



## Understanding Your Personal Liability as a City Official: A Primer

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This paper is meant to provide basic information regarding *state* laws that may result in criminal or personal liability for city officials. A home rule charter, local policy, or ordinance may provide for more stringent requirements in some circumstances. This paper is not comprehensive in nature, but rather is intended to highlight some of the state law provisions that most commonly give rise to personal liability in connection with the holding of or running for a city office. Please consult the individual state laws cited for detailed information about the issues discussed here. You can find additional resources regarding many of the topics discussed in this paper on our Web site at [www.tml.org](http://www.tml.org).

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## I. OPEN GOVERNMENT

This Section examines Texas open government laws related to meetings and records, both of which can result in personal liability for a local public official.

### A. Open Meetings

The Texas Open Meetings Act (TOMA) is found in chapter 551 of the Government Code. The TOMA works to protect the public's interest in knowing what a governmental body (e.g., a city council) decides and observing how and why a body reaches a decision. To that end, the general rule is that every regular, special, or called meeting of a governmental body, including a city council and some boards and commissions (depending on membership and authority), must be open to the public and comply with the requirements of the TOMA.<sup>1</sup>

The TOMA does not apply to every gathering of the members of a governmental body. For instance, attendance at purely social gatherings, candidate forums, or conventions and workshops is not a meeting under the TOMA, so long as any discussion of city business is incidental to the gathering and no formal action is taken.<sup>2</sup>

When a governmental body holds a meeting subject to the TOMA, the body must post a notice that includes the date, hour, place, and subject of the meeting.<sup>3</sup> There are additional notice requirements for a meeting held by videoconference.<sup>4</sup> The notice must be posted on a bulletin board at city hall in a place readily accessible to the public at all times for at least 72 hours before the meeting.<sup>5</sup> In addition, the following requirements apply to cities that have a Web site: (1) a city under 48,000 in population must post meeting notices on the site; and (2) a city over 48,000 in population must post the entire agenda on the site.<sup>6</sup> Emergency meetings to address a matter of urgent public necessity may be called with two hours notice that identifies the nature of the emergency.<sup>7</sup>

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<sup>1</sup> TEX. GOV'T CODE §§ 551.001(3)–(4) (defining the terms “governmental body” and “meeting”), 551.002 (“Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.”).

<sup>2</sup> *Id.* § 551.001(4).

<sup>3</sup> *Id.* § 551.041.

<sup>4</sup> *Id.* § 551.127.

<sup>5</sup> *Id.* §§ 551.043, 551.050.

<sup>6</sup> *Id.* § 551.056(b)(1), (c)(1). The attorney general has explained that “[t]he terms ‘agenda’ and ‘notice’ have been used interchangeably in discussions of the Open Meetings Act, because of the practice of posting the agenda as the notice or as an appendix to the notice. However, an agenda of a meeting is defined as ‘a list, outline, or plan of things to be considered or done,’ while the notice of the meeting is a written announcement.” Tex. Att’y Gen. Op. No. DM-228 (1993) at n.2 (citations omitted).

<sup>7</sup> TEX. GOV'T CODE § 551.045.

If, at a meeting, a member of the public or the governmental body inquires about a subject not on the agenda, any response must be limited to either (1) a statement of factual information; or (2) a recitation of existing policy.<sup>8</sup> And any deliberation or decision about the subject must be limited to a proposal to place the subject on a future agenda.<sup>9</sup> The governing body of a city may receive from staff, or a member of the body may make, a report about “items of community interest” without having given notice of the subject matter if no action is taken in regard to the item.<sup>10</sup>

There are various exceptions that authorize closed meetings, also known as “executive sessions.” Some of the most commonly-used exceptions include discussions involving: (1) the purchase or lease of real property; (2) the receipt of gifts; (3) consultations with an attorney; (5) personnel matters; (5) economic development; and (6) certain security matters.<sup>11</sup> The governing body must first convene in open session, identify which issues will be discussed in executive session, and cite the time and applicable exception.<sup>12</sup> All final actions, decisions, or votes must be made in an open meeting.<sup>13</sup>

Cities must keep written minutes (or a “certified agenda” for executive sessions) or recordings of all meetings, except those involving a closed consultation with an attorney.<sup>14</sup> The minutes of an open meeting must state the subject of deliberations and indicate each vote, decision, or other action taken.<sup>15</sup> Minutes do not have to be a verbatim transcript. Minutes of open meetings must be kept forever.<sup>16</sup> Executive session certified agendas or recordings must be kept for at least two years, and longer if litigation is pending.<sup>17</sup> A home-rule city with a population of 50,000 or more must make a video and audio recording of each regularly scheduled open meeting available on its Web site.<sup>18</sup>

Penalties for violating the TOMA range from having actions voided to the imposition of fines and incarceration. Any action taken in violation of the TOMA is voidable and may be reversed in a civil lawsuit.<sup>19</sup> There are four criminal provisions under the Act; those provisions prohibit: (1) knowingly conspiring to circumvent the Act by meeting in numbers less than a quorum for the purpose of secret deliberations;<sup>20</sup> (2) calling or participating in an impermissible closed meeting;<sup>21</sup> (3) participating in a closed session without a certified agenda or tape recording;<sup>22</sup> and

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<sup>8</sup> *Id.* § 551.042.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* § 551.0415 (defining “items of community interest” to include things like an expression of thanks, congratulations, or condolence).

<sup>11</sup> *Id.* §§ 418.183, 551.071, 551.072, 551.073, 551.074, 551.076, 551.087.

<sup>12</sup> *Id.* §§ 551.101, 551.103(c)(3).

<sup>13</sup> *Id.* § 551.102.

<sup>14</sup> *Id.* §§ 551.021, 551.103.

<sup>15</sup> *Id.* § 551.021.

<sup>16</sup> 13 TEX. ADMIN. CODE § 7.125 (Tex. St. Lib. & Archives Comm’n, Local Schedule GR). Local retention schedules are available at <https://www.tsl.texas.gov/slr/recordspubs/localretention.html>.

<sup>17</sup> TEX. GOV’T CODE § 551.104.

<sup>18</sup> *Id.* § 551.128.

<sup>19</sup> *Id.* §§ 551.141-142.

<sup>20</sup> *Id.* § 551.143.

<sup>21</sup> *Id.* § 551.144.

<sup>22</sup> *Id.* § 551.145.

(4) disclosing a certified agenda or recording of a closed meeting to a member of the public.<sup>23</sup> Violations are misdemeanor offenses. Depending upon the offense, fines may be up to \$2,000, and incarceration may be up to six months.

As to the second violation—calling or participating in an illegal closed meeting—an official may be convicted for participating even if unaware that the meeting is prohibited.<sup>24</sup> It is a defense that the member or the official acted in reasonable reliance on a: (1) court order; (2) written opinion of a court of record; (3) written attorney general’s opinion; or (4) written opinion of the attorney for the governing body.<sup>25</sup>

Elected and appointed officials who are members of a governmental body subject to the TOMA must complete a one hour open meetings training course regarding the Act.<sup>26</sup> If a member of the governmental body fails to attend the required training course, it does not impact the validity of an action taken by the governmental body.<sup>27</sup> A certificate of course completion is admissible as evidence in a criminal prosecution under the TOMA, although it is not prima facie evidence that the defendant knowingly violated the TOMA.<sup>28</sup>

## **B. Public Information**

The Texas Public Information Act (PIA) is found in Government Code Chapter 552. Under the PIA, information that is written, produced, collected, assembled, or maintained in connection with the transaction of official city business is generally available to the public.<sup>29</sup> While many cities have professional staff that manage the city’s records and respond to public requests for records, it is important for officials to have an understanding of what constitutes a public record and the duties of a city under the PIA.

The PIA applies to all city records, on practically any media and created on any device.<sup>30</sup> For example, items such as handwritten notes taken by a city councilmember during a city council meeting, an interview, or during an evaluation in connection with the official business of the city are public records.<sup>31</sup> E-mails sent from a councilmember’s personal computer to constituents relating to city business are public records subject to the PIA.<sup>32</sup>

When a city receives a request, it should never inquire why a person is requesting information, but if a request for information is unclear, a city official may ask for clarification.<sup>33</sup> All requests

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<sup>23</sup> *Id.* § 551.146.

<sup>24</sup> *Tovar v. State*, 949 S.W.2d 370 (Tex. App.—San Antonio 1997), *aff’d*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

<sup>25</sup> TEX. GOV’T CODE § 551.144(c).

<sup>26</sup> *Id.* § 551.005(a).

<sup>27</sup> *Id.* § 551.005(f).

<sup>28</sup> *Id.* § 551.005(g).

<sup>29</sup> *Id.* § 552.002.

<sup>30</sup> *Id.*

<sup>31</sup> *See, e.g.*, Open Records Decision Nos. 626 (1994) (concluding handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are subject to the PIA), 450 (1986) (concluding handwritten notes taken by appraiser while observing teacher’s classroom performance are subject to the PIA) .

<sup>32</sup> *See* GOV’T CODE § 552.002 (defining “public information”).

<sup>33</sup> *Id.* § 552.222.

should be treated the same, without regard to the requestor's identity.<sup>34</sup> Members of the public may request copies of information or inspect information at city hall, and information should be available, at a minimum, during normal business hours.<sup>35</sup>

Certain specifically-listed information is made "automatically" public under the PIA. For example, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body must almost always be released unless made confidential under law.<sup>36</sup> Information must be released "promptly," which is defined in the PIA as being "as soon as possible under the circumstances, that is, within a reasonable time, without delay."<sup>37</sup> If a requestor seeks a large volume of information, a city may certify to the requestor in writing a reasonable date by which it will provide the information.<sup>38</sup>

While certain information has to be disclosed, there are literally hundreds of exceptions that either allow or require (also known as permissive and mandatory exceptions) a city to withhold certain types of information. The exceptions range from information regarding ongoing law enforcement investigations to certain medical information. If a city official believes that requested information is confidential by law or may be withheld pursuant to an exception, the city has ten business days to seek an attorney general ruling to allow it to withhold the information, and an additional five business days to submit samples of the information with arguments as to why the information may be withheld.<sup>39</sup> Generally, the only way that a city can withhold information under the PIA is if the attorney general rules that it may do so, and missing the ten-day deadline may waive the city's right to withhold.<sup>40</sup> Because of the strict deadlines, cities should develop procedures for receiving and processing requests for information. Both city staff and officials should be familiar with any such procedures.

