

TEXAS MUNICIPAL LEAGUE

Understanding Your Personal Liability as a City Official: A Primer

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 here on our Web site at 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. In general terms, the TOMA protects the public's interest by requiring a governmental body to open its meetings.

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.¹

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

When a governmental body holds a meeting subject to the TOMA, the body must post an agenda that includes the date, hour, place, and subject of each meeting.³ The agenda 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.⁴ 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.⁵ Emergency meetings to address a matter of urgent public necessity may be called with two hours notice that identifies the nature of the emergency.⁶

If, at a meeting, a member of the public or the governmental body inquires about a subject not on the agenda, any deliberation or decision about the subject must generally be limited to: (1) a proposal to place the subject on a future agenda; (2) a statement of factual information; or (3) a

¹ 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.”).

² *Id.* § 551.001(4).

³ *Id.* § 551.041.

⁴ *Id.* §§ 551.043, 551.050.

⁵ *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).

⁶ TEX. GOV'T CODE § 551.045.

recitation of existing policy.⁷ The governing body of a city may receive, from staff or a member of the body, 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.⁸

There are various exceptions that authorize closed meetings, also known as “executive sessions.” The seven most commonly-used exceptions include discussions involving: (1) purchase or lease of real property; (2) security measures; (3) receipt of gifts; (4) consultation with attorney; (5) personnel matters; (6) economic development; and (7) certain homeland security matters.⁹ 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.¹⁰ All final actions, decisions, or votes must be made in an open meeting.¹¹

Cities must keep written minutes or recordings (or a “certified agenda” for executive sessions) of all meetings, except those involving a closed consultation with an attorney.¹² The minutes of an open meeting must state the subject and indicate each vote, decision, or other action taken.¹³ Minutes do not have to be a verbatim transcript. Minutes of open meetings must be kept forever.¹⁴ Executive session certified agendas or tapes must be kept for at least two years, and longer if litigation is pending.¹⁵

Penalties for violating the Act range from having the action voided to the imposition of fines and incarceration. Any action taken in violation of the Act is voidable and may be reversed in a civil lawsuit.¹⁶ 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;¹⁷ (2) calling or participating in an impermissible closed meeting;¹⁸ (3) participating in a closed session without a certified agenda or tape recording;¹⁹ and (4) disclosing a certified agenda or tape recording to a member of the public.²⁰ Violations are misdemeanor offenses. Depending upon the offense, fines may be up to \$2,000, and incarceration may be up to six months.

⁷ *Id.* § 551.042.

⁸ *Id.* § 551.0415 (defining “items of community interest” to include things like an expression of thanks, congratulations, or condolence).

⁹ *Id.* §§ 418.183, 551.071, 551.072, 551.073, 551.074, 551.076, 551.087.

¹⁰ *Id.* § 551.101.

¹¹ *Id.* § 551.102.

¹² *Id.* §§ 551.021, 551.103.

¹³ *Id.* § 551.021.

¹⁴ 13 TEX. ADMIN. CODE § 7.125(b)(1) (Tex. St. Lib. & Archives Comm’n, Local Schedule GR) *available at* <https://www.tsl.state.tx.us/slr/recordspubs/localretention.html>.

¹⁵ TEX. GOV’T CODE § 551.104.

¹⁶ *Id.* § 551.141.

¹⁷ *Id.* § 551.143.

¹⁸ *Id.* § 551.144.

¹⁹ *Id.* § 551.145.

²⁰ *Id.* § 551.146.

As to the second violation—calling or participating in an illegal closed meeting—an official can be convicted for participating even if unaware that the meeting is prohibited.²¹ 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.²²

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.²³ 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.²⁴ 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.²⁵

B. Public Information

The Texas Public Information Act (PIA) is found in Government Code Chapter 552. Under the PIA, information that is collected, assembled, or maintained in connection with the transaction of official city business is generally available to the public.²⁶ 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 what duties a city has under the PIA.

