. As such, it is intended more as a roadmap than an encyclopedia, and will in many cases identify and direct the readers' attention to other publications from which a more in-depth analysis and understanding of those laws, rulings and regulations may be harvested.

Texas cities deal with a dazzling array of legal issues, statutes and rules. When I worked for the Texas Municipal League, all of the attorneys in the legal division registered as lobbyists with the Ethics Commission in order to represent municipal interests during the legislative sessions. Part of the registration process involved identification of the subject matters about which each lobbyist might be engaged. The registration form listed 83 different subjects, and each TML registrant checked all but eight of those subjects as potential topics that might affect cities. Those 75 topics are the ones the legislature may enact or repeal laws about, and do not include things like community relations, employee morale, balancing a budget, and any of the myriad other topics that make municipal work rewarding, beneficial, and the source of extreme melancholy. In other words, city officials are expected to learn a lot, know a lot, and deal with a lot.

What follows, however, is only the tip of the iceberg about the tip of the iceberg—a short primer about some of the topics that city officials most commonly and routinely encounter. Each topic is presented in the following format: 1. Primary sources, which consists of the relevant statute or, for some topics, leading cases or AG opinions; 2. Comments and observation, which are intended as practical tips and guidance for dealing with common municipal law issues, but with a minimum of authority citing, case law analysis, and attendant legalese; and 3. Secondary sources, being handbooks, articles, or other sources of information in the event more in-depth information, authority, case law analysis, and attendant legalese is desired.

Number of Inhabitants versus Population

Sprinkled throughout the statutes that affect Texas cities are provisions that grant authority or make determinations on the basis of the number of inhabitants therein, as opposed to a city's population. The distinction is important because "population" is defined by law as the number of persons living within an area as determined by the latest federal decennial census. The number of inhabitants, on the other hand, may be determined between federal censuses, provided that it is done correctly. Accordingly, while most statutes that grant authority, such as those allowing incorporation of a city, those determining the size of a city's extraterritorial jurisdiction (ETJ), and those allowing a city to adopt Home Rule status, use the word "inhabitants." Thus, a city might, five years after and five years before a census, legally determine that its ETJ is larger, or that it may call an election to consider adoption of a home rule charter. Only a few use "population" but for those that do, any authority a growing city may wish to

exercise must wait until the next census proves that it has, in fact, grown large enough to meet the statutory criteria.

Types of Cities

There are five types of cities in Texas, one of which exists in name only. They are Home Rule, Special Charter, General Law Type A, General Law Type B, and General Law Type C.

A Home Rule city is one that has achieved a number of inhabitants of 5000 or more and has adopted a home rule charter. There are approximately 320 now existing in the State, out of approximately 1220 incorporated municipalities.

A Special Charter city is one that was created by special law, usually by statute, prior to about 1900, when that practice was finally discontinued (it ended for the most part in 1858 when the first municipal incorporation act was adopted by the legislature, but a few cities were created legislatively thereafter.) All valid special charter cities have, by now, adopted home rule status or ceased to exist. Those that were created and later stopped functioning, officially ceased to legally exist, by statute, once ten years passed without their holding an election for municipal officers.

A Type A General Law city is one that had at the time of its incorporation 600 or more inhabitants, or one or more "manufacturing establishments" within its corporate limits, or which has, since incorporation, has obtained 600 or more inhabitants and has adopted Type A status.

A Type B General Law city is one that incorporated as Type B, which usually means that it had between 201 and 600 inhabitants (although it could have been 201 to 9,999) and which has never adopted Type A, or other, status.

A Type C General Law city is one that incorporated as Type C or converted to Type C status after incorporation as Type A or B. It's primary distinction is that it is governed by a "Commission" form of government, whereas Types A and B are "Aldermanic." A commission consists of a mayor and two commissioners. A "Board of Alderman," or city council, usually consists of a mayor and five aldermen.

The fundamental difference between a Home Rule city and a General Law city is that the latter is authorized to do only what the constitution or legislature has authorized, whereas the former is authorized to do anything the constitution or legislature has not prohibited. Certainly there are specific statutes that authorize Home Rule cities to take particular action (such as unilateral annexation), but generally speaking a Home Rule city may, usually through its charter, take action that is not available to a General Law city. Typical among such authorized acts are initiative, referendum, recall, and term limits.

There is also a basic difference in maximum allowed ad valorem (property) tax rates. Although most cities are not even close to their maximum allowed tax rate, a Home Rule

city has a legal ceiling of $2.50 per hundred dollars valuation; a Type A city has $1.50, and a Type B has $.25. The Type C rate depends on its number of inhabitants, as described below.

In many cases, the statutes are silent with regard to the authority a Type B or a Type C city has, but two provisions in the Local Government Code fill those voids. Section 51.035 states that a Type B city has the same "authority, duties, and privileges as a Type A general law municipality, unless the Type B general law municipality, in exercising the authority or privilege, or performing the duty, would be in conflict with another provision of this code or other state law that relates specifically to Type B general-law municipalities." In other words, if Type B is silent, it may look to Type A in most cases.

Similarly, Section 51.051 provides that a Type C city with 501 to 4,999 inhabitants follows Type A authority when the statutes for Type C are silent, and a Type C with 201 to 500 inhabitants follows Type B authority. An alternative method for determining Type C authority exists in Section 51.052, but it is of limited application, at least for the purposes of this paper.

Open Meetings

1. Primary source:

Chapter 551, Government Code. Note that it is not the Local Government Code. The Texas Open Meeting Act, aka "TOMA," will be referred to in this section as "the Act."

2. Comments and Observations:

If certain City Managers and City Attorneys who come to Texas from other states are to be believed, Texas has one of the most stringent and restrictive open meetings laws in the nation. This is not the message that is conveyed by newspapers, the Attorney General, or public opinion, however, and cities in general, TML in particular, has sometimes been characterized as "the traditional opponent of open government." This characterization is ridiculous, but a few bad apples, bad fact situations, and bad ideas can give all cities a bad rap in regard to both open meetings and open records issues.

Following, in general terms, are the basic open meetings topics and rules about which city officials must be cognizant.

a. Agenda item drafting: Each agenda item must adequately inform the public of the matter that the governing body, whether city council, city commission, planning and zoning commission or other municipal body subject to the Act, is going to discuss and possibly act on. Failure to adequately describe a matter could lead to the action taken by the governing body being declared void in a subsequent, successful challenge. (Note, however, that there must be a subsequent, successful challenge. Citizens, council members, and newspapers sometimes characterize the action of a governmental body, often for political

reasons, as "illegal" because it was inconsistent with the manner in which the item was posted. Such action may, in fact, be voidable, but is not void until a court so declares.)

The basic rule is that an agenda item can never be too informative or contain too much information. When in doubt, describe the potential subject matter and potential action more fully than is absolutely necessary. If there is a subsequent challenge, it will almost certainly be because the action—not the mere wording of the agenda—is controversial and there are opponents to it willing to pay to mount a lawsuit. Controversial items are often large, expensive, career-affecting matters, so it is particularly painful to get such a matter resolved only to have the action thrown out by a court because the agenda item was too vague or did not adequately describe all the possible ways the Council could take to resolve it. There is some debate, based on Attorney General Opinions, about the absolute necessity of having an "action" word in the item, such as "vote," "take action," or "act on," as opposed to merely saying "consider," "discuss," "deliberate," etc. My advice is to always have such a word.

Unless your city secretary, city manager or other person who prepares the agenda is well-versed in proper agenda item wording, it is strongly recommended that the city attorney review every agenda before it is posted.

b. Agenda posting: Unless the meeting qualifies as an emergency, the agenda must be posted no less than 72 hours before the meeting will convene. The place for posting is described in the Act for cities is "on a bulletin board at a place convenient to the public in the city hall." It may be posted in additional places, but a bulletin board in city hall that can be viewed 24/7 by members of the public is mandatory.

c. Emergency meeting: A meeting that is truly an emergency may be convened after only two hours of posting. To be an emergency the subject matter of the meeting must involve "an imminent threat to public health or safety or "a reasonably unforeseeable situation." The nature of the emergency must be clearly identified, and the emergency must be something that cannot wait for 72 hours, cannot be based on mere convenience, cannot be due to error on the city's part for not acting sooner. Whether or not an emergency is truly an emergency depends on the facts of the situation, and in some cases it may be appropriate if the governing body, before actually taking the matter up, determines that a majority of its members agree that an emergency exists.

d. Executive, or closed, sessions: This is probably the single most controversial issue related to the Act. Rightly or wrongly, governing bodies often want to have closed sessions about topics for which a closed session is not authorized. In an ideal world, a governing body would not hold a closed session except in very limited, clearly authorized situations, and would allow everything they do to be observed by the public. In practice, elected officials are simply not

always willing to speak their minds freely in front of the voters. I have even had the experience of a city council member announce (during a closed session) that he considered it to be the duty of the city attorney to find ways for the council to hold unauthorized closed meetings. Mercifully, he seemed to be the only council member who felt that way.

The Act lists 21 flavors of authorized closed sessions, but only eight of those are available to cities, viz:

(i) Advice of legal counsel under 551.071;
(ii) Real property under 551.072;
(iii) Prospective gift under 551.073;
(iv) Personnel under 551.074;
(v) Security devices under 551.076;
(vi) Certain public power competitive matters under 551.086;
(vii) Economic Development negotiations under 551.087; and
(viii) Certain licensing or certifications test items under 551.088.

In addition to the Public Information Act exceptions, there is one exception in the Tax Code, Section 321.3022, whereby information related to sales taxes collected from businesses within a city and supplied to that city by the State Comptroller in response to a request must be kept confidential. Also, there is a series of exceptions in the Government Code (Sections 418-175-418.183) related to homeland security/emergency response issues that must be kept confidential in regard to critical infrastructure, security codes, communication encryption codes, construction of weapons, reported terrorist activity, information intended to prevent acts of terrorism and criminal activity, and information related to disabled persons.

