



## Constitutional amendment would make votes permanent

A committee of the Texas House of Representatives heard proposals March 7 to amend the Texas Constitution to require recorded votes.

It was the first time the issue had even gotten to a committee hearing, Doug Toney, representing the Texas Daily Newspaper Association and the Texas Press Association, said.

"It's a real simple argument," said Toney, publisher of the *New Braunfels Herald-Zeitung*. "The public has a right of accountability on how legislators vote."

Two joint resolutions being considered differed over what votes should be recorded, according to the *Austin American-Statesman*.

One by State Rep. Dan Branch, R-Dallas, would require recorded votes only on final passage. State Rep. Elliott Naishtat, D-Austin, would require recorded votes at other stages of the process as well.

Prospects for the proposed constitutional amendment seem uncertain.

House speaker Tom Craddick said the two houses of the Legislature already have taken an important step by changing the rules for this session, but anything from here on would be up to the legislators.

He said some legislators are wary about giving up their authority to establish the rules because once an amendment is passed, they would be locked into it.

That, supporters of the amendment say, is the point.

Nearly 180 organizations and individu-

als statewide have called for a change in the Legislature's voting procedures, led by the Texas Press Association, the Associated Press Managing Editors, the Texas Association of Broadcasters and the League of Women Voters.

*The Dallas Morning News* has conducted a nearly yearlong campaign in favor of recorded votes. Most of the daily newspapers in the state have published editorials calling for recorded votes.

"Changing the constitution should be up to the voters," the newspaper said in an editorial. "It's up to these lawmakers to give voters the option. It's a good bet that the citizens of Texas don't think accountable government is a trifling matter."

### Legislative voting rules OK, but...

Rules for this session of the Texas Senate and the House of Representatives made it easier for citizens to find out how their legislators voted, but the rules didn't go far enough, those pushing for recorded votes contend.

Meanwhile, bills have been introduced to submit a constitutional amendment requiring recorded votes.

"Texas legislators took a half step toward allowing the people who elected and pay them to know how senators and representatives actually voted on state business," the *Austin American-Statesman* said in an editorial.

Both houses passed rules requiring that every member's vote on final passage of a bill or joint resolution be recorded on the Internet within 24 hours, but the House will record only final

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Because the Legislature is still in session, the status of bills is uncertain in mid-session. For information about the House, go to [www.house.state.tx.us](http://www.house.state.tx.us) and for information about the Senate, go to [www.senate.state.tx.us](http://www.senate.state.tx.us).



# Journalists, public need shield law

By Joel White  
FOIFT President

The Freedom of Information Foundation has endorsed a “shield law,” a law that shields journalists from being compelled to testify and to reveal their confidential sources in most cases.

State Rep. Aaron Pena of Edinburg has introduced a bill that would create such a law, and an identical bill has been introduced by State Sen. Rodney Ellis of Houston.

Some have asked why a law protecting journalists from having to reveal confidential sources is a freedom of information issue. After all, the proposed law would close off a piece of information rather than open it up to the public. Others have questioned the need for such a law in light of the fact that some courts have ruled that journalists cannot be compelled to reveal confidential sources.

The purpose of a shield law is not to protect reporters or the media, but to protect the sources of information who otherwise risk retaliation and possible prosecution for providing information to journalists and the public.

Confidential sources are confidential for a reason: their sharing of information with the press will lead to retaliation. The best known example is the “Deep Throat” of the Watergate scandal, who had good reason to fear the worst if it became known within the Nixon administration that he was the source of the news articles that ultimately led to the criminal convictions of some of the nation’s most powerful men and the resignation of the president.

If “Deep Throat” knew his identity could not be protected, would he have risked his career and perhaps his life by sharing his information with the *Washington Post*? There are countless lesser-known confidential sources with information that is critical to the public. Without a shield law to protect them, they are unlikely to make that information public.

That is why a shield law is a freedom of information issue. As United States Supreme Court Justice William O. Douglas said in the first and last Supreme Court decision on protection of confidential sources: “A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of government intrigue or aggression. If he can be summoned to testify [about his sources], his sources will dry up, and the attempted exposure, the effort to enlighten the public, will be ended. The reporter’s main function in American society will be to pass on to the public the press releases which the various departments of government issue.”