The PIA applies to all city records, in practically any medium.²⁷ 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.²⁸

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.²⁹ All requests should be treated the same, without regard to the requestor’s identity or the type of information sought.³⁰ 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.³¹

²¹ *Tovar v. State*, 949 S.W.2d 370 (Tex. App.—San Antonio 1997), *aff’d*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

²² TEX. GOV’T CODE § 551.144(c).

²³ *Id.* § 551.005(a).

²⁴ *Id.* § 551.005(f).

²⁵ *Id.* § 551.005(g).

²⁶ *Id.* § 552.002.

²⁷ *Id.*

²⁸ *See, e.g.*, Open Records Decision Nos. 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are subject to the Act), 450 (1986) (handwritten notes taken by appraiser while observing teacher’s classroom performance are subject to the Act) .

²⁹ TEX. GOV’T CODE § 552.222.

³⁰ *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.

³¹ *Id.* §§ 552.021, 552.221.

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 always be released.³² 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.”³³ 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.³⁴

While certain information has to be disclosed, there are literally hundreds of exceptions (both permissive and mandatory) that may allow or require 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 opinion 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.³⁵ 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.³⁶ Because of the strict deadlines, cities should develop—and city officials should learn—procedures for receiving and processing requests for information.

A city may charge fees for providing public information.³⁷ In many cases, the fees can include the reasonable costs of copies and labor.³⁸ 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.³⁹

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;⁴⁰ (2) distributing information that is confidential under the PIA, knowingly using 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;⁴¹ or (3) with criminal negligence, failing or refusing to give access to or provide copies of public information to a requestor.⁴² Violations are

³² *Id.* § 552.022.

³³ *Id.* § 552.221.

³⁴ *Id.*

³⁵ *Id.* § 552.301.

³⁶ *Id.* 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, county jailers, security officers, and employees of the Texas Department of Criminal Justice or a prosecutor’s office).

³⁷ *Id.* §§ 552.261–.275.

³⁸ *Id.* § 552.261.

³⁹ *Id.* § 552.269.

⁴⁰ *Id.* § 552.351.

⁴¹ *Id.* § 552.352.

⁴² *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

misdeemeanor offenses. Depending on the offense, fines may be up to \$4,000 and up to six months in jail may be served.⁴³ A city official may also be ordered to release public information by a civil court.⁴⁴ 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. Thus, it likely would not apply to a councilmember.

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 four state laws that require city officials disclose information about these matters to the public by filling out an affidavit or some other type of disclosure statement or form. We are always conservative in our advice about these matters and believe the best practice is “When in Doubt, Fill it Out!”

A. Local Government Code Chapter 171

Chapter 171 of the Local Government Code regulates local public officials’ conflicts of interest.⁴⁵ It prohibits a local public official from voting or participating on 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.⁴⁶

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.⁴⁷ In addition, a public official is required to abstain from further participation in the matter except when a majority of

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.*

⁴³ *Id.* §§ 552.351–.353.

⁴⁴ *Id.* § 552.321.

⁴⁵ TEX. LOC. GOV’T CODE §§ 171.001–.010.

⁴⁶ *Id.* § 171.004.

⁴⁷ *Id.*

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.⁴⁸

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.”⁴⁹ This term includes a member of a planning and zoning commission.⁵⁰

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.⁵¹

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.⁵²

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.⁵³ 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.⁵⁴

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.”⁵⁵ A nonprofit corporation is considered a business entity.⁵⁶ The term also includes a business entity that represents an entity or person with an interest in a matter before the city council.⁵⁷ A city and other public entities, such as a state university or school district, are not a business entity.⁵⁸

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

⁴⁸ *Id.*

⁴⁹ *Id.* § 171.001(1).

⁵⁰ Tex. Att’y Gen. Op. No. DM-309 (1994), at 2.

⁵¹ TEX. LOC. GOV’T CODE § 171.002(a).

⁵² *Id.* § 171.002(b).

⁵³ *Id.* § 171.002(c).

⁵⁴ Tex. Att’y Gen. Op. No. JC-0063 (1999).

⁵⁵ TEX. LOC. GOV’T CODE § 171.001(2).

⁵⁶ Tex. Att’y Gen. Op. No. JM-424 (1986), at 2.

