



Protecting the public's right to know

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FOI training passes; shield doesn't

By Paul C. Watler

A major victory for open government emerged from the 2005 Texas Legislature with the approval of a bill for mandatory training for Texas office holders and public employees in the state's freedom of information laws.

The training bill had been proposed by Attorney General Greg Abbott and was sponsored by Sen. Jeff Wentworth and Rep. Todd Baxter.

The biggest disappointment in the 2005 session was the failure of the Legislature to pass a journalist's shield law under a bill introduced by Sen. Rodney Ellis. SB 604 was based on the 1999 North Carolina shield law, the most recently passed shield law in the country.

The shield law bill would have fostered the free-flow of information about government and public affairs by providing reporters with legal protection for their sources.

SB 604 offered a qualified privilege for the protection of confidential and non-confidential news sources and work product. The bill would have allowed the privilege to be overcome on a showing by the preponderance of the evidence, which is the lowest burden of proof under the law. Thirty-one states and the District of Columbia currently have some form of a shield law, including California, Florida, Georgia, Pennsylvania, and every single state bordering Texas.

Unfortunately, the bill failed to pass the Senate. Given the lack of protection in Texas afforded by current statutes and case law, the only thing that journalists will continue to have to protect sources is their willingness to resist a subpoena, possibly suffering the consequences of jail or financial liabilities.

In contrast to the shield law failure, the passage of open government training, SB 286, was a big win for

open government. The bill requires most elected and appointed public officials to take a training course in the Texas Public Information Act and the Texas Open Meetings Act. All newly elected or appointed government officials must enroll in the course within 90 days after taking office, and current government officials would be expected to enroll as soon as possible.

The legislation, long supported by Attorney General Abbott, grew out of his desire to clear up confusion about the open records law and change attitudes among government officials as they interact with the public at the local and state levels. The bill was signed into law by Gov. Rick Perry on May 20 and takes effect Jan. 1.

There were a few other victories for open government in this legislative session. SB 121, introduced by Sen. Robert Duncan, makes more information available to the public concerning the State of Texas' investment of public funds. Likewise, SB 914 requires more disclosure of relationships between local government officers and vendors wanting to do business with local government, requiring the filing of disclosure reports with the Texas Ethics Commission.

SB 727, sponsored by Sen. Jeff Wentworth, favorably amends the Texas Public Information Act regarding copying costs, the time period for review of documents and other areas.

Finally, in the open meetings area, SB 1133 passed, requiring several types of governmental bodies to post open meetings notices on the Internet in addition to the existing requirements.

Paul C. Watler is a director and past president of the FOIFT. He served as chair of the Foundation's Legislative Committee and is an attorney in private practice with Jenkens & Gilchrist, P.C. of Dallas.



Abbott deserves our thanks

By Joel White
FOIFT President

Since 1978, one of the Foundation's core missions has been to educate public officials about their responsibilities under

the Texas open government laws.

During that time, we have conducted hundreds of seminars across the state. Our Hotline attorneys have answered thousands of calls from public officials.

Representatives from government agencies at all levels have graduated from the First Amendment Institute, and of course the *FOI Focus* has been an important source of information about developments in the Open Meetings and Public Information acts.

We have testified before the Legislature, and our members have published countless editorials on measures designed to improve or weaken public access to government.

Over the years we have worked with, and sometimes against, public officials at every level, from governors and attorneys general to small town school boards and tiny police forces.

While there have always been officials who have fought for more government secrecy, we have also been fortunate to have like-minded officials on the side of open government. Members of the Texas Legislature who have worked with us to improve the public information laws and to defeat dozens of bills designed to weaken them come readily to mind.

In Texas, no public official has more influence on openness in government than the attorney general. At the very least, the attorney general is the government officer primarily responsible for enforcement of the Public Information Act. How he or she performs that duty determines in almost every instance whether public information will be released promptly, and in many cases whether it will be released at all.

Even more important, the attorney general's enforcement policies and dedication of resources determine whether violators will be prosecuted or allowed to flout the law with impunity. A good attorney general can enforce the laws that allow public participation in our government. A great one can foster a greater understanding of why that is

essential to our democracy.