Justice Douglas was unfortunately writing for a minority of the court. The actual holding in *Branzburg v. Hayes* was that journalists had no right to refuse to disclose their confidential sources. But there was no majority opinion in the case, which was decided by a vote of four to four, with one justice concurring in a separate, ambiguous opinion.

Because of that ambiguity (and capable First Amendment lawyers) most courts throughout the United States interpreted the case as allowing reporters not to testify about their sources in most circumstances. However, that trend was reversed in Texas more than a decade ago, when the Court of Criminal Appeals held that there is no right not to testify about confidential sources. Federal courts and state civil courts have also become decidedly less friendly to the concept.


Journalists who refuse to testify about their sources are increasingly jailed in Texas, as in other states with no shield law. As a lawyer who has represented journalists threatened with jail for not giving up their sources, I can say with certainty that the current state of the law is abused by government prosecutors.

Prosecutors seldom get the opportunity to jail a reporter over a story, but sadly, some of them will try to take the opportunity when it presents itself. It is all too easy for a prosecutor to issue a subpoena to a reporter who has written a critical article, demanding to know who leaked the critical information to the press.

In other cases, prosecutors have jailed journalists for not turning over their research materials, as was the case with Vanessa Leggett, who spent 168 days in federal detention in 2001. Tellingly, Leggett had refused to work as an undercover agent for the FBI. Only after that refusal did the government claim that her research materials were critical to a murder prosecution. The U.S. Department of Justice ignored with impunity its own regulations in issuing the subpoena for Leggett’s research. Those regulations were put in place decades ago to prevent the kind of abuse that the government visited upon Leggett for declining their invitation to become an involuntary undercover agent.

Fortunately, journalists have been willing to go to jail rather than compromise their integrity. But I question whether we should continue to have a justice system that makes it easy for prosecutors (and others) to jail journalists. The current state of the law threatens the independence of the press and therefore puts all of our liberties at risk.

The proposed shield law is not absolute. Journalists will still have to comply with subpoenas in cases in which they have actually witnessed a crime, or in cases in which their testimony is critical and not available elsewhere. But government officials will no longer be able to jail reporters for writing articles critical of them, or for refusing to act as unwilling government investigators. That will be a victory not only for a free and independent press, but for all who believe in open and responsible government.

  
*The purpose of a shield law is not to protect reporters or the media, but to protect the sources of information who otherwise risk retaliation and possible prosecution for providing information to journalists and the public.*



# Student says Light of Day opened her eyes

*Editor's Note: The Light of Day project encourages university journalism students to do projects using the open government laws in order to learn about the laws and find meaningful stories. Hannah Seddelmeyer, one of the participants, was asked to tell about her experiences with the project.*

**By Hannah Seddelmeyer**

Graduate Student

Mayborn Graduate Institute of Journalism- UNT

When I first heard what my Advanced Reporting Techniques class would be doing last fall, I knew that we had a lot of work ahead of us...and that it wasn't going to be easy.

We were investigating Texas colleges and universities to see how well they complied with the Clery Act, which requires them to report all violent and nonviolent crime to the government and their own campuses.

The team included nine students from the Mayborn Graduate Institute of Journalism at the University of North Texas (including myself), six students from Southern Methodist University, and one student from Texas Christian University.

To begin, we got a list of all Texas colleges and universities and split them up among our class and the one at SMU. For my part of the project, along with researching my assigned schools, I took the information gathered by all the students and put it into a massive database. We then used the database to determine the schools that we should take a closer look at.

One of those schools was the Houston Community College System, which reported seven homicides to the U.S. Department of Education in three years. A small group of us went down to Houston to deliver the bad news.

We were well coached on how to interview difficult sources and what questions to ask, but doing the actual leg work was an experience that I think the four of us will not soon forget.

As we were gathering the information, it was difficult to look ahead and see what kind of stories would develop. But as it all started to come together, we were noticing a trend.

Most of the schools were not doing what they were supposed to be doing. So we sent out Freedom of Information requests to these schools asking for all offense reports for the reported years. People tend to take you more seriously when you have the Freedom of Information Foundation in your corner.