Of those ten, counting the series of homeland security/emergency planning exceptions as one, the four that are used routinely are legal counsel, real property, personnel, and economic development. The basic rules for those four are as follows:

(i) Closed sessions under 551.071: A governing body may go into executive session to obtain legal advice from its attorney under two circumstances: when it will discuss pending or contemplated litigation and when, in the opinion of the attorney, it is necessary to do so in order to uphold his or her ethical obligations under the rules of disciplinary procedure.

Under the first category, there must either be a lawsuit that has been filed in which the city is involved as a party, or there must be genuine likelihood of such a lawsuit. The mere fact that the city might get sued for something it is contemplating doing is not enough. It is necessary that it has been informed, preferably in writing, that litigation is definite or highly probable.

The second category is a little less distinct, but is generally interpreted to mean that the attorney believes that he or she needs to give the city, his or her client, legal advice that should be subject to the attorney/client privilege. Thus, if a city council is seeking to determine what to do in connection with an existing contract, and the attorney believes that its members need to receive legal advice in order to make the right decision, but that giving that advice in a public forum may jeopardize the city's legal position under the contract, then an executive session may be authorized.

This latter category of this type of closed session authorization is, in my opinion, the most likely to be abused by city council members or other officials, and is therefore the most likely to be significantly modified by the legislature if abuses of it occur. It is not terribly unusual for council members to claim that they need legal advice about a particular matter when, in fact, they want to go behind closed doors and freely discuss, or deliberate, the issue.

Until 1999, there was another type of closed session authorized that was generally called a "staff briefing." The idea was that a governing body should be allowed to go behind closed doors and hear its city manager or other staff members deliver a report about sensitive or potentially sensitive matters. If done properly, the council members were allowed to receive the report, ask direct questions of the staff member, and provide direct answers to questions from the staff member, but were not allowed to deliberate or take action about the matter. However, rightfully or wrongfully, a perception arose that governing bodies were saying they were getting staff briefings when they were, in fact, making decisions about what to do about matters of public interest. The staff briefing was repealed, and if a similar perception develops concerning closed sessions to receive advice of legal counsel, it would not be surprising to see the legislature restrict is usage.

It should go without saying that in order to go into an executive session to receive advice of legal counsel, an attorney must be present, either in person or by telephone, e-mail, or video. City attorneys, unlike council members, are permitted by law to "virtually" participate in meetings, but a council may not meet in closed session to receive legal advice from itself or any non-lawyer.

(ii) Closed sessions under 551.072: a governing body may go into closed session to discuss the sale, exchange, or purchase of land if discussing the transaction in an open session may have a detrimental effect on its negotiating position or would cause the price of the land to change. The mere fact that land is involved and that its ownership might change hands is not enough if there is no purchase, exchange, or sale or if there is no likelihood of public discussion having an effect on the potential bargain.

(iii) Closed sessions under 551.074: a governing body may go into a closed session to discuss one or more of its officers or employees. More precisely, it may do so to discuss the "appointment, employment, evaluation, reassignment,

duties, discipline, or dismissal," or a complaint or charge against an officer or employee. The mere fact that an employee or officer is involved in a matter the council wants to discuss is not enough if one of the grocery list of discussion items listed above is not involved. Thus, a discussion of how much an officer or employee should be paid, the amount of an individual's raise, the percentage amount for every employees' annual pay raise, reorganization of a city department, reduction or increase in staff, and similar issues are not something that can be discussed behind closed doors. An evaluation of an officer or employee might include discussion of salary or pay increases, and the duties of the city manager might include reorganization of a department, but the matter to be discussed must actually be covered under the umbrella of one or more of the grocery list

The governing body must also discuss specific officers or employees, not a class of them. The agenda item may not simply say "personnel," "city employees," "police department," "public works employees," or some similar group. The officer(s) or employee(s) should be identified, either by name, or if their office or position with the city is unique, by that office or position. The primary purpose of this exception is to protect the officer or employee from embarrassment or disclosure of confidential information, not to provide a convenient tool for the governing body to speak its mind in private.

If the officer or employee who is the subject of the closed session requests that the matter be deliberated in open session, the governing body has no choice but to do so. The officer or employee does not have an absolute right to be in the closed session, but the ability to bring it out into the open often convinces the governing body that his or her presence is appropriate.

(iv) Closed sessions under 551.087: a governing body may go into closed session to discuss a specific economic development prospect. The discussion may involve commercial or financial information about the business prospect or details of an offer or incentive package to that prospect, but there must be a specific prospect. A general discussion of economic development needs, strategies, or policies must be deliberated in an open session.

e. Posting executive sessions on a meeting agenda: A certain amount of confusion exists about how an executive session must be posted on an agenda. The rules is that (i) the subject matter of the item must be adequately posted on the agenda to allow it to be discussed in an open session, and (ii) the subject matter of the item must meet one or more of the ten exceptions discussed above that allow a governing body to go into executive session about the matter. In other words, the Act does not *require* the governing body to announce on its agenda that an executive session will be held, and should it become apparent during a meeting that a close session is desirable and it is allowed under the Act, as just described, the governing body may go behind closed doors, even though the agenda does not announce that it will do so.

Nevertheless, if a governing body, or the person responsible for preparing the agenda knows that the governing body plans to go into executive session, the agenda should so state. Similarly, there should be an item on the agenda following the executive session for the taking of action in open session regarding matters discussed in closed session, because no action may be taken in a closed session and posting an item for action (vote, etc.) is recommended.

Many cities post a paragraph of "boiler plate" at the end of their agendas announcing that the governing body may go into executive session on a particular matter. Sample language for such boiler plate is as follows:

> The City Council reserves the right to adjourn into Executive Session at any time during the course of this meeting to discuss any matters listed on the agenda, as authorized by the Texas Government Code, including, but not limited to, Sections 551.071 (Consultation with Attorney), 551.072 (Deliberations about Real Property), 551.073 (Deliberations about Gifts and Donations), 551.074 (Personnel Matters), 551.076 (Deliberations about Security Devices), 551.087 (Economic Development), 418.175-183 (Deliberations about Homeland Security Issues) and as authorized by the Texas Tax Code, including, but not limited to, Section 321.3022 (Sales Tax Information).

If the city is one of the approximately 75 in the state that has a municipally-owned electric utility, it should include "551.986, (Certain public power competitive matters) in the list, and if it is a Civil Service city, or otherwise administers employee testing for licenses or certification, it should include "551.088 (Certain licensing or certification test item)."

Note, however, that use of such boilerplate language is not a substitute for meeting the two part test described above. The item to be discussed must still be properly posted for an open session, and its subject matter must be covered by one of the nine exceptions in the Government Code or the one exception in the Tax Code.

f. Minutes, Certified Agendas, and Tape Recordings: Governing bodies must keep official minutes of their meetings, but doing so is not a requirement of the Act. Caselaw clearly establishes that the validity of a governing body's actions often turn on what the minutes say. In fact, a contract a city has entered into may be declared unenforceable if the minutes do not reflect that it was authorized.

What the Act requires is the type of record that must be kept for closed sessions, which is either a "certified agenda," or a tape recording. The two are very dissimilar, in that the latter captures every word spoken, while the former consists only of (i) a statement of the subject matter of each deliberation; (ii) a record of any further action taken (which may not be actual action, in the sense of voting to approve or disapprove, which may only be done in an open session); and (iii) an

announcement by the presiding officer at the beginning and end of the closed session indicating the date and time.

Whether tape recording or certified agenda, the record is confidential, and must be retained, under seal, at least two years after the date of the closed meeting. It may be reviewed only if a court orders it, or if a current member of the governing body desires to inspect or listen to it, even if the member was not present during the closed session. It may not be copied.

g. Violations of the Act: The following are criminal violations of the Act:

(i) Participating in a closed meeting knowing that no certified agenda or tape recording is being kept (Class C misdemeanor);

(ii) Knowingly disclosing to a member of the public a certified agenda or tape recording of a lawful closed session (Class B misdemeanor)

(iii) Knowingly calling, organizing or participating in an unauthorized closed meeting (Misdemeanor fine of $100 to $500, one to six months in jail, or both).

(iv) Knowingly conspiring to circumvent the Act by meeting in numbers of less than a quorum for the purpose of secret deliberations in violation of the Act (Misdemeanor fine of $100 to $500, one to six months in jail, or both)

In addition, a person who discloses a certified agenda or tape recording may be liable for actual and exemplary (punitive) damages and attorneys' fees.

A citizen or member of the news media may bring an action for injunction or mandamus to prevent, stop or reverse a violation of the chapter, and my recover costs and attorney fees if successful.

An action of a governing body taken in violation of the Act is voidable

Of all the potential violations and ramifications of non-compliance with the Open Meetings Act, the one that creates the most confusion is the one listed as (iv) above. Everyone understands that a quorum may not get together and discuss city business outside of a properly posted meeting, but there is a great deal of misunderstanding and fear about whether two, or possibly three, members of a governing body may discuss city business without violating the Act.

Clearly, if two or more members intentionally decide they do not want the public to know why they are going to vote on a particular matter, and therefore get together to work out agreements and make decisions in secret, knowing that they are violating the Act, then it is a violation. The misunderstanding arises about what happens when two members simply talk about city business on the phone or in person without actually intending to violate the Act. If they did not knowingly conspire and had no intent to have secret deliberations, then they have not violated the Act, but proving a negative is difficult. Public perception, when two

or more members of a governing body are seen talking to each other, is often that they are engaged in an illegal secret meeting.

Additionally, the Attorney General has identified a violation that is commonly called "a walking quorum." This occurs either when two members of a governing body get together, or a third person not on the governing body communicates with a member, and then the subject matter of the discussion is communicated to other members of the governing body in a daisy chain fashion, either by one or more of the members or the third person.

