



Keeping government accountable

By Wayne Slater

The Dallas Morning News - Austin Bureau

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AUSTIN - A leading advocate of open government warned that Bush administration efforts to limit access to records because of the war on terrorism threaten the very liberties that Americans were fighting for in Iraq.

"Secrecy does not equal security," Jane Kirtley, a professor of media ethics and law at the University of Minnesota, told a forum sponsored by the Freedom of Information Foundation

of Texas and the University of Texas. She said national security is cited increasingly as a pretext for denying access for information.

In Texas, the Legislature has been considering nearly two-dozen bills that would curtail access to government records.

In Washington, the Justice Department has been analyzing plans for expansion of the Patriot Act, signed into law after the Sept. 11, 2001, terrorist attacks.

"It is not whether you are for the war or against the war or for President Bush or against President Bush," Kirtley said. "It is about keeping the government accountable."

The forum

coincided with the 30th anniversary of passage of what now is known as the Texas Public Information Act.

Former state Sen. Don Adams, a co-sponsor of the original bill in 1973, said opponents of open government have consistently sought to chip away at citizens' ability to monitor their government.

As an example, Adams noted that members of a House committee met in secret Feb. 26 to advance a bill sought by business that would limit the ability of injured people to file lawsuits.

Hobby expresses his OR views

AUSTIN - The public's right to know does not depend upon whims of officials, elected or non-elected, said former Lt. Gov. Bill Hobby, who added: "Winning an election or getting a government job doesn't make anybody smarter than they were before, or less subject to the law."

Hobby and his wife, Diana, received the John Henry Faulk Award for Civic Virtue from the Freedom of Information Foundation of Texas in part of a two-day celebration and observance of what now is known as the Public Information Act.

Hobby was instrumental in guiding the Open Records Act through the Texas Senate while he served as lieutenant governor from 1973 to 1991. He declared that 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.

"Freedom of information laws are generally about open records, open meetings, notice of meetings and publication of agenda," he said. "They ensure transparency in government. Any institution that is not transparent is not trustworthy or believable."

Hobby said that there are probably 20 bills that would create exemptions (to government openness).

It's doubtful, he added, that many of the bills are really necessary.



From left to right: Diana Hobby, Bill Hobby, Dolph Briscoe, Jr. and Robert Decherd.



Public can handle the truth

By **Wanda Garner Cash**
FOIFT President



We also should be experiencing a national shiver at how little our government trusts us.

*--FOIFT President
Wanda Garner Cash*



When America faced chaos during the Civil War, Abraham Lincoln trusted that Americans would process information responsibly as long as the government was open to them. “If given the truth (the people) can be depended upon to meet any national crisis,” Lincoln said. “The great point is to bring them the real facts.”

Today, as fear of terrorism inspires modern chaos, most all Americans share the nationwide concern for our country’s safety. We also should be experiencing a national shiver at how little our government trusts us.

The Patriot Act, the Homeland Security Act and their various iterations propose an alarming erosion of civil liberties, ranging from the right to challenge secret evidence at trial to a damaging dilution of the First Amendment that would severely compromise the public’s right to know.

In April, the Department of Homeland Security published proposed rules to significantly expand the scope of secrecy required by the Homeland Security Act, particularly the section dealing with the Critical Infrastructure Information. The expansion would unintentionally allow companies to keep broad categories of information secret and also enact provisions that restrict the government’s ability to use that information.

The Freedom of Information Foundation of Texas shares the concerns of the American Society of Newspaper Editors and other journalistic organizations that this proposal unnecessarily limits public scrutiny of broad categories of information, especially relating to the public’s health and safety.

It is important that we support efforts to clarify the wording in favor of openness. Vermont Sen. Patrick Leahy, a longtime advocate for freedom of information issues, and several other senators have introduced an amendment that would protect communications about infrastructure vulnerability while narrowing the range of secrecy protected by law and curbing the criminal penalties for disclosure.

The DHS will accept public comments through June 15. Please contact your congressional representative, members of the Senate Committee on Governmental Affairs and the Department of Homeland Security in support of Leahy’s “Restore FOI” Act amendment.

Meanwhile, we also must remain vigilant for similar attempts to ratchet down public access that are occurring in the Texas Legislature, where a mid-season count identified 22 bills with significant threats to open government. Throughout this session and in those past, the FOI Foundation has worked diligently with the Texas Press Association and Texas Daily Newspaper Association to fend off these assaults.

