



## Dewhurst backs FOI in Austin

Advocates of open government applauded Lt. Gov. David Dewhurst's eight-point plan for improving access to state government announced in December with only minor cautions about waiting for the details of his proposals.

In a Dec. 3 news release the lieutenant governor endorsed recorded votes in the Texas Senate, over which he presides, and presented his plan for changes in the way state government makes information available to the public.

His plan would:

1. Create a central clearinghouse for complaints and inquiries by citizens.
2. Require electronic reports for all ethics filings to be posted on the Internet.
3. Ask a Senate committee to develop a cable television service similar to C-SPAN to televise sessions of the Legislature and selected meetings of state agencies and to broadcast others on the Internet.
4. Change Senate rules to provide for recorded votes to be posted on the Web. It would cover second readings and final passage of bills, any bill returned to the Senate from the House with amendments, Conference Committee reports, Joint Resolutions that go to the voters as constitutional amendments and any amendments.
5. A system in which citizens could track bills and comment by e-mail on pending legislation.

*See Dewhurst on page 6*

## Sen. Cornyn supports FOI in Washington

U.S. Sen. John Cornyn hopes to reshape the federal Freedom of Information Act to make it more like the Texas open government laws he championed as attorney general of Texas.

At the beginning of the new 109<sup>th</sup> Congress that opened in January, Cornyn plans to introduce legislation that would put access to federal information more on par with Texas' open government laws, which are widely regarded as some of the nation's strongest, an article in the Washington publication *Roll Call* reported on Oct. 21.

Cornyn has already won one victory in the effort. In the reorganization of Senate committees responsible for oversight of intelligence agencies, the oversight of FOI laws was moved to the Governmental Affairs Committee. With the help of Sen. Patrick Leahy (D-Vt.), ranking Democratic member of the Judiciary Committee, Cornyn succeeded in keeping oversight of government information laws with the Judiciary Committee.

The two committees long have held concurrent jurisdiction over such laws as the national FOIA and the Privacy Act. Now the Judiciary Committee, of which Cornyn is a member, will have sole oversight.

The Judiciary Committee hasn't had an oversight hearing on FOIA in more than 12 years, *Roll Call* reported, and Governmental Affairs hasn't done so since 1980.

Also in the area of open government, Congressman Henry Waxman (D-Calif.) introduced the Restore Open Government Act, with nine co-sponsors.

*See Cornyn on page 7*



# Many FOI developments are positive

By Joel White  
FOIFT President

This has been a busy quarter for open government and for the near future the Foundation will continue to be as busy as we have ever been.

Most developments are positive, beginning with the ongoing success of the Light of Day project. Journalism students across the state have investigated federally mandated police reporting of campus crime, with great success. Their stories have revealed that reporting of campus crime varies greatly from campus to campus, with non-reporting and under-reporting sometimes with tragic results.

Their articles have been fascinating and have already had an impact on the way campus crime is reported. The articles led the non-profit organization Security on Campus to call on the U.S. Department of Education to investigate the serious violations reported by the University of North Texas and Southern Methodist University student journalists, and the department has stated that it will investigate.

Attorney General Greg Abbott has advocated mandatory education for state employees on compliance with the Open Meetings and Public Information Acts. The attorney general recognized that there would be concerns over the cost of providing public information seminars and costs for those attending, but said the cost of noncompliance, including litigation and criminal prosecution, far outweighed the expense of education. So far, opposition to the proposal has come from district attorneys who apparently resent being told that their knowledge of the law could be improved, or that anyone else should explain the law to their staffs. The Foundation will do whatever it can to promote the AG's proposal.

General Abbott's ruling on the Health Information Portability and Accountability Act (HIPAA) is being challenged in a state appeals court in Austin. In February, General Abbott ruled that the federal health care privacy law was, by its own terms, subject to the Texas Public Information Act. That ruling resolved many questions that had arisen in the wake of the new law, and made it clear that government agencies must comply with the PIA rather than HIPAA's privacy rule.

