



Abbott accepts James Madison Award

"It means the world to me to be honored with this award."

Thus Texas Attorney General Greg Abbott accepted the 2005 James Madison Award at a luncheon during the State Conference in Austin Sept. 9.

FOIFT President Joel White presented the award, citing the attorney general's record of support for open government.

"No public official has more influence on freedom of information than the attorney general," White said. How the AG performs that function influences how open government is in the state.

He noted that Abbott had a tough act to follow after Attorney General John Cornyn had been the first AG to win the James Madison Award before moving on to the U.S. Senate.

White cited Abbott's achievements in FOI: Abbott increased the funding for the Open Government Division and was the first AG to hire a prosecutor just for open government cases.

Abbott's ruling on HIPAA, the federal medical privacy law, said the Texas Public Information Act took precedence over the

federal act because of a provision in HIPAA itself. (That ruling is on appeal.)

Abbott made the education of public officials a high priority in his administration

and the result was a law requiring newly elected public officials to receive training in FOI.

Abbott's office has maintained an FOI hotline and has conducted seminars on FOI.

White called the training law "a major success, and we appreciate the AG and his staff." He said the AG's Office had been "strong allies in promoting open government."

In his acceptance, Abbott praised Katherine "Missy"

Cary, chief of the Open Records Division, and his communications director, Angela Hale. He introduced Hadassah Schloss, whose office was moved into the AG's office, and Harry White, new enforcement prosecutor in the office. Schloss handles disputes over charges made for public records in the state.

"I am personally proud to fight for the cause of open government in Texas," Abbott said in his acceptance. "We will keep working every day to keep that light shining in the state of Texas."



FOIFT President Joel White presents Attorney General Greg Abbott with the Foundation's James Madison Award at its State Conference in Austin.



Privacy has a two-pronged test

By **Joel White**
FOIFT President

Everyone who has worked on open government issues has dealt with the tension between personal privacy and the public's right to know.

We are all entitled to protection of personal privacy, and in particular to protection from public disclosure of highly personal or intimate information. Our laws recognize these concerns.

For example, the Texas Public Information Act protects highly intimate or embarrassing information, the disclosure of which would be offensive to a person of ordinary sensibilities. But that is only part of the equation. Even highly intimate or embarrassing information must be disclosed if it is of legitimate public concern.

This two-part test for determining when private information is entitled to legal protection was set out by the Texas Supreme Court in 1976 and has been followed ever since. The first part of this privacy test is uncontroversial. Highly intimate and embarrassing information whose disclosure would be highly offensive to a reasonable person plainly should be protected from public disclosure. It is the second part of the test that is frequently forgotten: in order to be protected, even highly intimate and embarrassing information must be of no legitimate public concern.

For example, while a person's personal financial and banking information is ordinarily considered intimate and is therefore protected from disclosure, financial transactions between an individual and a government agency are always of legitimate public concern and therefore are never entitled to protection from public disclosure. Driving records may ordinarily be protected, but the driving records of a public school bus driver should not be.

In recent years, public concern over a perceived loss of privacy has increased, at least in part by fear of identity theft and access to information through the Internet. It is often difficult to determine whether such increased concern is justified.

According to a study in 2003 by the Federal Trade Commission, almost 3.5 million Americans discovered that their personal information had been misused to open new credit accounts, take out new loans or engage in other types of fraud.

However, there does not appear to be any indication that identity theft is increasing, or that the Internet is contributing to it. The vast majority of identity theft still involves theft of a credit card or checkbook —two very old fashioned crimes. And the vast majority of personal information that is stolen to fraudulently apply for credit appears to be obtained from discarded mail, rather than anything having to do with the Internet. In short, what we used to call forgery, fraud and just plain theft have now been repackaged into a new crime called "identity theft." Fear of identity theft and the idea that it is fueled by the Internet is beginning to erode the traditional privacy equation.

Several bills were introduced in the last legislative session that were designed to keep various kinds of personal information off of the Internet, including information that is readily available to the public and publicly filed court documents.

