



Conference emphasizes cooperation

"Cooperating for the Public Good" will be the theme for the 2004 Freedom of Information State Conference Friday, Oct. 1, in Austin at the Stephen F. Austin Inter-Continental Hotel.

The deadline for the \$100 early registration is Friday, Sept. 10. Registrations received after Sept. 10 will be \$150.

Randy Sanders, editor of the *Lubbock Avalanche-Journal* and vice president of FOIFT, is the conference chair.

The conference will begin with a panel discussion on "Coming Together: HIPAA Doesn't Have to Hamper Public Information."

Participants in the panel will be Lubbock City Attorney Anita Burgess, newspaper attorney Gary McLaren and Sanders.

The trio will discuss how they worked together to present information to the Texas Attorney General's Office to assist in developing an AG's opinion on how the Health Insurance Portability and Accountability Act (HIPAA) and the Public Information Act of Texas interacted.

The second session, moderated by Wanda Cash, publisher and editor of the *Baytown Sun*, is titled "Internet Access to Court Records."

The session will be a discussion of the recommendations to the Texas Judicial Council from a special committee that was convened to suggest guidelines for access to court records via the Internet.

Confirmed panelists are Chief Justice Tom Phillips of the Supreme Court of Texas, Elizabeth Kilgo of the Texas Judicial Council and Dianne Wilson, Fort Bend County clerk.

The third session is titled "Record Votes." Moderated by Pete Slover of *The Dallas Morning News'* Austin Bureau, the second session will ask the

question, "Should the Texas Legislature Require Record Votes Reflecting How Individual Members Voted on Issues?"

Norman Moore, chief clerk of the Arizona House of Representatives, will be one panelist. Other panelists will come from the editorial board of *The Dallas Morning News*, the Texas Legislature and the Texas League of Women Voters.

The closing session of the conference is titled "Private Rights and the Public Information Act."

Moderated by Houston attorney Joe Larsen, the panel will consist of Missy Cary, chief of the Texas attorney general's Open Records Division; Susan Gusky of York, Keller and Field LLP and former chairwoman of the attorney general's Opinion Committee; James Sibley of Title Data in Houston; and Austin attorney David Donaldson, board members of the FOIFT.

The panel will examine issues related to claims of third-party rights to information, such as claims of trade secrets, invasion of privacy, confidential financial information and copyrights.

In addition, with governmental bodies often hiring private organizations to handle what were once governmental functions and to maintain governmental records, issues related to the right of access to this information will be discussed by the panel.

The panel also will comment on the trend of governmental bodies to compete with the private sector and to assert their own "private" rights to information.

Greg Abbott, Texas attorney general, has been invited to speak to the conference during the luncheon where the FOIFT's prestigious James Madison Award will be presented.



Public records belong to the public

By Joel White
FOIFT President

When San Antonio's WOAI-TV producer Steve Kline asked local police stations for public information, such as the number of homes that had been broken into in a neighborhood, he found he was routinely given the third degree.

"What do you need this for?" "Why are you asking?"

Some police officials would not release public information until Kline provided a written explanation of who he was and why he needed the information. Of course, such inquiries are not permitted under the Public Information Act, but Kline found that almost without exception, the police violated the law.

Kline also found that law enforcement officials were unfamiliar with other basic provisions of the act, including provisions that require the prominent posting of a sign containing the rights of requestors and responsibilities of government agencies to provide information.

Some officials openly questioned whether Kline was engaged in some illicit activity merely because he was requesting public documents. (Kline found no such problems at school boards or city halls.)

The problem, on one level, is ignorance of the open records laws. But there is another issue that goes deeper than simple ignorance about a body of law that every public official should be familiar with. That issue is a failure of government officials to recognize that the public, and not the officials, own the public's records.

The same failure occurs every time a Texas judge excludes the public from a courtroom during a criminal trial, or refuses access to documents filed in open court. Such acts are plain violations of law, but they also demonstrate that the judge has forgotten or perhaps never understood whose courtroom he or she sits in. It is of course the public's courtroom, not the judge's, and it is the public's trial.