Before that ruling there was widespread misunderstanding and misapplication of the law. For instance, football coaches had refused to release the names of injured players, churches were afraid to post the names of hospitalized members and the City of Lubbock was hesitant to release crime and accident information.

The Texas Department of Mental Health and Mental Retardation challenged General Abbott's ruling, and unfortunately the challenge was successful in state district court. The case involved a request for the number of sexual assaults in the department's facilities over a five-year period. The case is now on appeal and briefs are due this month. The Foundation will file a friend of the court brief.

Lieutenant Governor David Dewhurst has proposed changes to make the Texas Legislature more open and accessible to the public. Dewhurst's proposal would not only require recorded votes in the Texas Senate, as the Foundation has advocated, it would also post them on the Internet. In addition, the lieutenant governor proposes to televise the Legislature, to set up an electronic system for tracking legislation, and to require online filing of campaign finance reports. Dewhurst also recommends reviewing all exceptions in the Public Information Act to ensure they are not being misused. State contracts would also be accessible online under the proposal. We need to support this proposal in the Legislature and in editorials. It is just good policy.

The Foundation is writing a friend of the court brief to protect the attorney general's decision on public access to public pension investment information.

The Texas Growth Fund invests public pension funds in private equity firms—firms that are not publicly traded. Most of the firms are organized as limited partnerships, so the Texas Growth Fund, a government agency, is a limited partner. Since it began investing in 1992, the Texas Growth Fund has invested more than \$40 million of state employee pension funds in six limited partnerships that have since gone bankrupt.

One would think that above almost any other information, the government's investment of public employees' pension funds in questionable limited partnerships would be a matter of legitimate public concern and certainly subject to public scrutiny. But the Fund, joined by other government agencies that invest public money in these limited partnerships, have opposed the release of even the most basic information about these investments, and have vowed to fight any effort to force disclosure.

But the Texas Growth Fund and other government agencies like it want to invest public funds in complete secrecy, far from any possible public oversight or criticism. Their "just take our word for it" attitude is abhorrent to our constitutional system of representative government, in which the "government is the servant and not the master of the people." It is also a recipe for another Sharpstown scandal.



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# Bills seek to disclose state investments

Bills have been introduced in the Legislature to make it easier for people to find out how the state is investing public money.

Attorney General Greg Abbott announced his support for the measures, which he said would require more accountability and disclosure in the investment of public funds.

“Texans must be able to find out how their hard-earned money is being managed by investment firms,” Abbott said. “There is no proof that secrecy will ensure sound investments, but we know that secrecy can conceal bad investments.”

Concerns about possible nepotism, conflicts of interest and other issues have increased awareness of the problems with secret investments in the state.

State Rep. Dan Gattis (R-Georgetown) and Sen. Robert Duncan (R-Lubbock) introduced the bills during the pre-filing period. The proposal would clarify the open records laws with regard to how public money is invested.

“It protects the public’s right to know what is being done with its tax dollars, and it protects the ability of the state of Texas to continue to invest in the future of the state of Texas, which is important to all of us,” Rep. Gattis told The Associated Press.

It would affect such agencies as the University of Texas Investment Management Co., which manages a \$16.2 billion fund for UT and Texas A&M. It also would affect the Employees Retirement System of Texas, the Permanent School Fund and the Texas Growth Fund.

Rep. Gattis noted that investment of public funds

has grown rapidly and diversified widely. “My legislation will bring Texas open government laws, written in the 1970s, into the new century.”

Managers of the funds involved have maintained that certain disclosures about their investments of the public’s money would unfairly expose proprietary information to competitors.

“The legislation would acknowledge firms’ right to assert confidentiality of certain information,” the attorney general said, “and balance that with the public’s right to know whether its money is being invested wisely.”

The Attorney General’s Office is in a court standoff with the Texas Growth Fund over Abbott’s ruling earlier last year that the fund must release information about its investments of Teacher Retirement System funds. The AG said that the fund had failed to show how such disclosures could harm its marketplace interests.

The legislation proposed would require government offices to publicly disclose information they possess relating to their investments. This would include the name of any fund in which the office is investing, the year the fund was created, the dollar amount committed to the fund and the return on that investment.