When Greg Abbott was elected attorney general, he had a tough act to follow. His predecessor, John Cornyn, had made open government a top priority.

Among other significant improvements, General Cornyn revamped the opinion process so that requests for information could be handled far more quickly and efficiently. In fact, General Cornyn's dedication to transparency in government made him the only attorney general ever to earn the Foundation's highest honor, the James Madison Award.

It was against this background that Greg Abbott assumed the office. He quickly demonstrated his commitment to public access by increasing funding for the Open Government Division of his office, even as other divisions suffered spending cuts. He was the first attorney general to hire a prosecutor solely to prosecute open records violations. That prosecutor was apparently long overdue; she handled 140 cases before her first year was through.

General Abbott was quick to take on major challenges to government openness, ruling against secrecy in the investment of public funds, such as the Texas Growth Fund, and ruling that the privacy provisions of the Health Insurance Portability and Accountability Act were subject to the state Public Information Act.

He determined that the bulk of violations were caused by government agencies' lack of understanding of their obligations under the Public Information Act, and he made education of public officials a top priority of his administration. The attorney general's FOI hotline has answered thousands of calls from government agencies, and the attorney general's Open Government Division has provided hundreds of open government seminars, many in conjunction with the Foundation, across the state.

Most recently, General Abbott successfully championed legislation that requires public officials to be trained on open government laws. That legislation is a major step forward for everyone concerned with the rule of openness in government.

Attorney General Abbott and his staff, led by Missy Cary, have been strong allies in promoting open government. They deserve our congratulations.



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- Joel White, FOIFT president



Become a member!

Help support the FOIFT and the work that it does. This year, we have answered more than 1,200 Hotline calls, testified for legislation that would help keep government open and against legislation that would close it off, trained future First Amendment leaders in our First Amendment Institute, filled dozens of speakers requests and held our annual state conference. However, we need your help. Become a member of the FOIFT, get a tax-break and join us in keeping government in the sunshine! See www.foift.org for details.

Media, police work out radio problem

When the Wichita Falls Police and Fire departments changed to a new 800-megahertz digital radio system last March, newsroom scanners at the newspaper and broadcast stations went silent.

The new system requires specific equipment and encryption codes for police transmissions. The city for several weeks remained adamant that no outside parties, including the media, should have access to the transmissions. Officials cited officer and public safety as their reasons, according to the *Wichita Falls Times Record News*.

They also said information officers needed, such as cautions about health conditions and possible criminal activities, should not be broadcast so that others could listen.

Media outlets argued that public safety also was a major concern, and lobbied for the same access to real-time communications they have had in the past. They resorted to asking members of the public to call them when they saw breaking news events. The Freedom of Information Foundation of Texas supported the media in their efforts.

Finally, on June 6, the two sides reached an agreement.

The city announced it would allow KFDX-TV, Channel 3; KAUZ-TV, Channel 6; and the *Times Record News* each to

buy two digital radios, programmed to receive dispatching information for the Wichita Falls Fire Department and the Police Department's primary traffic channel.

The agreement was designed as a temporary measure while the city works toward a Web site that will offer information on certain police and fire activities as they happen, according to the newspaper.

"No one benefits when media and law enforcement are at odds with each other, and I think it was in the spirit of that understanding that the final agreement was reached," *Times Record News* Editor Carroll Wilson said.

Mayor Lanham Lyne was quoted in the city's news release saying, "This agreement ensures that the media has access to police and fire events while allowing members of those departments to operate in a safe environment."

KAUZ News Director Drew Hadwal cited thunderstorms that occurred just prior to the agreement as to why the agreement was necessary. "We felt pretty much out of the loop as to what could have been happening in the city as the storms slammed us."

Wilson said it was extraordinary that the TV stations and the newspaper put competitive issues aside and worked together to negotiate the deal.



"It was extraordinary that the TV stations and the newspaper put competitive issues aside and worked together to negotiate the deal."

—Carroll Wilson, Wichita Falls Times Record News editor



Grand jury indicts on OMA violation

A grand jury in Upshur County has returned an indictment against a former school board president, charging that he conspired to circumvent the Open Meetings Act, Attorney General Greg Abbott announced.