Thus, a city manager or city secretary may not "poll" the members of the city council by calling each, asking them their opinion on a particular substantive matter, and then calling the next member and telling them what the other members said. It is permissible for a staff member to call each council member and ask them a procedural question, such as "are you available for a special meeting at a particular time," or "how do you want me to word the agenda item that you directed me to place on the meeting agenda." It is also permissible, even vital, for members to discuss matters of city business with the city manager, city attorney, city secretary, or other staff member who has relevant information. Neither the staff member nor the council member may then turn around and disclose the substantive nature of the discussion to enough additional members of the council to comprise a quorum.

h. Final, important observations about the Open Meetings Act: There are numerous other topics that could be addressed herein, such as what is a meeting as opposed to a social function or a regional training session, whether attendance of a meeting by telephone or video is allowed, who may be allowed to attend a closed session in addition to members of the governing body, and, particularly, when comment from the public or by council and staff members are allowed when the subject matter of the comments is not posted on the agenda. Those topics are important but are addressed fully in the *Attorney General's Open Meetings Handbook* and other publications.

Two final observations that need to be made, however, are:
(i) The ramifications of being accused of violating the Act can be as disruptive and tormenting as an actual violation. Public opinion, newspaper stories, and response at the ballot box can convince even a careful, law-abiding member of a governing body that holding local office is more or a curse than an honor.

Jurisdiction to enforce the Act lies with the local prosecutors—county attorney or district attorney. Those officials also have statutory authority to ask the Attorney General to investigate and assist, which often occurs. While some local prosecutors do not like to spend time on open meetings issues, others can be very zealous, and while both local prosecutors and Assistant Attorneys General and their investigators are usually very qualified and professional, the investigations can take on witch hunt characteristics. It is not particularly unusual for either a

member of a governing body, a staff member, or a citizen to allege a violation of the Act for reasons other than desire to promote open government in Texas. It is not unheard of for an investigator to treat an investigation into an alleged illegal closed meeting as the tip of iceberg of corruption, and to conduct their examination accordingly.

A particular governing body may conduct its meetings and closed sessions for years without challenge or question, only to find itself suddenly in the midst of a storm of bad publicity and allegations of criminal activity, sometimes for good reason, but often not. The Open Meetings Act has many flaws, and it is time, in these writers' opinions, that it be sunsetted and made more workable and efficient by the legislature. That probably will not happen, however, because of the fear on the part of local officials that the result will be something even worse and more inefficient than what currently exists.

Accordingly, while it may be inconvenient, and may sometimes defy common sense, all city officials should seriously consider a policy that makes the scheduling of executive sessions the rare exception, not the rule, to be held only when absolutely necessary and when in clear compliance with the Act. They are intended to be allowed only in narrow circumstances; members of the public grow suspicious when closed sessions are held frequently

Elected officials should also accept the idea that they need to wait until they are in a legal, open meeting to discuss their concerns and ideas about matter of public business, rather than trying to work issues out ahead of time outside of public view. They should not be hesitant to let the public see what they think and say about such matters, even if doing so demonstrates that they do not know as much about a particular matter as they need to know. They should be particularly reliant on their city managers, city attorneys, city secretaries, and department heads who live with the issues, make their living understanding the issues, and who are usually anxious to assist the governing body make the right decision if given a reasonable opportunity to do so.

(ii) An important, but often overlooked protection from violating the Act, at least with regard to participation in an illegal closed session, is contained in Section 551.144(c) which provides that:

> It is an affirmative defense to prosecution under Subsection (a) (i.e. calling, organizing or participating in an unpermitted executive session) that the member of the governmental body acted in reasonable reliance on a court order or a written interpretation of this chapter in an opinion of a court of record, the attorney general, or the attorney for the governmental body.

In other words, the members of a city council are protected from prosecution for participating in an illegal closed meeting if they first asked their city attorney for a

written opinion on the legality of the closed meeting the council wants to conduct even if the attorney is wrong and the closed meeting is actually not legal. However, of the 13 cities for which our law firm serves as city attorney, only one routinely requests, or requires, a written opinion of that nature prior to every council meeting at which a closed session is scheduled. In all but one instance, the letter opinion has been that the closed session was legal, and in the one instance where we declined to provide such a letter, no closed meeting was held.

3. Secondary Sources: *Open Meetings Handbook*, Texas Attorney General, available online at http://www.oag.state.tx.us/AG_Publications/pdfs/openmeeting_hb2008.pdf.; *Open Government Training video*, Texas Attorney General, *The 2008 Texas Open Meetings Act Made Easy,* Texas Attorney General, available on line at http://www.oag.state.tx.us/AG_Publications/pdfs/openmeetings_easy.pdf

Public Information/Open Records

1. Primary source: Chapter 552, Government Code. Note that it is not the Local Government Code. The Texas Public Information Act will be referred to in this section as "the Act."

2. Comments and Observations: The Texas Public Information Act is one of the most counter intuitive areas of municipal law. When presented with an open records request, documents that one would think must be disclosed may be kept private under the Act. Conversely, documents that one would never wish to disclose must in fact be disclosed. Furthermore, there is no "safe side" on which to err. It is a crime to fail to disclose records that are public information. It is also a crime, in many circumstances, to disclose records that are not public information. Therefore, the focus in responding to any particular request must be to thoroughly and correctly determine which documents are and aren't public information, without exception.

The following, in general terms, are the basic open records topics and rules about which city officials must be cognizant:

a. All documents presumed public: The Act begins with the proposition that all documents in the possession of a city are presumed to be public information. Internal investigations, legal memoranda, real estate negotiations, medical information, are all presumed to be public.

b. No special form of request needed: While many cities have a standard form for public information requests, the public is not required to use such a form in order to trigger the requirements of the Act. Therefore, it is important to treat any written request for information, in whatever form, as a request for public information under the Act.

c. Withholding documents: Under the Act, a city may withhold documents if the documents meet one of many exceptions to the general rule that all documents are public. However, a city is not empowered to make this determination on its own. Instead, a city wishing to withhold information from a requestor must request a decision from the Attorney General's Office. The request from a city to the Attorney General's Office should contain the arguments of the city regarding which exceptions to disclosure apply to the requested documents. In addition to argumentation and citation, the Attorney General's Office also requires that the city provide them with a copy of what the city is attempting to withhold.

Timing can be critical, because a city only has ten business days from the date of the request to determine whether it wishes to seek an Attorney General Opinion in an attempt to withhold documents, or waive any objections the city may have. Some additional time (five days from date of request) is added to actually produce the documents in question. The Attorney General however, has up to forty five days to consider your brief, and may extend their time period for response if necessary.

Finally, the requirement to submit a brief to the Attorney General's Office prior to withholding documents only applies to written requests (including e-mail). Verbal requests do not trigger the requirements of the act. It is, therefore, important from a practical standpoint for a city to obtain all requests for information in writing.

d. Municipal Court: Municipal Courts are not subject to the requirements of the Act. Should your municipal court receive a request for information, the court has different rules for responding to requests for information. The rules and regulations related to such requests are beyond the scope of this paper.

e. Repetitive Requests: If a city has previously provided copies of certain information, the Act provides that the governmental body has no duty to provide the same information to the requestor again. Please note that this only applies to information which has already been given to the requestor. If a requestor repeatedly requests information, and the city has withheld the information in the past pursuant to an Attorney General's Opinion, a request must yet again be sent to the Attorney General addressing the new request for information, and re-alleging the applicable exceptions to public disclosure.

3. Secondary Sources: *Public Information Handbook*, Texas Attorney General, available at: http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf; *Texas Public Information Act Made Easy,* Texas Attorney General, available at: http://www.oag.state.tx.us/AG_Publications/pdfs/2006pia_easy.pdf.

Governing Body Issues

1. Primary Sources: Texas Constitution, Art. 16, Sec. 40; Chapters 21, 22, 23, 24, Local Government Code; Chapter 574, Government Code; *State v. Brinkerhoff*, 17 S.W. 109 (Tex. 1886); *Ehlinger v. Clark,* 8 S.W.2d 666, 673-74 (Tex. 1928); *State v. Martin*,

51 S.W.2d 815 (Tex.Civ.App.--San Antonio 1932). Tex.Elec.Code.§§ _ 83.009; 32.052 (Vernon 199); Op.Tex.Att'y Gen.Nos. JM-129, JM-133, and JM-519, and LO-92-004, LO-92-8, and LO-92-70.

a. Makeup of City Governing Bodies: The most common type of governing body for a Texas City is that which is statutory for a Type A or Type B General Law City, which is a mayor and five alderman, aka council members, aka councilmen, aka council persons. A Home Rule City may have a different makeup, and often does, being whatever number is contained in that City's charter. A Type C city is governed by a "Commission" of a mayor and two commissioners.

A General Law city may adopt a ward system by dividing the city into as many area containing the same approximate number of voters as the governing body decides is necessary for the good of the city, and then electing two aldermen from each ward. Doing so will result in a general law city having an even number of alderman, usually four, six, or eight, plus a mayor, but wards are not common.

Some General Law cities have been ordered by a federal court to establish single member districts in response to voting rights challenges, but in the absence of a court order, a General Law city has no authority to establish single member districts. Home Rule cities may, and often do create single member districts through their charters.