⁵⁷ Tex. Att’y Gen. Op. No. DM-309 (1994), at 2.

⁵⁸ Tex. Att’y Gen. Op. Nos. DM-267 (1993), at 2, JM-852 (1988), at 2.

deliberations.⁵⁹ 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.⁶⁰

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.⁶¹ 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.⁶² 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.⁶³

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.⁶⁴ 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.”⁶⁵

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.⁶⁶ The affected member may not generally participate in consideration of that item.⁶⁷

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.⁶⁸ A knowing violation of Chapter 171 is a Class A misdemeanor, which is punishable by a fine and/or confinement.⁶⁹

It is important to note, there are specific laws relating to the selection of a bank. A city may select a bank as its depository even if one or more of the members of the governing body is an officer or director of the bank or owns or has a beneficial interest, individually or collectively, in ten percent or less of the outstanding capital stock of the bank, so long as two conditions are

⁵⁹ Tex. Att’y Gen. Op. No. GA-0334 (2005), at 6.

⁶⁰ *Id.*

⁶¹ Tex. Att’y Gen. Op. No. GA-0796, at 4 (2010); Tex. Att’y Gen. LO-98-052.

⁶² Tex. Att’y Gen. Op. No. GA-0136 (2004), at 3.

⁶³ 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)).

⁶⁴ Tex. Att’y Gen. LO-96-049.

⁶⁵ *Dallas Cnty. 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.

⁶⁶ TEX. LOC. GOV’T CODE § 171.005.

⁶⁷ *Id.*

⁶⁸ *Id.* § 171.006.

⁶⁹ *Id.* § 171.003.

met.⁷⁰ First, a majority of the members of the governing body must vote to select the bank as a depository.⁷¹ Second, the interested member must abstain from voting or taking part in the proceedings.⁷² The attorney general has concluded that this provision regarding conflicts of interests in the selection of depositories is an exception to Chapter 171.⁷³

B. Local Government Code Chapter 176

Chapter 176 of the Local Government Code requires certain local government officials to disclose employment and business relationships with vendors who conduct business, or consider conducting business, with local government entities. The requirements apply to most political subdivisions, including a city.⁷⁴ 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.⁷⁵

A city council member, a director, superintendent, administrator, president, or any other person that is designated as the executive officer of the local government entity is considered a local government officer.⁷⁶ A city may extend the disclosure requirements of Chapter 176 to an employee of the city who has the authority to approve contracts on behalf of the city.⁷⁷

An officer is required to file a conflicts disclosure statement if a vendor enters into a contract with the city or if the city is considering entering into a contract with the vendor, and the officer or officer's family member has an employment or other business relationship with the vendor that results in the officer or officer's family member receiving taxable income that is more than \$2,500 in the preceding twelve months.⁷⁸ An officer who receives investment income, regardless of amount, is not required to file a disclosure statement.⁷⁹ 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.⁸⁰

An officer is also required to file a statement if the officer or officer's family member accepts one or more gifts from a vendor that has an aggregate value of more than \$250 in the preceding twelve months.⁸¹ An officer is not required to file a statement in relation to a gift, regardless of amount, that is accepted by an officer or officer's family member if the gift is given by a family

⁷⁰ *Id.* § 131.903(a)(2).

⁷¹ *Id.* § 131.903(a)(2)(A).

⁷² *Id.* § 131.903(a)(2)(B).

⁷³ Tex. Att'y Gen. LO-97-093.

⁷⁴ TEX. LOC. GOV'T CODE § 176.001(3).

⁷⁵ *Id.*

⁷⁶ *Id.* § 176.001(4).

⁷⁷ *Id.* § 176.005(a).

⁷⁸ *Id.* § 176.003(a).

⁷⁹ *Id.*

⁸⁰ *Id.* § 176.001(2-b).

⁸¹ *Id.* § 176.003(a).

member of the person accepting the gift, is a political contribution, or is food, lodging, transportation, or entertainment accepted as a guest.⁸²

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.⁸³

A “vendor” includes any person that enters or seeks to enter into a contract with a city.⁸⁴ The term also includes an agent of a vendor.⁸⁵

The term “family member” is defined as a person related to another person within the first degree of consanguinity (blood) or affinity (marriage).⁸⁶ Thus, an officer’s family member would include the officer’s spouse, father, mother, son, daughter, father-in-law, mother-in-law, son-in-law, daughter in law, or a step child.