Police officers, judges and other public officials will sometimes respond that they are acting in good faith to protect a higher value than the public's right of access to the public's own documents, information and institutions. Such assertions rarely withstand scrutiny. I recall one judge who excluded the public from jury selection in a highly publicized trial in Galveston and claimed she had done so to ensure that potential jurors would be more truthful. (She later abandoned that argument and claimed it was necessary to exclude the public because the air conditioners weren't working properly.)

Trials have been conducted in public since before the Norman Conquest. Public attendance has always been encouraged because it makes all of the participants more truthful. But even if public scrutiny did not enhance truthfulness, it is still the public's trial, being conducted in the public's courtroom, and the public has a right to attend.

It is ultimately the public who will decide whether trials are conducted properly and whether justice is done. Without openness, there can be no confidence in the fairness or result of the trial. Without public confidence, the justice system cannot function, as people who do not believe in the system will not abide by it either.

The same is true of all government agencies in a democracy. Without openness, the public will ultimately lose confidence in any government institution, from schools to police forces, from city hall to the White House.

As the United States Supreme Court has put it, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

Police officials misunderstood their job when they refused to release public records to Steve Kline until he provided what they believed was a good explanation of why he wanted them. The right to inspect public documents is a good explanation in itself. No one should have to explain that.

Project encourages students to use FOI laws

A project will be launched this fall to encourage university journalism students to undertake investigative stories using the state and federal open records laws and offering them support from directors of the Foundation.

On May 18, the Board of Directors approved the pilot Light of Day project for the 2004-05 academic year to be designed by a committee appointed by the president.

Board members Pete Slover and Nick Voinis presented the proposal to the board. Daniel Russ was absent, but also was one of the planners. Pulitzer Prize

winner Craig Flournoy of Southern Methodist University, David McHam of the University of Houston and Lorraine Branham of the University of Texas at Austin also spoke to the board about the plan.

"In the fall, professors would get together with their students to design and execute a journalism project that demonstrates and fulfills FOIFT's public information mission in whatever context they deem fit, as part of a class curriculum, as an extra-credit project, as a student newspaper project or an honors student effort," their report said.



"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

- U.S. Supreme Court



Baytown Sun wins access to records

The *Baytown Sun* and the public have the right to know how much a city-owned golf course in Mont Belvieu pays its employees through a private management company.

A June 1 ruling by the 14th Circuit Court of Appeals found in favor of the newspaper in its 2002 lawsuit against the city and the Eagle Pointe Golf and Recreation Complex over payroll records. The decision overrules one made last year by a lower court judge in favor of the city.

The appeals court ruling found that the records are subject to the Texas Public Information Act because the management agreement between the city and a private management company gives the city the right to inspect the books and records of the complex. The complex is wholly supported by taxpayer dollars and is the management company's only client.

The opinion did not address one of the primary questions of the appeal, whether the contractual arrangement with the city effectively makes the management company a government entity and therefore subject to the Act. Instead, justices based their ruling on the city's entitlement to the requested records solely on the language of the management agreement.

The opinion called the city's contention that it never had access to the payroll information an "untenable position."

Attorneys for the city said they will not appeal, and that it's up to the management company to release the records. The owner of the management company said he would consult his own attorney before deciding on his appeal option and whether to release the information.

Charles Daughtry, the attorney for the *Baytown Sun*, said the appeals court would issue a mandate to the city and the management company which would say that they were expected to comply with the opinion and make available the salary information sought by the *Sun*.

If the management company appeals the ruling to the Texas Supreme Court within 30 days, it would not have to release the information during that time. But, he said, since the Supreme Court decides to hear only about 5 percent of the cases referred to it, he expects the company will comply with the ruling.

Wanda Garner Cash, editor and publisher of the *Baytown Sun* and former FOI Foundation president, said the court's decision was a vindication for "all taxpayers who have the right to ask questions about how their money is being spent."

"Cities and other government entities shouldn't be able to farm out contracts to private companies to avoid scrutiny and accountability," she said. "Maybe with this ruling, they'll be less likely to violate the spirit of open government."



