

Chapter 176: Conflict of Interest Disclosures (H.B. 1491)



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**CHAPTER 176: CONFLICT OF INTEREST DISCLOSURES
(H.B. 1491)**

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On May 25, 2007, the Texas Legislature passed House Bill 1491 amending Chapter 176 of the Texas Local Government Code (“Chapter 176”). This Bill was designed to remedy issues which existed in the previous version of Chapter 176 created by House Bill 914 in 2005. Chapter 176 contains requirements for the disclosure of business and employment relationships and gifts designed to insure disclosure of financial and business relationships between officers of local government entities and those who contract with the entities. These requirements affect not only local government officers, but also persons doing business with local governmental entities. House Bill 1491 became effective immediately upon passage on May 25, 2007.

I. Overview of Chapter 176 Requirements:

1. Conflicts Disclosure Statement (176.003) – If a local government entity enters into or is considering entering into a contract for the sale or purchase of real property, goods or services with a person (including an agent of a person), an officer of the local government is required to file a Conflicts Disclosure Statement if the officer or a family member of the officer:
 - (a) is receiving taxable income from an employment or other business relationship with the person, other than investment income, that exceeds \$2,500 during the 12-month period preceding the officer’s awareness of the contract or consideration of the person; or
 - (b) has received gifts with an aggregate value of more than \$250 in the 12 month period before the officer became aware of the contract or consideration of the person (with some exclusions discussed below).

2. Conflict of Interest Questionnaire (176.006) – A person (or their agent) who enters or seeks to enter into a contract with a local government entity for the sale or purchase of real property, goods or services, and has a business relationship with the local government entity must file a Conflict of Interest Questionnaire if they:
 - (a) have an employment or other business relationship with an officer of the local governmental entity or an officer’s family member as described in 1(a) above; or
 - (b) have given an officer of the local governmental entity or an officer’s family member one or more gifts with the aggregate value specified in 1(b) above.

3. List, Posting Requirements – The local governmental entity is required to make a list of the officers of the entity available to the public and provide access to the statements and questionnaires filed under Chapter 176 on its Internet website.

The full text of H.B. 1491 is available at www.capitol.state.tx.us.¹ Discussion relating to recent amendments is marked herein with a “♣” for easy reference. A knowing violation of the filing provisions in Chapter 176 is a Class C misdemeanor. It is a defense to prosecution that the required filing was made not later than the seventh business day after receiving notice from the local governmental entity of the alleged violation.^{*} The requirements of Chapter 176 are in addition to any other disclosures required by law.²

For comparison, the former version of the statute was H.B. 914 (79th Regular Session, 2005). Requests for clarification of the prior version of the statute by Representatives Beverly Woolley and John Smithee and others can be found on the Texas Attorney General’s website along with the Attorney General’s response, dated August 2, 2006. (See GA-0446 and RQ-0451-GA at www.oag.state.tx.us). Interpretation from GA-0446 which is still applicable to the amended statute (marked with a “◆◆◆”) is provided herein. The Texas Ethics Commission (“the Commission”) was charged with developing the forms for the Conflicts Disclosure Statement (FORM CIS) and the Conflict of Interest Questionnaire (FORM CIQ). These forms are available on the Commission’s website at www.ethics.state.tx.us.³ The Ethics Commission does not provide advice or interpretation relating to Chapter 176.

Who is a “person” to whom Chapter 176 applies?

Section 176.002 makes Chapter 176 applicable to any person who:

1. Enters or seeks to enter into a written contract for the sale or purchase of real property, goods, or services with a local governmental entity; ^{*} or
2. Is an agent of such a person in their business with a local governmental entity.

This does not include a state, a political subdivision of a state, the federal government, a foreign government, or an employee of any of these entities acting in their official capacity.

This paper will use the term “vendor” interchangeably with a “person” under 176.002.

¹ Attorneys representing municipal clients may review discussion of this Bill in the *Texas Municipal League Legislative Update*, June 7, 2007 (Number 20, at pg. 7 and Summary at pg. 41).