Chapter 176 applies to any written contract for the sale or purchase of real property, goods or services.⁸⁷ A contract for services would include one for skilled or unskilled labor, as well as professional services.⁸⁸

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; or (2) has given an officer or an officer’s family member one or more gifts totaling more than \$250 in the preceding twelve months.⁸⁹

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.⁹⁰

The statements and disclosures must be filed with the records administrator of the city.⁹¹ 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 176.⁹²

⁸² *Id.* §176.003(a-1).

⁸³ *Id.* §176.003(b).

⁸⁴ *Id.* §176.002(a).

⁸⁵ *Id.*

⁸⁶ *Id.* §176.001(2).

⁸⁷ *Id.* §176.001(1)(1-d).

⁸⁸ *Id.* §176.001(6).

⁸⁹ *Id.* §176.006(a).

⁹⁰ *Id.* §176.006(a-1).

⁹¹ *Id.* §176.003(b).

⁹² *Id.* §176.001(5).

A city that maintains a Web site is required to post on that site statements and disclosures that are required to be filed under the Chapter.⁹³ However, a city that does not have a Web site is not required to create or maintain one.⁹⁴ A city does not have a duty to ensure that a vendor complies with the requirement to file a questionnaire.⁹⁵

An officer or vendor who knowingly fails to file a statement or a disclosure when required to do so commits a Class C misdemeanor.⁹⁶ It is an exception to prosecution if 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.⁹⁷ The validity of a contract between a city and a vendor is not affected solely because an officer or vendor fails to file a statement or disclosure.⁹⁸

The Texas Ethics Commission is charged with creating statements and disclosure forms, and has adopted forms that conform to the requirements of the Chapter. The forms may be found at www.ethics.state.tx.us.

C. Government Code Chapter 553

Chapter 553 of the Government Code requires 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.”⁹⁹

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.¹⁰⁰

The term “public funds” is defined to “include[] only funds collected by or through a government.”¹⁰¹ 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

⁹³ *Id.* § 176.009(a).

⁹⁴ *Id.*

⁹⁵ *Id.* § 176.006(h).

⁹⁶ *Id.* §§ 176.003(c); 176.006(f).

⁹⁷ *Id.* § 176.006(g).

⁹⁸ *Id.* § 176.006(i).

⁹⁹ TEX. GOV’T CODE § 553.002(a).

¹⁰⁰ *Id.* § 553.001(2).

¹⁰¹ *Id.* § 553.001(1).

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.¹⁰²

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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ An affidavit example is available on our Web site at: http://www.tml.org/legal_topics/legal_ethics.asp.

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.¹⁰⁶

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*.¹⁰⁷ 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;¹⁰⁸
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; and¹⁰⁹
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

¹⁰² *Id.* § 553.002.

¹⁰³ *Id.* § 553.002(a).

¹⁰⁴ *Id.* § 553.002(c).

¹⁰⁵ *Id.* § 553.002(b).

¹⁰⁶ *Id.* § 553.003.

¹⁰⁷ TEX. LOC. GOV'T CODE § 145.001.

¹⁰⁸ *Id.* §§ 145.002–.003.

¹⁰⁹ *Id.* §§ 145.003(b)(2), 572.023(a).

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; and a list of all boards of directors on which the individual serves.¹¹⁰

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.¹¹¹ Annually, the mayor, city councilmembers, the city manager, and the city attorney must file a financial disclosure statement for the preceding year by April 30.¹¹² 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.¹¹³

City officers and candidates for elected city office must file the financial statement on a form provided by the Texas Ethics Commission.¹¹⁴ 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 mail two copies of the form to each city officer or candidate for city office. Two copies of the form shall be mailed to city officers at least thirty days prior to the April 30th filing deadline and two copies of the forms shall be mailed to candidates for elected city office at least ten days prior to the filing deadline.¹¹⁵

The completed financial disclosure statement is filed with the city clerk or secretary.¹¹⁶ Statements are public records and are to be maintained so as to be accessible to the public during regular office hours.¹¹⁷

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.¹¹⁸ 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

¹¹⁰ *Id.* §§ 145.003(b)(2), 572.023(b).

