



**ETHICAL RESPONSIBILITIES DURING AN EMERGENCY**

**Presented at the Texas City Attorneys Association Fall Meeting  
in Conjunction with  
the Texas Municipal League Annual Conference  
Austin, Texas**

**October 10, 2013**

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# **ETHICAL RESPONSIBILITIES DURING AN EMERGENCY**

## **I. INTRODUCTION**

When representing a governmental entity, the myriad of laws that apply to elected officials and public entities bring ethical responsibilities to the forefront of most daily interactions and considerations. Attorneys for cities and other public entities work with elected officials and staff to continually reiterate the importance of ethics laws and responsibilities to ensure that ethics laws are a constant consideration in the daily operations of a governmental entity.

In an emergency situation, however, it can be easy to overlook the fact that the same ethics laws that apply on a normal daily basis are just as applicable, and just as important, in an emergency situation. But whether in a short-term or protracted emergency, city officials and staff are often focused on the struggles of maintaining normal operations under stressful circumstances with limited resources so that the ethics laws that would otherwise be a part of their normal operations can be overlooked in the stress of the situation. It is important for both municipal officials and the staff that provide counsel to remember that in an emergency situation ethics laws should continue to be considered in the actions and decisions made even under exceptional circumstances.

## **II. Nepotism**

A governmental body may not appoint, confirm the appointment of, or vote to place an individual in a position that is to be compensated from public funds or fees of office if the individual is related to any board member within the third degree by consanguinity or within the second degree by affinity.<sup>1</sup> This prohibition applies to all elected officials on the governing body, and the related elected official may not simply abstain from the vote for the appointment or placement (as is the case in conflict of interest situations).

The statutes regarding nepotism are fairly straightforward and easy to abide by in a normal daily setting. However, in an emergency situation, quick decisions and limited resources could lead to the inadvertent hiring of a relative of an elected official. This is specifically precarious in an emergency scenario because the increased amount of work, whether construction labor or simply paperwork, can produce necessary but temporary positions that need to be quickly filled. But it is important for municipal officials and staff to remember that even though filling these positions must be necessary, the speedy employment of a trustworthy relative can put an elected official in the position of violating nepotism laws.

## **III. Conflicts of Interest**

In an emergency situation, municipalities and elected officials could be faced with entering into a higher than average amount of contracts for services and equipment, and often these agreements are entered into on a quicker timeline than would occur in normal circumstances. Further exacerbating the situation is what can be a limited quantity of contractors and equipment

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<sup>1</sup> TEX. GOV'T CODE § 573.041.

available to the governmental entity when others in the area affected by the emergency may be utilizing the limited resources.

#### **A. Texas Local Government Code Chapter 171**

Under Chapter 171 of the Texas Local Government Code, a “local public official”<sup>2</sup> must file an affidavit if he or she has a substantial interest in a business entity or in real property. An official has a “substantial interest” in a business entity if:

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

An official has a “substantial interest” in real property if the “interest is an equitable or legal ownership with a fair market value of \$2,500 or more.”<sup>4</sup>

The filed affidavit must state the nature and extent of the interest and the official shall abstain from further participation in the matter if:

- (1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or
- (2) in the case of a substantial interest in real property, 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.<sup>5</sup>

The affidavit must be filed with the “official record keeper” of the governmental entity before any vote or decision on any matter involving the business entity or the real property takes place.<sup>6</sup>

An official is considered to have a substantial interest if any person related to that official in the first degree by consanguinity or affinity has an interest,<sup>7</sup> meaning that the official’s parents, children or spouse may not have a substantial interest in the applicable business entity or real property.

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<sup>2</sup> A “local public official” is defined as “a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature.” TEX. LOC. GOV’T CODE ANN. § 171.001(a).

<sup>3</sup> TEX. LOC. GOV’T CODE ANN. § 171.002(a).

<sup>4</sup> *Id.* at § 171.002(b).

<sup>5</sup> *Id.* at § 171.004 (a)

<sup>6</sup> TEX. LOC. GOV’T CODE ANN. § 171.004 (a), (b).