² Local public officials are still required to file an affidavit and abstain from voting under Section 171.004 of the Local Government Code if they have a substantial interest in a business entity or in real property for which an action on the matter will have a special economic effect. Provisions of the Texas Penal Code which generally prohibits a person from giving gifts to public officials still apply as well.

³ Additionally, on May 15, 2006, the Texas Municipal League obtained approval from the Commission for an electronic Conflict of Interest Questionnaire (FORM E-CIQ) prepared by the Texas Purchasing Management Association which is available at www.tml.org.

What is a “local government entity”?

Under Section 176.001(3) of Chapter 176, "local governmental entity" includes:

- County, municipality, school district, junior college district;
- Local government corporations (e.g., economic development corporations);
- Boards and commissions (e.g., boards of adjustment, P & Z commissions);
- Local government authorities (e.g., housing authorities); and
- Almost every other type of political subdivision in Texas.⁴

♣ Also includes open-enrollment charter schools operating under Subchapter D, Chapter 12, Education Code (H.B. 1491 added definition at 176.001 (1-b)).

Corporations, boards, commissions, districts, or authorities are included if a member is appointed by a mayor, commissioners court of a county, or the governing body of a municipality. The term excludes certain types of cooperatives organized for purposes such as legislative representation. Under this definition, most planning and zoning commissions, zoning boards of adjustment, economic development corporations, historic design review commissions and other commissions and boards of a municipality will be covered.

II. Requirement for Local Government Officers to File Conflicts Disclosure Statements:

Section 176.003 (a) of Chapter 176 provides that a local government officer must file a conflicts disclosure statement with respect to a vendor if:

- (1) the vendor enters into a contract with the local governmental entity or the local governmental entity is considering entering into a contract with the vendor⁴ and
- (2) the vendor:

(A) has an employment or other business relationship with the local government officer or a family member of the officer that results in the officer or family member receiving taxable income, other than investment income, that exceeds \$2,500 during the 12-month period preceding the date that the officer becomes aware that: (i) a contract described by Subdivision (1) has been executed; or (ii) the local governmental entity is considering doing business with the vendor⁵;

or

⁴ See *TML Legislative Update*, December 16, 2005.

⁵ Former version had no minimum amount and did not exclude investment income.

(B) has given to the local government officer or a family member of the officer one or more gifts, other than gifts of food, lodging, transportation, or entertainment accepted as a guest, that have an aggregate value of more than \$250 in the 12-month period preceding the date the officer becomes aware that: (i) a contract described by Subdivision (1) has been executed; or (ii) the local governmental entity is considering doing business with the vendor.

Given the fact that many cities have hundreds and sometimes thousands of people seeking to do business with the city, some cities are making lists of vendors available for review by the officers of the city. However, it is often impractical to keep these lists updated and to provide for regular review of the lists by the affected officers.

♣ The exclusion of investment income means that dividends, capital gains, or interest income generated from a personal or business checking or savings account, a personal or business investment or a personal or business loan will not trigger the reporting requirement.

♣ Section (a-1) has been added to provide an exception for:

- (1) gifts given by a family member;
- (2) political contributions defined by Title 15 of the Election Code; and
- (3) food, lodging, transportation, or entertainment accepted as a guest.

Who is a “local government officer”?

Under Section 176.001(3) of Chapter 176, “local government officer” includes any member of the governmental body and the director, administrator, or other executive officer of the entity. For a city, this would include:

- Mayors and city council members;
- A city manager or administrator;
- Local government board, commission, and authority members;
- Economic development corporation board members;
- An executive director of an economic development corporation; and
- Any other person who is designated as an executive officer of a local government entity.⁶

♣ Under Section 176.005, The local government entity may extend the disclosure requirements of the Chapter to any employee who has the authority to approve contracts on behalf of the entity, including a designated representative under Chapter 271. The designated employees will be considered local government officers for purposes of Chapter 176 and must be identified on a list which is made available to requestors.