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- Wanda Garner Cash,
Baytown Sun



Judge orders City of Pharr to release records

A district judge in Edinburg has ordered the City of Pharr to hand over contracts and documents it withheld from *The Monitor* of McAllen and to pay a substantial part of the newspaper's legal fees.

District Judge Mario Ramirez declared the city's policy for handling public records requests violated the Texas Public Information Act. The records concerned work done for the city by Lopez and Lopez, a Pharr-based architectural firm.

John Bussian of North Carolina, a specialist in media law who represents Freedom Communications Inc., said the ruling should stop the practice of automatically delaying a response to a public records request for 10 days and

referring even the most basic requests to a city or county attorney for review.

Rex Leach of the McAllen law firm of Atlas & Hall also represented the newspaper.

"I hope the ruling clarified that the act does not allow an automatic 10-day time period to comply with public information requests, but rather, the document or information is to be turned over right away," Leach said, according to a story in *The Monitor*.

Monitor reporter Ryan Gabrielson made a written request for all documents and materials related to business the architectural firm had done with Pharr since 1985. In September 2003, the *Monitor*, part of the Freedom

Newspapers of Texas, filed suit. The City of Pharr never asked for an attorney general's opinion on the records it withheld, *The Monitor* reported.

"This affirms the Texas Freedom of Information Act," *Monitor* Editor Stephen Fagan said, "and it is a victory, not just for *The Monitor*, but for all the people of the Rio Grande Valley who are entitled to public information from officials and public bodies."

Mayor Leo Palacios of Pharr apologized and said he didn't understand why officials at city hall did not surrender the requested documents. "In my opinion, they should have given you those papers way back then," he told the newspaper.

Perry's actions raise FOI questions

A private trip to the Bahamas with campaign donors, a closed-door policy for a new management council that may act as a governor's cabinet and questions about travel not listed on his public schedule have drawn some heat for Gov. Rick Perry, who has pretty much ignored the controversy.

The Freedom of Information Foundation filed an open records request for information about the newly created management council. The records released were not of much value, according to Joe Larsen, Foundation board member and a Houston attorney.

The request sought records of the Feb. 25 meeting of the Governor's Management Council, attended by 11 agency heads and other officials. In order to ensure "a free flow of information," the governor said it was appropriate to have closed meetings. That concerned members of the Foundation board.

"He's apparently hostile to open government by his acts and deeds," Larsen said. "Going back to the entire government reorganization, he sought to completely close access to his working budget."

Larsen said the government reorganization eliminated some public boards. Perry might be replacing them with the new management council the public doesn't have access to.

Kathy Walt, the governor's spokeswoman, said the new council has no set schedule and that she didn't know of any requirement that the council post future agendas. The governor's office contends the meetings are not subject to the Open Meetings Act because it is not a deliberative body.

"Some states have a cabinet similar to the federal government's, but not Texas," Mike Cox of the Texas Press Association wrote in his State Capital Highlights column. "Of course, you can have a cabinet and call it a pantry. Or,

in the case of Texas, it could be called the Governor's Management Council."

Also, The Associated Press reported that the governor's publicly released travel schedule omits his political schedule, personal items and some other activities.

The campaign-financed trip to the Bahamas, for example, did not appear on copies of his schedule released under the Public Information Act. An overnight stay at the White House also was not listed, although a dinner at the White House was.

Spokeswoman Walt told the *San Antonio Express-News* that the governor's "state schedule" doesn't include personal items or "spur-of-the-moment" activities.

Suzy Woodford of Common Cause said the governor has found more excuses for closed-door meetings and secret trips than previous governors. Walt disagreed, according to the AP story. "The governor believes in open government and open records," she said. "The Open Meetings Act and the Public Information Act have certain exemptions."

Woodford said the public still wouldn't know about the Bahamas trip if it hadn't been for a man who spotted the governor there and posted it on the Internet, in reference to an angler's sighting of Perry in the Bahamas.

The *San Antonio Express-News* filed an open records request for documents related to the trip that included letters and e-mails to Perry from Texans. "With all due respect, have you LOST YOUR MIND?" a woman from Lockhart e-mailed Perry. "This little trip to the Bahamas...has convinced a long-term, middle-aged conservative to vote you out of office."