All such measures have one thing in common: they abandon a well-reasoned and commonsense approach to protecting personal privacy. Instead of asking the sensible question of whether information is of legitimate concern to the public, some legislators and judges would simply ban personally identifying information from the Internet altogether, even though that same information is both of legitimate public concern and readily available to the public at the courthouse or through a Public Information Act request.

The test should always be whether information is highly intimate to a reasonable person and whether it is of legitimate public concern, not where the information happens to be stored.

Perhaps more important, rising public sentiment that personal privacy is routinely being invaded can be exploited. Government agencies and officials who do not want embarrassing information about themselves to become public have learned to invoke the personal privacy interest of others as an excuse not to release the information.

For example, when government authorities wished to withhold photographs of prisoner abuse at Abu Ghraib, they argued that release of the photographs would invade the personal privacy of the prisoners. When it was pointed out that such privacy concerns could be eliminated by blurring the prisoners' identities, the government responded with its real concern: release of the photographs would cause hatred of the United States in Iraq, Afghanistan and elsewhere.

Recently, the Texas Animal Health Commission declined to release the name of a rancher who sent in a cow for slaughter that tested positive for BSE, claiming among other exceptions, that it invaded the rancher's privacy, but never mentioning the public interest prong of the test.

And, lest we forget, there was the case of the Hitchcock ISD claiming that release of the names of persons (including its trustees) who were delinquent in property taxes was an invasion of their privacy. Attorney General Abbott's office made quick work of that. And, hopefully, the mandated training that he supports and will administer will instruct governmental bodies regarding both prongs of the privacy test.



"It is the second part of the test that is frequently forgotten: in order to be protected, even highly intimate and embarrassing information must be of no legitimate public concern."

– Joel White, FOIFT
President



Pseudo-classification causes concerns

Pseudo-classification of documents was one of the FOI concerns voiced by a panel speakers at the State Conference in Austin Sept. 9.

Classifications without legal backing include such things as “For Official Use Only” and “Sensitive, Not Classified” and tend to restrict access to information while not involving real classified information or any force of law, the speakers said.

National security constraints, privacy regulations and “embarrassment” as a reason for not releasing information were other concerns cited.

Speakers were Andy Alexander, Washington bureau chief for Cox Newspapers; Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press; and Thomas M. Susman, partner in Ropes & Gray law firm in Washington. His practice includes information and privacy law.

Susman cited what he said was “a direct frontal assault on freedom of information by the current (Bush) administration.” But he said the federal FOI Law was working well, although the time is right for changes. He said 88 percent of FOI requests come from individuals asking for personal records about themselves, and 99 percent are granted. For other requests, 66 percent are granted.

He said Sen. John Cornyn’s bill to set up an office on FOI was “the most important reform on the scene.”

Dalglish also said the FOI law works well, but, she said, “Some are

so frightened by terrorism that they would close up things that have always been open,” such as critical infrastructure information the public needs.

She also noted that 4 million first responders, such as ambulance and fire crews, have had to sign a non-disclosure oath causing a “chilling effect” on getting information.

She cautioned that reporters should keep a close eye on the billions of dollars going to hurricane relief. Reporters in Florida had trouble getting information about how money was being spent after its hurricanes.

Money is flowing “to the most corrupt government in the country,” she said, referring to Louisiana.

Another problem she cited was a tendency of the federal government to fight FOI requests until just before the trial of a lawsuit then yielding up the information, in which case the requestors cannot collect legal fees as they would if they prevailed at trial.

Alexander said one problem with electronic records is that they can be removed with a keystroke, as has been the case with some federal records.

He said the number of classified documents in the federal government is up 81 percent since 2001.

Alexander, who is chairman of the FOI Committee of the American Society of Newspaper Editors, said Sunshine Week, which was sponsored by ASNE, was a big success and will be repeated.

“There was tremendous reader reaction,” to the stories and editorials on FOI, he said.

Dalglish said new restrictions on information will result in greater use of confidential sources. “More journalists are going to jail.”

Claims of privacy are the most serious challenges to open government, Susman said.

He also noted the restrictions placed on photographs, such as photos of the prisoners in Iraq and at Guantanamo Bay and photos of flag-covered coffins.