⁶ See *TML Legislative Update*, December 16, 2005. Note this would not usually include the City Attorney.

What is a “business relationship”?

- ♣ Under amended Section 176.001 (1-a), a "business relationship" is a connection between the vendor and the local government officer or their family member based on a commercial activity of one of the parties, but does not include a connection based on:

(A) a transaction that is subject to government rate or fee regulation;

(B) a transaction conducted at a price and subject to terms available to the public; or

(C) a purchase or lease of goods or services from a vendor that is state or federally chartered and subject to regular examination and reporting to a state or federal agency.

When and where does the local government officer have to file?

Pursuant to Section 176.003(b), an officer must file a Conflicts Disclosure Statement with the records administrator (see discussion below under “Where are Conflict of Interest Questionnaires Required to be filed”) not later than 5 p.m. on the seventh business day after the date on which the officer becomes aware of the facts that require the filing of the statement pursuant to Section 176.003(a).

Who qualifies as a family member of an officer?

Chapter 176 defines “family member” as a person related to another person within the first degree of consanguinity or affinity, as described by Subchapter B, Chapter 573, Government Code, but not a person who is only related because of Section 573.024(b) of the Government Code.* This definition would include children, spouses, parents, step-children and parents-in law or children in-law, except that relationships by affinity would end upon divorce.

What if a family member of an officer does business with the city?

Chapter 176's disclosure requirements apply to contracts even when the vendor is a family member of a local government officer. However, the amendment specifically excludes gifts from family members from the reporting requirements.*

How is the \$250 threshold on gifts calculated?

- ◆◆◆ The reporting requirements of chapter 176 are triggered upon receipt of more than \$250 in gifts by the local government officer and the officer's family as individuals rather than as a family unit... (citations omitted). [GA-0446].

What must be included in the Conflicts Disclosure Statement?

Pursuant to Section 176.004, the Conflicts Disclosure Statement must be sworn and signed, and must:

- disclose the relevant employment or other business relationship, including the nature and extent of the relationship and any applicable gifts received; and
- acknowledge the disclosure applies to each family member of the officer and covers the required 12-month period.

What Filing Issues May Arise Where a Local Government Official is Also an Attorney?

- ◆◆◆ "Many local government officials are also attorneys and may have clients who qualify as vendors."...As a general rule, the identity of a client is not protected by the attorney-client privilege. There is a narrow and limited exception that protects a client's identity if revelation of a client's identity would also reveal a privileged communication. Because the exception is narrow and depends on the nature of the specific factual circumstances, the question of when it applies in any given situation must be determined on a case-by-case basis...Therefore we cannot advise on when the identity of a vendor who is also a client of an attorney who is an officer may be withheld from disclosure under chapter 176 pursuant to the exception to the attorney-client privilege. [GA-0446].

The safest course of action would be to inform the client whose information will be revealed and obtain their consent before listing the client relationship on the Questionnaire.

How do the Conflict Disclosure Statements Affect Ethical Abstention Decisions?

There is no provision in Chapter 176 requiring an officer to abstain from a vote relating to a conflict disclosed on a Disclosure Statement. However, where other laws allow abstention, an officer should abstain for ethical reasons in these circumstances. There is no requirement for anyone at the local government to police this abstention.

Do relationships which are protected under the Open Records Act need to be disclosed?

- ♣ Section 176.012 provides that Chapter 176 does not require the disclosure of information excepted from disclosure under Chapter 552 of the Government Code.⁷

⁷ See Govt Code Section 552.105 which protects information regarding the location of property which might lead to the disadvantage of a local government in real estate transactions and Section 552.131 which protects information relating to economic development negotiations until a contract is actually reached.