The grand jury indicted John Moore, former school board president in the New Diana Independent School District. The same grand jury also indicted Dan Noll, former superintendent, on a charge of abuse of official capacity.

Moore's was the first criminal indictment for an Open Meeting Act violation obtained by a Texas attorney

general.

The indictment against Moore stemmed from private conversations he allegedly had with several school board members to gauge their support for a possible severance package for Noll, in exchange for Noll's resignation, the attorney general said.

The package was approved at a subsequent school board meeting. Evidence surfaced indicating Noll had misused public funds while in office.

Those revelations also allegedly prompted Moore to confess an open meetings violation to the Upshur County district attorney in hopes that the meeting where Noll's severance

package was approved would be voided.

District and county attorneys have original jurisdiction to enforce the Open Meetings Act, but they can request assistance from the attorney general, as the Upshur County district attorney did in this instance. The Texas Rangers and the district attorney's office assisted the attorney general in investigating the cases.

In 2003, Abbott obtained the first known criminal conviction of a public official for violating the Public Information Act. Llano Superintendent Jack Patton was fined \$1,000 and given six months probation.

Fort Worth SPJ chapter presents First Amendment Awards

Jeff Claassen, Scott Streater and Seth Borenstein of the *Fort Worth Star-Telegram* took first place in the "Use of Public Records: Investigative" category of the 2005 First Amendment Awards presented by the Society of Professional Journalists-Fort Worth Professional Chapter.

Linda Campbell of the *Star-Telegram* took first place for opinion writing and Jessica DeLeon of the *Star-Telegram* won for reporting on open government. Jennifer Autrey of the *Star-Telegram* won the Open Doors Award for excellence in using public records in investigative reporting.



From the AG. . .

By Greg Abbott

As you know, the Open Meetings Act and Public Information Act establish the open government requirements for meetings of governmental bodies and for disclosure of public information. These laws apply to virtually all governmental entities and officials in Texas.

Surprisingly, despite this broad impact, there has been no uniform requirement or mechanism for public officials to receive training on how to comply with these laws. This is vital because a failure to comply with either law may result in civil and, in some cases, criminal penalties.

Good news! Times have changed. The Texas Legislature passed a law this regular session requiring that public officials receive training on open government laws. Senate Bill 286 by Sen. Jeff Wentworth and co-sponsored by Rep. Todd Baxter adds an educational requirement to the existing Open Meetings Act and Public Information Act.

The new law requires elected and appointed officials to take a course within 90 days of taking the oath of office or assuming official duties. The training courses, each portion one hour in length, would emphasize the responsibilities that government officials have to the public in complying with open government laws, including instruction in:

- the general background of the legal requirements for open meetings and public information;
- the applicability of open government laws to governmental bodies;
- procedures and requirements regarding quorums, notice and record keeping and holding open and closed sessions under the Open Meetings Act;
- procedures and requirements for requests for information under the Public Information Act;
- the role of the attorney general; and
- penalties and consequences for failure to comply with open government laws.

SB 286 would also allow public information officers employed by governmental bodies to take the Public Information Act course. The office of the attorney general will provide a videotaped course at no cost.

Our office is also required to review and approve courses of training to be provided by third party instructors (possibly at a cost to attendees). The law takes effect on Jan. 1, and current government officials are encouraged to enroll as soon as possible.

My office has placed on our website (<http://www.oag.state.tx.us/agency/sb286info.shtml>) a section containing up to date information about the implementation of SB 286.

SB 286 grew out of my office's commitment to change attitudes among government officials who must interact with the public daily. The attorney general's Open Records Division receives more than 12,000 requests per year from government officials seeking guidance pertaining to disclosure of records to citizens and media.

As attorney general, I have learned that public officials do not always know what is required of them. Education about the duty of government to provide information to the citizens it represents is one way the attorney general's office can ensure correct responses are provided.

We live in an era in which citizens demand more openness from their government. It is my hope that this training will give all of its attendees the tools they need to provide the best possible service to all of the people of Texas.

Decision awaited on HIPAA case

A hearing has been held on the Federal Health Insurance Portability and Accountability Act (HIPAA) case, but no decision has yet been made by the 3rd Court of Appeals in Austin.