One Houston teacher wrote that if there were extra funds for the study of education finances, she would be willing to go to the Bahamas and discuss reform with the governor.

'Supreme Being' fails separation test

The Texas Supreme Court has refused to review two lower court rulings concerning state policies that First Amendment and separation of church and state proponents say impermissibly entangled state government in religion.

The high court declined to hear an appeal of trial and appellate court decisions holding that the comptroller of public accounts violated the religious establishment clause of the First Amendment by using a "supreme being test" to deny a franchise tax exemption to the Ethical Society of Austin.

The comptroller concluded that the group does not qualify as a religion because it does not insist that its members adhere to a belief in a supreme being nor does it impose other theological requirements for congregational membership.

Comptroller Carol Keeton Strayhorn had also denied a franchise tax exemption application from the Red River Unitarian Universalist Church in Denison. Documents obtained through a Public Information Act request revealed that Strayhorn denied Red River's application on the same ground used in the Ethical Society case.

Red River filed in the Supreme Court a friend-of-the-court brief opposing the comptroller's test. Former FOI Foundation President Rob Wiley, a partner in the Houston office of Locke Liddell & Sapp LLP, represented Red River at the Supreme Court.



"He's apparently hostile to open government by his acts and deeds. Going back to the entire government reorganization, he sought to completely close access to his working budget."

- Joe Larsen, Ogden, Gibson, White, Broocks & Longoria, L.L.P.





From the AG. . .

By Greg Abbott

As my office increases its efforts to enforce the Public Information Act, we will also increase our efforts to educate both requestors and governmental bodies on their respective rights and obligations under the Act. This month I will discuss access to information contained in certain law enforcement records.

When may law enforcement records be withheld? Under Section 552.108 of the Public Information Act, a law enforcement agency may withhold law enforcement records dealing with the detection, investigation or prosecution of crime when the agency has an ongoing investigative or prosecutorial interest or when an investigation has concluded in a result other than a conviction or deferred adjudication. However, in such instances, the public may still have access to the basic information contained in the records.

What is basic information? Basic information is usually, but not always, found on the front page of an offense or arrest report. Some examples of basic information appearing in offense reports are: the offense committed, the location of the crime, the identification of the complainant, the premises involved, the time of the occurrence, the property involved, any vehicle involved, the detailed description of the offense, and names of investigating officers.

This information may be contained in an offense report or in other records such as radio dispatch logs. It is basic information regardless of its location. The public generally has access to this information.

What is not basic information? Other information that identifies individuals involved in crime, however, may not be basic information even though it may appear on the front page of an offense report. Examples of this type of information include mug shots and driver's license numbers. This information is not among the information that is generally available to the public when law enforcement records are withheld.

Does the public always have access to basic information? Basic information is not always available to the public. The most common reason basic information is not released to the public is when there is a conflict with individual privacy interests. For instance, the identity of a victim of sexual assault is private and will not be released even if it would otherwise be basic information.

Other statutes may make entire reports confidential, prohibiting the release of basic information. Examples include provisions of the Family Code that make records involving juvenile offenders and records involving allegations of child abuse or neglect confidential.

Finally, a law enforcement agency may demonstrate special circumstances for withholding basic information in certain limited instances.

As requestors and governmental bodies become more familiar with the Public Information Act with the assistance of my office, and as my commitment to enforcing the Act is evidenced by the efforts of the new Compliance and Enforcement Section of the Open Records Division, I expect the incidence of noncompliance and associated complaints to diminish.

I invite you to visit our Web site at www.oag.state.tx.us and click on Open Government for additional resources and information to assist you.



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*—Attorney General
Greg Abbott*



Bills filed requiring recorded votes

Bills were introduced in the May special session of the Texas Legislature to require recorded votes, but Gov. Rick Perry never opened up the session to anything but public school finance.

Another special session is anticipated, and similar bills will be introduced then and in the regular session beginning in January.

Republican State Sen. Jeff Wentworth of San Antonio signed on as a sponsor of a bill by Dallas Republican Sen. John Carona to amend the Texas Constitution to require legislators to record almost all of their votes.