It was hard to visualize what the results would be, when all we had was a list of numbers. But soon the offense reports came in, and the numbers turned into discrepancies in reporting and these discrepancies turned into one gigantic story.

It was at a Wednesday night class, not too far from deadline, when I think I realized just how big the story was. Each student went around the room and told of schools that continually denied them access to their records, schools that did not report to their campuses what they were reporting to the government, and schools that didn't find it necessary to report sexual assaults to the campuses if the victim was an acquaintance of the accused.

I left the room grinning from ear to ear; we didn't just have a story, we had an incredible story.

I think I can speak for many students involved with the project when I say that it opened my eyes to a new kind of journalism, one that I am definitely interested in pursuing.

I believe that we owe a great deal of gratitude to our professors, Dan Malone and Craig Flournoy, who believed that we (lowly students that we are) could do it and helped us every step of the way. I think that they knew long before we did what kind of story we had, and encouraged us to find it ourselves.

I learned more by working on this project than I ever could have learned in any classroom. I learned that when you reach a wall, it usually means that there is something behind it. I learned so much about how the system works, and how to make it work for us as reporters.

The skills that I acquired working on the Light of Day project are ones that I will carry with me throughout my career.

Students are not regularly given the opportunity to prove themselves in such a way, and we greatly appreciate the opportunity to do so.



*"I left the room grinning from ear to ear; we didn't just have a story, we had an incredible story."*

*—Hannah Seddelmeyer, graduate student, University of North Texas*



## Council members indicted for open meetings violations

The *Big Bend Sentinel* reported that a Brewster County grand jury has indicted two members of the Alpine City Council alleging violations of the Texas Open Meetings Law.

The indictments allege that Katie Elms-Lawrence and Avinash Rangra

took part in an illegal closed meeting on or about Oct. 22, 2004.

Council member Nancy DeWitt filed an open records request in December and obtained copies of e-mails sent from Rangra's work computer to other council members.

District Attorney Frank Brown declined to say if the evidence the grand jury heard was from the e-mails DeWitt obtained. In a statement to the *Sentinel*, Elms-Lawrence said she never met in an illegal closed meeting or conspired to evade the law.



# From the AG. . .

By Greg Abbott

The public often confuses the Open Meetings Act and the Public Information Act, because both statutes reflect the commitment of the state to principles of open government. Yet the two acts have very different histories, coverage, exceptions, and means of enforcement.

The Open Meetings Act was adopted in 1967, and has been revised on numerous occasions thereafter, most notably in the 1973 legislative session that enacted the Public Information Act, originally called the Open Records Act. I will explain some of the differences between the two statutes.

In the most obvious sense, the distinction is clear: the Open Meetings Act applies to “meetings,” while the Public Information Act is applicable to “records.”

The Open Meetings Act applies to every “governmental body,” as defined in the statute, including state agencies in the executive and legislative branches of government, and to local governing bodies, such as county commissioner courts, city councils, school boards, and the boards of all special districts. The Public Information Act is applicable to all of these bodies, but it also embraces any other body that receives the unrestricted use of public funds. Neither statute applies to the judiciary.

One of the primary differences between the statutes is the kind of exceptions applicable to each. The Open Meetings Act, although generally requiring all meetings of a governmental body to be open to the public, contains a list of exemptions that permit the governmental body to meet in executive, or closed, session under certain narrowly defined circumstances.

A governmental body may meet in closed session, for example, to deliberate about certain personnel matters, to discuss negotiations about property, gifts, and donations, to consult with its attorney, and a number of other matters.


The Public Information Act, while in general providing that all records maintained by a governmental body are available to the public for inspection and copying, contains a rather extensive list of exceptions from disclosure. Although some of the exceptions in each statute are similar to those of the other, the exceptions are self-contained, and it is not permissible to incorporate one statute’s exceptions into those of the other.

Another important difference between the two statutes lies in their respective means of enforcement. From the original passage of the Public Information Act in 1973, the attorney general has been delegated the role of initially construing, by written decision, every request for information that is challenged by a governmental body.

Whenever a governmental body denies access to information, it must submit to the attorney general, within a statutory time frame, both the request for information and the information itself, together with arguments as to why the information should be withheld from disclosure. If the attorney general concludes that the information is not excepted from disclosure, he may seek judicial action to require its release.