Note that a "place" on a city council is not the same as a district seat. Most cities designate positions on their councils as place 1, place 2, place 3, etc., but the primary purpose for doing so is to identify which places will be filled by election in odd-numbered years and which will be filled in even-numbered years.

b. Quorum: The normal rule is that a quorum is a majority of the voting members of the governing body. This rule may be modified by charter in a Home Rule city, and in a Type A General Law city it is established by statute as being a majority of the aldermen, excluding the mayor, which is typically three. However, for special (called) meetings and for those in which "the imposition of taxes" is considered, two-thirds of the voting aldermen make up the quorum, which is normally four, excluding the mayor. For a Type B city, a quorum is either four aldermen or the mayor and three aldermen, and the rule for special and tax meetings requiring a super quorum does not apply. For a Type C Commission, the quorum is two of the three members.

c. Voting: In a Type A city the mayor votes only in the event of a tie. In a Home Rule city the charter establishes whether the mayor votes or votes only in the event of a tie. For a Type B city there is a difference of opinion among some municipal law scholars. Because the statute allows the mayor to be counted toward the quorum, an argument exists that the mayor is authorized to vote. Conversely, because Sec. 51.035, Local Government Code states that a Type B city has the same authority, duties and privileges as a Type A unless Type B authority would conflict, many Type B cities allow the mayor to vote only in the event of a tie. Until such time, if ever, that either the legislature or the Attorney General clarifies the matter, the safest

course of action for a Type B city is to continue what it has always done with regard to the mayor's voting practices, or if change is desired, to do so by ordinance

d. Vacancies: When a vacancy on a governing body occurs due to death, resignation, removal or other cause, the vacancy is typically filled either by appointment by the rest of the governing body or by special election. For a Home Rule city the charter should specify. For a Type A city the remainder of the city council may fill by appointment unless a majority votes to call a special election or unless two or more vacancies exist, in which case a special election is mandatory. For a Type B or C city the vacancy may be filled by appointment.

Because elections are expensive and because uniform election dates are six months apart, a Type A governing body should be careful not to allow two vacancies to be created if it can be avoided. One method of avoiding that result is to follow a rule in the Election Code that states that if a member of the governing body resigns (which must be in writing), the resignation becomes effective whenever the governing body accepts it or after the passage of eight days, whichever first occurs. Accordingly, if one vacancy exists on a council and another council member resigns, the remaining members of the Council may call a special meeting before the eight days passes and, before accepting the resignation, appoint someone to fill the first vacancy, thereby leaving only one vacancy.

It is important to note that when a council member vacates his or her office by resignation or other cause (except removal), that he or she continues to occupy the office as a constitutional "holdover." This means that the council member may continue to serve, may vote, be counted toward a quorum, etc., until such time as his or her successor takes office. The holdover status ends when the successor "qualifies," which means to take the oath of office.

e. Removal of Members of the Governing Body: Prior to 1999, sitting council and commission members could be removed for certain reasons by the rest of the governing body, sitting more or less as a court. That procedure was replaced that year by the procedure contained in Subchapter B of Chapter 21 of the Local Government Code, which requires that a petition be submitted to the local district court, and, if the district judge so orders, after a trial is held and the court orders that the member be removed. The grounds for which a removal action may be brought are incompetency, official misconduct or "intoxication on or off duty caused by drinking an alcoholic beverage" unless the alcoholic beverage was prescribed by a licensed physician. Conviction of a felony or a misdemeanor involving moral turpitude also acts as grounds for "immediate removal." In the event a member is removed through this procedure, he or she may not run for reelection before the second anniversary of the date of removal.

Removal may also occur, automatically, if a member of a General Law city governing body misses three consecutive, regular meetings and was not either sick or did not

first obtain a leave of absence at a regular meeting. Note that special meetings are not counted. Home Rule cities may have a similar rule in their charters.

3. Secondary Sources: *Public Officers: Traps for the Unwary*, Texas Attorney General, available online at http://www.oag.state.tx.us/AG_Publications/pdfs/2006trapshb.pdf; TML's *Handbook for Mayors and Council Member in General Law Cities* and *Handbook for Mayors and Council Member in Home Rule Cities*; TML's *Newly Elected Officials' Training Video; Texas Dual Office-Holding Law Made Easy,* Texas Attorney General, available online at http://www.oag.state.tx.us/AG_Publications/pdfs/dualoffice_easy.pdf

Purchasing and Procurement

1. Primary Sources: Chapters 252 and 271, Local Government Code, Chapter 2254, Government Code

2. Comments and Observations: Prior to the 2007 session, purchasing, procurement, and contracting by Texas cities was more cumbersome than it now is. That year the legislature increased the "floor" at which competitive bidding is required from $25,000 to $50,000. It also made various amendments that increased a city's flexibility by allowing, for example, reverse auctions; alternative construction project systems such as construction manager-agent, construction manager at-risk, and design-build; and expanding the use of competitive sealed proposals. Also note that contracts may not be broken down into segments simply to avoid dollar threshold for the competitive bidding or HUB requirements.

For the purpose of this paper, there follows a series of basic, sometimes simplistic, guidelines and tips:

a. Exemptions from Bidding Requirements: Certain types of purchases do not require competitive bidding regardless of the amount of public funds to be expended. Those exemptions are listed in Section 252.022, Local Government Code.

b. Competitive Sealed Proposals: The basic difference between competitive sealed bids and competitive sealed proposals is as follows: a city that does the former, i.e. goes out for sealed bids, must publish and/or make available specific bidding instructions, directions for bidding and a deadline for submission, after which the bids are opened and, assuming it is compliant with the instructions and other applicable procedures, a contract is awarded to the lowest responsible bidder. Once submitted, a bid may not be changed, and the city is not allowed to negotiate with a bidder on price or other details of the bid. A city that does the latter, i.e. issues a "request for proposal," or "RFP," solicits proposals to provide a certain good, service, or construction of a project, and after the proposals are received, it is permissible to discuss and even modify the proposal to ensure that the city obtains the best deal possible.

Prior to 2007, the use of RFPs was severely restricted, and their use is still not available for every type of purchase a city may wish to make. However, the advantages of an RFP approach, over a competitive sealed bid approach, is often significant, and any city desiring to enter into an important purchasing or construction contract should determine if it may do so through issuance of RFPs.

c. Contracts for Certain Professional Services: Even though "personal, professional, and planning services" are exempt from competitive bidding requirements, other restrictions, particularly the Professional Services Procurement Act, apply. In particular, a city that desires to engage the services of a professional engineer, accountant, architect, surveyor, doctor, optometrist, real estate appraiser or professional nurse may not do so on the basis of competitive bids, and must do so on the basis of qualifications and competency, as well as fair and reasonable price. This often means that the city should issue a "Request for Qualifications," or "RFQ," and then select from among those who respond who are determined to be qualified, and who offer the city a fair and reasonable price. However, if a city manager or other official has reliable information on which to rely that demonstrates that a particular professional is, in fact, qualified, it may contract with the professional without the necessity of issuing an RFQ.

d. Lowest Responsible Bidder versus Best Value: The long-standing, traditional rule is that cities award contracts to the "lowest, responsible bidder." The lowest bid is usually obvious, and whether a bidder is responsible usually requires either that the city is familiar with the bidder, its safety record, its reputation for quality goods and services, or that reliable information is forthcoming that clearly demonstrates that the bidder is not responsible for some reason. In other words, bids are usually awarded on the basis of lowest cost, but occasionally a bid may be rejected on the basis of the bidder's responsibility.

However, Texas cities also have the option of awarding a contract to a bidder that demonstrates that its bid offers the city the "best value." This is not as subjective as it may sound, and before going out for bids on the basis of best value, the city must decide what criteria will be considered, and must include the same in its bid specifications and requirements. Factors a city may consider in determining best value are statutorily described in Section 252.043 as the following:

(i) purchase price;
(ii) reputation of the bidder and its goods or services;
(iii) quality of goods and services;
(iv) extent to which the goods or services meet the city's needs;
(v) the bidder's past relationship with the city;
(vi) the impact of the ability of the city to comply with laws related to historically underutilized businesses and nonprofit organizations employing persons with disabilities;
(vii) the total long-term cost to the city; and
(viii) any other relevant criteria specifically listed in the request for bids or proposals.

Note that the statute lists certain types of projects, such as streets, utilities, water supply, wastewater, drainage, and other projects that must still be awarded to the lowest responsible bidder.

e. Historically Underutilized Businesses: Section 252.0215 requires that a city that makes and expenditure of more than $3000 but less than $50,000 shall contact at least two historically underutilized businesses (HUBs) in the county, on a rotating basis, based on information provided by the Comptroller's office. The statute does not specify how the contact must be made, does not require that a project be awarded to a HUB, and does not provide a penalty for non-compliance. If no HUB is listed in the county by the Comptroller, the city is exempt from compliance. Note that this requirement is separate and apart from any requirements for contracting with or utilizing HUBs under federal law, particularly for projects involving federal funds.

f. Change Orders: After a contract has been awarded, the contract price may be increased by a total of 25 % through the use of change orders. The amount is an aggregate, and increases of more than 25% are subject to competitive bidding requirements. The contract price may not be decreased by more than 25% without the consent of the contractor.

g. Cooperative Purchasing Programs: A city may participate in state or local cooperative purchasing programs, or both, whereby the cooperative undertakes the necessary competitive bidding or competitive proposal procedures, and the cities who are members of the cooperative may then purchase the goods or services, without going out for bids on their own, at the same price and from the same vendor that contracted with the cooperative.

3. Secondary sources: *2008 Texas Municipal Procurement Laws Made Easy*, Texas Attorney General (Julian Grant) and Jeff Chapman of Ford, Nassen & Balwin, Scott Houston of TML, and Jeff Moore of Brown & Hofmeister. Also note that the newest TML affiliate is the Texas Public Purchasing Association, established in 2008 (http://www.txppa.org/assoc/cms).

Personnel and Employment

1. Primary Sources: Chapters 21-24, 141-180, Local Government Code, Chapter 617, Government Code.

2. Comments and Observations: Of all the topics addressed in this paper, the one most seeded with land mines, and therefore the one for which this paper should least be considered as significant authority, is that of personnel and employment matters. Cities find themselves in turmoil or in the courthouse in connection with wrongful termination, the Fair Labor Standards Act, the Americans with Disabilities Act, sexual harassment, the Family and Medical Leave Act, Workers Compensation, Civil Service, Collective Bargaining, unlawful discrimination, whistle blower actions, and similar issues and

charges far too frequently to base significant personnel decisions on a "Municipal Law 101" presentation. That is not to say that the authors have not handled and advised cities on a myriad of personnel issues so much as it is meant to say that each situation is so fact specific, and the applicable law or appropriate response so variable according to each fact situation, that every personnel and employment issue should be handled with extreme caution and careful study.