At the urging of Dallas Democratic State Rep. Steve

Wolens, the House recorded the votes on the public school finance bill in early May. "That's progress," *The Dallas Morning News* said in an editorial.

Texas is one of only nine states that does not require at least some of the votes of their legislatures to be recorded. Many crucial issues in the Texas Legislature are decided by voice votes.

The Morning News, which has led the drive to require recorded votes in the Legislature so citizens can know how their representatives voted, said 78 organizations, individuals and newspapers have supported the effort, including many members of the Legislature.

AP president wants media advocacy center

The Associated Press President and CEO Tom Curley announced plans in May for a media advocacy center to lobby in Washington for open government.

Few details were reported when Curley spoke at the Hays Press-Enterprise Lecture Series in Riverside, Calif.

He said AP would invite groups including the Society of Professional Journalists and the Reporters Committee for Freedom of the Press to help develop the plan.

Curley denounced increased official secrecy in unveiling the proposal.

"The powerful have to be watched, and we are the watchers. You don't need to have your notebook snatched by a policeman to know that keeping an eye on government activities has lately gotten a lot harder," he said, according to an AP story.

He said the proposed Washington office would seek

better laws for more accessible government information.

At every level of government, records are being sealed and requests for information denied, he said.

Courts are imposing gag orders and sealing documents.

Examples he cited:

An AP reporter's digital recording was erased by a U.S. marshal at a speech by Supreme Court Justice Antonin Scalia.

A photographer on assignment for the AP outside a Michael Jackson grand jury hearing had to delete images after being ordered to do so by a sheriff's deputy.

He called the Health Information Portability and Accountability Act (HIPAA) "a new nightmare" for journalists. It had the goal of protecting sensitive personal medical information, but wound up spreading paranoia among health institutions about cooperating with the media, he said.

A federal reporters' shield law might be sought, he indicated.

Meantime, he said, AP will continue audits to ensure official compliance with FOI laws. State AP bureau chiefs will monitor the status of still and video cameras in state and federal courtrooms, and legal challenges will be mounted when access is denied.

Stuart Wilk of *The Dallas Morning News* and president of the Associated Press Managing Editors, said he would ask the APME to endorse the initiative.

In addition, more than 30 nonprofit groups are organizing to fight government secrecy. The *Austin American-Statesman* reported that the group is led by OMB Watch, a government watchdog group. It has launched a Web site, www.openthegovernment.org.

The group called for the government to release the coalition's "Ten Most Wanted Documents." At the top of the list is the 28 classified pages of a 900-page Joint House and Senate Intelligence committee report from its investigation of 9-11.



"The powerful have to be watched, and we are the watchers."

- AP President Tom Curley



Fort Worth SPJ presents FOI, First Amendment awards

Craig Flournoy of Southern Methodist University and formerly of *The Dallas Morning News*, won the inaugural Defending the Open Doors Award from the Fort Worth Chapter of the Society of Professional Journalists.

The Defending the Open Doors Award was established to honor an individual or organization for overall effort to defend the people's right to open government and open records.

The chapter presented its initial First Amendment Awards, honoring work that furthered the rights to open records and open government, on April 30.

The chapter said its program honored work that "addresses the problems of the powerless and disadvantaged in society."

Dan Malone of the *Fort Worth Weekly* won the award for news writing on open records and open government issues. Carolyn Barta of *The Dallas Morning News* won the award for opinion writing on open

government issues.

Other winners were Doug J. Swanson of *The Dallas Morning News*, the Defending the Disadvantaged Award; Jennifer Autrey, Yamil Berard and Scott Streater of the *Fort Worth Star-Telegram*, the Use of Public Records/Investigative (Print) Award; Todd Bensman and Robert Riggs of KTVT, CBS, Channel 11, the Use of Public Records/Investigative (Broadcast) Award; Wendy Lyons Sunshine of *Fort Worth Weekly*, the Opening the Books (Business Writing) Award; and Kristen Gilbreth of *The University Daily*, Texas Tech University, the Student Project.