Lawyers from Attorney General Greg Abbott's office argued both sides of the case May 25 since the case involves a ruling by the AG's Open Records Division and since the attorney general's office also repre-

sents the Department of Mental Health and Mental Retardation.

The attorney general is appealing a ruling by a Travis County district judge that favored MHMR and was contrary to the attorney general's ruling.

Ed Burbach, deputy attorney general for litigation, said other states are watching the Texas case, which will determine if state law applies.

"What controls—the Texas Public

Information Act or HIPAA and the privacy rules?" he said.

Abbott ruled that the Texas law takes precedent because of provision in the HIPAA law itself.

That meant that media outlets and individuals would have access to information that some hospitals and authorities have declined to release under the federal law, the *Austin American-Statesman* reported.



"SB 286 grew out of my office's commitment to change attitudes among government officials who must interact with the public daily."

– Attorney General
Greg Abbott



AG rejects challenge to Open Meetings Law

Attorney General Greg Abbott has rejected a challenge to the Open Meetings Act, saying it is not unconstitutionally vague.

Tom Maness, Jefferson County district attorney, asked for the ruling and clarification of the language in the law prohibiting meetings “in numbers less than a quorum for the purpose of secret deliberations.”

“Because section 551.143’s meaning is plain, it provides adequate notice and does not allow for arbitrary enforcement,” the AG opinion said. (Opinion No. GA-0326)

“Members of a governmental body who knowingly conspire to gather in numbers that do not physically constitute a quorum at any one time but who through successive gatherings secretly discuss a public matter with a quorum of that body violate section 551.143 of the Open Meetings Act. This section is not on its face void for vagueness.”

Maness said that in the past two years he had conducted two investigations into allegations that public officials violated the provision of the law. He said he was concerned because of substantial disagreement among interested parties about the correct interpretation of the law and its constitutionality.

He questioned the meaning of “meeting” and “deliberations.”

A quorum is a quorum whether the members physically meet at the same time and in the same place or not. A quorum is a majority of the governmental body.

The law does not require that members must be in each other’s physical presence to constitute a quorum, the opinion stated.

The law applies to members who gather in numbers that do not physically constitute a quorum at any one time but who through successive gatherings, secretly discuss a public matter with a quorum of that body.

Maness submitted a hypothetical situation in which County Commissioner A calls Commissioner B and the county judge. Commissioner A discusses a matter which has already been posed for the next regularly scheduled Commissioners Court meeting and urges either directly or impliedly that Commissioner B and the county judge vote in a certain way.

The AG opinion said Commissioner A appears to violate the statute because he seems to be operating with the requisite culpable mental state and is in fact meeting with a quorum of the Commissioners Court to secretly discuss public matters. Proof of his culpable mental state is a fact question which cannot be answered in an opinion, the AG said. Whether Commissioner B and the county judge had the “culpable mental state” also would be a fact question.

The vagueness doctrine requires that a statute define the offense with such definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement, the opinion said.

“Here, the activity made illegal by section 551.143 is quite definite on its face.”



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– AG Opinion No. GA-0326



FOI Forum



Jeffrey S. Boyd is a director of the FOIFT and a Hotline attorney. He is a member of the Austin law firm of Thompson & Knight LLP.

Question: A concerned parent just watched her first grader get on the school bus, and couldn’t help but wonder whether the bus driver is a safe and responsible driver. Can she get a copy of the bus driver’s driving record from the public school district?

Answer: Generally, a public school bus driver’s driving record (that is, a record that reflects traffic accidents and convictions for traffic law violations) is public information and must be provided to the public upon request. See Abbott Open Records Letter Ruling OR2004-1092; Cornyn Open Records Letter Ruling OR2000-2967; Transp. Code § 521.046 (Department of Public Safety must provide to public individual’s driving record upon submittal of individual’s driver’s license number or full name and date of birth).

The driver’s constitutional and common law rights to privacy do not protect this information, because such information is not “highly intimate or embarrassing, and is of legitimate concern to the public.” And although section 411.085 of the Texas Government Code generally protects “criminal history record information,” section 411.082(2)(B) expressly provides that such information does not include driving record information.