A city may charge fees for providing public information.<sup>41</sup> In many cases, the fees may include the reasonable costs of copies and labor.<sup>42</sup> If a city does not act in good faith in calculating the costs, a requestor is entitled to recover three times the amount of the overcharge actually paid.<sup>43</sup>

The PIA provides for both criminal penalties and civil remedies. The criminal provisions prohibit: (1) willfully destroying, mutilating, removing without permission, or altering public information;<sup>44</sup> (2) distributing information that is confidential under the PIA, knowingly using

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<sup>34</sup> *Id.* § 552.223. A city is not, however, required to accept or comply with a request for information from a person who is imprisoned or confined in a correctional facility. *Id.* § 552.028.

<sup>35</sup> *Id.* §§ 552.021, 552.221.

<sup>36</sup> *Id.* § 552.022.

<sup>37</sup> *Id.* § 552.221.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 552.301; *but see* TEX. OCC. CODE § 1701.662 (establishing a different time frame to request an attorney general decision for body worn camera recordings).

<sup>40</sup> TEX. GOV'T CODE § 552.301. There are a limited number of statutes that allow a city to withhold information without requesting a ruling from the attorney general. *See, e.g., id.* § 552.1175(f) (relating to the address, phone number, social security number and personal family information of peace officers and others).

<sup>41</sup> *Id.* §§ 552.261–.275.

<sup>42</sup> *Id.* § 552.261.

<sup>43</sup> *Id.* § 552.269.

<sup>44</sup> *Id.* § 552.351.

confidential information in an impermissible manner, permitting inspection of confidential information by a person who is not authorized to inspect the information, or disclosing confidential information to an unauthorized person;<sup>45</sup> or (3) with criminal negligence, failing or refusing to give access to or provide copies of public information to a requestor.<sup>46</sup> Violations are misdemeanor offenses. Depending on the offense, fines may be up to \$4,000 and up to six months in jail may be served.<sup>47</sup> A city official may also be ordered to release public information by a civil court.<sup>48</sup> In addition to constituting a crime, violations of the second and third offenses listed above also constitute official misconduct and thus, may be grounds for removal under the “official misconduct” provisions of Texas Local Government Code Sections 21.025(a)(2) and 21.031(a) or through a recall or other removal action authorized by a city charter.

As to the third offense—failing or refusing to provide access to or copies of information—it is, by its terms, limited to an officer for public information or the officer’s agent. Therefore, it likely would not apply to a councilmember.

### C. Records Retention

The Local Government Records Act (LGRA) is found in Chapters 201 through 205 of the Local Government Code. Under the LGRA, a city is required to establish a records management program.<sup>49</sup> In simple terms, such a program generally addresses the creation, use, maintenance, retention, preservation, and disposal of city records.

Local government records created or received in the transaction of official business or the creation or maintenance of which were paid for by public funds are city property and must be preserved and managed in accordance with state law.<sup>50</sup> There are statutory procedures by which a city can seek to recover a local government record.<sup>51</sup>

It is a Class A misdemeanor for an officer or employee to knowingly or intentionally violate the LGRA or rules adopted pursuant to the LGRA by: (1) impermissibly destroying or alienating a local government record; or (2) intentionally failing to deliver records to a successor in office as required by the LGRA.<sup>52</sup>

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<sup>45</sup> *Id.* § 552.352.

<sup>46</sup> *Id.* § 552.353. It is an affirmative defense that the officer reasonably believed that public access was not required and that (1) the officer relied on a court order or attorney general opinion, (2) the officer requested a decision from the attorney general, (3) the governmental body filed a petition for declaratory judgment after the attorney general issued a ruling; or (4) the person is an agent of an officer for public information and relied on the written instructions of that officer not to disclose the information. *Id.*

<sup>47</sup> *Id.* §§ 552.351–.353.

<sup>48</sup> *Id.* § 552.321.

<sup>49</sup> TEX. LOC. GOV’T CODE §§ 203.026, 203.047.

<sup>50</sup> *Id.* § 201.005.

<sup>51</sup> *Id.* § 202.005.

<sup>52</sup> *Id.* § 202.008. As discussed elsewhere, city records are also protected from destruction by state laws outside of the LGRA. See TEX. GOV’T CODE § 552.351 (providing that the willful destruction or mutilation of a public record is a criminal offense), TEX. PENAL CODE § 37.10(3) (providing that the intentional destruction of a governmental record is a criminal offense).

## II. CONFLICTS OF INTEREST AND FINANCIAL DISCLOSURE

A common source of alleged wrongdoing revolves around conflicts of interest. Whether real or perceived, these allegations often arise out of a conflict of interest relating to personal financial gain, employment, or special treatment for family members or business relations. This section highlights various state laws that require city officials disclose information about these matters to the public by filling out some type of disclosure or abstaining from voting on a matter. If you have any doubt whether you have a conflict of interest, you should comply with these requirements.

### A. Local Government Code Chapter 171: Real Property and Business Interests

Chapter 171 of the Local Government Code regulates local public officials' conflicts of interest.<sup>53</sup> It prohibits a local public official from voting on or participating in a matter involving a business entity or real property in which the official has a substantial interest if an action on the matter will result in a special economic effect on the business that is distinguishable from the effect on the public, or in the case of a substantial interest in real property, it is reasonably foreseeable that the action will have a special economic effect on the value of the property, distinguishable from its effect on the public.<sup>54</sup>

A public official who has such interest is required to file, before a vote or decision on any matter involving the business entity or real property, an affidavit with the city's official record keeper (usually the city secretary), stating the nature and extent of the interest.<sup>55</sup> In addition, a public official is required to abstain from further participation in the matter except when a majority of the members of the governing body also have a substantial interest and are required to file and do file affidavits of similar interests on the same official matter.<sup>56</sup>

The term "local public official" is defined to mean "a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any . . . municipality . . . or other local governmental entity who exercises responsibilities beyond those that are advisory in nature."<sup>57</sup> This term includes a member of a planning and zoning commission.<sup>58</sup>

A public official has a substantial interest in a business entity if the official:

- (1) owns 10 percent or more of the voting stock or shares of the business entity;
- (2) owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or
- (3) receives funds from the business entity that exceed 10 percent of the person's gross income for the preceding year.<sup>59</sup>

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<sup>53</sup> TEX. LOC. GOV'T CODE §§ 171.001–.010.

<sup>54</sup> *Id.* § 171.004.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* § 171.001(1).

<sup>58</sup> Tex. Att'y Gen. Op. Nos. KP-0105 (2016), DM-309 (1994).

<sup>59</sup> TEX. LOC. GOV'T CODE § 171.002(a).



A public official has a substantial interest in real property if the interest is an equitable or legal ownership interest with a fair market value of \$2,500 or more.<sup>60</sup>

A public official is also considered to have a substantial interest in a business entity or real property if the official's relative within the first degree of consanguinity (blood) or affinity (marriage) has a substantial interest in the business entity or real property.<sup>61</sup> As such, any "substantial interest" that a public official's spouse, parent, child, step-child, father or mother-in-law, or son or daughter-in-law has is imputed to the public official. For example, a public official has a "substantial interest" in a business that employs the official's daughter if the official's daughter earns a small income, which exceeds ten percent of her gross income.<sup>62</sup>

A business entity is defined as "a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law."<sup>63</sup> A nonprofit corporation is considered a business entity.<sup>64</sup> The term also includes a business entity that represents an entity or person with an interest in a matter before the city council.<sup>65</sup> Public entities such as a city, state university or school district, are not a business entities.<sup>66</sup>

The limit on "further participation" by a public official who has a conflict does not preclude the public official from attending meetings, including executive session meetings, relevant to the matter in which he has a substantial interest, provided that the official remains silent during the deliberations.<sup>67</sup> Thus, an interested public official does not participate in a matter by merely attending an executive session on the matter and remaining silent during the deliberations.<sup>68</sup>

The question of whether a vote or decision has a "special economic effect" on a business entity or on the value of real property is generally a question of fact.<sup>69</sup> However, a vote or decision will, as a matter of law, have a "special economic effect" if the governing body considers purchasing goods or services from a business entity in which a local public official has a substantial interest.<sup>70</sup> Additionally, the issue of whether a vote or decision has a special economic effect may be answered as a matter of law in the context of the purchase or sale of an interest in real property.<sup>71</sup>

Whether it is "reasonably foreseeable" that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public, is fact specific.<sup>72</sup>

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<sup>60</sup> *Id.* § 171.002(b).

<sup>61</sup> *Id.* § 171.002(c).

<sup>62</sup> Tex. Att'y Gen. Op. No. JC-0063 (1999).

<sup>63</sup> TEX. LOC. GOV'T CODE § 171.001(2).

<sup>64</sup> Tex. Att'y Gen. Op. No. JM-424 (1986), at 2.

<sup>65</sup> Tex. Att'y Gen. Op. No. DM-309 (1994), at 2.

<sup>66</sup> Tex. Att'y Gen. Op. Nos. GA-0826 (2010), at 1, DM-267 (1993), at 2, JM-852 (1988), at 2.

<sup>67</sup> Tex. Att'y Gen. Op. No. GA-0334 (2005), at 6.

<sup>68</sup> *Id.*

<sup>69</sup> Tex. Att'y Gen. Op. No. GA-0796, at 4 (2010); Tex. Att'y Gen. LO-98-052.

<sup>70</sup> Tex. Att'y Gen. Op. No. GA-0136 (2004), at 3.

<sup>71</sup> Tex. Att'y Gen. Op. No. GA-0796 (2010), at 4 (discussing *Dallas Cnty. Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 281-82 (Tex. App.—Dallas 1991, writ denied)).

<sup>72</sup> Tex. Att'y Gen. LO-96-049.