It would also require government offices to disclose the recusal of any governing board member on the basis of his or her personal investments. Fees, expenses and other compensation assessed against the government office also would have to be disclosed.

It also would require a description of the types of business conducted by companies the state invests in.



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*--Attorney General Greg Abbott*



## Who has custody of closed meeting tapes?

A dispute in San Jacinto County over custody of the tape recording of a closed meeting of the Commissioners Court resulted in an attorney general’s opinion that the county judge alone could not change a policy of the court and that transferring custody of such a tape to the county clerk does not make it a public record.

According to the opinion, the county clerk routinely taped a closed meeting of the Commissioners Court on June 1. At that meeting, the county judge, over the county clerk’s objection, took possession of the recording.

County Auditor Ray Stelly asked for an AG opinion about who is the proper custodian of a tape recording of an executive session.

In the opinion, the AG said the Commissioners Court has the discretion to allow or deny the county clerk admission to executive sessions. The Commissioners Court is the proper custodian of the tape of an executive session, but it may delegate that duty to the county clerk. That had been the policy in San Jacinto County.

A commissioners court acts by majority vote of its members, the opinion stated, and a single member acting alone has no authority to alter

court policy, including the county judge.

Also, releasing the tape to the county clerk would not render it a public document. Such a tape may be released to the public only under court order. Furthermore, because the county clerk is not a member of the Commissioners Court, she, even as custodian of the tape, is not authorized to inspect the tape.

A governmental body has discretion over who may attend an executive session, the opinion stated. It may include officers and employees whose participation is necessary to the matter under consideration.



# From the AG. . .

By Greg Abbott

When analyzing the broad policy statement of the Public Information Act, one cannot be left with anything less than the impression that education should be an integral, required component of the Act.

Very simply stated, “The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.”

Clearly, public officials must be educated about the Act in order to fulfill their legislative directive to conduct the people’s business in the open.

I have asked the Legislature to guarantee in the Open Meetings Act and the Public Information Act mandatory open government training. Our office’s enforcement program has confirmed what we believed all along about open government in Texas, that there is a small minority of public officials at all levels who do not want to follow the rules. Most do, but simply don’t know what all of the rules are.

Where there are questions, there should be answers in the form of training. If I have my way, ignorance of the law will never be an acceptable excuse for failure to comply with open government laws.

Unfortunately, there are a number of public officials who do not want the training we are proposing to be required by law. These officials maintain that it will be too expensive or that we already have enough laws.

First, gaining the knowledge needed to perform one’s service to the public is not “too expensive” when compared with the time and dollar expense associated with litigation and enforcement actions under open government laws.

Second, my office has for a number of years offered training, publications and a toll-free number to assist governmental bodies with open government laws. While these have moved us forward in our quest for compliance, it is time to take education efforts to the next level by codifying the proposed requirement.

Around 20 state agencies already have a statutorily mandated open government training requirement. The proposed legislation would merely expand required training to every public official.

We must all speak with one voice in Texas that open government is necessary and vital in a democracy. As public servants, we should respect and serve the public by making our learning a top priority.

Under a true democratic system of government, the public must have meaningful accountability. We owe the public we serve no less than a complete commitment to serving openly and in their interests.

*“The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.”*

—Patrick Henry, American colonial revolutionary



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## Records of power sales ruled confidential

Attorney General Greg Abbott has ruled that the public has no right to see the customer list of the Texas General Land Office’s State Power Program. *The Galveston County Daily News* said in an editorial that the AG is right about the law. “Unfortunately, the law is on the wrong side of the public’s interest,” the paper said.

*The Daily News* has published stories about the state’s sale of public power.

Under the program, natural gas from state lands is sold or traded for electricity. The electricity is then sold back to local governments, including

school districts. The sole contractor is Reliant Energy.

“The cost of the natural gas is a huge part of the cost of producing electricity,” the paper said in an editorial. “If you’re using the public’s natural gas to produce the electricity for these cities and school districts, you’d expect that they’d be getting a good deal on the price.”