Following then, are short descriptions of certain broad issues that are designed solely to be part of an overview presentation on municipal law.

a. At Will Employment: Texas is an "at will employment" state, which is one in which either an employer or an employee can legally break the employment relationship with no liability, provided there was no express contract for a definite term governing the employment relationship and that the employer does not belong to a union or similar collective bargaining entity. Under this legal doctrine, the employer is theoretically free to discharge an employee at any time for any cause or no cause at all and the employee is free to quit or cease work for any reason.

Numerous exceptions exist, of course, particularly prohibitions against discharging an employee on the basis of discrimination (particularly race, age or gender); discharging for a reason prohibited by statute, such as for "whistle-blowing;" discharging in violation of a statutory procedure such as that for dismissal of municipal officers in a General Law city; Section 1983 violations; or failing to comply with an employment agreement, which may have been created without the City's express intention to do so.

Generally, however, Texas cities are careful to preserve at-will employment status, to clearly and repeatedly state that it exists in its personnel policies, and to avoid entering into written employment agreements except in very limited circumstances.

b. Discrimination: most, but certainly not all, laws that protect against discrimination are federal, and include the following:

• race, color and national origin discrimination under the Civil Rights Act of 1964, Executive Order Number 11478 among other numerous laws that protect people from race, color and national origin discrimination.

• sex and gender discrimination under the Civil Rights Act of 1964 and Equal Pay Act of 1963.

• age discrimination under the Age Discrimination in Employment Act of 1967.

• physical and mental disability discrimination under the Americans with Disabilities Act of 1990

• religious discrimination, under the Civil Rights Act of 1964.

• military status discrimination under the Vietnam Era Veterans Readjustment Assistance Act of 1974.

c. Section 1983: Section 1983 is the common, shorthand reference to 42 United States Code, Section 1983, which provides that anyone who, under color of state or local law, causes a person to be deprived of rights guaranteed by the U.S. Constitution, or federal law, is liable to that person.

d. Whistleblower actions: It is a violation of Texas law to discharge an employee for reporting a violation of law by the employer. Specifically, Section 554.002, Government Code provides that:

> A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.
>
> (b) In this section, a report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:
>
> (1) regulate under or enforce the law alleged to be violated in the report; or
>
> (2) investigate or prosecute a violation of criminal law.

e. Fair Labor Standards Act: The FLSA, 29 USC Sections 201-219 and supporting federal regulations, regulates the obligations and calculation of overtime and minimum wage compensation for "non-exempt employees." Exempt employees, who are not entitled to overtime compensation, includes certain salaried, executive, administrative, and professional employees. For cities these are typically the city manager, city secretary, police chief, fire chief, municipal judge, and many, but not necessarily all, department heads. The FLSA establishes tests for determining if an employee is exempt or non-exempt.

Non-exempt employees are entitled to receive overtime pay equal to one and one-half their normal compensation for hours worked in excess of 40 per week. Different rules apply to police and fire officers who work certain shifts. A city that employs fewer than five employees is not subject to the FLSA and is not required to pay overtime compensation. In lieu of overtime, a city may establish a "compensatory time" program whereby employees entitled to overtime receive time away from work similar to vacation on a one and half times normal rate.

f. Civil Service, Collective Bargaining, Meet and Confer: As employers in an at-will employment state, Texas cities have traditionally been unenthusiastic about the establishment of anything that resembles employee unions. Civil Service, Collective Bargaining, and Meet and Confer are employment-related doctrines that are available

to police officers and fire fighters that have union-like qualities. Each subject has a long history and is relatively complicated, but each also applies only to a handful of Texas cities. Rather than attempt to provide detail in this overview presentation, each will merely be defined below. The details of each are addressed in Chapters 142, 143 and 174, Local Government Code. Collective Bargaining is also found in Chapter 617 of the Government Code.

Civil Service: "Civil Service" is generally defined as being employed by federal, state, or local government. More specifically it is a set of rules which, if adopted by a city, guarantees those employees who are covered by civil service certain rights with regard to promotion, benefits, pay, and job security. Those pertaining to police and fire are generally found in Section 143 of the Local Government Code. In cities where civil service has been adopted, a Civil Service commission will be established to assist with implementation and carrying out of the rules adopted.

Collective Bargaining: Section 617.002, Texas Government Code, prohibits any public employer from recognizing an employee organization as the sole and exclusive bargaining agent and prohibits the public employer from negotiating a contract with two major exceptions: Chapter 174, Local Government Code, is an exception for fire fighters and police officers who obtain the right to bargain by local option referendum and Chapter 143, Local Government Code, allows police and firefighters to "meet and confer" without a referendum. In the 2001 session the legislature approved meet and confer on behalf of the respective groups they represent. The collective bargaining statutes are found in The Texas Fire and Police Employee Relations Act codified in Chapter 174, Local Government Code passed in 1973 and covers fire fighters and police officers in any city, town or political subdivision in the State. Collective Bargaining only contains two absolute requirements. First, both parties must sit down and negotiate for 60 days. Secondly, it requires each party to attempt in good faith to reach an agreement. It absolutely forbids an employee from taking part in a work stoppage, work slowdown or any other type of job action.

Meet and Confer: Found generally in Section 142, Local Government Code, the "meet and confer" provisions allow a police or fire department to petition a city to recognize an entity selected by them as their association to be the sole and exclusive bargaining entity in negotiations with the city. The city may recognize the entity based upon the petition or order the petition to go before the voters to decide whether the city is allowed to "meet and confer" or order a certification election to decide whether the entity represents a majority of the police or fire officers of the city. Specific provisions pertaining to such elections are found in Section 142, Local Government Code.

3. Secondary Sources: The *Fair Labor Standards Handbook* (Thompson Publishing Group); *Texas Employment Law Handbook* (Association of Business & Chambers of Commerce); *Guide to Employee Handbooks* by Robert J. Nobile.

Annexation

1. Primary Sources: Chapter 43, Local Government Code

2. Comments and Observations: Annexation is the authority of a city to expand, to grow, and to take in additional territory. The ability of a city to remain financially healthy, to provide the services its citizens demand, and to be the type of community in which its citizens take pride is largely dependent on its ability to grow when its population increases. Nevertheless, municipal annexation, particularly unilateral annexation by Home Rule cities is constantly under attack, particularly in the legislature.

The basic, city perspective is as follows: nobody wants to pay taxes, but nearly everyone wants police and fire protection, good streets, reasonable control of growth, water service, sewer service, garbage pickup, and all the other services that cities do or can provide. Cities have a few other sources of revenue, but most are particularly dependent on ad valorem tax collection. Citizens who work in cities often live in surrounding suburbs. They utilize city services, but do not pay for them except through sales taxes and a few miscellaneous fees. If a city is not allowed to grow and annex those suburbs (assuming they are not part of another city) as the number of persons who demand and use its services increases, then the increased cost must be borne by the persons living inside the city. As those costs increase, more citizens flee the inner city, leading to loss of services and urban decay.

Only Home Rule cities, except in limited circumstances, may annex property without the permission of the property's owners or inhabitants. Texas and Texans are fiercely protective of property rights and are not particularly enamored with government, local or otherwise, so it is not surprising that there is and remains significant resistance to the idea that a large, or large-ish, city can simply reach out and make surrounding property a part of the city. The notion that a landowner should have a right to vote on whether his or her land is included in a city is a basic concept that is easy to sell and hard to explain away, no matter how reasonable and wise the explanation may be.

In 1999, the legislature revised the state's annexation laws more significantly than had been done since the laws were first enacted, largely in response to a highly controversial annexation accomplished by the City of Houston. Home Rule cities must now be much more careful, and must meet much higher standards and follow more complicated and challenging procedures in order to annex property than before 1999. Ten years have passed, and there is no guarantee that fresh assaults on annexation authority will not be successful. At a minimum, any city that is careless or heavy-handed in its annexation efforts may find itself as the poster child for annexation reform during the next session of the legislature.

Following are major high points and significant issues associated with annexation:

a. Annexation limited to adjacent territory in a city's extraterritorial jurisdiction: A city may only annex territory that is adjacent to, or touching, its current corporate

limits and which is contained in its extraterritorial jurisdiction, or ETJ. A city's ETJ is the area immediately surrounding the city that is not located in the ETJ or corporate limits of another city. Its size is dependent on the number of inhabitants in the city, to wit:

(i) a city with fewer than 5000 inhabitants has an ETJ of one-half mile;
(ii) a city with 5000 to 24,999 inhabitants has an ETJ of one mile;
(iii) a city with 25,000 to 49,999 inhabitants has an ETJ of two miles;
(iv) a city with 50,000 to 99,999 inhabitants has an ETJ of three and one-half miles; and
(v) a city with 100,000 or more inhabitants has an ETJ of five miles.

b. Annexation by General Law Cities providing water or sewer service: As stated above, there are limited circumstances when a General Law city may annex territory unilaterally, without the permission of the owners or inhabitants of the territory. The principal method for doing so is authorized by Section 43.033, which provides that if the city is providing water or sewer service to an area (which is adjacent and in the city's ETJ) then it may annex the area.

However, the amount of land that the city may annex is somewhat unclear. The statute says that the area annexed may not include "unoccupied territory in excess of one acre for each service address for water and sewer service." This gives rise to several questions, e.g. "How much land is included in a "service address?" "Must the "unoccupied territory" be owned by the owner or occupant of the "service address?" and "If there are several such 'service addresses' and the city intends to annex all, can the pattern of annexation be drawn in a manner that suits the city's purposes, or is the result necessarily, and possibly oddly, gerrymandered according to size of service addresses, the ownership and amount of unoccupied territory that exists, and the shape of various tracts?