In instances where the economic effect is direct and apparent at the time of the action, both a court and the attorney general have concluded that the economic effect was “reasonably foreseeable.”<sup>73</sup>

There are special rules beyond the filing of an affidavit and abstaining from voting that apply to the adoption of a budget. If an item of the budget is specifically dedicated to a contract with a business entity in which a member of the governing body has a substantial interest, the governing body must vote on that line item separately.<sup>74</sup> The affected member may not generally participate in consideration of that item.<sup>75</sup>

If a public official votes on a matter that he or she has a substantial interest in or fails to abstain from further participation, the action of the governing body on the matter is not voidable, unless the matter that was the subject of the action would not have passed without the vote of the person who had a substantial interest.<sup>76</sup> A knowing violation of Chapter 171 is a Class A misdemeanor, which is punishable by a fine and/or confinement.<sup>77</sup>

## **B. Local Government Code Chapter 176: Vendor Relationships**

Chapter 176 of the Local Government Code requires certain local government officers to disclose employment, business, and familial relationships with vendors who conduct business, or consider conducting business, with local government entities. The requirements apply to most political subdivisions, including cities.<sup>78</sup> The Chapter also applies to a “local government corporation, a board, commission, district, or authority” whose members are appointed by a mayor or the city council.<sup>79</sup>

A “local government officer” (officer) includes: (1) a mayor or city councilmember; (2) a director, administrator, or other person designated as the executive officer of the city; and (3) an agent (including an employee) of the city who exercises discretion in the planning, recommending, selecting, or contracting of a vendor.<sup>80</sup>

An officer is required to file a conflicts disclosure statement in at least three situations:

1. An officer must file a statement if the officer or officer’s family member<sup>81</sup> has an employment or other business relationship with a vendor that results in the officer or officer’s family member receiving taxable income of more than \$2,500 in the preceding

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<sup>73</sup> *Dallas Cty. Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 278 (Tex. App.—Dallas 1991, writ denied); Tex. Att’y Gen. Op. No. GA-0796 (2010), at 6.

<sup>74</sup> TEX. LOC. GOV’T CODE § 171.005.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* § 171.006.

<sup>77</sup> *Id.* § 171.003.

<sup>78</sup> TEX. LOC. GOV’T CODE § 176.001.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> An officer’s family member is a person related to the officer within the first degree by consanguinity (blood) or affinity (marriage). *Id.*

twelve months.<sup>82</sup> An officer who only receives investment income, regardless of amount, is not required to file a disclosure statement. Investment income includes dividends, capital gains, or interest income gained from a personal or business checking or savings account or other similar account, a personal or business investment, or a personal or business loan.<sup>83</sup>

2. An officer is required to file a statement if the officer or officer's family member accepts one or more gifts (including lodging, transportation, and entertainment accepted as a guest) from a vendor that has an aggregate value of more than \$100 in the preceding twelve months.<sup>84</sup> An officer is not required to file a statement in relation to a gift, regardless of amount, if the gift: (1) is a political contribution; (2) is food accepted as a guest; or (3) is offered on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient.<sup>85</sup>
3. An officer is required to file a statement if the officer has a family relationship with the vendor.<sup>86</sup>

There is at least one exception to the three situations set out above. A local government officer does not have to file a statement if the vendor is an administrative agency supervising the performance of an interlocal agreement.<sup>87</sup>

An officer is required to file a statement no later than 5 p.m. on the seventh business day after the date on which the officer becomes aware of facts that require a filing of the statement.<sup>88</sup>

A "vendor" includes any person that enters or seeks to enter into a contract with a city.<sup>89</sup> The term also includes: (1) an agent of a vendor; (2) an officer or employee of a state agency when that individual is acting in a private capacity; and (3) Texas Correctional Industries (but no other state agency).<sup>90</sup>

Chapter 176 applies to any written contract for the sale or purchase of real property, goods (personal property), or services.<sup>91</sup> A contract for services would include one for skilled or unskilled labor, as well as professional services.<sup>92</sup>

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<sup>82</sup> *Id.* § 176.003(a)(2)(A).

<sup>83</sup> *Id.* § 176.001.

<sup>84</sup> *Id.* § 176.003(a)(2)(B) .

<sup>85</sup> *Id.* §§ 176.001(2-b), 176.003(a-1).

<sup>86</sup> *Id.* § 176.003(a)(2)(C). An officer has a family relationship with a vendor if they are related within the third degree by consanguinity (blood) or second degree by affinity (marriage). *Id.* § 176.001.

<sup>87</sup> *Id.* § 176.003(a-2).

<sup>88</sup> *Id.* §176.003(b).

<sup>89</sup> *Id.* §176.001.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

A vendor is required to file a conflict of interest questionnaire if the vendor has a business relationship with the city and has: (1) an employment or other business relationship with an officer or an officer's family member that results in the officer receiving taxable income that is more than \$2,500 in the preceding twelve months; (2) has given an officer or an officer's family member one or more gifts totaling more than \$100 in the preceding twelve months; or (3) has a family relationship with an officer.<sup>93</sup>

A vendor is required to file a questionnaire not later than the seventh business day after the later of the following: (1) the date that the vendor begins discussions or negotiations to enter into a contract with the city or submits an application or response to a bid proposal; or (2) the date that the vendor becomes aware of a relationship or gives a gift to an officer or officer's family member, or becomes aware of a family relationship with an officer.<sup>94</sup>

The statements and disclosures must be filed with the records administrator of the city.<sup>95</sup> A records administrator includes a city secretary, a person responsible for maintaining city records, or a person who is designated by the city to maintain the statements and disclosures filed under Chapter 176.<sup>96</sup>

A city that maintains a Web site is required to post on that site statements and disclosures that are required to be filed under Chapter 176.<sup>97</sup> However, a city that does not have a Web site is not required to create or maintain one.<sup>98</sup>

An officer or vendor who knowingly fails to file a statement or a disclosure when required to do so commits a Class A, B, or C misdemeanor, depending on the amount of the contract.<sup>99</sup> It is an exception to prosecution that an officer/vendor files a statement/questionnaire not later than the seventh day after the date the person receives notice from the city of the alleged violation.<sup>100</sup> The validity of a contract between a city and a vendor is not affected solely because a vendor fails to file a questionnaire.<sup>101</sup>

The Texas Ethics Commission is charged with creating statements and disclosure forms. The forms (Form CIS and Form CIQ) may be found at [https://www.ethics.state.tx.us/filinginfo/conflict\\_forms.htm](https://www.ethics.state.tx.us/filinginfo/conflict_forms.htm).

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<sup>93</sup> *Id.* §176.006(a).

<sup>94</sup> *Id.* §176.006(a-1).

<sup>95</sup> *Id.* §§176.003(b), 176.006(a-1).

<sup>96</sup> *Id.* §176.001(5).

<sup>97</sup> *Id.* § 176.009.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* §§ 176.013.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* § 176.006(i).

### C. Government Code Chapter 553: Property Acquisition

Chapter 553 of the Government Code provides that a “[a] public servant who has a legal or equitable interest in property that is to be acquired with public funds shall file an affidavit within 10 days before the date on which the property is to be acquired by purchase or condemnation.”<sup>102</sup>

Chapter 553’s affidavit requirement applies to a “public servant,” defined as a person who is elected, appointed, employed, or designated, even if not yet qualified for or having assumed the duties of office, as: (1) a candidate for nomination or election to public office; or (2) an officer of government.<sup>103</sup>

The term “public funds” is defined to “include[] only funds collected by or through a government.”<sup>104</sup> The language of Chapter 553 suggests that a public servant is required to disclose his/her interest in property even when the property is to be acquired by a separate governmental entity with which the public servant is not affiliated. There appears to be no case or attorney general opinion that addresses this issue. Thus, a public servant or official subject to Chapter 553 should consult his/her private legal counsel regarding the application of Chapter 553 in this scenario.

Chapter 553 is not, by its language, limited to real property interests. Thus, if a public servant has a legal or equitable interest in any real (e.g., land) or personal (e.g., a vehicle) property acquired with public funds, and has actual notice of the acquisition or intended acquisition of the property, the public servant should file a Chapter 553 affidavit.<sup>105</sup>

A Chapter 553 affidavit has to be filed within ten days before the date on which the property is to be acquired by purchase or condemnation.<sup>106</sup> The affidavit is filed with the county clerk of the county in which the public servant resides as well as the county clerk of each county in which the property is located.<sup>107</sup>

The affidavit must include: (1) the name of the public servant; (2) the public servant’s office, public title, or job designation; (3) a full description of the property; (4) a full description of the nature, type, and amount of interest in the property, including the percentage of ownership interest; (5) the date the public servant acquired an interest in the property; (6) the following verification: “I swear that the information in this affidavit is personally known by me to be correct and contains the information required by Section 553.002, Government Code;” and (7) an acknowledgement of the same type required for recording a deed in the deed records of the county.<sup>108</sup> An affidavit example is available on our Web site at: <http://www.tml.org/example-documents>.

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<sup>102</sup> TEX. GOV’T CODE § 553.002(a).

<sup>103</sup> *Id.* § 553.001(2).

<sup>104</sup> *Id.* § 553.001(1).

<sup>105</sup> *Id.* § 553.002.

<sup>106</sup> *Id.* § 553.002(a).

<sup>107</sup> *Id.* § 553.002(c).

<sup>108</sup> *Id.* § 553.002(b).

A person who violates Section 553.002 of the Government Code by failing to file the required affidavit is presumed to have committed a Class A misdemeanor offense if the person had actual notice of the acquisition or intended acquisition of the legal or equitable interest in the property.<sup>109</sup>

#### **D. Local Government Code Chapter 145: Cities with a Population of 100,000 or More**

Local Government Code Chapter 145's financial disclosure requirements apply *only in a city with a population of 100,000 or more*.<sup>110</sup> In general terms, Chapter 145:

1. requires each mayor, each member of a city council, each city attorney, each city manager, and each candidate for city office to file an annual financial statement with the city clerk or secretary;<sup>111</sup>
2. requires that the financial statement include an account of the financial activity of the covered individual and the individual's spouse and dependent children, if the individual had control over that activity; and<sup>112</sup>
3. requires that the financial statement include all sources of income; shares of stocks owned, acquired, or sold; bonds, notes, or other paper held, acquired, or sold; any interest, dividend, royalty, or rent exceeding \$500; each person or institution to whom a personal debt of \$1,000 or more exists; all beneficial interests in real property or businesses owned, acquired, or sold; certain gifts received; income in excess of \$500 from a trust; a list of all boards of directors on which the individual serves; and information about certain contracts with a governmental entity.<sup>113</sup>

Candidates for elected city office are required to file the financial disclosure statement not later than the earlier of: (1) the twentieth day after the deadline for filing an application for a place on the ballot in the election; or (2) the fifth day before the date of the election.<sup>114</sup> Annually, the mayor, city councilmembers, the city manager, and the city attorney must file a financial disclosure statement for the preceding year by April 30.<sup>115</sup> A new city manager or a new city attorney must file a financial disclosure statement within forty-five days of assuming the duties of office.<sup>116</sup>

City officers and candidates for elected city office must file the financial statement on a form provided by the Texas Ethics Commission.<sup>117</sup> The form (PFS-Local) is available here:

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<sup>109</sup> *Id.* § 553.003.