III. Requirement Vendors and Other Persons File Conflict of Interest Questionnaire:

♣ Section 176.006 requires a vendor who enters or seeks to enter into a contract for the sale or purchase of property, goods, or services with the local governmental entity and any of their agents involved in the business with the entity (see “Who is a person to whom Chapter 176 applies” heading above) to file a conflict of interest questionnaire if the vendor has a business relationship with the local governmental entity, and:

(1) has an employment or other business relationship with an officer of the entity or their family member as set out in Section 176.003(a), or

(2) has given an officer of the entity or their family member gifts with the aggregate value set out in Section 176.003(a) (except excluded gifts).⁸

The form must be filed with the appropriate records administrator not later than the seventh business day after the later of:

(1) the date that the person: (A) begins discussions or negotiations to enter into a contract with the local governmental entity; or (B) submits to the local governmental entity an application, response to a request for proposals or bids, correspondence, or another writing related to a potential contract with the local governmental entity; or

(2) the date the person becomes aware of the employment or business relationship or gifts which would trigger the requirement^{*}

What persons are required to file Conflict of Interest Questionnaires?

The amended version of this provision reduces significantly the number of persons who must file Questionnaires. Persons who enter into or seek to enter into contracts with local governmental entities through the bidding, purchasing, or professional services procurement processes of an entity as well as persons who are providing services (including professional services such as legal services) or buying property from or selling property to the entity would be required to file under the old version of the statute. Under the new amendment, they are only required to file if they have the requisite business relationships and/or have provided the aggregate amount of gifts under the statute. The amendment still does not require persons who are seeking permits, zoning, plat approval, or licensing to file. In fact, a provision which would have required disclosures from these persons was removed from the former bill at the Committee level. See also, the discussion relating to “Who is a person to whom Chapter 176 applies” above.

⁸ Under the former version, vendors had to file the forms even if there was no relationship and an undefined term, affiliations, added to the confusion.

Must Questionnaires be filed by all employees and agents of a business?

- ♣ Section 176.001(a) defines “Agent” as a third party who undertakes to transact some business or manage some affair for another person by the authority or on account of the other person.

- ◆◆◆ Partnerships, corporations and other corporate bodies are "persons" subject to chapter 176. As applied to a corporate or legal entity, chapter 176.002's disclosure requirements apply to only the legal entity that is the "person" contracting or seeking to contract with the local governmental entity. Third-party individuals who act as agents under agency law for a legal entity contracting or seeking to contract with the local governmental entity are independently subject to chapter 176 under section 176.002(a)(2)...We see no indication that the legislature intended to exclude corporate bodies from the reach of the disclosure requirements, thus a partnership, corporation or other corporate body is a "person" subject to chapter 176 under the plain language of section 176.002(a)(1). We believe that when a partnership, corporation or other legal entity contracts or seeks to contract with the entity, the partnership, corporation or other legal entity is the party obligated to file the statement...But chapter 176 also applies to an "agent of a person described by Subdivision (1) in the person's business with a local governmental entity."Considering that definition of "agent," we do not construe the term in subsection 176.002(a)(2) to include the individuals who compose the legal entity. (citations omitted). [GA-0446].

Is there a minimum amount for the size of contracts triggering the requirement?

Although there are minimum thresholds for the employment or business relationships and value of gifts which must be reported under Chapter 176, there is no minimum size for the contract which is being entered into or sought between the vendor and the governmental entity which triggers the application of Chapter 176.

- ◆◆◆ Unlike chapter 171 of the Local Government Code pertaining to conflicts of interest, chapter 176 contains no minimum threshold amount for contractual transactions. Chapter 171 provides that an officer must disclose any substantial interests the officer has in a business interest or real property when that business interest or real property is the subject of a vote or decision before the entity. A substantial interest is generally defined through a minimum threshold of at least 10 percent of the business interest or gross income of the officer or \$2,500 of the market value of any real property. Chapter 176 does not contain any minimum threshold contract amount...Pursuant to the plain language of the statute, we conclude that even contracts involving small and routine purchases are subject to chapter 176. (citations omitted). [GA-0446].