Section 43.033 was enacted in 1991, but there are currently no definitive answers to these questions and others. Any General Law city that can, and desires to pursue annexation under 43.033 is well-advised to work closely with its city attorney, city engineer, and perhaps a land surveyor before leaping into the annexation process.

One provision that may provide relief from the foregoing questions in some circumstances is Subsection (a) 4 B, which states that an alternative to the one acre of unoccupied territory rule is that an area entirely surrounded by a Type A city may be annexed, apparently regardless of size, so long as water or sewer service is being provided.

Significant caveats in connection with this statute are (i) it is available only to General Law cities with a population (not number of inhabitants) of 1000 or more that is not eligible to adopt a home rule charter (i.e. does not have 5000 or more inhabitants); (ii) if the area is appraised for agricultural or wildlife management use, the city must at least offer to enter into a development agreement that will delay annexation and guarantee continued ETJ status; and (iii) if after one year of the

annexation a majority of the landowners or registered voters in the area annexed petition for disannexation, the city must disannex it, but may also discontinue providing water and/or sewer service therein.

c. Other annexations by General Law cities: General Law cities may also annex territory owned by the city, may annex reservoirs it owns, may annex certain navigable streams, may annex airports it owns, and may annex certain adjacent streets, highways and roads. However, the traditional method of annexation by a General Law city is by petition from either landowners or qualified voters in the area to be annexed.

Annexation by petition from area voters is slightly different for Type A and Type B cities, and the requirements are addressed in Sections 43.024 and 43.025 respectively. Both require a petition from a majority of the voters in the area. Annexation by petition of landowners, on the other hand applies equally to annexation by Type A, B, or C cities, but is applicable only to "sparsely populated areas," which are defined as being one-half mile of less in width, contiguous, and either vacant or in which fewer than three qualified voters reside.

There are still a few other statutory provisions that allow annexation by General Law cities, but which were apparently enacted to apply to only certain, specific circumstances, or cities, existing when the law was adopted.

d. Annexation by Home Rule Cities: As stated previously, the state's annexation laws were significantly overhauled in 1999, so that annexation by a Home Rule city must comply with certain, often-complicated rules, including provisions for including the area in a three year annexation plan, unless the land is exempt there from by statute, certain negotiations and arbitration that may be required for certain annexations, contracts for services in lieu of annexation, and other matter. Considering that any Home Rule city contemplating an annexation program will, or better, be served by competent legal counsel and other consultants, a detailed explanation of those rules will not be undertaken, but reference to the secondary sources cited below are encouraged.

Nevertheless, certain rules in existence for unilateral Home Rule annexations before 1999 that remain in effect are:

(i) the maximum amount of territory that may be annexed in one year may not exceed 10 percent of the incorporated area of the city unless no annexation was accomplished in the previous calendar years, so that the ten percent per year may be carried over to equal not more than 30 percent of the incorporated area of the city.

(ii) the area to be annexed may not be less than 1000 feet in width at its narrowest point, and

(iii) an annexation must be completed within 90 days after the date the annexation proceedings are instituted. This provision is somewhat confusing, and actually has application only to Home Rule cities that

require multiple readings prior to adoption of an ordinance. Thus a city that requires two or more readings must complete annexation no later than 90 days after the first reading of the ordinance, whereas a city that may adopt an ordinance after only one reading may simultaneously institute and complete its annexation by adoption of its annexation ordinance.

e. Procedural Requirements: A reading of certain annexation statutes, particularly those applicable to annexation by petition for General Law cities, will lead the reader to conclude that the statute contains all of the procedural requirements in one provision. Although some city attorneys still argue to the contrary, the prevailing view, based on certain caselaw, is that all annexations, including those by petition, must be accompanied by preparation of a service plan, publication of notice and the holding of at least two public hearings.

f. Service Plan Requirements: Similarly, the prevailing view is that all annexations must be accompanied by preparation of a service plan wherein the city spells out the type of services it will provide and when such services will be made available. The contents of the plan, which includes provision of police and fire protection; emergency medical services; solid waste collection; water and wastewater facilities; maintenance of roads and streets and street lights; parks, playgrounds and swimming pools; and maintenance of any other publicly owned facility or service in the area, is described in Section 43.056. The service plan must be completed and available for public inspection before notice of the annexation hearings is published.

g. Disannexation: In addition to disannexation after one year in connection with Section 43.033, described above, a city may be forced to disannex an area if it fails to provide services in the manner required by Sections 43.056 or 43.065, depending on the type of annexation, and reflected in the city's service plan. Of particular importance is the city's ability to meet the deadlines to provide "full municipal services," including water and wastewater services within two and a half years or, if properly extended, no more than four and a half years.

3. Secondary Sources: *Municipal Annexation in Texas: Is it Really that Complicated?* by Scott Houston, TML Director of Legal Services, available at http://www.tml.org/legal_pdf/ANNEXATION012808.pdf;

Annexation and Municipal Regulation of the ETJ, by Edwin P. Voss, Brown & Hoffmeister, available at http://www.bhlaw.net/CM/ArticlesPresentations/Annexation%20and%20Municipal%20Regulation%20of%20the%20ETJ.pdf.

Zoning and Subdivision Regulation

1. Primary Sources: Chapters 211 and 212, Local Government Code

2. Comments and Observations: Like annexation and personnel matters, this topic is too large and complicated to address in depth in a Municipal Law 101 presentation. Principal overview issues include the following:

a. Subdivision regulation versus Zoning: Subdivision regulation is principally what occurs in the platting process, whereby a plat must be approved by either a county or a city before land may be subdivided in anticipation of development. A city's exercise of subdivision regulation applies in the corporate limits and may be extended to its ETJ, whereas county subdivision regulation is limited to unincorporated areas, including a city's ETJ. A statute requires cities and counties to reach agreement and establish the equivalent of one-stop permitting for platting regulation in the ETJ.

Zoning, on the other hand, is limited to a city's corporate limits and may not be extended to its ETJ. It is also exercised only by cities (except in very limited circumstances in which counties may zone, principally in areas near the U.S./Mexican border). Whereas subdivision regulation has significant focus on the construction, availability and access to public facilities such as streets and utility systems, zoning addresses how land may be used. The difference between the two is illustrated by the statutory provision, Section 212.003(a), which declares what subdivision regulation is not, viz:

> [U]nless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality shall not regulate:
>
> (1) the use of any building or property for business, industrial, residential, or other purposes;
>
> (2) the bulk, height, or number of buildings constructed on a particular tract of land;
>
> (3) the size of a building that can be constructed on a particular tract of land, including without limitation any restriction on the ratio of building floor space to the land square footage;
>
> (4) the number of residential units that can be built per acre of land; or
>
> (5) the size, type, or method of construction of a water or wastewater facility that can be constructed to serve a developed tract of land if:
>
> (A) the facility meets the minimum standards established for water or wastewater facilities by state and federal regulatory entities; and
>
> (B) the developed tract of land is:
>
> (i) located in a county with a population of 2.8 million or more; and
>
> (ii) served by:
>
> a) on-site septic systems constructed before September 1,

> 2001, that fail to provide adequate services; or
>
> (b) on-site water wells constructed before September 1, 2001, that fail to provide an adequate supply of safe drinking water.

This statute, to a large degree, describes what zoning is, particularly with regard the use of property, the size of buildings, number of units per acres, type of construction. Zoning is the most intense governmental regulation of land use that exists in Texas, and is often the most useful tool a city has to make itself the type of community its citizens desire. Conversely, exercise of its zoning authority frequently become a buzz saw of resistance and opposition for Texas cities.

b. Size of subdivided tracts that must be platted: Section 212.004 provides that a plan may not be required for a division of land into parts greater than five acres, "where each part has access and no public improvement is being dedicated." This means that if the family farm or other large tract is divided into tracts larger than five acres, and no street, utility easement or other public improvement is dedicated to the city or county, and none of the tracts are landlocked, then the city may not require approval of a plat. Note that a county's platting authority, under Section 232.0015(g), is generally limited to tracts of ten acres of less. This means that in a city's ETJ, it may, if the county agrees, establish platting rules utilizing a combination of city and county authority so that plats may be required of tracts as large as ten acres rather than five.

c. Limited Time Period for Plat Approval: As a general rule, under Section 212.009, a city must act on a plat within 30 days after the plat is filed, and if the city fails to either approve or deny the application in that time period, it is considered approved by operation of law. Accordingly, cities often establish rules for determining when an application if considered to be administratively complete, so that the 30 day clock does not start to run until the application contains all the information needed for city staff to analyze it and recommend its approval or disapproval.

d. Comprehensive Plan: A city that elects to enact zoning regulations must, under Section 212.004, adopt ordinances that are "in accordance with a comprehensive plan designed to:

> (1) lessen congestion in the streets;
> (2) secure safety from fire, panic, and other dangers;
> (3) promote health and the general welfare;
> (4) provide adequate light and air;
> (5) prevent the overcrowding of land;
> (6) avoid undue concentration of population; or
> (7) facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements.

Oddly enough, adoption of a comprehensive plan, while authorized, is not mandated by law, except as just stated—in order to have zoning regulations they must comply with a comprehensive plan. The exact nature and makeup of the plan is not dictated, and they vary considerably from city to city.

e. Planning and Zoning Commission: The governing body of a Home Rule city must, and the governing body of a General Law city may establish a zoning commission, which is often called a Planning and Zoning Commission. If a General Law city does not establish a commission, the city's governing body exercises the authority granted to a zoning commission.

That authority consists primarily of establishing and amending zoning regulations and amendments thereto, establishing and authorizing changes to zoning classifications and establishing and authorizing changes to zoning district boundaries. Note, however, that a Zoning Commission is essentially only an advisory body. Final zoning action must be approved by the city's governing body.