Some prison pictures were withheld on the basis that they might “inflammate the enemy.” Audits of Haliburton had the names of individuals blacked out. The faces of troops acting as pallbearers were blacked out.

Such practices, he said, “open the door to embarrassment as a standard” for withholding information and photos.

Another new issue is “practical obscurity,” the proposition that information open locally should not necessarily be open on the Internet.

Dalglish cited the “state secrets privilege” for withholding information by the president. In 1988 during the Cold War, there were four cases of the use of state secrets. In 2001, there were 33 times that many.

Anderson was asked who the opponents of Cornyn’s bills were. He said the Justice Department, “which has never been a friend of FOI.”



“Some are so frightened by terrorism that they would close up things that have always been open.”

*—Lucy Dalglish,
Reporters Committee
for Freedom of the
Press executive*



Senator questions closed caucuses

Sen. Jeff Wentworth of San Antonio has questioned the practice in the Texas Senate of holding frequent closed caucuses.

Many times this year, senators have met as a group behind closed doors in what they call caucuses. The frequency of the meetings and the topics discussed bother Sen. Wentworth, who has been an advocate for open government.

“I am concerned that although it’s not breaking the law, technically, I do believe it violates the spirit, clearly, on

open government,” he told The Associated Press.

Sen. John Whitmire of Houston, who heads the caucus meetings, said the senators discuss such things as work schedules and other internal matters, not legislative business.

State senators have a reputation for negotiating details of legislation in private before bills make their way to the Senate floor, the AP reported.



From the AG. . .

By Greg Abbott

As you may know, the 79th Legislature recently passed legislation transferring a number of responsibilities pertaining to the Public Information Act (the “Act”) from the Texas Building and Procurement Commission (formerly the General Services Commission) to the Office of the Attorney General (“OAG”).

These responsibilities include prescribing the content and form of the sign that governmental bodies are required to display that contains basic information about the rights of a requestor, the responsibilities of a governmental body, and the procedures for inspecting or obtaining a copy of public information under the Act.

The new legislation also directly affects the Open Records Steering Committee which will now be led by the committee member representing the OAG. I am also pleased to announce that the transfer of responsibilities provides for the addition of Hadassah Schloss to my office as the cost rules administrator for the OAG.

The most notable legislative change that will directly affect the public is that my office will now be responsible for enforcing the cost provisions of the Public Information Act. This includes administering the rules that determine the charges and methods for charging for copies of public information, as well as considering requests from governmental bodies for exemption from the rules or part of the rules.

In addition, complaints of overcharges for copies of public information may now be made directly to the OAG. Hadassah Schloss, as cost rules administrator, will continue to answer cost questions as well as investigate and resolve cost complaints backed by the authority of the OAG.

My office is pleased to take on these additional responsibilities because they ultimately reduce the burden of those members of the public with questions, concerns or

complaints arising under the Act, as they will now all be addressed by one office.


I am especially glad to have Hadassah join the OAG as she has worked closely with this office on open records matters for years. Hadassah is an accomplished public speaker who has testified at legislative hearings providing her expertise on permissible charges under the Act. She has also educated members of the public along with representatives of governmental bodies regarding proper interpretation of the cost provisions of the Act.

Hadassah is a past recipient of the James Madison Award, which is presented by the Freedom of Information Foundation of Texas to honor individuals whose appreciation and respect for the First Amendment and open government have been demonstrated by exemplary actions, words or deeds.

She is also responsible for developing and revising Texas Administrative Code rules on open records issues and she writes and edits special publications on charges for public information. Hadassah’s wealth of knowledge, vast experience and passion for her job make her an asset to my agency and will especially benefit the Open Records Division of the OAG.

As always, the Office of the Attorney General takes its responsibilities under the Act very seriously and strives to ensure that government is open and accessible to all. I am excited about the changes that are taking place, and I trust that these changes will result in more efficient customer service.

Hadassah will continue to be available by telephone at (512) 475-2497 after her move to the OAG. Please visit our website at www.oag.state.tx.us for additional information on these and other legislative changes, and join me in welcoming Hadassah to the Office of the Attorney General.