¹¹¹ *Id.* § 145.004(c).

¹¹² *Id.* § 145.004, 572.026(a).

¹¹³ *Id.* § 145.004, 572.026(c).

¹¹⁴ *Id.* § 145.005(a).

¹¹⁵ *Id.* § 145.005(b).

¹¹⁶ *Id.* § 145.003(b).

¹¹⁷ *Id.* § 145.007(a).

¹¹⁸ *Id.* § 145.009.

or mental capacity prevents either the filing or the request for an extension before the filing date.¹¹⁹ Extensions shall not be granted to candidates for elected city office.¹²⁰

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.¹²¹

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).¹²² In addition, certain city officers may be required to execute a bond in conjunction with their office.¹²³

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.¹²⁴ 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.”¹²⁵

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.¹²⁶ 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

¹¹⁹ *Id.* § 145.004(e).

¹²⁰ *Id.* § 145.004(f).

¹²¹ *Id.* § 145.008.

¹²² *See, e.g., Wisenbaker 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).

¹²³ *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).

¹²⁴ *TEX. LOC. GOV’T CODE* § 171.003.

¹²⁵ *Id.* § 171.001(1).

¹²⁶ *Id.* §§ 252.021, 252.022.

procurement method for city construction projects set out in Chapter 2267 of the Texas Government Code (formerly contained in Subchapter H of Chapter 271 of the Local Government Code).¹²⁷

A city may use competitive sealed proposals for the purchase of any goods or services, including high technology items and insurance.¹²⁸ 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.”¹²⁹ 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.¹³⁰

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.¹³¹

In addition, two provisions—Local Government Code Sections 271.905 and 271.9051—authorize the use of local preference when awarding a contract. 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.¹³² 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.¹³³ 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.

¹²⁷ *Id.* § 252.021. House Bill 628, passed during the 2011 regular legislative session, consolidates the alternative procurement methods for most governmental entities into a new Chapter 2267 of the Texas Government Code. House Bill 628 is available at <http://www.capitol.state.tx.us/>.

¹²⁸ *Id.* § 252.021(b).

¹²⁹ *Id.* § 252.043.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* § 271.905.

¹³³ *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.¹³⁴
- A procurement necessary to preserve or protect the public health or safety of the city's residents.¹³⁵
- A procurement necessary because of unforeseen damage to public machinery, equipment, or other property.¹³⁶
- A procurement for personal, professional, or planning services.¹³⁷
- A purchase of land or a right-of-way.¹³⁸
- A procurement of items that are available from only one source.¹³⁹

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 <http://cpa.state.tx.us/procurement/prog/hub/>.¹⁴⁰ If the list fails to identify a HUB in the county in which the city is located, the city is exempt.¹⁴¹

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 2267 of the Texas Government Code (formerly Chapter 271, Subchapters H and J, of the Local Government Code).¹⁴² The alternative methods are:

¹³⁴ *Id.* § 252.022(a)(1).

¹³⁵ *Id.* § 252.022(a)(2).

¹³⁶ *Id.* § 252.022(a)(3).

¹³⁷ *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).

¹³⁸ *Id.* § 252.022(a)(6).

¹³⁹ *Id.* § 252.022(a)(7).

¹⁴⁰ *Id.* § 252.0215.

¹⁴¹ *Id.*

¹⁴² 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.

- Competitive bidding (which is different than the “standard” competitive bidding processes in Chapter 252/Chapter 271, Subchapter B).¹⁴³
- Competitive sealed proposals (may be used for civil engineering projects).¹⁴⁴
- Construction manager agent.¹⁴⁵
- Construction manager at risk (may be used for civil engineering projects).¹⁴⁶
- Design-build¹⁴⁷ (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 2267, Subchapter H).
- Job order contract (may not be used for civil engineering projects).¹⁴⁸

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.¹⁴⁹

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.¹⁵⁰

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 <http://www.window.state.tx.us/procurement/>, and a joint TML/Texas Association of School Board cooperative is online at www.tml.org. 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

¹⁴³ TEX. GOV’T CODE Chapter 2267, Subchapter C.