Are attorneys and other professional services providers “persons”?

◆◆◆ Chapter 176 includes professional services contracts. [GA-0446].

Where are Conflict of Interest Questionnaires Required to be Filed?

The Conflict of Interest Questionnaires are to be filed with the records administrator for the entity. This is defined in 176.001 as the director, county clerk, municipal secretary, superintendent, or other person responsible for maintaining the records of the entity or other person designated by the entity to maintain statements and questionnaires filed.^{9*} Under the amended version of the statute, local government entities may want to restructure their filing procedures for the forms to place responsibility under the purchasing department which has contact with the vendors.

When must an updated Questionnaire be filed?

An updated Questionnaire must be filed between June 1 and September 1 of each year that the contract or activity continues and on or before the seventh business day after the date of an event that would make a statement in the questionnaire incomplete or inaccurate.

What is required to be included in the Conflict of Interest Questionnaire?

Chapter 176 requires that the CIQ form ask each vendor or other person seeking business to describe:

(1) each employment or business relationship the person has with each local government officer of the local governmental entity and identify those with respect to which:

- the local government officer receives, or is likely to receive, taxable income, other than investment income, from the person; or
- the person filing the questionnaire receives, or is likely to receive, taxable income, other than investment income, from, or at the direction of, a local government officer, that is not from the entity; and

(2) each employment or business relationship with a corporation or other business entity with respect to which a local government officer of the local governmental entity serves as an officer or director; or holds an ownership interest of 10 percent or more. ♣¹⁰

⁹ This is a change from the former version which did not allow for a different person to be designated.

¹⁰ ◆◆◆ To the extent a vendor merely adopts the list of the various entities and relationships provided by the local governmental entity, the vendor does not "describe" the required relationships and affiliations and therefore does not comply with chapter 176. Similarly, to the extent a vendor adopts an incomplete list of the various entities and relationships provided by the local governmental entity, the vendor does not "identify" and "describe" all relevant relationships and affiliations and therefore does not comply with chapter 176. [GA-0446].

IV. Requirements for List and Posting by Local Governmental Entity:

Chapter 176 also provides specific requirements for the local government entity:

- Section 176.007 requires the records administrator to maintain a list of the officers of the entity subject to the bill and make the list available to the public.
- Section 176.009 requires the entity to provide access to the statements and questionnaires which have been filed on the Internet Web site of the entity, but does not require an entity to maintain a website.^{11♣}
- ♣ Section 176.011 requires the statements and questionnaires filed to be maintained in accordance with the entity's records retention schedule.¹²

Is contract validity affected?

- ♣ Pursuant to Section 176.006 (i), a contract between a local governmental entity and a vendor who fails to comply with chapter 176 is not void.¹³

V. Conclusion:

H.B.1491 has amended Chapter 176 disclosure requirements for both local government officers and persons seeking business with local governments to clarify confusion in the previous version of Chapter 176. The amendments to the Chapter significantly limit the situations in which forms will be required while still meeting the goal of requiring additional disclosures of relationships between local government officers and vendors who are seeking contracts with the local governmental entities they represent.

[note the term affiliations no longer applies; the amended version eliminates confusing language regarding these and other relationships which existed in the previous version.]

¹¹ Counties with a population of 800,000 or more and cities with a population of 500,000 or more must also provide access on the website for each report of political contributions and expenditures filed under Chapter 254 Election Code by members of the governing body.

¹² There is nothing in the law which states an entity should only post forms filed by persons who are awarded contracts, so all forms filed by any bidder or other person seeking a contract should be posted on the internet. Pursuant to Section 176.006 (h), a local governmental entity does not have an affirmative duty to require vendors to comply with chapter 176.

¹³ ♦♦♦... local governmental entities may choose to impose such a requirement on all its vendors and to provide for the voidability of a contract entered into in violation of chapter 176. Texas law "recognizes that there is no duty to inform others of the requirements of the law because all persons are presumed to know the law." [GA-0446].