Print, broadcast and online professionals in Texas and Oklahoma were eligible for the awards, along with student journalists.

The chapter said the program honored stories that made use of public and business records and that examined the issues of freedom of information and open government.

Freedom of Information briefs

A lawsuit claims the University Interscholastic League violated the Open Meetings Act at least 100 times between March 2, 2000, and Feb. 17, 2004.

The suit on behalf of a high school basketball player, whose eligibility was involved, contends that the UIL failed to file its agendas with the Secretary of State's Office for posting at least seven days prior to each meeting. It also claims 59 meetings were declared emergency meetings, but they did not meet the requirements for emergency meetings under the law.

Athlete David Garcia also claimed District 30-5A violated the open meetings law by failing to post its notice of a Nov. 20, 2003, meeting at least 72 hours prior to the meeting. The suit is pending in Austin.

Garcia moved into the Nixon school district after a dispute with his previous coach. He was ruled ineligible because the district board determined that he moved for athletic purposes, according to a story in the *Laredo Morning Times*.

The eligibility became moot after the basketball season because Garcia was a senior.

A justice of the peace candidate in Robertson County was defeated in the Democratic primary after supporters of his opponent accused him of using city credit cards to charge personal and campaign expenses.

Credit card statements obtained through the Public Information Act revealed that Hearne Mayor Ruben Gomez, the JP candidate, spent \$1,814 on political signs and T-shirts plus hundreds of dollars more on meals, Bobbie Threadgill told the Hearne City Council at a council meeting.

Gomez responded by saying the allegations were politically motivated. The Hearne city attorney told the *Bryan-College Station Eagle* that all charges were either legitimate city purchases or personal expenses that were repaid by Mayor Gomez.

A spokesman for the Taylor Independent School District, in a letter to the editor of the *Taylor Daily Press*, said the district welcomed open records requests and the inspection of any information subject to the Public Information Act after a column called a records request effort frustrating.

The letter from Larry W. Robbins, community services director of the school district, also noted the schedule of approved rates for records charges established by the state. He listed his name, e-mail address and phone number where members of the public could obtain a brochure produced by the district. It lists every

administrator's name, phone number, e-mail address and areas of responsibility.

The City of Highland Village settled two lawsuits by former police officers, and the settlement agreements were made public after an attorney general's opinion favored *The Dallas Morning News*.

The city and its insurance companies agreed to pay former police Sgt. Roger Howell Myers about \$122,500 and Officer Kevin Ray Hall \$170,000, according to the newspaper. City Attorney Terrance Welch had sought to keep the settlement amounts private.

The officers claimed their First Amendment rights were violated when they were punished for publicizing what they thought were department ethics abuses on the Internet. Officer Hall was fired and Sgt. Myers demoted. Myers is no longer with the department, nor is Hall, who said he is not interested in returning to law enforcement.

A Montague County Grand Jury no-billed two Sunset city officials after hearing evidence on possible open meetings violations. District Attorney Tim Cole said the grand jury subpoenaed Danny Russell, now Sunset's mayor, and Renee Maddox, now municipal court clerk. Cole said the two are both former city secretaries. Both testified. A Texas Ranger assisted in the investigation.

"The grand jury heard evidence from the Ranger and the two people and decided to no-bill it," Cole said. "I fully believe there were open meeting violations that occurred, but the grand jury chose not to indict because they felt the problem had been remedied."

Three Borger City Council members were no-billed by a grand jury. The three, Mayor Judy Flanders, Mayor Pro Tem Meryl Barnett and City Councilman Charles Gillingham, were investigated by the grand jury on possible Open Meetings Act violations. Former City Manager Chris Coffman alleged the three violated the law by discussing Coffman among themselves on the phone. A Texas Ranger assisted in the investigation.

Attorney General Greg Abbott ruled that Travis County District Attorney Ronnie Earle did not have to disclose details of his investigation into Republican campaign finance activities in 2002.

Earle has been investigating whether the Texas Association of Business and the Texans for a Republican Majority, founded by House Majority Leader Tom DeLay, violated state laws by using corporate money for campaign activities.



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