It is significant to note in our silver anniversary year that, since 1978, the Foundation has worked to ensure that the public’s business is conducted in public, a goal that can be achieved without jeopardizing national security.

Indeed, if state and federal lawmakers continue to tamper with the hard-won public access laws, it will not be security which is compromised, but freedom, along with the public’s trust in government.

The FOI Foundation believes, as Mr. Lincoln did, that the public can be trusted with the facts.

AG orders release of budget draft copies

AUSTIN - Gov. Rick Perry got a special assignment from the Texas Attorney General’s office—release to the public drafts of the state budget Perry’s office was working on prior to his zero-based budget.

A four-page AG opinion said Texas law requires that the documents be disclosed.

The governor’s office had argued that draft budget copies and other related copies should be kept private because of exceptions in the Texas Public Information Act.

In asking for the AG opinion, Perry’s office contended that disclosure of the documents would discourage “frank exchange of information among government staff and agencies.”

An Associated Press story quoted Perry spokeswoman Kathy Walt as saying that the records comprised “literally tens of thousands of pages” that had to be assembled.

A developing trend for cities?

A trend appears to be developing for cities to channel news media questions to a central public relations person or another single source rather than allowing individual city council members or city staff members to talk to the media.

The justification seems to be that the city, whatever city it is, should “speak with one voice.”

Council members are sometimes discouraged from contacting the news media as individuals. Staff members are told not to talk to the media but to refer all media questions to a single source.

Most cities, however, seem to still have an open door policy allowing any city official or staff person to talk freely to the news media.

The city council of Highland Village, a fast-growing suburb of Dallas in Denton County, on April 8 decided against putting in writing a proposed policy that would limit contacts with the news media after free-speech issues were raised.

Under the proposed policy, members of the Highland Village council would have had to inform one another and the city manager before contacting reporters or expressing their own viewpoints or opinions and pass requests for official city policy to the mayor, city manager or public affairs manager.

However, comments after the decision indicated the council members would follow the proposed policy by mutual agreement without putting the policy in writing.

Council member Don Combs said, “We all know

how we feel. I don’t think we need a resolution to hamper this.”

Council member Fred Busche said it made more sense to have an agreement among council members with no penalties for those who contact reporters without consulting with one another. “It’ll be something we’ll do as a cooperative group, in the interest of cooperating with the council,” he said.

Prior to the decision, there was some discussion of the freedom of speech of the council members. There was discussion about whether any policy was needed and that there was a need for the city to “speak with one voice.”

“The issue with the policy is just that on official council decisions and policies and directives, the council needs to speak with one voice,” Highland Village Mayor Bill Lawrence told *The Dallas Morning News* reporter Lesley Tellez. There was some criticism that the one voice the mayor proposed for the city could be his voice.

“This would apply to citizens as well,” Tellez said. “Anyone requesting information might be referred to the mayor.”

The city of Denton, the county seat, has an open policy on media contacts. The city manager encourages reporters to talk directly with those on staff who have the information first-hand.

Neither Dallas nor Fort Worth has a media relations policy for elected officials, and other cities, such as Carrollton and Frisco, may not have written policies, but do share the philosophy of “one voice.”



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-- Highland Village Mayor Bill Lawrence



FOIFT celebrates 25 years and counting...



Left: Former Lt. Gov. Bill Hobby speaks at the FOIFT's 25th Anniversary dinner in honor of him and Diana Hobby.

Below: Co-chairs of the event, Robert W. Dechard and former Gov. Dolph Briscoe, Jr., with Bob Schieffer, the event's keynote speaker.



Left: Kathy Mitchell, former Gov. Ann Richards, Lissa Walls Vahldiek, Ann Arnold and Wanda Garner Cash are presented with a Senate resolution in honor of the FOIFT's 25th anniversary.



Attorney General Opinions

Drug pricing questions

Prices charged to the state by specific drug manufacturers and wholesalers that are collected by the Texas Department of Health and used by the Interagency Council on Pharmaceuticals Bulk Purchasing are not public, the Attorney General's office has determined.

However, the information also may not be distributed to the members of the Council, which include the Texas Health Department, the Mental Health and Mental Retardation Department, the Correctional Managed Health Care Committee and the Employees Retirement System of Texas.