<sup>7</sup> *Id.* at § 171.002(c).

## **B. Texas Local Government Code Chapter 176**

Texas Local Government Code requires that a “conflicts disclosure statement” be filed with the official record keeper of the governmental entity by a local government officer when:

- (1) An officer of the governmental body, or his/her family member have an employment or business relationship with a person who must file a questionnaire, and these individuals receive more than \$2,500 from this relationship; or
- (2) An officer of the governmental body, or his/her family member has received (in the 12-month period preceding the business relationship) gifts totaling more than \$250 (excluding food, lodging, transportation, or entertainment) from an affected person who has executed a contract with the governmental body, or that the governmental body is considering doing business with.<sup>8</sup>

Chapter 176 differs from Chapter 171 as the filing requirement applies to a “local government official,” which, in addition to an elected official, may include “a director, superintendent, administrator, president, or other person designated as the executive officer of the local governmental entity”<sup>9</sup>

## **IV. Open Meetings Laws**

In an emergency the potential for displaced elected officials and staff, limited communications resources, a lack of resources and facilities and time limitations all make laws relating to open meetings difficult to adhere to during an emergency situation. It will likely be necessary to hold open meetings to conduct city business during an emergency, and other than certain exceptions, all open meetings statutes have to be followed.

### **A. Meeting Definitions and Quorum Issues**

A meeting is defined as a deliberation by a quorum of a governmental body at which public business or public policy over which the governmental body has control is discussed.<sup>10</sup> The Texas Open Meetings Act requires that every regular, special or called meeting of a governmental body be open to the public,<sup>11</sup> and that 72 hours’ notice be given that the meeting is being held. A “deliberation” is defined as a “verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body or any public business.”<sup>12</sup> A deliberation includes verbal discussions, as well as the exchange of written material or communications through

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<sup>8</sup> *Id.* at § 176.003(a).

<sup>9</sup> *Id.* at § 176.001(4)(B)

<sup>10</sup> TEX. GOV'T CODE § 551.001(4)(A).

<sup>11</sup> *Id.* at § 551.002.

<sup>12</sup> *Id.* at § 551.001(2)

electronic means.<sup>13</sup> It is important to remember that such communications include text messaging, message boards and social media outlets (ie. Twitter and Facebook).

In an emergency, there can often be a great deal of decisions and issues to address by a governmental body, and all of this decision-making needs to be undertaken in compliance with the Texas Open Meetings Act. It is likely that during emergencies, little is being discussed but public business, so elected officials should be cautious that their interactions with their fellow elected officials do not inadvertently result in deliberation by a quorum and thus an illegal meeting. In fact, an open meeting can occur if a quorum of a governmental body simply receives information from a third party,<sup>14</sup> such as when a quorum of a governmental body hears input from the public in a public comment session or town hall meeting.<sup>15</sup>

It can be a challenge for all governmental bodies in normal circumstances to avoid “walking quorums,” but this violation of the Texas Open Meetings Act can be particularly easier to fall into in an emergency. A walking quorum is where a quorum of a governmental body deliberates about public business without a quorum being present in one place.<sup>16</sup> As stated in *Esperanza Peace and Justice Center v. City of San Antonio*, a court will look at whether there is intent by elected officials to avoid the Texas Open Meetings Act requirements when a walking quorum occurs to determine whether there is a violation.<sup>17</sup> An example of a walking quorum that may occur during an emergency is telephone polling of elected officials regarding an item of public business.

## **B. Access to the Meeting**

The Texas Open Meetings Act requires that every regular, special or called meeting of a governmental body be open to the public.<sup>18</sup> Although the Act does not mandate where or at what type of location a meeting must be held, the statutory requirement that meetings be “open to the public” has been interpreted by the Attorney General to mean that the meeting must be in a location physically accessible to the public<sup>19</sup> and that public is “permitted to attend.”<sup>20</sup> The issue of whether a meeting location is accessible to the public is a question of fact, and the Attorney General has concluded that resolution of the question may depend upon several factors such as the type of governmental body, the nature of the interested public, the meeting location, and the distance from the governmental body's jurisdiction.<sup>21</sup>

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<sup>13</sup> Tex. Att’y Gen. Op. Nos JC-0307 (2000) at 5-6, DM-95 (1992) at 5.