The most notable legislative change that will directly affect the public is that my office will now be responsible for enforcing the cost provisions of the Public Information Act.



College Station settles with city manager

College Station City Manager Tom Brymer resigned in July ending a two-week dispute that started when a divided City Council abruptly fired him.

Brymer had challenged his firing contending that the council violated the Texas Open Meetings Act because the matter had not been listed specifically on the meeting agenda, according

to the *Bryan-College Station Eagle*

Brymer was to receive a severance package totaling \$177,585 and agreed to abandon any plans for legal action. The severance package amounts to nine months’ pay and benefits plus \$1,000 in attorney fees.

His ouster in College Station started early July 15 when four of the seven council members voted to fire

him, citing a need for new leadership. But because the item was not posted on the council agenda, Brymer alleged that the action was a violation of the Texas Open Meetings Act and threatened to sue.

An investigation by the Brazos County District Attorney’s Office is ongoing, according to the *Eagle*.



FOI Forum

Joe Larsen is a director of the FOIFT and a Hotline attorney. He is a member of the Houston law firm of Ogden, Gibson, White, Brooks & Longoria, L.L.P.

Question: Every agenda the school board lists the same exception for a closed meeting, "Personnel matters related to hiring and resignations." (1) Is this sufficient to comply with the law? (2) Does this cover personnel matters not related to a specific person?

Answer: This is actually a point where the attorney general opinions diverge somewhat from the case law.

The cases, notably *Cox v. Austin Independent School District* and *Finlan City of Dallas*, require that advance notice of closed meetings specifically and fully disclose the subjects to be considered at the closed session and, when public interest in a particular subject increases, the notice must become more specific.

(1) In the *Cox* case, the Texas Supreme Court held that an agenda item of "personnel matters" was insufficient notice when the subject of the closed meeting was the superintendent.

However, there are AG opinions holding that "nothing in the Act or cases ...requires that advance notice be given that a particular subject will be discussed in executive session rather than an open meeting."

This language has been construed by the AG and other governmental bodies to allow the sort of "boilerplate" notice provision set out in the question. FOIFT believes these AG rulings are inconsistent with *Cox* and *Finlan*.

However, it is well-settled under both the AG opinions and case law that notice of "personnel matters related to hiring and resignations" is insufficient if the personnel matter relates to an employment position of high public interest such as a superintendent.

(2) A governmental body may not go into closed session to cover "personnel matters" not related to a specific person.

For example, a discussion on whether to give all teachers a pay raise is not a "personnel matter" as defined under the exception to the Texas Open Meetings Act.

Dalglish says secrets increasing

Post 9-11, the number of secrets in the federal government has soared, Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, said in a speech to the graduating class of the First Amendment Institute Sept. 8 in Austin.

"This administration has more control over their message than any in my lifetime," she said, reviewing the number of documents being classified.

The number of classified documents has more than doubled in five years, now totaling 15.6 million documents, she said. The federal government is spending \$7.2 billion just to classify documents.

The number classified as "state secrets" has grown. There are 33 times more classified documents now than during the Cold War.

She cited a report that said that it costs \$148 to keep documents secret and only \$1 to declassify them.

Dalglish also called anew for a federal shield law to protect reporters' sources. Two years ago this summer, the Court of Appeals for the 7th Circuit ruled that there was no journalists' privilege in the Supreme Court ruling *Branzburg v. Hayes*.

However, 31 states and the District of Columbia have passed shield laws to protect reporters from subpoenas requiring them to testify in many kinds of cases.

She cited several reasons reporters need to protect sources.

One is independence. Reporters need to be credible and not seen as agents of the government. Truth is another. "When sources dry up, the public gets only the government's version of the truth," she said. Also, if reporters don't resist subpoenas, they become "the witness of choice" for prosecutors.

Seven received graduation certificates from the First Amendment Institute. They were Mark Engebretson, editor of the *Graham Leader*; Kristin Finan, reporter for the *Houston Chronicle*; Marc Fuller, associate at Vinson & Elkins; Craig Garnett, owner and publisher of the *Uvalde Leader-News*; Katie Howard, general counsel in the Office of Sen. Jeff Wentworth; Daryl Janes, manager of information systems in the Office of the State Comptroller; and Matt Stowe, deputy solicitor general in the Office of the Attorney General.