Actually, the Galveston school district “is getting skinned,” the paper said. It is paying 17 percent more for electricity than it could buy it for on the open market. What about other school districts and other buyers? Are

they getting a good deal? “Hard to say since the General Land Office’s list of customers is secret.”

How much is Reliant making? That’s secret. In the deal, there is a system that rewards officials with the state, power providers and Reliant with bonuses. “That’s secret, too,” the *Daily News* said.

“Texans don’t need to take the word of the stewards of public money that the money is being well spent. They have the right to see the records. The law should be changed to say that—and say it clearly,” the editorial said.

# FOI briefs

Because of the work of three watchdogs, the taxpayers of **Edinburg** get information they need to keep an eye on the school board.

As Brittney Booth of *The Monitor* reported, the Sept. 28 board meeting agenda said the district bought an athletic washer for the new high school, weightlifting machines and equipment for some of the district's athletics programs.

Because the price of the items was not listed, the taxpayers wouldn't know about the \$26,545 washer, the \$35,850 for weightlifting machines, the \$35,019 spent for "Formica and related items" or the \$39,378 for cross country equipment.

However, Fern McLaugherty and two friends, using the Public Information Act, file weekly requests for the board's expenditures. Then, at the public comment portion of the board meetings, she reports to the board exactly what they spent at the last meeting.

The paper said the 55-year-old Edinburg resident plans to keep doing so until the district lists the price of their purchases on the agenda or at least reads the prices out loud at the meetings.

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The *Austin American-Statesman* suspended its lawsuit against Texas House Speaker Tom Craddick after Craddick agreed to disclose new information about his telephone calls.

The paper sued in October seeking phone records pertaining to Craddick's race for speaker. Records have been subpoenaed by a Travis County grand jury looking into whether outside groups improperly assisted his election as speaker. Craddick has denied any wrongdoing.

Under an agreement filed in district court in **Austin**, Craddick will release the phone numbers of all corporations, groups representing corporations or non-Texas residents who called or were called from Craddick's office or official cell phone. He will release all records of calls to or from public officials or employees acting in their official capacities and the city, state, date, time of connection and duration of all telephone calls.

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Two items on the legislative wish list of the **Austin** school board relate to open government.

One proposal would require that names and addresses be included in all e-mail requests under the Public Information Act. Some requests have been sent from anonymous e-mail accounts, said David Duty, the district's legislative liaison, according to the *Austin American-Statesman*.

The other would explore ways to eliminate requests considered harassing and those that appear to be strictly for

commercial gain, the story said. Companies have requested information so that they can market products, such as insurance, to students and staff members.

The challenge, Duty said, would be to find a reasonable way to tweak the law without the district appearing to be anti-open government.

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Charges of violating the Open Meetings Act against the mayor and five **Bartlett** City Council members were dropped after they took a course on the open meetings law offered by the Texas Municipal League, according to Bell County Attorney Rick Miller.

*The Tribune-Progress* in Bartlett said misdemeanor criminal charges were filed Sept. 24 against the council members.

The alleged violations occurred June 7 when the council fired three employees without giving them a public hearing. The council failed to cite at the meeting the section of the law that authorized the closed sessions.

"There are two reasons for open meetings violations: ignorance or arrogance," the county attorney said. "Training takes care of the first; jail takes care of the other."

Representatives of six other cities attended the TML training session at Bartlett Oct. 13, according to the paper.

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*The Tyler Morning Telegraph* used the Public Information Act and assistance from an attorney general's opinion to get information about the alleged misuse of funds by the **Smith County** Sheriff's Department.

Over the past decade, officials of the department raised more than \$500,000 for search-and-rescue animals, but spent much of the money for other purposes, including guns and cash for undercover drug deals, the paper reported.

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*The Baytown Sun* asked for the driving records of 401 school bus drivers in four school districts in the area. All but one complied.

The **Goose Creek** school district asked for an AG's opinion, saying the records were not public if they invade personal privacy or disclose criminal histories. The AG's office said the driving records are not criminal history records and that school bus drivers' records are not highly intimate and do concern the public.