<sup>14</sup> TEX. GOV’T CODE § 551.001(4)(B).

<sup>15</sup> See Tex. Att’y Gen. Op. No. JC-0248 (2000) at 2.

<sup>16</sup> See *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 476 (W.D. Tex. 2001)

<sup>17</sup> *Id.*

<sup>18</sup> TEX. GOV’T CODE § 551.002 (Vernon 2008).

<sup>19</sup> Tex. Attn’y Gen. Op. JC-0487(2002) at 2; Tex. Attn’y Gen. Op. JC-0053 (1999) at 5-6.

<sup>20</sup> Tex. Attn’y Gen. Op. M-220 (1968) at 5.

<sup>21</sup> JC-0053 at 6 (determining that it would be “highly unlikely” for a meeting of a Texas governmental body that is held at an underwriter's office in New York City to be accessible to the public under the Open Meetings Act).

## **C. Emergency Exceptions to the Texas Open Meetings Act**

### **1. Exceptions to the 72 Hours' Notice Requirement**

The Texas Open Meetings Act provides that a governmental body may meet to address an emergency issue or item of “urgent public necessity.” An issue counts as an emergency item if immediate action is required because of an (1) imminent threat to public health or safety; or (2) a reasonably unforeseeable situation. What constitutes an “emergency” is very strictly construed and will apply only to a limited number of circumstances. It is important to note that even though a municipality may be in the midst of an emergency, each item on a meeting agenda may not itself constitute an emergency.

The emergency exception includes adding an emergency item to an already posted agenda, where items of urgent public necessity that are subject to the exception may be added to an existing agenda with only 2 hours' notice. However, non-emergency items must still have 72 hours' notice before they may be considered by the governmental body.

### **2. Use of Videoconferencing and Conference Call Technologies**

The Texas Open Meetings Act allows governmental bodies to conduct meetings by conference call or videoconference in certain limited circumstances that may be useful to a municipality in an emergency situation.

A governmental body may hold an open or closed meeting by conference call only if (1) an “emergency or public necessity”<sup>22</sup> exists; and (2) convening at one location of a quorum is impossible; or (3) the meeting is held by an advisory board.<sup>23</sup> If holding a conference call, the meeting is subject to the notice requirements of any other meeting of the governing body, and the notice must specify the location where meetings of the governing body are typically held.<sup>24</sup> The open portions of the telephone meeting shall be audible to the public at the location specified in the notice, and this location must provide two-way communication during the entire conference call meeting.<sup>25</sup> Finally, the call must be recorded and the recording made available to the public.<sup>26</sup>

Although not an emergency provision, the use of videoconferencing may be useful in an emergency. House Bill 2414 from the 83<sup>rd</sup> Legislative Session authorizes meetings to be held by videoconference in certain circumstances. The videoconferencing must allow the meeting participants to speak to one another. Videoconferencing is authorized only if:

- A meeting location at a physical space is provided,

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<sup>22</sup> Pursuant to Section 551.045(b), an emergency or an urgent public necessity exists only if “immediate action is required of a governmental body because of: (1) an imminent threat to public health and safety; or (2) a reasonably unforeseeable situation.”

<sup>23</sup> TEXAS GOV'T CODE § 551.125(b).

<sup>24</sup> *Id.* at § 551.125 (c), (d).

<sup>25</sup> *Id.* at § 551.125 (e), (f). Each party must be clearly identified prior to speaking in the telephone conference meeting. TEXAS GOV'T CODE § 551.125(f).

<sup>26</sup> TEXAS GOV'T CODE § 551.125 (e)

- The video conferencing includes a camera and microphone so that members of the public can participate,
- The presiding officer is present at the physical space, and
- The opportunity of the public to participate is the same as if the meeting did not involve videoconferencing.<sup>27</sup>

Videoconferencing, although not authorized only for emergencies, may be useful in an emergency situation where the technology is available to hold such a meeting, but difficulties arise in getting the members of a governmental body together in one place.