<sup>110</sup> TEX. LOC. GOV'T CODE § 145.001.

<sup>111</sup> *Id.* §§ 145.002–.003. The requirements seem to apply to interim city managers and city attorneys as well. *Cf.* Tex. Ethics Comm'n Op. Nos. 27 (1992), 265 (1995).

<sup>112</sup> *Id.* § 145.003(b)(2), TEX. GOV'T CODE § 572.023(a).

<sup>113</sup> TEX. LOC. GOV'T CODE § 145.003(b)(2), TEX. GOV'T CODE § 572.023(b).

<sup>114</sup> TEX. LOC. GOV'T CODE § 145.004(c).

<sup>115</sup> *Id.* § 145.004, TEX. GOV'T CODE § 572.026(a).

<sup>116</sup> TEX. LOC. GOV'T CODE § 145.004, TEX. GOV'T CODE § 572.026(c).

<sup>117</sup> TEX. LOC. GOV'T CODE § 145.005(a).

[https://www.ethics.state.tx.us/filinginfo/pfsforms\\_insLocal.html](https://www.ethics.state.tx.us/filinginfo/pfsforms_insLocal.html). A detailed listing of the required contents can be found in Section 572.023 of the Texas Government Code. If information in the financial disclosure form is required to be filed by category, Section 572.022 sets forth reporting categories. The city secretary must deliver (by mail, personal delivery, e-mail, or other electronic transfer) copies of the form to city officers and candidates for city office within certain time deadlines.<sup>118</sup>

The completed financial disclosure statement is filed with the city clerk or secretary.<sup>119</sup> Statements are public records and are to be maintained so as to be accessible to the public during regular office hours.<sup>120</sup>

Both criminal and civil penalties may be imposed for failure to file a financial disclosure statement. An offense under Chapter 145 is a class B misdemeanor, which is punishable by a fine up to \$2,000 and/or confinement up to 180 days.<sup>121</sup> Section 145.010 sets forth a process whereby a civil penalty up to \$1,000 can be assessed upon failure to comply after notice is received from the city attorney.

The city secretary shall grant an extension of not more than sixty days for the filing of the financial disclosure statement to a city officer or a person appointed to a city office if: (1) the individual makes an extension request before the filing deadline; or (2) the individual's physical or mental capacity prevents either the filing or the request for an extension before the filing date.<sup>122</sup> Extensions shall not be granted to candidates for elected city office.<sup>123</sup>

The city secretary shall maintain a list of the city officers and candidates required to file a financial disclosure statement. No later than ten days after the filing deadline, the city secretary shall provide a list to the city attorney showing for each city officer and candidate for city office: (1) whether the individual filed a timely statement; (2) whether the individual was granted an extension and the new filing deadline; or (3) whether the individual did not timely file a financial statement or receive an extension of time.<sup>124</sup>

## **E. Miscellaneous Conflicts Provisions**

### **1. Plats**

A provision governing conflicts of interest in the plat approval process was added to state law in 1989. It requires a member of a municipal authority responsible for approving plats who has a substantial interest in a subdivided tract to file an affidavit stating the nature and extent of the interest and abstain from further participation in the matter.<sup>125</sup> The affidavit must be filed with

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<sup>118</sup> *Id.* §§ 145.002, 145.005(b)

<sup>119</sup> *Id.* § 145.003(b).

<sup>120</sup> *Id.* § 145.007(a).

<sup>121</sup> *Id.* § 145.009.

<sup>122</sup> *Id.* § 145.004(e).

<sup>123</sup> *Id.* § 145.004(f).

<sup>124</sup> *Id.* § 145.008.

<sup>125</sup> *Id.* § 212.017(d).

the municipal secretary or clerk before a vote or decision regarding the approval of a plat for the tract.

For purposes of this disclosure requirement, “subdivided tract” means a tract of land, as a whole, that is subdivided. The term does not mean an individual lot in a subdivided tract of land.<sup>126</sup>

A person has a substantial interest in a subdivided tract if the person:

- (1) has an equitable or legal ownership interest in the tract with a fair market value of \$2,500 or more;
- (2) acts as a developer of the tract;
- (3) owns 10% or more of the voting stock or shares of or owns either 10% or more or \$5,000 or more of the fair market value of a business entity that:
  - (A) has an equitable or legal ownership interest in the tract with a fair market value of 2,500 or more; or
  - (B) acts as a developer of the tract; or
- (4) receives in a calendar year funds from a business entity described in (3) that exceed 10% of the person’s gross income for the previous year.<sup>127</sup>

A person is also considered to have a substantial interest in a subdivided tract if the person is related in the first degree by consanguinity or affinity to another person who has a substantial interest in the tract. An offense under this subsection is a Class A misdemeanor.<sup>128</sup> The finding by a court of a violation of this requirement does not render voidable an action of the municipal authority responsible for approving plats, unless the measure would not have passed without the vote of the member who violated the requirement.<sup>129</sup>

## 2. Depository

Local Government Code Section 131.903 regulates conflicts of interest with respect to a city’s selection of a depository. A bank is disqualified from serving as the depository of the city if an officer or employee of the city who has a duty to select the depository owns or has a beneficial interest, individually or collectively, in more than 10 percent of the outstanding capital stock of the bank.<sup>130</sup> In other words, a city council may not select a bank as the city’s depository if a mayor or councilmember owns more than 10 percent of the bank.

If an officer or employee of the city is a director or officer of the bank, or owns 10 percent or less of the capital stock of the bank, the bank is not disqualified from serving as the city’s depository so long as: (1) the interested officer or employee does not vote or take part in the proceedings; and (2) a majority of the other members of the city council vote to select the bank as the depository.<sup>131</sup>

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<sup>126</sup> *Id.* § 212.017(a).

<sup>127</sup> *Id.* § 212.017(b).

<sup>128</sup> *Id.* § 212.017(e).

<sup>129</sup> *Id.* § 212.017(f).

<sup>130</sup> *Id.* § 131.903(a)(2).

<sup>131</sup> *Id.*



The attorney general has concluded that Section 131.903 is an exception to the general conflicts of interest statute in Chapter 171 of the Local Government Code.<sup>132</sup> That being said, TML attorneys advise that any local public official with a “substantial interest” in a bank, as that term is defined by Chapter 171 of the Local Government Code, comply with the Chapter 171 requirements of (1) filing an affidavit that discloses the potential conflict; and (2) abstaining from participating in the selection of the bank, even if the potential conflict doesn’t trigger the specific conflict of interest provision under Local Government Code Section 131.903.

### **III. ACTING AS A SURETY**

There are various instances in which a city may require an entity with which it contracts to utilize a surety (sometimes referred to as a guarantor or secondary obligor).<sup>133</sup> In addition, certain city officers may be required to execute a bond in conjunction with their office.<sup>134</sup>

A local public official commits a Class A misdemeanor offense if the official knowingly: (1) acts as a surety for a business entity that has work, business, or a contract with the governmental entity or (2) acts as a surety on any official bond required of an officer of the governmental entity.<sup>135</sup> For the purposes of these violations, a “local public official” is defined to mean “a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any . . . municipality . . . who exercises responsibilities beyond those that are advisory in nature.”<sup>136</sup>

### **IV. PURCHASING**

At meetings throughout the budget year, the city council may be called on to approve the purchase of goods, services, and property. With limited exceptions, before a city enters into a contract that requires an expenditure of more than \$50,000, it must comply with the procedures for competitive sealed bidding or competitive sealed proposals in Chapter 252 of the Texas Local Government Code.<sup>137</sup> As an alternative to competitive sealed bidding or proposals, a city may use the following procurement methods: (1) the reverse auction procedure for purchasing in Section 2155.062(d) of the Government Code; (2) a cooperative purchasing program under Subchapters D and F of Chapter 271 of the Local Government Code; or (3) an alternative

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<sup>132</sup> Tex. Att’y Gen. LO-97-093.

<sup>133</sup> See, e.g., *Wisembaker v. Johnny Folmar Drilling Co.*, 334 S.W.2d 465, 466 (Tex. Civ. App.—Texarkana 1960, writ dismissed) (describing that the City of Quitman had filed suit against a drilling company and its surety on the company’s performance bond for breach of contract).

<sup>134</sup> See, e.g., TEX. LOC. GOV’T CODE § 22.072(c) (authorizing the city council in a type A general law city to require municipal officers to execute a bond payable to the city and conditioned that the officer will faithfully perform the duties of the office).

<sup>135</sup> TEX. LOC. GOV’T CODE § 171.003; see also Tex. Att’y Gen. Op. No. KP-0132 (2017) (concluding that 171.003 does not prohibit a local public official from acting as a surety on a bail bond, i.e., a surety for an individual made to secure the release of an individual defendant from the State’s custody).

<sup>136</sup> TEX. LOC. GOV’T CODE § 171.001(1).

<sup>137</sup> *Id.* §§ 252.021, 252.022.

procurement method for city construction projects set out in Chapter 2269 of the Texas Government Code.<sup>138</sup>

A city may use competitive sealed proposals for the purchase of any goods or services, including high technology items and insurance.<sup>139</sup> However, construction projects must generally be procured using competitive bidding or specific alternative methods (discussed below).

For general procurement of goods or services (as discussed below, special rules may apply to construction procurement), a contract must be awarded to: (a) the lowest responsible bidder, or (b) the bidder who provides goods or services at the “best value.”<sup>140</sup> When determining “best value,” the city may consider factors other than the purchase price of the goods and services, including among other things: (1) the reputation of the bidder and the bidder’s goods or services; (2) the quality of the bidder’s goods or services; (3) the bidder’s past relationship with the city; and/or (4) any other lawful criteria.<sup>141</sup>

The city must indicate in the bid specifications and requirements that the contract will be awarded either to the lowest responsible bidder or to the bidder who provides goods or services at the “best value” for the city.<sup>142</sup>

In addition, two provisions—Local Government Code Sections 271.905 and 271.9051—authorize the use of local preference when awarding a contract *under the Local Government Code*. Section 271.905 allows a city to consider a bidder’s principal place of business when a city awards a contract for real or personal property.<sup>143</sup> Specifically, it provides that if a city receives one or more bids from a bidder whose principal place of business is in the city and whose bid is within three percent of the lowest bid price of a non-resident, the city may pick the resident bidder after a written determination that the decision is in the best interests of the city.<sup>144</sup> This is a useful provision for awarding contracts, but it appears to be directed towards the purchase of tangible items rather than services.