The paper's review of the records revealed that all but one driver were eligible to get behind the wheel of a school bus and assume responsibility for children's lives. The driver whose violations exceeded the maximum allowed by the state was a junior high coach in Anahuac who had three speeding tickets and one driver safety course within the last three years. That added up to 10 points, the number at which the Department of Public Safety says a person is ineligible to drive a school bus.



*"There are two reasons for open meetings violations: ignorance or arrogance. Training takes care of the first; jail takes care of the other."*

*--Bell County Attorney Rick Miller*



# Dewhurst proposes open government legislation

Continued from page 1

6. Require details of state contracts, except for trade secrets and protected financial data, to be posted on the Web.

7. Review all exceptions to the Public Information Act to see if they are “reasonable and effective.”

8. Improve cell phone and Blackberry service and wireless access in the Capitol itself.

“The Freedom of Information Foundation of Texas strongly supports the lieutenant governor’s plan for greater openness in state government,” Joel White, president of the Foundation, said in a public statement.

His plan would make Texas government more responsive to the public and would increase public oversight and participation, White said. “This is the public’s information, not the government’s, and there is no excuse for not making it available to the public. We applaud the lieutenant governor’s efforts.”

Dewhurst said, “I believe my proposals today will go a long way toward bringing open and good government to you, the people we serve. So today I’m calling upon the Senate to open the windows and let the sun shine in.”

The recorded votes requirement would involve only a change in Senate rules. Some urging recorded votes prefer a constitutional amendment that could not be changed by a vote of the Legislature. Dewhurst’s recorded votes proposal would mainly apply only to the Senate, and only for one session.

“The devil’s in the details,” Tom Smith, director of the watchdog group Public Citizen, said of the proposal regarding state contracts. “Today we’re not able to find out

how many citizens are being served by many of these companies and at what cost.” Without such data, “we don’t know whether we’re getting a bargain or whether we’re getting taken by these contractors.”

Meanwhile, four major Texas newspapers produced a package of stories carried by each newspaper about the need for recorded votes. The papers were *The Dallas Morning News*, *The Houston Chronicle*, the *San Antonio Express-News* and the *Austin American-Statesman*. Kelley Shannon of The Associated Press did a story on the issue, distributed to AP members in the state.

Editorial endorsements of Dewhurst’s plans were quick in coming.

“There can be only one reason a lawmaker opposes recorded votes,” the *Denton Record-Chronicle* editorialized. “He does not want the people to know how he voted. Any legislator who says differently is either lying or is too stupid to trust with the public’s business.”

Noting that polls show 80 percent of Texas support recorded votes, the paper said it favored a constitutional amendment. “A constitutional amendment would be subject to a vote of the people, and we’d like to see those legislators who argue for secrecy and ‘tradition’ slapped in the face with an 80 percent vote for openness.”

The *San Antonio Express-News* said: “Dewhurst said government officials and the public would be better off with more open government. He is absolutely right, and his plan could move Texas in the proper direction.”

The *Dallas Morning News* said: “We can quibble with details and timing on these items. But the philosophy behind them is good government.”



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—Lt. Gov. David Dewhurst



## AG’s prosecutor nails city officials

The attorney general’s special prosecutor for open government scored with an admission by Cedar Park city officials that they had several illegal meetings and an agreement to complete open government training.

They also agreed to participate in legislative activities next session to promote any new law advocating open government education for public officials, an initiative by the attorney general.

Special Prosecutor Brandy Byrd-Hallford, an assistant attorney general, deferred criminal prosecution for 180 days in order for the six city officials to

complete the terms of the agreement, according to a news release issued by the AG’s Office.

The officials admitted they violated the state’s open meetings law last spring during negotiations to remove the city manager.

“I am pleased that government officials are beginning to see the light regarding Texas’ open government laws,” Attorney General Greg Abbott said. “My office will continue to pursue those who attempt to keep the public out of public meetings. Texans deserve no less.”

## ASNE sets Sunshine Week

The American Society of Newspaper Editors is promoting a nationwide Sunshine Sunday and Sunshine Week in March, encouraging editorials, op-ed pieces, editorial cartoons and news and feature stories “that drive public discussion about why open government is important to everyone, not just to journalists.”