In many cities, the Zoning Commission is also the body that approves plats.

f. Board of Adjustment: A city may, but is not mandated, to establish a Board of Adjustment. The Board must be comprised of at least five members appointed by the governing body for terms of two years. The primary functions of the Board are to (i) approve variances and special exceptions to the zoning ordinance, and (ii) to hear appeals from decisions of building officials. Whereas the decisions of a Zoning Commission, in most cases, must be confirmed by the city's governing body, and appeals from the Commission are to the governing body, appeals from decisions of a Board of Adjustment go directly to a court of competent jurisdiction, which is usually a district court.

g. City Enforcement of Deed Restrictions: As a general rules, deed restrictions and restrictive covenants, which are restrictions on land use usually established by developers or sellers of land, and which are contained in individual deeds or declarations of covenants, restrictions or reservations applicable to subdivisions, may not be enforced by a city. The exception is for a city that has not adopted zoning regulations, and which elects to enforce the restrictions. In the more common situation, in which a city exercises zoning authority over land subject to restrictions and covenants, both sets of land use rules apply and in the event of inconsistency, the more restrictive controls. It should also be noted that some land use practices that may be valid under a deed restriction or restrictive covenant are outside the scope of city zoning authority.

3. Secondary Sources: *Texas Municipal Zoning Law*, by John Mixon; *Annexation and Municipal Regulation of the ETJ*, by Edwin P. Voss, Brown & Hoffmeister, available at http://www.bhlaw.net/CM/ArticlesPresentations/Annexation%20and%20Municipal%20Regulation%20of%20the%20ETJ.pdf.

Finance

1. Primary Sources: Chapters 102, 103, 252, 372, 395, 402, 501-505, Local Government Code; Chapters 1331, 1431, Government Code, Chapters 6, 11, 25, 26, 31, 151, 156, 182, 183, 321, 351

2. Comments and Observations: As illustrated by the list of primary sources, which is certainly not exhaustive, there are a myriad of issues related to municipal finance. Furthermore, a city must employ qualified financial advisors, auditors, and bond counsel, and other consultants or employees in order to adequately address the multiple critical issues each city faces with regard to how it will collect, obtain, manage and utilize public funds. This presentation will touch on only a few highlights of a few of the issues:

a. Budget: Every city must adopt and adhere to a budget, the procedure for which is laid out in Ch. 102, Local Government Code.

b. Annual Audit: Every city is required to have its records and accounts audited annually, the requirements for which are contained in Chapter 103, Local Government Code.

c. Sources of Municipal Revenue and Funds: Whereas sales taxes, property taxes, and franchise compensation are the most common sources of city revenue, many other sources exist, either as revenue sources, cost recovery methods, of specialized items, as illustrated by a the subjects taken from the Table of Contents from TML's *Revenue Manual for Texas Cities:*

Alcoholic Beverage Tax
Anticipation Notes
Assessments
Bank Loans
Bingo Prize Fees
Bonds
Building Security Fees
Cemetery Tax
Certificates of Obligation
Child Safety Fees
Coin-Operated Machine Tax
Court Technology Fees
Credit Card Fees
Donations
Drainage Fees
Felony Forfeiture Funds
Franchise Fees, general
Franchise Fees, Cable TV and Video
Franchise Fees, Electricity
Franchise Fees, Gas & Water
Investments
Juvenile Case Manager Fees
Municipal Court Fines
Municipal Development Districts
Sales Taxes
Open Records Charges
Park Grants
Police Education Fund
Property Tax for General Revenue
Property Tax on Personal Property
Pro Rata Fees
Raffles
Sales Tax, Crime Control
Sales Tax, Dedicated Purposes
Sales Tax, Economic Development
Sales Tax, General Revenue
Sales Tax, Property Tax Relief
Sales Tax, Street Maintenance
Sales Tax, Gas & Electricity
Sales Tax., Telecommunications

Franchise Fees-Telecommunications	Special Improvement Dist. Fund Tax
Grants	Street Assessments
Hotel Occupancy Tax	Traffic Fine Revenue
Impact Fees	User Fees
Interlocal Agreements	Utility Fees
Internet Payment and Access Fees	Venue Tax

A city searching for additional or alternative sources of funds is well-advised to determine if any of the foregoing that are not now being collected or obtained are or may be available.

3. Secondary Sources: TML's *Revenue Manual for Texas Cities*, available from TML, see: https://www.tml.org/pub_legal.html#revenue.

Conduct/Ethics

1. Primary Sources: Chapters 171, 176, Local Government Code; Chapter 573, Government Code; Chapters 36-39, Penal Code.

2. Comments and Observations: There is no single Texas statute that spells out all laws of ethics for Texas officials. When most persons think of public service ethics, they think of conflicts of interest, rules against bribery and acceptance of gifts, disclosure of relationships with business entities, and prohibitions against the hiring of relatives of an official. Although the topic is certainly larger, those areas—conflicts of interest, disclosure of relationships, nepotism, and gifts and honorariums—will be the principal focus of this portion of this presentation. Also included will be short discussions on misuse of public property and misuse of public information.

a. Conflicts of Interest: A conflict of interest, like beauty, is often in the eye of the beholder. What appears to be improper or suspect to a citizen may not be an actual violation of law or ethics regulations. The Texas legislature first took a crack at defining and regulating conflicts of interest in 1874 with a law entitled *An Act to Prevent Speculations by Officers, or Ex-Officers, and Agents in County, City and Town Contracts and Liabilities.* The law, which imposed a criminal penalty of ten to twenty times the amount of money involved in the "speculation", proved to be as unwieldy as its title, and in 1875 the legislature enacted Article 988, which prohibited members of city councils from being:

> directly or indirectly interested in any work, business or contract, the expense, price or consideration of which is paid from the city treasury, or by an assessment levied by an ordinance or resolution of the city council, nor be the surety of any person having a contract, work or business with said city, for the performance of which security may be required, nor be the surety on the official bond of any city officer.

These general prohibitions lasted 98 years. In addition, the Texas Penal Code was amended in 1925 to add criminal sanctions for "trading in claims" and being "interested in contracts." Numerous cases were handed down by Texas courts, but the degree of culpability of some officials, contrasted with ignorance of the law by others, resulted in a confusing and sometimes conflicting set of rules. In 1973, the Legislature enacted what is now Chapter 171, Texas Local Government Code, in an attempt to provide certainty and measurability where there previously existed a great deal of subjectivity.

Chapter 171 focuses its prohibitions on two broad activities: substantial interests in business entities and substantial interests in real property. It defines the former as owning 10 percent or more of the voting stock; $15,000 or more of the fair market value; or receiving funds that exceed 10 percent of a person's gross income for the previous year from or of a business. It defines the latter as having an ownership interest in real property valued at $2500 or more.

The prohibition extends to persons related in the first degree, blood or marriage, to an official, and prohibits an official who has such a substantial interest from "participation in" a vote or decision regarding the business or land that comes before the City Council. An official with such an interest is required to file an affidavit identifying the interest prior to the vote or decision, and failure to do so, failing to abstain from participating in the matter, acting as a surety for the business, or acting as surety on a bond required of an officer of the City, is a Class A misdemeanor. A vote on a matter that would not have passed but/for the vote of an official voting in violation of Chapter 171 is voidable. Also, the governing body of a City with an official who has such a substantial interest must take separate votes on any budget matters that involve the business entity in question, and the member with the substantial interest may not participate in the separate vote. However, if a majority of the entire city council has similar substantial interests, so that all are required to file an affidavit and not participate, then all are allowed to participate in the vote or decision.

Chapter 171 has proven to be much more effective than the previous statutes and caselaw, and the legislature's intent to apply it to all local governmental officials, so that one set of rules governed all, is illustrated by Section 171.007, in which states that Chapter 171 preempts the common law of conflicts of interest and is cumulative of municipal charter provisions and city ordinances defining and prohibiting conflicts of interest.

Nevertheless, since 2000, the Texas Attorney General has occasionally cited or made reference to the "common law rules of conflicts of interest" in Opinions, which has caused concern among some municipal attorneys and officials that they may once again be judged on the basis of subjective and uncertain rules.

b. Disclosure of Relationships: Even though Chapter 171 requires the filing of affidavits to identify substantial interests of local officials, the legislature saw fit in

2005 to enact Chapter 176, Local Government Code, which requires local government officials to file a "conflicts disclosure statement" that identifies any business, employment or relationship the official or a member of his or her family has with a vendor, person, or entity that is or may do business with that local government.

As originally enacted, Chapter 176 gave rise to numerous questions, many of which were addressed during the 2007 legislative session through a bill sponsored by TML. As a result, Chapter 176 now requires that executive officer of the city file a disclosure statement if the officer has an employment or business relationship with a vendor that results in the officer or officer's family member receiving taxable income that exceeds $2,500. An officer is not required to file a disclosure statement if the officer or officer's family member receives taxable income from a vendor that is investment income (dividends, capital gains, or interest generated form a personal or business checking or savings account, a personal or business investment, or a personal or business loan). An officer is also not required to file a disclosure statement regarding a gift received by the officer or officer's family member if the gift is given by a family member of the person receiving the gift, or if the officer or officer's family member receives a gift that is a political contribution. A city is required to terminate an employee who knowingly fails to comply with the requirements of Chapter 176.

It is an exception to prosecution, rather than a defense to prosecution, that an officer filed a disclosure statement not later than the seventh business day after receiving notice from the city of an alleged violation.

A vendor is required to file a conflicts of interest questionnaire if: (a) the vendor has a business relationship with a city officer or an officer's family member and the relationship results in the officer receiving taxable income; or (b) the vendor has given the officer or the officer's family member a gift; 8. require a vendor to file a conflicts of interest questionnaire not later than the seventh business day after the later of the date the vendor: (a) begins negotiations to enter into a contract with a city or submits an application elated to a potential contract with the city; or (b) becomes aware of a conflict of interest; 9. require a vendor to file an updated conflicts disclosure not later than the seventh day after the date of an event that would make a statement in the questionnaire incomplete or inaccurate.