"This administration has more control over their message than any in my lifetime."

- Lucy Dalglish, Reporters Committee for Freedom of the Press executive

FOI Briefs...



“Speaker Tom Craddick has refused to ask House members to approve voting reforms. But every house seat is up for re-election next year, and it’s beyond us how a straight-talking incumbent could campaign against putting his or her name on every vote cast.”

– The Dallas Morning News editorial



The Dallas Morning News has called for an interim study of the question of recorded votes after the issue died in the House during the recent legislative session.

“It’s time for legislative leaders interested in open, transparent government to resume the effort by ensuring it’s on the agenda for between-session study,” an editorial said.

“Speaker Tom Craddick has refused to ask House members to approve voting reforms,” the paper said. “But every house seat is up for re-election next year, and it’s beyond us how a straight-talking incumbent could campaign against putting his or her name on every vote cast.”

The Corpus Christi Caller-Times filed a complaint against the Texas Department of Family and Protective Services, contending the agency failed to release information about cases of child neglect and abuse, including some that led to deaths of children.

In a letter Aug. 25 to the Travis County district attorney, the paper’s vice president and editor, Libby Averyt, said the department violated the Public Information Act by not properly responding to the newspaper’s request for information.

“We filed this complaint only after exhausting all the proper channels in seeking this material through the Public Information Act,” Averyt said.

The Focus Daily News of DeSoto could not get a copy of a police report about a May 11 police shooting because no report was written.

City Attorney Ron MacFarlane claimed there was no report on the shooting death. Sgt. Colin Chenault fired his weapon twice, striking and killing a reported fugitive after he allegedly reached for a gun in his waistband, the paper said.

City officials in Abilene met in groups with officials of Cracker Barrel. Although a quorum was not present for any one meeting, FOI board member Joe Larsen told the Abilene Reporter-News that the meetings were illegal.

The Open Meetings Act was violated because it prohibits successive meetings that end up forming a quorum, Larsen said.

In two back-to-back meetings, Mayor Norm Archibald and some City Council members met with Cracker Barrel officials. Two council members attended each of the meetings and the mayor attended both, for a total of three city officials at each meeting.

The state has lost more money than it has made on a billion-dollar electricity marketing program promoted as a way of raising money for Texas schools, according to a review of records obtained by the Galveston County Daily News.

Under the program, the General Land Office trades natural gas from public lands to Reliant Energy for electricity it then sells to public customers such as schools, cities and counties.

The Land Office said in August it would comply with an information request made under the Public Information Act for \$93,000. After the paper filed a lawsuit, the office turned over gross revenue figures.

A review of the records found that the program appeared to be a net loss for Texas because of tax exemptions enjoyed by Reliant, the power program’s sole contractor.

When he was land commissioner, David Dewhurst persuaded lawmakers to create the power program in 1999, saying converting gas to electricity would make more money for the school fund than if the state simply sold the gas, according to the

newspaper. Dewhurst predicted the program would generate up to \$150 million a year for the schools.

Reliant does not have to pay gross-receipts taxes when it sells electricity to public entities through the program. A quarter of those taxes goes directly to education. If not for the power program, the state could have received about \$175 million more, \$4.4 million of which would have been for Texas schools, the paper said.

The Galveston Police Department asked the attorney general to say that it is exempt from releasing records concerning claims of police brutality, the Galveston County Daily News reported.

The department argued that all 54 complaints received over the past five years should be kept secret for one of three reasons: the claim has not been upheld by the Police Officers Civil Service Commission, the claim is subject of a lawsuit, or the release would interfere with the detection, investigation or prosecution of a crime. The police department asked the AG for an opinion on June 16.

Cintra Zachry, the only developer under contract with the state for a leg of the Trans-Texas Corridor project, has asked a court in Austin to block release of its development and financing plans, which Attorney General Greg Abbott has said are public records.

The Houston Chronicle sought an AG’s opinion after the Texas Department of Transportation refused to reveal its plans for the project.