¹⁴⁴ *Id.* Chapter 2267, Subchapter D.

¹⁴⁵ *Id.* Chapter 2267, Subchapter E.

¹⁴⁶ *Id.* Chapter 2267, Subchapter F.

¹⁴⁷ *Id.* Chapter 2267, Subchapters G and H.

¹⁴⁸ *Id.* Chapter 2267, Subchapter I.

¹⁴⁹ *Id.* § 2267.056.

¹⁵⁰ 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.¹⁵¹

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.¹⁵² 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.¹⁵³
- A municipal officer or employee who intentionally or knowingly violates the competitive procurement requirements of Chapter 252 commits a Class B misdemeanor.¹⁵⁴
- A municipal officer or employee who intentionally or knowingly violates Chapter 252 other than by conduct described above commits a Class C misdemeanor.¹⁵⁵

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.¹⁵⁶

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.”¹⁵⁷ Chapter 573 of the Texas Government Code is the primary anti-nepotism law in Texas.¹⁵⁸

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 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

¹⁵¹ TEX. GOV'T CODE § 2155.062(d).

¹⁵² TEX. LOC. GOV'T CODE § 252.061.

¹⁵³ *Id.* § 252.062.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* § 252.063.

¹⁵⁷ OFFICE OF THE TEXAS ATTORNEY GENERAL, 2006 PUBLIC OFFICERS: TRAPS FOR THE UNWARY 17 (2006), https://www.oag.state.tx.us/open/publications_og.shtml (last visited Sept. 26, 2011)(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)).

¹⁵⁸ TEX. GOV'T CODE §§ 573.001–.084.

from public funds.¹⁵⁹ 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.¹⁶⁰ 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 statutory exceptions to the general rule against the appointment of close relatives. Chapter 573 does not apply to cities with fewer than 200 people.¹⁶¹ An exception—often 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.¹⁶² 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.”¹⁶³

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.¹⁶⁴ 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 certain nepotism problems.¹⁶⁵

¹⁵⁹ *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).

¹⁶⁰ TEX. CONST. art. XVI, § 17; Tex. Att’y Gen. Op. No. JM-636 (1987).

¹⁶¹ TEX. GOV’T CODE § 573.061(7).

¹⁶² *Id.* § 573.062.

¹⁶³ *Id.*; 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 of consideration of a measure”).

¹⁶⁴ 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).

¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷

Noncompliance with Chapter 573 may subject the appointing officer(s) to severe consequences including removal from office and criminal sanctions.¹⁶⁸

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.¹⁶⁹ The Chapter deals generally with offenses involving a "public servant," which is defined to mean a person elected, selected, appointed, employed or otherwise designated as an "officer, employee, or agent of government," which includes a city.¹⁷⁰ The Texas Ethics Commission is authorized to prepare written advisory opinions regarding Chapter 36 and those opinions are available on the Commission's Web site.¹⁷¹

¹⁶⁶ TEX. GOV'T CODE § 573.044.

¹⁶⁷ *Id.* § 573.042.

¹⁶⁸ TEX. GOV'T CODE ANN. §§ 573.081–.084.

¹⁶⁹ TEX. PENAL CODE §§ 36.01–.10.

¹⁷⁰ *Id.* §§ 1.07(24)(B), (41)(A).

¹⁷¹ TEX. GOV'T CODE § 571.091(a)(8); *see also* <http://www.ethics.state.tx.us/>.

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.”¹⁷² 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.¹⁷³

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).¹⁷⁴ At least one Texas Court has indicated that the term should be broadly construed to promote justice.¹⁷⁵

The offense of bribery is a second degree felony.¹⁷⁶

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.¹⁷⁷ 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.’”¹⁷⁸ An honorarium may include such things as fees for speaking, fees for teaching, severance pay, and moving expenses.¹⁷⁹

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.¹⁸⁰

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,

¹⁷² *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.