The Commissioner of Health had asked the AG's opinion on several questions related to the drug pricing information. One question was whether the council could discuss the prices in a closed session. The answer was no.

The Legislature created the council to study the bulk purchasing of prescription drugs by state agencies. The council is to make recommendations "regarding drug utilization review, prior authorization, the use of restrictive formularies, the use of mail order programs and co-payment structures to the member agencies."

The law specifically prohibited disclosure of information about what a specific manufacturer or wholesaler charges. The state agencies involved can consider data collected, but without knowing the prices charged by individual companies. The public will not have access to that information either. (Opinion No. GA-0019)

Law officer information

The AG said the address, phone number and Social Security number of a law enforcement

officer may be exempt from public disclosure on a voter registration form if the officer files proper notice with the voter registrar and other agencies to which the information is transferred.

Secretary of State Gwyn Shea asked for the opinion. Some law enforcement officers may request that some information about them not be made public. The exemption applies to peace officers, county jailers, employees of the Texas Department of Criminal Justice and commissioned security officers.

There is a conflict between the election code requirements and the exemption provision, but the AG said the exemption provision was enacted later and thus it prevails.

The secretary of state's question was whether the exemption applied at the state level as well as the local level. The AG opinion said the restriction applies if the officer chooses to restrict public access to the information and notifies the proper agencies, which include the state comptroller's office and the county. (Open Records Division Decision No. 678)

Delinquent taxpayer info

Another recent opinion concerned delinquent taxpayers. State Comptroller Carole Keeton Strayhorn asked whether her office must disclose certain information about state tax liens.

An AG opinion said the comptroller may disclose the amount of the current tax, penalty and interest owed by a delinquent taxpayer even to the extent this information is disclosed to supplement information available in a publicly available state tax lien notice. (Opinion No. GA-0028)

Meals could spell trouble

TYLER - Depending upon whom you invite, breakfast, or any other meal, could spell trouble if it involves governmental bodies and certain legal rules are not met. Recently such an event took place in Smith county.

Smith county commissioners should have posted an advance public notice of a breakfast meeting that preceded the regular meeting, according to findings of the Smith county district attorney.

County Judge Becky Dempsey and all four Smith county commissioners were present to view a computer presentation of work done by county extension agents. Agents were there to answer questions that commissioners might have.

But the district attorney's office said the meeting should have been posted under the Texas Open Meetings Act because a quorum of commissioners was present and public business was conducted, although no action was taken.

Government is 'servant'

Attorney General Greg Abbott, the state's top attorney, said that open government has never been more important than it is today. At the FOIFT board of directors retreat in Dallas, he said that at a time of heightened security, it is necessary to remember that government is the servant of the people, not the master.

"It is my job to make sure the public continues to know what the government is doing," Abbott said. He also renewed a pledge he made as a candidate last year that he would bring legal action against any public officials who fail to follow the laws on open government. "We cannot allow public officials to flaunt the open government laws," he said.



"We cannot allow public officials to flaunt the open government laws."

-- Attorney General Greg Abbott





F O R U M

By Joseph R. Larsen

Joseph Larsen is a hotline attorney for FOIFT and is a member of the Houston firm of Ogden, Gibson, White, Broocks & Longoria, L.L.P.

Q: Suppose a city commission or council has allowed a “public comments” period during regularly scheduled meetings and abruptly eliminates it. Does the mayor or city manager have authority under the Open Meetings Act to leave the public comment section off the meeting agenda, or is action of the entire commission required? Further, if public comments were resumed, could participants be restricted from personal criticism of personnel?

A. The first part of the question should be answered in terms of what goes on the agenda rather than what is excluded. If the governmental body seeks to have a “public comment” period during the meeting, it must be placed on the agenda. Tex Atty Gen. Op JC-0169 (2000).

The governmental body as a whole has the authority to determine its own agenda. Tex. Atty Gen. Op DM-228 (1993). Each member of that body “must be permitted to place on this agenda any item of his choosing.” *Id.* Accordingly, it would seem that any commissioner would have authority to place “public comments” on the agenda. Tex. Atty. Gen. Op. JM-63 (1993) (county judge was not authorized to control the content of the agenda even though a statute designated him the presiding officer of the court).

The mayor or city manager alone should not have the authority to preclude the council from placing the item on the agenda. See Atty Gen. Op. DM-473 (1988) (upholding Dallas city council rule of procedure that “the mayor shall include on an agenda any item requested by five city council members or by a majority of a city council committee”).