Section 271.9051 authorizes a city to give a preference to a local bidder when awarding a contract for personal property *or services* if: (1) the local bid is within five percent of the lowest bid that isn’t local, and (2) the city’s governing body finds in writing that the local bid offers the best combination of price and economic development factors such as local employment and tax revenues. Legislation passed in 2009 and 2011 limits the applicability of this provision to contracts for construction services that are less than \$100,000 and contracts for other purchases that are less than \$500,000.

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<sup>138</sup> *Id.* § 252.021. House Bill 628, passed during the 2011 regular legislative session, consolidated the alternative procurement methods for most governmental entities into a new Chapter 2267 of the Texas Government Code. Senate Bill 1093, passed during the 2013 regular legislative session, moves those methods to Chapter 2269 of the Texas Government Code.

<sup>139</sup> *Id.* § 252.021(b).

<sup>140</sup> *Id.* § 252.043.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* § 271.905.

<sup>144</sup> *Id.*

A city does not have to comply with competitive procurement requirements for certain expenditures, even if the expenditure is over \$50,000. The most common exemptions are as follows (see Section 252.022(a) of the Local Government Code for a complete list of exemptions):

- A procurement made because of a public calamity that requires the immediate appropriation of money to relieve the necessity of the city's residents or to preserve the property of the municipality.<sup>145</sup>
- A procurement necessary to preserve or protect the public health or safety of the city's residents.<sup>146</sup>
- A procurement necessary because of unforeseen damage to public machinery, equipment, or other property.<sup>147</sup>
- A procurement for personal, professional, or planning services.<sup>148</sup>
- A purchase of land or a right-of-way.<sup>149</sup>
- A procurement of items that are available from only one source.<sup>150</sup>

Whether or not to use any of the exemptions is up to each city, and the decision should be made based on the advice of local legal counsel.

A city, in making an expenditure of more than \$3,000 but less than \$50,000, shall contact at least two HUBs on a rotating basis, based on information provided by the Texas Comptroller's Office pursuant to Chapter 2161 of the Government Code, see information at <https://comptroller.texas.gov/purchasing/>.<sup>151</sup> If the list fails to identify a HUB in the county in which the city is located, the city is exempt.<sup>152</sup>

For construction projects that involve the construction of a building that is to be designed and constructed in accordance with accepted building codes (commonly referred to as "vertical construction projects"), and those that are civil engineering projects (commonly referred to as "horizontal construction projects"), a city may use many of the alternative procurement methods set out in Chapter 2269 of the Texas Government Code.<sup>153</sup> The alternative methods are:

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<sup>145</sup> *Id.* § 252.022(a)(1).

<sup>146</sup> *Id.* § 252.022(a)(2).

<sup>147</sup> *Id.* § 252.022(a)(3).

<sup>148</sup> *Id.* § 252.022(a)(4). Certain professional services, however, must be procured through a competitive selection process under Chapter 2254 of the Government Code (the Professional Services Procurement Act).

<sup>149</sup> *Id.* § 252.022(a)(6).

<sup>150</sup> *Id.* § 252.022(a)(7).

<sup>151</sup> *Id.* § 252.0215.

<sup>152</sup> *Id.*

<sup>153</sup> House Bill 628, passed during the 2011 regular legislative session, consolidated the alternative procurement methods for most governmental entities into a new Chapter 2267 of the Texas Government Code. Senate Bill 1093, passed during the 2013 regular legislative session, moves those methods to Chapter 2269 of the Texas Government Code.

- Competitive bidding (which is different than the “standard” competitive bidding processes in Chapter 252/Chapter 271, Subchapter B).<sup>154</sup>
- Competitive sealed proposals (may be used for civil engineering projects).<sup>155</sup>
- Construction manager agent.<sup>156</sup>
- Construction manager at risk (may be used for civil engineering projects).<sup>157</sup>
- Design-build<sup>158</sup> (may not generally be used for civil engineering projects, although a handful of very large cities—those over 100,000 in population—may use design-build for a limited number of civil works projects under Government Code Chapter 2269, Subchapter H).
- Job order contract (may not be used for civil engineering projects).<sup>159</sup>

For each of the methods listed above, a city awards the contract to the contractor who provides the “best value” to the city based on the selection criteria established by the city in its procurement documents. The selection criteria may generally include factors other than the construction cost, including among other things: (1) the reputation of the contractor and the contractor’s goods or services; (2) the quality of the contractor’s goods or services; and (3) the contractor’s past relationship with the city.<sup>160</sup>

Any provision in the charter of a home rule city that relates to the notice of contracts, advertisement of the notice, requirements for the taking of sealed bids based on specifications for public improvements or purchases, the manner of publicly opening bids or reading them aloud, or the manner of letting contracts that is in conflict with Chapter 252 controls unless the governing body elects to have Chapter 252 supersede the charter.<sup>161</sup>

Chapter 271, Subchapters D and F, of the Local Government Code (Cooperative Purchasing Programs) authorize cities to enter into cooperatives with the state or other local governments for the purpose of procuring goods and services. The state purchasing cooperative is online at <https://comptroller.texas.gov/purchasing/>, and a joint TML/Texas Association of School Board cooperative is online at <https://www.tasb.org/Services/BuyBoard.aspx>. In addition, several councils of governments offer cooperative purchasing.

Section 2155.062(d) of the Texas Government Code authorizes the use of the reverse auction method for the purchase of goods and services. A reverse auction procedure is: (1) real-time bidding process usually lasting less than one hour and taking place at a previously scheduled time and Internet location in which multiple suppliers, anonymous to each other, submit bids to provide the designated goods or services; or (2) a bidding process usually lasting less than two weeks and taking place during a previously scheduled period and at a previously scheduled

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<sup>154</sup> TEX. GOV’T CODE Chapter 2269, Subchapter C.

<sup>155</sup> *Id.* Chapter 2269, Subchapter D.

<sup>156</sup> *Id.* Chapter 2269, Subchapter E.

<sup>157</sup> *Id.* Chapter 2269, Subchapter F.

<sup>158</sup> *Id.* Chapter 2269, Subchapters G and H.

<sup>159</sup> *Id.* Chapter 2269, Subchapter I.

<sup>160</sup> *Id.* § 2269.056.

<sup>161</sup> TEX. LOC. GOV’T CODE § 252.002.

Internet location, in which multiple suppliers, anonymous to each other, submit bids to provide the designated goods or services.<sup>162</sup>

A contract made without compliance with competitive procurement laws is void, and performance of the contract may be enjoined by any property tax paying resident or a person who submitted a bid for a contract to which the competitive sealed bidding requirement applies, regardless of residency, if the contract is for the construction of public works.<sup>163</sup> The specific criminal penalties are as follows:

- A municipal officer or employee who intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive procurement requirements of Chapter 252 commits a Class B misdemeanor.<sup>164</sup>
- A municipal officer or employee who intentionally or knowingly violates the competitive procurement requirements of Chapter 252 commits a Class B misdemeanor.<sup>165</sup>
- A municipal officer or employee who intentionally or knowingly violates Chapter 252 other than by conduct described above commits a Class C misdemeanor.<sup>166</sup>

A final conviction for an offense constituting a Class B misdemeanor results in the immediate removal of that person from office or employment. For a period of four years following conviction, the removed officer or employee is ineligible to be appointed or elected to a public office in Texas, to be re-employed by the city, or to receive any compensation through a contract with that city.<sup>167</sup>

A more detailed discussion of these and other purchasing issues are addressed in TML's Municipal Procurement Made Easy paper, available here: [https://www.tml.org/p/procurement\\_easy%202017.pdf/](https://www.tml.org/p/procurement_easy%202017.pdf/).

## V. NEPOTISM

“Texas was the first state in the nation to recognize ‘the need for nepotism regulations and restrictions’; it first did so in 1907.”<sup>168</sup> Chapter 573 of the Texas Government Code is the primary anti-nepotism law in Texas.<sup>169</sup>

In many cities, the city council exercises final control over hiring decisions. In such a city, the general rule is that a councilmember is prohibited from appointing, confirming the appointment

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<sup>162</sup> TEX. GOV'T CODE § 2155.062(d).

<sup>163</sup> TEX. LOC. GOV'T CODE § 252.061.

<sup>164</sup> *Id.* § 252.062.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* § 252.063.

<sup>168</sup> OFFICE OF THE TEXAS ATTORNEY GENERAL, 2006 PUBLIC OFFICERS: TRAPS FOR THE UNWARY 17 (2006) (citing *Collier v. Firemen's & Policemen's Civil Serv. Comm'n of Wichita Falls*, 817 S.W.2d 404, 408 (Tex. App.—Fort Worth 1991, writ denied); Richard D. White Jr., *Consanguinity by Degrees: Inconsistent Efforts to Restrict Nepotism in State Government*, 32 ST. & LOC. GOV'T REV. 108, 109 (Spring 2000)).

<sup>169</sup> TEX. GOV'T CODE §§ 573.001–.084.

of, or voting on the appointment of an individual if: (1) the individual is related to himself or any member of the council within the third degree by consanguinity (blood) or within the second degree by affinity (marriage); and (2) the position will be directly or indirectly compensated from public funds.<sup>170</sup> Chapter 573 does not require that the nepotism problem be disclosed or documented in any particular fashion.

The resignation of a councilmember does not resolve nepotism problems where the councilmember continues to serve in a holdover capacity.<sup>171</sup> However, once the city fills the former officer's position and has qualified and sworn a new person into office, the local entity may then hire a close relative of the former official.