A city does not have an affirmative duty to ensure that a vendor complies with the requirements of the bill, and the validity of a contract is not affected if a person fails to comply with the requirements of Chapter 176.

A city that maintains a website must provide access to statements and questionnaires that are required to be filed, but the chapter does not require a city to maintain a website solely for that purpose. A city must maintain statements and disclosures in accordance with the city's records retention schedule; and a city is not required to disclose certain information that is excepted

A violation of the Chapter is a Class C misdemeanor.

c. Nepotism: Chapter 573, Government Code, contains the state's statutes that prohibit, or limit, the hiring of relatives of city officials. Essentially, it prohibits a person who is related within the third degree of consanguinity (blood) or the second degree of affinity (marriage) of a member of a governing body or a city manager authorized to hire city employees from being employed by the city.

It is interesting to note that the method for determining family relationships was changed by the legislature in 1991 so that it follows the Civil Law of Spain, instead of the Common Law of England with regard to determining relationships. As a result, these are the first, second, and third degrees of relationship:

(i). First degree: children, parents;
(ii) Second degree: grandchildren, siblings, grandparents;
(iii) Third degree: aunt/uncle, great grandparent or great grandchild and niece/nephew.

The practical effect of the change from common law method to civil law method meant that first cousins, who are fourth degree under the civil law, as are great uncles, grand nephews and great, great grandchildren, may be hired without restriction. One suspects that some legislator's cousin got a new job in late 1991.

An exception to the rule applies to a situation when the relative was already employed at the time the official took office. This exception requires the relative to have been continuously employed for at least thirty days prior to the appointment of his or her relative, and six months prior to the election of the relative. In a situation in which this "continuous employment" exception applies, the related official must thereafter abstain from participating in matters that directly affect his or her relative's position with the city.

d. Gifts and Honorariums: The following is quoted, or paraphrased, from *Gifts, and Honorariums Laws Made Easy*, cited below:

Texas Penal Code Section 36.02 makes it a crime of bribery for a person to offer, confer, or agree to confer, or for a public official or employee to accept, agree to accept, or solicit, any benefit as consideration for a decision, opinion, recommendation, vote or other exercise of discretion. The Penal Code defines a prohibited "benefit" as: "Anything reasonably regarded as pecuniary [monetary] gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest."

Therefore, anything that a reasonable person would find as having a monetary value should be refused. The Texas Ethics Commission, however, has advised that a plaque, unless it was quite elaborate, would not be considered a benefit under the bribery law if such item is unsolicited and not offered or accepted in exchange for any action or

inaction on the part of a public servant. To prove bribery, a prosecutor must show that the benefit that was given to an official was as consideration for an official's decision, vote, recommendation or other exercise of discretion. Whether a benefit was given as consideration for such actions remains a fact question that would have to be addressed on a case-by-case basis by the local prosecutor.

However, it is important to note that the Penal Code prohibits, with certain exceptions, a public official from ever accepting a benefit from a person subject to his or her jurisdiction, regardless of whether it was in consideration or in exchange for any official action.

Even if an item was offered or accepted after the exercise of an official action, it may still be considered bribery of a public official or employee. Penal Code section 36.02(c) states the fact that a benefit was not offered or accepted until after the exercise of some official discretion is not considered a defense to a prosecution for bribery.

Even if an item was not solicited and had no influence over the decision that was made, it may still be considered bribery of a public official or employee. The fact that a benefit did not have influence over the decision would not be considered a defense to a prosecution for bribery. Additionally, it is important to note that the Penal Code generally prohibits a public official from ever accepting a benefit from a person subject to his or her jurisdiction, regardless of whether it was in consideration or in exchange for any official action.[13] There are some exceptions to this prohibition (see below).

The Penal Code generally prohibits a public official from ever accepting a benefit from a person subject to his or her jurisdiction, regardless of whether it was in recognition of superior service or a token of gratitude.[14]

A gift or benefit would be considered anything reasonably regarded as monetary gain or a monetary advantage. A floral arrangement, gift basket or other item would constitute a gift. Similarly, tickets to an event or the provision of complimentary or discounted services or products would likewise constitute a gift. Providing a coffee cup, a minor trinket, a plaque, or some other item of nominal value might not be considered to be a gift. Whether an item has such a value is a fact question that must be determined on a case-by-case basis by the local prosecutor.

Several exceptions exist to the prohibition against providing a gift to a public official or public employee. The following are not prohibited:

1. Token Gifts: An item that has a value of less than $50, excluding cash or a negotiable instrument, if it was not given in exchange for any exercise of official discretion.

2. Gifts from Family or Close Friends: A gift conferred by an official's family or by a personal friend, if there is an independent relationship that is not related to the status or work of the official.
3. Gifts from Individuals With Whom the Public Official or Public Employee Has an Independent Business Relationship: A gift conferred by a professional or business contact if there is an independent relationship that is not related to the status or work of the official.
4. Statutorily Provided Fees: A fee that is provided by law that an official is lawfully entitled to receive for performing some function other than his or her official function as a public servant (e.g., jury duty fee).
5. Payment of Expenses: This exception applies only to a benefit given in honor or appreciation to a public servant who is required to file a campaign finance report under Title 15 of the Election Code or to file a personal financial disclosure statement under Chapter 572 of the Government Code. This benefit must be used solely to defray expenses that accrue in the performance of duties or activities in connection with the office. The expenses must be non-reimbursable by the political subdivision. The benefit and the source of any benefit in excess of $50 must be reported in the campaign finance report or the personal financial disclosure statement.
6. Political Contributions as defined by Title 15 of the Election Code.

A public official or employee who receives an unsolicited benefit may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious or scientific purposes. However, this exception does not apply if the gift was provided as part of an honorarium; in such a case, the gift should be refused, and the offering entity is free to make some other use of the benefit.

The prohibition on accepting honoraria appears to apply even if the official or employee provides the speech or service on his or her own personal time and there is no expenditure of public resources. It also does not matter for whom or where the speech or service is being provided.

The prohibition on honoraria does not prohibit a public official or public employee from accepting payment for meals, transportation, or lodging expenses in connection with a conference or similar event in which the public servant renders services, such as providing a speech, to the extent that those services are more than merely perfunctory.

e. Misuse of Government Property Statutes: Again, quoting or paraphrasing from *Texas Ethics, Gifts, and Honorariums Laws Made Easy*:

State law prohibits a public official or public employee from misusing government property, services, personnel, or any other thing of value belonging to the government

with the intent to obtain a benefit or harm or defraud another.[22] Misuse is defined as dealing with property in a way that is contrary to an agreement under which the public servant holds the property, a contract of employment or oath of office of a public servant, a law that prescribes the manner of custody or disposition of the property, or a limited purpose for which the property is delivered or received.

State law prohibits a public official or public employee from misusing any government property, including personnel.[24] Since most public employees are only allowed to perform work that benefits the general public during work hours, use of such employees to perform private work for an official during such hours would be prohibited.

State law would not allow the use of government property or the services of government employees by a public official for his private use even if the public entity is fully reimbursed for the value of the property or the services after the fact. Use of public resources for the market value of the property or services may be proper provided the proper official or board has authorized this practice as serving a valid public purpose. Interlocal governmental agreements are one example of such an arrangement.

State law would not prohibit the use of the services of a government employee if the work is done on the employee's own time and without the use of any public resources. However, if the employee working on his or her own time for an official is paid less than fair market value by the official for this work, the official might run afoul of gift prohibitions previously discussed.

A public official or public employee can be criminally prosecuted for a violation of the misuse of government property law Punishment for a violation of this law ranges from a Class C misdemeanor to a first degree felony depending on the value of the misused property.

There is no special remedy under the Penal Code that provides for removal of a public official due to a misuse of government property. However, if a person is criminally convicted of such an offense, it may affect his or her eligibility for office. Additionally, such a conviction may act to automatically remove the official from office or be a ground for seeking the removal of a member of a governing body through a recall or other removal action if such is authorized under state law or a city charter.

f. Misuse of Official Information Statutes: Again, from *Texas Ethics, Gifts, and Honorariums Laws Made Easy*:

State law specifically prohibits a public official or public employee from disclosing or using confidential information to which the official or employee has access by virtue of the office or employment to gain a benefit or advantage or with intent to harm or defraud another.

The prohibition on the misuse of official information applies only to information to which the public does not generally have access and that is prohibited from disclosure under Chapter 552 of the Government Code

There is no special remedy under the Penal Code that provides for removal of a public official due to a misuse of official information. However, if a person is criminally convicted of such an offense, it may affect his or her eligibility for office. Additionally, such a conviction may act to automatically remove the official from office or be a ground for seeking the removal of a member of a governing body through a recall or other removal action if such is authorized under state law or a city charter.

A public official or public employee can be criminally prosecuted for a violation of the misuse of official information law. An offense of this law is generally a felony of the third degree.

3. Secondary Sources: *Texas Nepotism Laws Made Easy,* Texas Attorney General, available at: http://www.oag.state.tx.us/AG_Publications/pdfs/2006conflict_easy.pdf. *Texas Conflicts of Interest Laws Made Easy,* Texas Attorney General, available at: http://www.oag.state.tx.us/AG_Publications/pdfs/2006conflict_easy.pdf; *Texas Ethics, Gifts, and Honorariums Laws Made Easy*, Texas Attorney General, available at: http://www.oag.state.tx.us/AG_Publications/pdfs/ethics_easy_2008.pdf

Conclusion

Although the topics addressed above are just a sampling of the many issues Texas city officials must deal with, and each of them no more than a light brushing of salient points, it is our hope that the foregoing will prove useful in your governance of, employment by, and service to Texas cities.