If the governmental body wishes to allow members of the public to speak at its public meetings, it may adopt reasonable rules to do so. Tex. Atty Gen. Op. JC-0169.

A governmental body “need not provide a forum for every citizen wishing to express an opinion on a matter.” Tex. Atty Gen. Op H-188 (1973).

However, in deciding what matters to consider, or which speakers to hear, it must not unreasonably discriminate.

Reasonable restraints on the number, length and frequency of presentations are also permissible. *Id.* However, if the public entity creates a public forum through an “open comments” period, it cannot restrict the content of the speech.

Further, to the extent a speaker raises an issue not on the agenda, it cannot be deliberated at that meeting, and comments by the members of the governmental entity should be limited to providing the speaker with a statement of specific factual information given in response to the inquiry or a recitation of existing policy.

A deliberation must be limited to a proposal to place the issue on the agenda for a subsequent meeting. Tex. Govt Code 552.042; Tex. Atty Gen. Op. JC-0169.

Survey: officials don’t comply with OR laws

Too many public officials do not comply with the state’s open government laws, and too many cities don’t know how to use the law, said a University of Texas at Tyler journalism teacher who supervised a survey of compliance in 14 East Texas counties.

“Too many public officials don’t comply with the law,” said Vanessa Curry of the Department of Communication at UT-Tyler told the FOIFT’s board of directors. “Too many cities don’t know how to use it.”

By contrast, county government scored a perfect 100 percent, complying completely with the law.

The survey was conducted in conjunction with the *Tyler Morning Telegraph* and the *Longview News-Journal*.

Curry, speaking at a dinner prior to the FOIFT’s annual retreat Feb. 20 in Dallas, said that a statewide survey is needed to raise awareness of the law among public officials.

Law enforcement scored the worst, with only 68 percent producing public records in accordance with the law.

Those seeking information from police departments and sheriff’s offices were met with personal questions, requests for identification, curses and lectures about privacy.

Requests sometimes were referred to the city attorney.

One requestor was told she needed a subpoena to see the records.



“Too many public officials don’t comply with the law. Too many cities don’t know how to use it.”

-- University of Texas at Tyler journalism teacher Vanessa Curry





From the AG. . .

By Greg Abbott

May 19, 1973, was a historic day for the state of Texas and for anyone who believes in the principle of government in the sunshine. On that day 30 years ago, the Texas Legislature gave final approval to what we know today as the Texas Public Information Act.

In establishing in statute the public's right to know, the Legislature also entrusted enforcement of the Act to the Office of the Attorney General. I am pleased to mark the 30th anniversary of the Act by reaffirming my commitment to open government.

As the preamble of the Act declares, "...the people insist on remaining informed so they maintain control over the instruments (the government) they have created." In other words, the best guarantee of our safety, welfare and public interest, both collectively and individually, is a fully informed public. The public's right to know is the highest principle of a democratic government.

My commitment to enforcing Texas open government laws is unwavering, whether the issue involves a local superintendent of schools or the Office of the Governor. My job is to enforce the law without fear or favor, and that is what I will do.

That commitment is challenged almost daily. Sometimes the challenge comes from officials who are new to the requirements of the law and unfamiliar with their responsibilities. Other times, the challenge comes from officials and entities who are openly uncooperative.

Non-compliance with the Act —whatever the explanation —is simply not acceptable. Every citizen is entitled to a prompt and appropriate response to an open records request. No governmental body or public official is exempt from this expectation.

For those who fail to comply with the law, I will continue to take whatever enforcement action is warranted to preserve the integrity of the Act and the public's right to know.

The demand for open government has never been greater. During 2003, we expect to issue more than 8,000 open records letter rulings, more than 10 times the number we issued in 1992.

We are taking several steps that will enable us to keep up with demand. For example, I have reduced the time required to issue many routine open records decisions by instituting a new "memorandum ruling" process.

Since September 11, 2001, there has been considerable anxiety about the disclosure of information that might compromise public safety and national security. Personal privacy is another source of increasing debate.

I understand these concerns, but heightened concerns about security require heightened scrutiny of our government. There can be no compromise of the principle that government is the servant of the people, not the master.