When producing “driving record information,” however, the school district must be sure to redact the driver’s “motor vehicle information” and “driver’s license information,” such as the drivers’ license number, type, class, restriction and expiration date. Under section 552.130 of the Public Information Act and chapter 730 of the Texas Transportation Code, this type of personal information is generally confidential and protected. But the individuals’ driving record remains subject to public disclosure.

Galveston paper sues General Land Office

The Galveston Daily News has sued the General Land Office over its response, or lack of response, to months of requests for information on the state's power program.

The Associated Press reported that the lawsuit asked a Travis County district court to intervene on behalf of the newspaper.

The Land Office trades natural gas from public land to Reliant

Energy for electricity it then sells to customers such as schools, cities and counties. Money made off of public lands goes into the Permanent School Fund and eventually to the public schools.

The lawsuit asks for documents relating to audits of the power program, gross revenue earned by the program from electricity sales and how much gas the program has purchased.

Land Office spokesman Jim Suydam said the agency had provided the paper everything it has sought.

"The information and concepts behind the documents involved are extremely complicated and can be difficult to understand. While we can provide information to the Galveston reporters, we cannot ensure that they comprehend it."



"While we can provide information to the Galveston reporters, we cannot ensure that they comprehend it."

— Jim Suydam, General Land Office spokesman



FOI Briefs...

Attorney General Greg Abbott has ruled that the state must release portions of its contract with CintraZachry, the partnership that will build part of the Trans-Texas Corridor, the *Austin American-Statesman* reported.

CentraZachry is expected to file suit to contest the release of the information.

The Houston Chronicle filed the open records request after the March 11 signing of a "comprehensive development agreement" with CentraZachry.

Beaumont and Port Arthur are among the growing number of cities posting their city council agendas on the Internet.

Although state law does not require that agendas be posted on a city's Web site, many cities now do.

Phyllis Boudreaux, Beaumont's city information services manager, told the *Beaumont Enterprise* that the agenda usually is posted about 4 p.m. on Fridays before the Tuesday meetings.

The *Fort Worth Star-Telegram* used the open records law in reporting that the Texas A&M and the University of Texas athletic departments had routinely purchased tens of thousands of dollars worth of dietary supplements that were not permitted under NCAA rules.

The supplements were labeled as containing ingredients that make them impermissible for distribution to student-athletes, the paper reported.

From fall 2000 to spring 2004, the programs spent nearly \$120,000 on 21 such products, according to records the paper acquired under the Public Information Act.

Mike Clark, assistant athletic director at A&M and now with the Seattle Seahawks, told the paper he believed the products were permissible when he ordered them. Jeff Madden, assistant AD at Texas, said he, too, thought the products were permissible.

After questions from the *Star-Telegram*, UT said it would resubmit the products to the NCAA for evaluation.

The *El Paso Times* obtained the names of the 13 schools where 27 employees of the El Paso Independent School District worked who were fired or resigned after a drug investigation.

The district first revealed the findings of the month-long investigation into employee use of drugs, mostly cocaine, on Feb. 11. The district said one teacher, two administrators and 24 workers, mainly in the maintenance and custodial departments, resigned or were fired after officials began asking questions about on-the-job drug use. Administrators have not named the 27 people, citing federal confidentiality laws.

A district judge has ruled that the Laredo City Council violated the Texas Open Meetings Act by discussing the purchase of a controversial piece of land in executive session without giving sufficient public notice, the *San Antonio Express-News* reported.

Two Laredo residents filed the suit after the city bought the strip of land where Webb County plans to build an international bridge. The city and the county have competing bridge proposals, both awaiting permits from the U.S. State Department, the paper said.

The Goose Creek school board refused to release a proposed contract for the school superintendent even after a heated discussion about it in an open meeting and after the board had approved it.

Once the *Baytown Sun* cited the Open Meetings Act, the contact was released. The district's two spokeswoman and the district's attorney had been excused from the meeting by the superintendent, Barbara Sultis.

Sultis was given an extension and a \$10,000 pay raise.

Senate passes Cornyn's FOI bill

The U.S. Senate June 24 passed S.1181, a bill written by Sen. John Cornyn that requires any future legislation containing exemptions to the Freedom of Information Act must "be stated explicitly within the text of the bill."