There are two statutory exceptions to the prohibition against the appointment of close relatives. Chapter 573 does not apply to cities with fewer than 200 people.<sup>172</sup> An exception (referred to as the "continuous employment exception") also exists for relatives who are continuously employed prior to the public official's election or appointment for: (a) thirty days, if the public official was appointed; (b) six months, if the public official is elected at an election other than the general election; or (c) one year, if the public official is elected at the general election.<sup>173</sup> But if an individual continues in a position under this exception, the public official to whom the individual is related "may not participate in any deliberation or voting on the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change in status, compensation, or dismissal of the individual if that action applies only to the individual and is not taken regarding a bona fide class or category of employees."<sup>174</sup>

In some cities, the city council has delegated final hiring authority to an employee. The delegation of final hiring authority, by ordinance, does not relieve a city council of its nepotism problems.<sup>175</sup> However, if final hiring authority has been delegated by city charter, reserving no authority in the city council, it is a valid delegation and may relieve the council of nepotism problems.<sup>176</sup>

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<sup>170</sup> *Id.* § 573.041. A "public official" is defined to mean "(A) an officer of this state or of a district, county, municipality, precinct, school district, or other political subdivision of this state; (B) an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or (C) a judge of a court created by or under a statute of this state." *Id.* § 573.001(3).

<sup>171</sup> TEX. CONST. art. XVI, § 17; Tex. Att'y Gen. Op. No. JM-636 (1987).

<sup>172</sup> TEX. GOV'T CODE § 573.061(7).

<sup>173</sup> *Id.* § 573.062.

<sup>174</sup> *Id.*; *see also* Tex. Att'y Gen. Op. No. JC-0558 (2002) (concluding that a city commissioner could not participate in a deliberation regarding a merit salary increase for his sibling who was working under the continuous employment exception and explaining that the term deliberation "embraces any discussion or consideration of a measure").

<sup>175</sup> Tex. Att'y Gen. Op. No. DM-2 (1991) (members of city council of a Type A general law city did not avoid prohibitions of anti-nepotism law by delegating hiring responsibility to the city administrator).

<sup>176</sup> Tex. Att'y Gen. Op. Nos. GA-0226 (2004) (explaining that a home-rule city may delegate final hiring authority to the city manager to avoid application of Section 573.041 to the city council if it delegates full and final authority by charter, reserving no authority in the city council); GA-0595 (2008) ("If the charter provides the city manager with full and final appointing authority . . . and reserves no authority for the city's governing body . . . the city manager may appoint an individual who is related to a city commissioner, but is not related to the city manager, without contravening the nepotism statutes, Government Code chapter 573.").

In addition to placing prohibitions on the hiring of close relatives, Chapter 573 prohibits a public official from trading nepotistic appointments.<sup>177</sup> For instance, a city councilmember is prohibited from appointing an individual who is closely related to a county commissioner where there is an understanding that the county commissioner will return the favor by hiring the city councilmember's close relative.

Chapter 573 also contains prohibitions applicable to candidates. A candidate is prohibited from taking "affirmative action to influence the following individuals regarding the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change in status, compensation, or dismissal of another individual related to the candidate within" the third degree by blood or second degree by marriage: (1) an employee of the office to which the candidate seeks election; or (2) an employee or officer of the governmental body to which the candidate seeks election.<sup>178</sup>

Noncompliance with Chapter 573 may subject the appointing officer(s) to severe consequences including removal from office and criminal sanctions.<sup>179</sup>

A more detailed discussion of the state nepotism law is available here: <https://www.tml.org/p/Texas%20Nepotism%20Laws%20Made%20Easy%202016.pdf>.

## **VI. PENAL CODE PROVISIONS**

There are various provisions of the Texas Penal Code commonly used to prosecute crimes related to government and government officials. This section highlights some of these provisions.

### **A. Bribery, Gifts, and Honorariums**

Chapter 36 of the Texas Penal Code, entitled "Bribery and Corrupt Influences," proscribes certain conduct such as bribery, coercion of a public servant or voter, attempts to influence the outcome of certain proceedings, and tampering with a witness.<sup>180</sup> The Chapter deals generally with offenses involving a "public servant," which is defined to include a person elected, selected, appointed, employed or otherwise designated as an "officer, employee, or agent of government," which includes a city.<sup>181</sup> The Texas Ethics Commission is authorized to prepare written advisory opinions regarding Chapter 36<sup>182</sup> and those opinions are available on the Commission's Web site: <https://www.ethics.state.tx.us/>.

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<sup>177</sup> TEX. GOV'T CODE § 573.044.

<sup>178</sup> *Id.* § 573.042.

<sup>179</sup> *Id.* §§ 573.081–.084.

<sup>180</sup> TEX. PENAL CODE §§ 36.01–.10.

<sup>181</sup> *Id.* §§ 1.07(24)(B), (41)(A).

<sup>182</sup> TEX. GOV'T CODE § 571.091(a)(8).

## 1. Bribery

“A person commits the offense of bribery if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another any benefit as consideration for the recipient’s decision, opinion, recommendation, vote, or other exercise of discretion as a public servant.”<sup>183</sup> It is no defense to prosecution that a person whom the actor sought to influence was not qualified to act in the desired manner because he had not assumed office or, for some other reason, lacked jurisdiction.<sup>184</sup>

A “benefit” is anything reasonably regarded as pecuniary gain or advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest (such as a relative or business partner).<sup>185</sup> At least one Texas Court has indicated that the term should be broadly construed to promote justice.<sup>186</sup>

The offense of bribery is a second degree felony.<sup>187</sup>

## 2. Honorariums and Other Gifts

A councilmember may not solicit, accept, or agree to accept an honorarium in consideration for services that the member would not have been requested to provide but for the member’s official position or duties.<sup>188</sup> The term “‘honorarium’ is commonly understood to be ‘a payment in recognition of acts or professional services for which custom or propriety forbids a price to be set.’”<sup>189</sup> An honorarium may include such things as fees for speaking, fees for teaching, severance pay, and moving expenses.<sup>190</sup>

Not included in the honorarium prohibition are: (1) transportation and lodging expenses in connection with conferences or similar events where the councilmember provides services (e.g., addressing the audience) so long as the service is more than merely perfunctory (i.e., superficial); and (2) meals provided in connection with an event described in (1) above.<sup>191</sup>

A councilmember may not solicit, accept, or agree to accept *any* benefit from a person the councilmember knows is interested in or likely to become interested in any contract, purchase,

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<sup>183</sup> *Valencia v. State*, No. 13-02-020-CR, 2004 WL 1416239 at \*2 (Tex. App.—Corpus Christi June 24, 2004, pet. ref’d)(not desig. for pub.); *see also* TEX. PENAL CODE § 36.02.

<sup>184</sup> TEX. PENAL CODE § 36.02(b).

<sup>185</sup> *Id.* § 36.01(3).

<sup>186</sup> *Valencia v. State*, No. 13-02-020-CR, 2004 WL 1416239 at \*3 (Tex. App.—Corpus Christi June 24, 2004, pet. ref’d)(not design. for pub.)(concluding that the offer to vote for or recommend the appointment of someone for a constable position is commensurate with an offer of a “benefit”); *but see Gándara v. State*, No. 08-15-00201-CR, 2016 WL 6780081 (Tex. App.—El Paso Nov. 16, 2016) (concluding that a sitting councilmember’s solicitation of a local business for public support of the city’s annexation in exchange for his efforts to “mediate” or “spearhead” favorable initiatives for the business did not constitute bribery).

<sup>187</sup> TEX. PENAL CODE § 36.02(e).

<sup>188</sup> *Id.* § 36.07(a); Texas Ethics Comm’n Op. No. 173 (1993).

<sup>189</sup> Tex. Att’y Gen. Op. No. GA-0354 (2005).

<sup>190</sup> *Id.*

<sup>191</sup> TEX. PENAL CODE § 36.07(b).



payment, claims, or transaction involving the exercise of the member's discretion.<sup>192</sup> Texas Penal Code Section 36.10 carves out exceptions under which a city official may accept certain gifts or benefits, including:

(1) fees prescribed by law to be received by a councilmember or any other benefit to which the member is lawfully entitled or for which he gives legitimate consideration in a capacity other than as a councilmember (e.g., a jury duty fee);

(2) gifts given by a person with whom the councilmember has a familial, personal, business or professional relationship, independent of the member's official status (e.g., birthday gift from a family member);

(3) certain benefits for which the councilmember files a statement under Chapter 572, Government Code, or a report under Title 15 of the Texas Election Code (TEX. ELEC. CODE § 251.001 *et seq.*);

(4) political contributions as defined by Title 15 of the Texas Election Code (TEX. ELEC. CODE § 251.001 *et seq.*);

(5) items with a value of less than \$50, excluding cash or a negotiable instrument (e.g., a check);<sup>193</sup>

(6) items issued by a governmental entity that allows the use of property or facilities owned, leased, or operated by the governmental entity;

(7) transportation, lodging, and meals that are allowed under the honorarium prohibition (Penal Code § 36.07(b));

(8) certain complimentary legal advice or legal services rendered to a public servant who is a first responder; and

(9) food, lodging, transportation, or entertainment accepted as a guest, if the donee is required by law to report those items.<sup>194</sup>

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<sup>192</sup> *Id.* § 36.08(d); *see also* Tex. Att'y Gen. Op. No. KP-0003 (2015) (concluding it is a fact question as to whether a sheriff, who has no authority to accept donations from the public to the county, engaged in illegal solicitation by attempting to raise funds to purchase scanning sonar for use in a lake patrol program). Texas Ethics Commission Opinion No. 543 (2017) concluded that, based on the facts described in the opinion, the executive director of a state agency would not receive an "honorarium" for purposes of Section 36.07(a) of the Penal Code or a "benefit" for purposes of Section 36.08 of the Penal Code by accepting a reimbursement of certain travel expenses that are payable by the state agency. The executive director would not be required to report the reimbursement on a personal financial statement.

<sup>193</sup> A prepaid debit card or gift card is considered to be cash for purposes of Section 36.10(a)(6) of the Penal Code. Tex. Ethics Comm'n Op. No. 541 (2017).

<sup>194</sup> TEX. PENAL CODE § 36.10.

If a city official receives an unsolicited benefit from someone under the official's jurisdiction that he is prohibited from accepting under Texas Penal Code Section 36.08, he may donate the benefit to a governmental entity that has the authority to accept the gift or may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.<sup>195</sup>

A violation of either of the bribery and gift laws described above is a Class A misdemeanor.<sup>196</sup> There are no specific provisions in Chapter 36 of the Texas Penal Code providing for removal of a public official or employee due to a conviction under these laws. However, such a conviction may be grounds for removal under the "official misconduct" provisions of Texas Local Government Code Sections 21.025(a)(2) and 21.031(a) or through a recall or other removal action authorized by a city charter.