Opening a dialogue about the public’s right of access to government information is the focus of the Sunshine Sunday and Sunshine Week: Your Right to Know. It kicks off March 13 and continues through that week.

# Cornyn pushes for changes to federal FOI laws

Continued from page 1

“That group, however, is comprised of progressive Democrats, who have historically shown more interest in promoting open-government laws than their Republican counterparts,” the story in *Roll Call* said.

“Cornyn, on the other hand, is as conservative as they are liberal.”

And, the story said, Cornyn is making the effort with a Republican administration “that open-government observers deem to be one of the most secretive in history.”

Cornyn told the publication that his passion for open government went back to his days as attorney general of Texas and before that as a judge.

“My interest in it really goes back to basics—my philosophy of government and why I am proud to call myself a conservative,” he said. “That is because all legitimate government authority flows from the consent of the governed, and the governed can’t consent if they don’t know what is going on.”

As for his conservatism, Cornyn told *Roll Call*, “One of the ironies is that the conservatives, of which I am proud to be one, are not generally thought to be good on this issue. I, for one, have never understood why. It just shows how sometimes people fall into bad habits without really thinking about the consequences of it.”

The publication noted that Cornyn had received the

James Madison Award from the FOIFT.

He agreed that Washington was different from Austin.

However, he said he would like the federal FOIA to begin with the underlying assumption in Texas: that a citizen is presumed to have a right to the information unless the government can prove that releasing it would not be in the public interest.

“That is a far cry from how the FOIA is carried out on the federal level,” *Roll Call* said. “If any agency denies or ignores a request for information, the only recourse is a lawsuit—an avenue financially feasible usually only to large media organizations and privately funded watchdog groups.”

Cornyn said his impression now is that if an agency can outwait the journalist, the news value goes down. “Obviously, the more obstacles go up—time, money or just the hassle factor—then people are going to lose interest.”

Cornyn said he thinks it would be wise to find some non-controversial areas to begin with “and move forward on those and use that as a beachhead.”

His long-term goals are even more ambitious. Congress and the courts are not subject to the FOI Act.

“I don’t see any good reason why it ought to apply to some branches and not others. I am skeptical of a blanket exclusion.”

## Cornyn questions Gonzales about Open Government

U.S. Sen. John Cornyn (R-Tex.) questioned Alberto R. Gonzales on open government during a hearing Jan. 6.

The following is the transcript of the Senate Judiciary Committee’s hearings on the nomination of Alberto R. Gonzales to be attorney general as transcribed by Federal News Service.

SEN. CORNYN: And finally, as you know, because we worked together in Texas when I was attorney general, I have a deep and abiding faith in the cause of open government, and as attorney general I was responsible for ruling on open records requests and writing legal opinions on open meetings laws. Well, Senator Leahy and I have joined cause, and I hope we’ll be able to come up with some improvements to the Freedom of Information Act. And I hope we can count on you to work with us in that cause, and here again because here again, as we’ve observed, Washington operates a little differently from what at least my experience had been in Austin and elsewhere, but the fundamental proposition about the people — the legitimacy of government flowing from the consent of the governed seems to be a principle that I hope would apply here as well as it applied in Austin, and I’m being somewhat facetious there. But let me get to my question.

As you know, Justices Scalia and Breyer both testified during the last Congress that the Administrative Conference of the United States is a great agency with a long track record of promoting good government, and that it deserves to be renewed. Indeed, President Bush recently signed legislation renewing the conference, and I’m confident did so after soliciting your input. I’m particularly interested in the Administrative Conference because of its previous role in improving agency performance under the Freedom of Information Act. If confirmed, will you commit to working with me and the committee and the Congress generally to ensure that the Administrative Conference has a strong role to play in enhancing agency performance under the Freedom of Information Act?

MR. GONZALES: I would commit to you, Senator. I would look forward to working with you on that issue.



**Partial funding for this issue of the FOI FOCUS was provided by the AT&T Foundation.**





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A quarterly publication  
of  
**The Freedom of  
Information  
Foundation of Texas**  
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