Mark Tapscott, director of the Center for Media and Public Policy of the Heritage Foundation, in a newspaper column called it the most significant open government reform in years.

Cornyn said after the passage of the bill: "If Congress is to establish a new exemption to FOIA, it should do so in the open and in the light of day, and the unanimous passage of this legislation makes clear that the Senate understands the need for that reform."

Originally S.1181 was part of Cornyn's and Sen. Patrick Leahy (D-Vt.) Openness Promotes Effectiveness in our National Government Act of 2005 (S. 394) that was introduced on Feb. 16. However it was introduced as its own bill because it had a better chance of getting through the Senate according to a Cornyn aide.

Cornyn and Leahy also introduced the Faster FOIA Act on March 10 that would establish an advisory Commission

on Freedom of Information Act Processing Delays.

The Senate Judiciary Committee voted March 17 to send a bill to the Senate floor that would establish a 16-member panel that would recommend ways to speed freedom of information requests.

Leahy also is the sponsor of the RESTORE FOIA Act, which would restore the biggest single rollback FOIA has suffered in its 39-year history. It would clarify an overly broad provision that allows corporate polluters and others to avoid public disclosure of problems simply by stamping them "critical infrastructure information," Cornyn said.

In his column, Tapscott cited more than 140 examples of obscure exemptions to the FOIA approved in recent years. He said the White House said it was not opposed to the measure when it was introduced.

"Seeing a conservative leading an FOIA-related charge has been a rarity in recent years on Capitol Hill," Tapscott said, "but Mr. Cornyn's work with a hardy band of legislators, activists and journalists suggests a growing realization on the right that big government's worst enemy is transparency."



"If Congress is to establish a new exemption to FOIA, it should do so in the open and in the light of day, and the unanimous passage of this legislation makes clear that the Senate understands the need for that reform."

– U.S. Sen. John Cornyn



Monson Awards go to Austin, Alvin reporters

The Freedom of Information Foundation and the Texas Press Association presented the Monson Freedom Of Information Award to representatives from the *Austin American-Statesman* and the *Alvin Sun-Advertiser* June 18 during the TPA's summer convention.

The Monson FOI Award honors journalists and/or newspapers for outstanding efforts that uphold First Amendment principles, increase public access to government, and improve awareness of state open government statutes.

"Achieving this kind of recognition from people so devoted to protecting freedom of information is most

meaningful," Fred Zipp, managing editor of the *American-Statesman*, said.

Andy Alford and Erik Rodriguez from the *Austin American-Statesman* won in the daily category for their series on "use of force" by police.

"An exhaustive, records-driven approach to a controversial topic. The use of academic experts to further the reporting was excellent, as was the voluminous use of material generated through FOI," according to the judge.

Edward Looby from the *Alvin Sun-Advertiser* won in the non-daily/web category.

The judge wrote, "An ethics charge against a city council member was met by stonewalling the paper's FOI

requests...and the 'Knowledge Held Hostage' feature was born. Love the spunk and tenacity on display here. This is what defending our right to know is all about!"

The award is named in honor of Nancy Monson, the FOIFT's executive director for many years, who retired in 2001 after providing leadership for nearly two decades on open government and public access issues.

The award recognizes specific efforts or actions taken during the preceding calendar year (2004). The achievements can be a single news story or series, an editorial or series of editorials, columns, editorial cartoons or a community FOI project.

APME presents top FOI Awards to four newspapers

The *Kerrville Daily Times*, *The Galveston County Daily News*, the *Tyler Morning Telegraph* and the *Fort Worth Star-Telegram* took top awards in the Freedom of Information category from the Texas Associated Press Managing Editors April 2 in Corpus Christi.

The first-place winners were: Class A - Glenda Taylor, *Kerrville Daily Times*, Blame Game; Class AA - Staff, *The Galveston County Daily News*, Electric Silence ... State Won't Release Records About Power Program; Class AAA - Jacque Hilburn, Roy Maynard, Laura Krantz, *Tyler Morning Telegraph*, AG rules sheriff's K-9 fund 'public'; Class AAAA - Yamil Berard, *Fort Worth Star-Telegram*, Teacher pension tries high-risk investments.



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