## **B. Falsification of Government Documents and the Misuse of Information**

City officials have access to and responsibility for documents and information. For instance, under the Public Information Act, a councilmember acting in his official capacity may review records of the city without implicating the PIA's prohibition against selective disclosure.<sup>197</sup> And under the Open Meetings Act, a councilmember may participate in a closed session to discuss the purchase or lease of real property.<sup>198</sup> Once privy to information or documents not available to the public, it is important for a councilmember to understand what liability he or she may have in regard to those documents and that information.

### **1. Falsification of Governmental Records**

Penal Code Section 37.10 works to prevent, among other things, the falsification of governmental records. A governmental record is broadly defined to include, among other things, anything belonging to, received by, or kept by government for information, including court and election records.<sup>199</sup>

The following activities are prohibited: (1) knowingly making a false entry in or false alteration of a governmental record; (2) making, presenting, or using a record, document or thing with knowledge of its falsity and an intent that it be taken as a legitimate government record; (3) intentionally destroying, concealing, removing or impairing the truth, legibility, or availability of a governmental record; (4) possessing, selling, or offering to sell a governmental record or blank form with the intent that it be used unlawfully; (5) making, presenting, or using a governmental

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<sup>195</sup> *Id.* § 36.08(i).

<sup>196</sup> *Id.* §§ 36.07(c), 36.08(h).

<sup>197</sup> *See, e.g.*, Tex. Att'y Gen. Op. No. JM-119 (1983) at 2 ("[W]hen a trustee of a community college district, acting in his official capacity, requests information maintained by the district, he is not a member of the 'public' for purposes of the Open Records Act."); Open Records Decision No. 666 at 2 (2000) ("[A] member of a governmental body who is acting in his or her official capacity is not a member of the public for purposes of access to information in the governmental body's possession. Thus, an authorized official may review records of the governmental body without implicating the Act's prohibition against selective disclosure.").

<sup>198</sup> TEX. GOV'T CODE § 551.072.

<sup>199</sup> TEX. PENAL CODE § 37.01(2).

record with knowledge of its falsity; or (6) possessing, selling, or offering to sell a governmental record or blank form with knowledge that it was obtained unlawfully.<sup>200</sup>

A violation of Section 37.10 can range from a misdemeanor to a third degree felony, depending upon the intent of the actor and type of record involved.

## **2. Misuse of Official Information**

Penal Code Section 39.06 proscribes the misuse of official information. A public servant commits an offense if, in reliance on information to which he has access by virtue of his office or employment and that has not been made public, he: (1) acquires or helps another acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information; (2) speculates or helps another speculate on the basis of the information; or (3) coerces another into suppressing or failing to report that information to a law enforcement agency.<sup>201</sup>

A public servant commits an offense if, with intent to obtain a benefit or intent to harm or defraud another, he discloses or uses information for a nongovernmental purpose that: (1) he has access to by means of his office or employment; and (2) is not public.<sup>202</sup> Conversely, a person commits an offense if, with intent to obtain a benefit or intent to harm or defraud another, he solicits or receives from a public servant information that: (1) the public servant has access to by mean of his office or employment; and (2) is not public.<sup>203</sup>

For purposes of this statute, “information that has not been made public” is information to which the public does not generally have access, and that is prohibited from disclosure under Chapter 552 of the Government Code (the Public Information Act),<sup>204</sup> such as the social security number of a peace officer where the officer has chosen to restrict access to that information or the proprietary information received from a third party in response to a request for proposals.

Coercing an employee into suppressing or failing to report information is a Class C misdemeanor.<sup>205</sup> Otherwise, the misuse of official information is a felony, the degree of which depends on the net pecuniary gain.<sup>206</sup>

## **3. Fraudulent Use or Possession of Identifying Information**

Penal Code Section 32.51 prohibits the fraudulent use or possession of identifying information (e.g., social security number, date of birth, fingerprints, bank account number). It is an offense, with the intent to harm or defraud another, to obtain, possess, transfer or use an item of (1) identifying information of another person without that person’s consent; (2) information

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<sup>200</sup> *Id.* § 37.10(a).

<sup>201</sup> *Id.* § 39.06(a).

<sup>202</sup> *Id.* § 39.06(b).

<sup>203</sup> *Id.* § 39.06(c).

<sup>204</sup> *Id.* § 39.06(d).

<sup>205</sup> *Id.* § 39.06(f).

<sup>206</sup> *Id.* § 39.06(e).

concerning a deceased person if obtained, possessed, transferred or used without legal authorization; or (3) identifying information of a child younger than eighteen years.<sup>207</sup> An offense is a felony.<sup>208</sup>

### C. Abuse of Official Capacity

A public servant may not intentionally or knowingly, with the intent to obtain a benefit or harm or defraud another, violate a law relating to the public servant's office or employment.<sup>209</sup> This provision may be best described as a "catch all" for bad government officials and because of its broad language may be used to attach a criminal penalty to varied conduct that may not have another criminal statute tied to it. A violation of this prohibition is a Class A misdemeanor.

A public servant may not intentionally or knowingly, with the intent to obtain a benefit or harm or defraud another, misuse government property, services, personnel or other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of his office or employment.<sup>210</sup> For instance, a city councilmember may not use city staff to gather information for use in a reelection campaign<sup>211</sup> or use city funds to purchase paint for use on his house.<sup>212</sup> Items such as frequent flyer miles, rental car or hotel discounts, or food coupons are *not* things of value belonging to the government for the purposes of Penal Code section 39.02.<sup>213</sup>

The penalty for misusing government property, services, or personnel varies, depending upon the value of the thing misused:

- Class C misdemeanor if the value is less than \$100;
- Class B misdemeanor if the value is \$100 or more but less than \$750;
- Class A misdemeanor if the value is \$750 or more but less than \$2,500;
- State jail felony if the value is \$2,500 or more but less than \$30,000;
- Third degree felony if the value is \$30,000 or more but less than \$150,000;
- Second degree felony if the value is \$150,000 or more but less than \$300,000; and
- First degree felony if the value is \$300,000 or more.<sup>214</sup>

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<sup>207</sup> *Id.* § 32.51(b).

<sup>208</sup> *Id.* § 32.51(c).

<sup>209</sup> *Id.* § 39.02(a).

<sup>210</sup> *Id.*

<sup>211</sup> See Tex. Ethics Comm'n Op. Nos. 522 (2014) (concluding that the work time of state employees is a thing of value belonging to the state and may not be misused by state employees or members of the legislature; and the use of a legislative employee's work time for purely personal activities would not further a state purpose and would constitute a misuse), 431 (2000) (concluding that it is a misuse of state resources for a legislator to use legislative staff members to gather information for use at a campaign fundraiser).

<sup>212</sup> See *State v. Trevino*, 930 S.W.2d 713, 714 (Tex. App.—Corpus Christi 1996, pet. ref'd) (describing the indictment of a city maintenance director who instructed employees to purchase paint for use to paint the city manager's home).

<sup>213</sup> TEX. PENAL CODE § 39.02(d).

<sup>214</sup> *Id.* § 39.02(c).

## **D. Official Oppression**

A public servant commits an offense by acting under color of his office or employment to intentionally: (1) subject another person to mistreatment, arrest, detention, search, seizure, dispossession, assessment, or lien that the public servant knows is unlawful; (2) deny or impede another person in the exercise or enjoyment of a right, privilege, power, or immunity, knowing his conduct is unlawful; or (3) subject another to sexual harassment.<sup>215</sup> These offenses constitute a Class A misdemeanor, except that it's a third degree felony if the public servant tries to impair the accuracy of data reported to the Texas Education Agency through the Public Education Information Management System.<sup>216</sup>

## **E. Forgery**

To “forge” something means to alter, make complete, execute, or authenticate any writing so that it purports: (1) to be the act of a person who did not authorize that act; (2) to have been executed at a time, place, or in a sequence other than was in fact the case; or (3) to be a copy of an original when no such original exists.<sup>217</sup> The term also means to issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged or to possess the same.<sup>218</sup>

It is an offense to forge a writing with the intent to defraud or harm another.<sup>219</sup> An offense ranges from a misdemeanor to a felony. With certain exceptions, it is a third degree felony to forge a writing that is or purports to be a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States.<sup>220</sup> And a person is presumed to intend to defraud or harm another if the person acts with respect to two or more writings of the same type and if each writing is one of the government writings listed above.<sup>221</sup>

## **F. Theft**

It is unlawful to appropriate property with the intent to deprive the owner of the property.<sup>222</sup> There is a value ladder to determine the punishment range such that the higher the value of the property stolen, the more severe the punishment. An offense is increased to the next higher category of offense if: (1) the actor was a public servant at the time of the offense and the property appropriated came into the actor's custody, possession, or control by virtue of his status as a public servant; or (2) the actor was in a contractual relationship with government at the time of the offense and the property appropriated came into the actor's custody, possession, or control by virtue of that contractual relationship.<sup>223</sup>

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<sup>215</sup> *Id.* § 39.03(a).

<sup>216</sup> *Id.* § 39.03(d).

<sup>217</sup> *Id.* § 32.21(a).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* § 32.21(b).

<sup>220</sup> *Id.* § 32.21(e).

<sup>221</sup> *Id.* § 32.21(f).

<sup>222</sup> *Id.* § 31.03(a).

<sup>223</sup> *Id.* § 31.03(f).