¹⁷³ TEX. PENAL CODE § 36.02(b).

¹⁷⁴ *Id.* § 36.01(3).

¹⁷⁵ *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”).

¹⁷⁶ TEX. PENAL CODE § 36.02(e).

¹⁷⁷ *Id.* § 36.07(a); Texas Ethics Advisory Opinion No. 173 (1993).

¹⁷⁸ Tex. Att’y Gen. Op. No. GA-0354 (2005).

¹⁷⁹ *Id.*

¹⁸⁰ TEX. PENAL CODE § 36.07(b).

payment, claims, or transaction involving the exercise of the member's discretion.¹⁸¹ 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, such as a check;

(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)); and

(8) food, lodging, transportation, or entertainment accepted as a guest, if the donee is required by law to report those items.¹⁸²

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.¹⁸³

A violation of either of the bribery and gift laws described above is a Class A misdemeanor.¹⁸⁴ There are no specific provisions in Chapter 36 of the Texas Penal Code providing for removal of

¹⁸¹ *Id.* § 36.08(d).

¹⁸² *Id.* § 36.10.

¹⁸³ *Id.* § 36.08(i).

¹⁸⁴ *Id.* §§ 36.07(c), 36.08(h).

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.¹⁸⁵ And under the Open Meetings Act, a councilmember may participate in a closed session to discuss the purchase or lease of real property.¹⁸⁶ 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 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.¹⁸⁷

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 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.¹⁸⁸

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.

¹⁸⁵ 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.”).

¹⁸⁶ TEX. GOV’T CODE § 551.072.

¹⁸⁷ TEX. PENAL CODE § 37.01(2).

¹⁸⁸ *Id.* § 37.10(a).

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.¹⁸⁹

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.¹⁹⁰ 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.¹⁹¹

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),¹⁹² 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.¹⁹³ Misusing official information is a third degree felony.¹⁹⁴

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 concerning a deceased person if obtained, possessed, transferred or used without legal authorization; or (3) identifying information of a child younger than eighteen years.¹⁹⁵ An offense is a felony.¹⁹⁶

¹⁸⁹ *Id.* § 39.06(a).

¹⁹⁰ *Id.* § 39.06(b).

¹⁹¹ *Id.* § 39.06(c).

¹⁹² *Id.* § 39.06(d).

¹⁹³ *Id.* § 39.06(f).

¹⁹⁴ *Id.* § 39.06(e).

¹⁹⁵ *Id.* § 32.51(b).

¹⁹⁶ *Id.* § 32.51(c).

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.¹⁹⁷ 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.¹⁹⁸ For instance, a city councilmember may not use city staff to gather information for use in a reelection campaign¹⁹⁹ or use city funds to purchase paint for use on his house.²⁰⁰ 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 39.02.²⁰¹

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

- (1) Class C misdemeanor if the value is less than \$20;
- (2) Class B misdemeanor if the value is \$20 or more but less than \$500;
- (3) Class A misdemeanor if the value is \$500 or more but less than \$1,500;
- (4) State jail felony if the value is \$1,500 or more but less than \$20,000;
- (5) Third degree felony if the value is \$20,000 or more but less than \$100,000;
- (6) Second degree felony if the value is \$100,000 or more but less than \$200,000; and
- (7) First degree felony if the value is \$200,000 or more.²⁰²

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

¹⁹⁷ *Id.* § 39.02(a).

¹⁹⁸ *Id.*

¹⁹⁹ *Cf.* Tex. Ethics Advisory Op. No. 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).

²⁰⁰ *Cf. 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).

²⁰¹ TEX. PENAL CODE § 39.02(d).

²⁰² *Id.* § 39.02(c).

his conduct is unlawful; or (3) subject another to sexual harassment.²⁰³ These offenses constitute a Class A misdemeanor.²⁰⁴

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.²⁰⁵ 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.²⁰⁶

It is an offense to forge a writing with the intent to defraud or harm another.²⁰⁷ An offense ranges from a misdemeanor to a felony. 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.²⁰⁸ 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.²⁰⁹

F. Theft

It is unlawful to appropriate property with the intent to deprive the owner of the property.²¹⁰ 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.²¹¹

VII. 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 enforcing Title 15 of the Election

²⁰³ *Id.* § 39.03(a).