## **V. Texas Penal Code Considerations**

### **A. Acceptance of Gifts**

A public servant may not solicit, accept or agree to accept an honorarium in consideration for “services that the public servant would not have been requested to provide but for the public servant’s official position or duties.”<sup>28</sup> However, a public official may accept meals, lodging and transportation expenses in connection with an event in which the official provides services, so long as these services are not “merely perfunctory.”<sup>29</sup>

The prohibitions in Texas Penal Code § 36.08 do not apply to fees or benefits to which the public servant is lawfully entitled or gives consideration for in a capacity other than as a public servant, or a gift conferred based on a personal, professional or business relationship independent of his or her official status.<sup>30</sup>

Acceptance of gifts can be a concern both during and following an emergency and can be intended as a simple gesture of kindness during uncertain times. But an elected official must be cautious when considering the acceptance of any gifts to be sure that there is no violation of Chapter 36 of the Texas Penal Code. In addition to these Penal Code prohibitions, the public official must still take into account conflicts of interest laws detailed in Chapters 171 and 176 of the Texas Local Government Code, and detailed above in Section IV.

### **B. Bribery**

A person commits an offense if he or she “intentionally or knowingly” offers, confers, solicits, accepts, or agrees to accept or confer on another any benefit in consideration for the exercise of the elected official’s discretion as a public servant.<sup>31</sup> A “benefit” is defined as

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<sup>27</sup> Texas House Bill 2414, 83<sup>rd</sup> Legislative Session (2013).

<sup>28</sup> TEX. PENAL CODE § 36.07(a).

<sup>29</sup> *Id.* at § 36.07(b).

<sup>30</sup> *Id.* at § 36.10(a)(1)-(2).

<sup>31</sup> TEX. PENAL CODE § 36.02(a).



“anything reasonably regarded as pecuniary gain or pecuniary advantage” and includes a benefit to another person in whose welfare the public official has a “direct and substantial interest.”<sup>32</sup>

The difference between bribery and the improper acceptance of a gift is that the benefit in bribery is assumed to influence an act by a public official, but an honorarium confers a benefit for something that the public official is doing as a component of his or her public duties. For example, a public official may accept a meal when participating as a keynote speaker at a TCAA conference, but may not accept that same meal if it is intended to persuade the public official to act or vote a certain way on a city issue. As stated above in Section VI.A., the acceptance of any benefit or gifts is also subject to conflict of interest statutes detailed in Section IV.

## **VI. Public Information Act Considerations**

Public information is defined as information that is “collected, assembled, or maintained under a law or ordinance or in connection with a transaction or official business” by a governmental body or on behalf of a governmental body, and the governmental body owns or has a right of access to the information.<sup>33</sup> Documents under the control of a governmental entity are presumed to be open to the public, and may exist as paper, microfilm, video, audio tape, e-mail and other similar forms.<sup>34</sup> If requested for disclosure, a public document may be withheld only if it is in a category of information specifically excepted from disclosure under the Texas Public Information Act.<sup>35</sup>

The Texas Public Information Act is both important and more difficult to comply with in an emergency, where an increased volume of requests and documents are being addressed, and access to regular record-keeping facilities and programs may be challenged. Very soon after an emergency, it is likely that a municipality will get requests for records under the Public Information Act, so both elected officials and municipal staff need to be cognizant not only that all documents and correspondence created during an emergency may be subject to disclosure, but that these documents need to be readily available to respond to requests in a timely manner.

## **VII. Conclusion**

In an emergency situation, municipal elected officials and staff prepare to address the emergency situation and ensure that city government and services can be provided for its citizens. In what can be a stressful environment and challenging circumstances public officials should remember to take into account ethics laws and considerations when addressing the emergency.

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<sup>32</sup> *Id.* at § 36.01(3).

<sup>33</sup> TEX. GOV'T CODE § 552.002(a)(1)-(2).

<sup>34</sup> *See id.* at § 552.001(a); 552.002(b).

<sup>35</sup> *See generally* TEX. GOV'T CODE, Ch. 52, Subch. C.