## VII. CEMETERIES

Cities with cemeteries should be aware that an officer, agent, or employee of a city commits a criminal offense (ranging from a Class A misdemeanor to a second degree felony) if the person:

- (1) engages in a business for cemetery purposes other than through a corporation organized for that purpose, if a corporation is required by law;
- (2) fails or refuses to keep records of interment as required by state law;
- (3) sells, offers to sell, or advertises for sale a plot or the exclusive right of sepulture in a plot for purposes of speculation or investment;
- (4) represents through advertising or printed material that a retail department will be established for the resale of the plots of plot purchasers, that improvements will be made in the cemetery, or that merchandise or services will be furnished to a plot owner, unless adequate funds or reserves are created by the cemetery organization for the represented purpose;
- (5) makes more than one interment in a plot in a cemetery operated by a cemetery organization other than as provided by law;
- (6) removes remains from a plot in a cemetery operated by a cemetery organization without complying with state law;
- (7) offers or receives monetary inducement to solicit business for a cemetery broker;
- (8) fails or refuses to keep records of sales or resales or to collect and remit fees as required by state law; or
- (9) fails or refuses to register as a cemetery broker as required by state law.<sup>224</sup>

There are additional prohibitions placed on officers, agents, and employees of cemetery organizations.<sup>225</sup> The Finance Commission of Texas is authorized to adopt rules to implement these prohibitions.<sup>226</sup>

## VIII. POLITICAL CONTRIBUTIONS, POLITICAL ADVERTISING, AND CAMPAIGN COMMUNICATIONS

The Texas Ethics Commission (TEC) is the best source of information for a candidate or an official regarding unlawful political contributions, political advertising, and campaign communications because TEC is charged by state law with administering and enforcing Title 15 of the Election Code (TEX. ELEC. CODE § 251 *et seq.*) which governs these matters.<sup>227</sup> That said, the following discussion highlights several key provisions of which candidates and officials should be aware.

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<sup>224</sup> TEX. HEALTH & SAFETY CODE § 711.052.

<sup>225</sup> *Id.* § 711.001(7) (defining “cemetery organization” to mean: (1) an unincorporated association of plot owners not operated for profit that is authorized by its articles of association to conduct a business for cemetery purposes; or (2) a corporation, as defined by Section 712.001(b)(3), that is authorized by its certificate of formation or its registration to conduct a business for cemetery purposes).

<sup>226</sup> *Id.* § 711.012.

<sup>227</sup> TEX. GOV'T CODE § 571.061(a)(3).

## A. Political Contributions

There are various prohibitions related to making and accepting political contributions, including prohibitions against accepting contributions without a campaign treasurer appointment in effect<sup>228</sup> and accepting cash contributions that exceed \$100.<sup>229</sup> Violations of these two prohibitions are Class A misdemeanors. The Election Code also prohibits the conversion of political contributions for personal use.<sup>230</sup>

Chapter 253 of the Election Code provides not only criminal, but also civil liability for violations of its provisions. For instance, a person who knowingly makes or accepts a campaign contribution in violation of Chapter 253 may have to pay an opposing candidate damages amounting to twice the value of the unlawful contribution or expenditure and attorney's fees.<sup>231</sup>

## B. Political Advertising and Campaign Communications

Certain disclosures must be made in relation to political advertising. “[P]olitical advertising that contains express advocacy is required to include a disclosure statement. The person who causes the political advertising to be published, distributed, or broadcast is responsible for including the disclosure statement.”<sup>232</sup> A violation may result in a civil penalty in an amount determined by the TEC.

There are restrictions on the contents of political advertising and campaign communications. Political advertising and campaign communications must not misrepresent a person's identity or title or the source of the advertising or communication.<sup>233</sup> A violation is a misdemeanor offense.<sup>234</sup> A TEC publication entitled “Political Advertising: What You Need to Know” is available at <https://www.ethics.state.tx.us/guides/Bpolad.pdf>.

There are restrictions on the use of a city's internal mail system to distribute political advertising. Officers and employees of a city are prohibited from knowingly using or authorizing the use of an internal mail system for the distribution of political advertising.<sup>235</sup> The prohibition does not apply to use of the city's mail system to distribute political advertising that: (1) is delivered to the city's premises through the U.S. postal service; or (2) is the subject of or related to an investigation, hearing, or other official proceeding of the city.<sup>236</sup> A violation of the prohibition is a Class A misdemeanor.<sup>237</sup>

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<sup>228</sup> TEX. ELEC. CODE § 253.031.

<sup>229</sup> *Id.* § 253.033.

<sup>230</sup> *Id.* § 253.035.

<sup>231</sup> *Id.* § 253.131.

<sup>232</sup> TEX. ETHICS COMM'N, POLITICAL ADVERTISING: WHAT YOU NEED TO KNOW (Jan. 1, 2017), *available at* <https://www.ethics.state.tx.us/guides/Bpolad.pdf>; *see also* TEX. ELEC. CODE § 255.001. There are certain exceptions to these rules.

<sup>233</sup> *Id.* §§ 255.004–.006.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* § 255.0031.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

Finally, it is important for a city official to understand the limitations on spending public funds (i.e., city funds) for political advertising. City officers and employees are prohibited from knowingly spending city funds for political advertising. The prohibition does not apply to a communication that factually describes the purpose of a measure so long as it does not advocate the passage or defeat of the measure.<sup>238</sup> A permissible communication may not, however, contain false information that is likely to influence a voter to vote for or against the measure.<sup>239</sup> A violation of these prohibitions is a Class A misdemeanor. Additionally, an officer or employee could be fined by the TEC. A city council that has ordered an election on a measure (e.g., a bond election), may request the TEC to issue a written advisory opinion as to whether a particular communication violates these prohibitions and the written opinion, among other things, serves as an affirmative defense to prosecution or imposition of a civil penalty. A TEC publication entitled “A Short Guide to the Prohibition Against Using Political Subdivision Resources for Political Advertising in Connection with an Election” is available at [https://www.ethics.state.tx.us/pamphlet/Bpad\\_pol.pdf](https://www.ethics.state.tx.us/pamphlet/Bpad_pol.pdf).

## IX. RANGES OF PUNISHMENT

Following is a list of the various levels of punishment prescribed by the Texas Penal Code and referenced throughout this Primer:

- Class C Misdemeanor – punishable by a fine not to exceed \$500.<sup>240</sup>
- Class B Misdemeanor– punishable by a fine not to exceed \$2,000, confinement in jail for a term not to exceed 180 days, or both.<sup>241</sup>
- Class A Misdemeanor– punishable by a fine not to exceed \$4,000, confinement in jail for a term not to exceed one year, or both.<sup>242</sup>
- State Jail Felony–generally punishable by confinement in jail for a term of not more than two years or less than 180 days, a fine not to exceed \$10,000, or both.<sup>243</sup>
- Third Degree Felony–punishable by imprisonment for a term of not more than ten years or less than two years, a fine not to exceed \$10,000, or both.<sup>244</sup>
- Second Degree Felony–punishable by imprisonment for a term of not more than twenty years or less than two years, a fine not to exceed \$10,000, or both.<sup>245</sup>
- First Degree Felony–punishable by imprisonment for life or for any term of not more than 99 years or less than 5 years, a fine not to exceed \$10,000, or both.<sup>246</sup>

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<sup>238</sup> *Id.* § 255.003.

<sup>239</sup> *Id.*

<sup>240</sup> TEX. PENAL CODE § 12.23.

<sup>241</sup> *Id.* § 12.22.

<sup>242</sup> *Id.* § 12.21.

<sup>243</sup> *Id.* § 12.35.

<sup>244</sup> *Id.* § 12.34.

<sup>245</sup> *Id.* § 12.33.

<sup>246</sup> *Id.* § 12.32.



## X. LEGAL EXPENSES

Service as a city official brings with it duties and responsibilities that are unique to public servants. Public officials often enjoy immunity from suits arising from their actions as a public official. And, to the extent that the Legislature has waived that immunity, the Legislature may have limited an official's liability and/or provided that officials may be indemnified.<sup>247</sup>

In the absence of a governing statute, the attorney general has opined that city officials may have their legal expenses paid for in *civil* suits brought against them personally if a majority of the city council determines: (1) payment of the legal fees serve a public interest and not merely the defendant's private interest; and (2) the officer committed the alleged action or omission forming the basis of the suit while acting in good faith within the scope of his or her official duties.<sup>248</sup> It is common for a city to purchase insurance (sometimes referred to as "errors and omissions insurance") that may provide coverage for officials in this regard.

The payment of legal expenses in relation to a *criminal* prosecution is analyzed differently. An official must pay criminal defense costs up-front because a city may not pay the expenses of an official who is found guilty of criminal charges. In other words, a city must defer payment of criminal legal expenses until they know the outcome of the case.<sup>249</sup> If a public official is found not guilty, a city has discretion to pay for a person's legal expenses in a criminal matter upon findings that the payment furthers a city purpose and that the prosecution was for an act performed in the bona fide performance of official duties.<sup>250</sup> A city councilmember is disqualified from voting on the issue of whether to pay his or her own legal fees, or the legal fees of another city councilmember indicted on the same facts for the same offense.<sup>251</sup> If a public official is found guilty, the city is prohibited from paying the expenses.<sup>252</sup>

Some cities also have ordinances and/or charter provisions that address the payment of legal defense costs and indemnification of city officials.

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<sup>247</sup> See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 102.004 ("A local government may provide legal counsel to represent a defendant for whom the local government may pay damages under this chapter."), 108.002 (discussing a public servant's liability limitation and referencing a city's authority to indemnify the public servant).

<sup>248</sup> See, e.g., Tex. Att'y Gen. Op. Nos. JC-0294 (2000), H-887 (1976); see also Tex. Att'y Gen. Op. No. KP-0040 (concluding that it is unlikely that a public interest is served in paying legal expenses associated with a challenge to an elected official's qualifications for office).

<sup>249</sup> See Tex. Att'y Gen. Op. Nos. KP-0037 (2015), JC-0294 (2000) at 1 ("[A] governmental body may not decide to pay the legal expenses incurred by a public officer or employee in defending against a criminal prosecution until it knows the outcome of the prosecution.").

<sup>250</sup> Tex. Att'y Gen. Op. No. JC-0294 (2000) at 6 (opining that previous cases concluding that public funds could not be used to defend a public officer in a criminal prosecution would likely not be followed today); see also Tex. Att'y Gen. Op. No. KP-0016 n.4 (explaining that JC-0294 "should not be read as precluding the payment of attorney's fees for services rendered in a criminal matter that concludes favorably at the grand jury stage", i.e., before charges are filed).

<sup>251</sup> Tex. Att'y Gen. Op. Nos. KP-0016 (2015) at 3, JC-0294 (2000) at 1, 6 (citing *City of Del Rio v. Lowe*, 111 S.W.2d 1208 (Tex. Civ. App.—San Antonio 1937), *rev'd on other grounds*, 122 S.W.2d 1919 (Tex. 1938)).

<sup>252</sup> *Id.* at 1, 9.