²⁰⁴ *Id.* § 39.03(d).

²⁰⁵ *Id.* § 32.21(a).

²⁰⁶ *Id.*

²⁰⁷ *Id.* § 32.21(b).

²⁰⁸ *Id.* § 32.21(e).

²⁰⁹ *Id.* § 32.21(f).

²¹⁰ *Id.* § 31.03(a).

²¹¹ *Id.* § 31.03(f).

Code (Tex. Elec. Code § 251 *et seq.*) which governs these matters.²¹² Following are a few key provisions of which candidates and officials should be aware.

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 effect²¹³ and accepting cash contributions that exceed \$100.²¹⁴ Violations of these two prohibitions are Class A misdemeanors. The Election Code also prohibits the conversion of political contributions for personal use.²¹⁵

Chapter 253 of the Election Code provides not only criminal liability 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.²¹⁶

B. Political Advertising and Campaign Communications

Certain disclosures must be made in relation to political advertising. Political advertising that contains express advocacy must indicate that it is political advertising and include the name of one of the following: (1) the person who paid for the advertising, (2) the political committee that authorized the advertising, or (3) the candidate or committee supporting the candidate, if the advertising is authorized by the candidate.²¹⁷ A violation may result in a civil penalty in an amount determined by the TEC but not to exceed \$4,000.

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.²¹⁸ A violation is a misdemeanor offense.²¹⁹ A publication from the TEC regarding political advertising is available at <http://www.ethics.state.tx.us/guides/G11polad.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.²²⁰ 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

²¹² TEX. GOV'T CODE § 571.061(a)(3).

²¹³ TEX. ELEC. CODE § 253.031.

²¹⁴ *Id.* § 253.033.

²¹⁵ *Id.* § 253.035.

²¹⁶ *Id.* § 253.131.

²¹⁷ *Id.* § 255.001. There are certain exceptions to these rules. *Id.*

²¹⁸ *Id.* §§ 255.004–.006.

²¹⁹ *Id.*

²²⁰ *Id.* § 255.0031.

investigation, hearing, or other official proceeding of the city.²²¹ A violation of the prohibition is a Class A misdemeanor.²²²

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 but the prohibition does not apply to a communication that factually describes the purpose of a measure as long as it does not advocate the passage or defeat of the measure.²²³ A permissible communication may not, however, contain false information that is likely to influence a voter to vote for or against the measure.²²⁴ 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. The TEC has a helpful publication regarding the use of public resources for political advertising, available at http://www.ethics.state.tx.us/pamphlet/B09pad_pol.pdf.

VIII. 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 \$500.²²⁵
- 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.²²⁶
- 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.²²⁷
- 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.²²⁸
- 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.²²⁹

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* § 255.003.

²²⁴ *Id.*

²²⁵ TEX. PENAL CODE § 12.23.

²²⁶ *Id.* § 12.22.

²²⁷ *Id.* § 12.21.

²²⁸ *Id.* § 12.35.

²²⁹ *Id.* § 12.34.

- 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.²³⁰
- 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.²³¹

IX. 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.²³²

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.²³³ It is common for a city to purchase insurance (sometimes referred to as “errors and omissions insurance”) providing 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 the charges. In other words, a city must defer payment of criminal legal expenses until they know the outcome of the case.²³⁴ 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.²³⁵ 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.²³⁶ If a public official is found guilty, the city is prohibited from paying the expenses.²³⁷

²³⁰ *Id.* § 12.33.

²³¹ *Id.* § 12.32.

²³² *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).

²³³ *See, e.g.*, Tex. Att’y Gen. Op. Nos. JC-0294 (2000), H-887 (1976).

²³⁴ *See* Tex. Att’y Gen. Op. No. 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.”).

²³⁵ *Id.* 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).

²³⁶ *Id.* 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)).

²³⁷ *Id.* at 1, 9.