Over the past 30 years, the Public Information Act has proven its value to the people of Texas. I am unshakably committed to its enforcement. I appreciate the support of the Freedom of Information Foundation of Texas, and look forward to working with you to champion government in the sunshine.

University seeks Attorney General's help

AUSTIN - The investment management arm of the University of Texas has asked the attorney general for help in making public all investment return information about private equity investments.

UTIMCO is the University of Texas Investment Management Co., created by the University of Texas System Board of Regents to manage all investments for which regents are responsible. Current value of funds managed by UTIMCO is more than \$13 billion.

The attorney general ruled last September that records on private equity investments at that time must be made public under the Texas Public Information Act, even if UTIMCO had signed a non-disclosure agreement

with the private-sector equity managers. That ruling applied only to the records available then.

UTIMCO requested a broader ruling in March to cover records on performance of private equity investments since September, as well as future records. UTIMCO no longer agrees to new non-disclosure agreements. However, 36 of 67 private equity managers have declined to release UTIMCO from previous confidentiality agreements.

During the past year, UTIMCO said it has received more than 800 requests under the Public Information Act for data on private equity investments. It says a permanent ruling by the AG regarding the openness of the records would expedite UTIMCO's responses to such requests.



Save the date

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They're all winners! Kudos to our directors



John Lumpkin, the longtime Texas bureau chief for The Associated

Press and a member of the Freedom of Information Foundation of Texas board of directors, has received the Jack Douglas Award from the Texas Associated Press Managing Editors organization.

The award, which was created by the Texas APME board in 1997 to honor the memory of the late associate editor of the *Fort Worth Star-Telegram*, is given in recognition of outstanding service to the Texas APME and Texas journalism. During the award ceremony at the group's convention in South Padre Island, Texas APME president Carroll Wilson of the *Wichita Falls Times Record News* praised Lumpkin's service, calling him the "glue" that holds the state organization together.

"He literally knows every editor and managing editor and many of our line supervisors and right on down to many of our reporters," Wilson said. "He always conveys a commitment to making Texas newspapers better than they really are."

Under his influence, the Texas APME has become one of the largest and most active journalism organizations in the country.

Lumpkin's honor also was in consideration of his many years of service to the FOIFT and First Amendment causes everywhere.



Tony Pederson, chair of Southern Methodist University's journalism department

and former executive editor and senior vice president of *The Houston Chronicle*, recently received a First Amendment Award from the Houston Trial Lawyers Association at the organization's annual banquet.

Created in 1995, the awards celebrate the exercise of First Amendment freedoms and honor the excellence and courage of Houston-area journalists.

Pederson, a member of the Freedom of Information Foundation of Texas board of directors and also a former recipient of the FOIFT's James Madison Award, was lauded for his active role in advocating free speech and freedom of the press in Latin American countries.

While serving as president of the Inter American Press Association, Pederson made numerous advocacy trips to Central and South American countries where journalists risk their lives daily in pursuit of the freedom to express themselves.

In addition to the award, the lawyer's group presented Pederson with a \$1,000 check, which he donated to the FOIFT.

Other Houston area journalists receiving awards included Thom Marshall of *The Houston Chronicle*, L.M. Sixel of *The Houston Chronicle*, Art Rascon of KTRK-TV, Wayne Dolcefino of KTRK-TV, Anna Werner of KHOU-TV and Scott Nowell of *The Houston Press*.



Brett Shipp, an investigative reporter for WFAA-TV (Channel 8) and a

member of the Freedom of Information Foundation of Texas board of directors, was part of a WFAA crew named winner of the prestigious Peabody Award.

The award is the highest honor for TV news and entertainment programming. The Dallas station won for its series entitled "Fake Drugs, Real Lives," which investigated reports that police informants planted the sheetrock material gypsum on people who were arrested on cocaine charges.

Charges against 50 defendants eventually were thrown out, and two police officers working with the informants were suspended.

"Cloud Nine," responded series reporter Brett Shipp, when he learned of the news while on assignment in El Paso. "It is so sweet. I'm still shaking. I didn't think we were going to be a player in that."

David Duitch, WFAA's vice president of news said, "I'm on top of the world. To get this type of recognition from our peers is just a real honor."

The Channel 8 investigative team — Shipp, producer Mark Smith, editor Kraig Kerchem and Duitch also were honored previously with a duPont-Columbia Silver Baton and two Katie Awards for the series.



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