The plan includes a \$7.2 billion toll road from Dallas to San Antonio that could eventually reach from Oklahoma to Mexico. Cintra Zachry has the inside track to build the facilities and operate them for the state for the next 50 years, the newspaper said.

AG commends FOIFT efforts

By Randy Sanders

Texas Attorney General Greg Abbott praised the work of the Freedom of Information Foundation during an August luncheon with several FOIFT board members in Austin.

“You were a very big help in this past Legislature,” General Abbott said as he recapped the session and its impact on FOI issues.

One of the most important bills concerning openness in government passed by the Legislature (SB 286), according to the AG, mandates that elected and appointed officials take part in training designed to familiarize them with issues pertaining to public information and open meetings.

Public information coordinators also are required to complete a training course.

“We face an ongoing challenge with regard to this training bill,” the attorney general said, but he pointed out that once everything is in place, “it makes it easier to be aggressive in prosecution.”

Abbott’s staff will have a Web-based program available at <http://www.oag.state.tx.us>.

The curriculum is two hours long with one hour devoted to the Public Information Act and the second hour focused on the Open Meetings Act.

The curriculum is interactive. Those who take the training will receive a certificate recognizing that the course was completed.

“Knowing they committed a violation is the toughest part for our elected officials,” Abbott said. By affirming that they participated in the training “puts an end” to the defense that they didn’t know they were violating the law.

According to Katherine “Missy” Cary of the AG’s Open Records Division, requiring public information officers to receive training will allow them to attend seminars that previously weren’t considered a priority. In the past, Cary pointed out, “A lot of PIOs would say, ‘I’d like to go, but they won’t let me.’”

“We’ve come a long way,” Cary, a former recipient of the FOI’s James Madison Award, told the board members at the Aug. 19 lunch.

Because the Open Records Division receives dozens of requests for rulings each week, “We appreciate (the FOI) thinking philosophically when we don’t have time,” she said. “We can’t do it all.”

Concerning the training curriculum, Ms. Cary said, “We want to be good out of the gate.”

Abbott encouraged the board to examine the training video the office is preparing when it is completed.

“Be thinking about ways we can improve it,” the attorney general said. “We want to know if you have criticisms so that we can correct them.”

In a major change in how the State of Texas does its business, the attorney general said, the Office of Open Records Administrator for the General Services Commission, currently held by Hadassah Schloss, is now known as the cost rules administrator and is operating out of the AG’s office.

This move will bring more support and influence to the administrator, Cary pointed out.

The attorney general also introduced Harry White at the luncheon.

White, who has been practicing law in Athens for more than three years, has joined the AG staff as a prosecutor in the Criminal Law Enforcement Division that was created in 2003.

“We will make every effort to assist local DAs in prosecuting open meetings violations,” White said.

White pointed to the first criminal indictment in Texas for an Open Meetings Act violation as an example of his division’s work. John Wesley Moore II, former president of the New Diana Independent School District, was indicted by an Upshur County grand jury for conspiring to circumvent the state’s Open Meetings Act in May.

Open government seminar attracts 73 officials, media

A total of 73 government officials and members of the media took part in a Responsible Rights workshop in Corpus Christi in July. Foundation attorneys and board members Joe Larsen and Jorge Rangel led the session on open government laws.

Hadassah Schloss, who is responsible for working to assure that charges made for public records are within the law, also participated.

FOI board member Rangel said he

was surprised by the array of government officials who showed up and the quality of their questions.

“I was impressed with the level of understanding and commitment by the public officials,” he said. “They genuinely want to do the right thing and that is encouraging.”

Larsen said most non-compliance comes from ignorance of the law.

Beginning Jan. 1, state law requires all persons responsible for dealing

with public information to be formally trained in open government laws.

“There is so much to this,” San Patricio County Clerk Gracie Alaniz Gonzales said. “If it’s a public record, I want to make sure we comply.”

An analysis by the Corpus Christi Caller-Times on compliance by 41 area cities, counties and other public bodies found that more than 55 percent of the public officials in the survey followed the law.



“There is so much to this. If it’s a public record, I want to make sure we comply.”

– San Patricio County Clerk Gracie Alaniz Gonzales





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