By contrast, enforcement of the Open Meetings Act is delegated to local prosecutors, and for purposes of compelling compliance, to members of the public. The attorney general can and does, however, assist local officials in the prosecution of violations of the Act when requested to do so. Requests for legal rulings on questions relating to the Open Meetings Act are handled by the attorney general through the regular, formal opinion process, rather than through the statutory framework created by the Public Information Act.

The Open Meetings Act and the Public Information Act represent the pledge of the state to uphold both the principles and the reality of open government in Texas. I am proud to be a part of that commitment.

  
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—Texas Attorney General Greg Abbott



## Bill would place ERCOT under FOI laws

State Rep. Trey Martinez-Fischer, D-San Antonio, has filed House Bill 1082 which would bring the Electric Reliability Council of Texas under the open meetings and open records laws.

ERCOT, a private, non-profit organization was given the franchise to regulate the Texas power grid several years ago. It is funded by mandatory assessments collected from electricity customers by utilities, which are ERCOT members. ERCOT takes the position that it is not

a governmental body.

As a result, reporters and other members of the public, and even the Public Utility Commission, which has oversight of ERCOT, cannot get information on salaries contracts and other information that would be public as a governmental agency, according to Randy Chapman, executive director of Texas Legal Services Center, a statewide legal aid program that has pushed for ERCOT openness.

# Legislature's rules not a permanent solution

Continued from page 1.

votes, not committee votes, votes on amendments or second readings.

The House rules also provided that the votes will be recorded if one member requests it, instead of requiring that three members must request it as in the past.

In the Senate, voice votes on nonprocedural matters, including amendments to bills, will be recorded in the Senate Journal. It will list all members as voting for the bill unless a member asks to be recorded voting against.

"This is a definite improvement," Sen. Jeff Wentworth, R-San Antonio, said.

Suzy Woodford, director of Common Cause Texas, said the changes did not go far enough. "What we would have preferred the House do today is put in the rules that all non-ceremonial votes will be recorded," she said.

The House rejected a proposal by State Rep. Pete Gallego, D-Alpine, to post amendments offered during floor debate in "real time" on the Internet.

The *Waco Tribune-Herald* said the proposal would have given the average citizen the same access to House floor amendments while they are debated "as well-heeled lobbyists get when they pay for the information from legislative tracking services."

The paper said it was a shame the public is denied the same access to government operations available to lobbyists "and high-priced political consultants because of an exercise of partisan power."

Tom Smith, director of Public Citizen in Texas, said in a column in *The Dallas Morning News* that major debates and the key votes in the Legislature occur when bills are read the second time. "Often the real telling votes are on

amendments that may weaken or strengthen a bill, not on the bill's final passage."

He said knowing how legislators vote is the only way to ensure that "those you are sending to Austin are representing you and not big campaign donors."

Keven Willey, editorial page editor of *The Dallas Morning News*, discounted the rules changes when she spoke to the FOIFT board in February.

"What they've done so far is mainly window dressing," she said.

Presumptive voting is not adequate, she added. That is presuming a member voted for unless the member asks to be recorded against.

Director Wanda Cash noted at the same meeting that House Speaker Tom Cradick had said he didn't think a constitutional amendment was needed.



Keven Willey, vice president and editorial page editor for *The Dallas Morning News*, briefs the FOI Board of Directors on the recorded votes issue at its board retreat in February.

## TPA wants names of finalists, more openness

The Texas Press Association has voted to support legislation requiring publication of the names of finalists for school superintendent.

House Bill 415 by State Rep. Todd Baxter, R-Austin, requires school districts to release the names of applicants for school superintendent who have been interviewed twice.

Also, Richard Stone, chairman of TPA's Grassroots Legislative Committee and the TPA/Texas Daily Newspaper Association Legislative Advisory Committee, wrote a guest column on FOI issues carried by many member papers.

In it he said: "One of the more

troubling aspects of open government statutes is that most public officials learn about this body of law from lobby groups and training organizations that are not particularly fond of open government laws."

They teach local officials how to use the letter of the law to circumvent the open records and public meetings acts, he said. He cited the Texas Municipal League, the Texas Association of School Boards and the Texas Association of Counties.

"Typically, these groups take a somewhat adversarial approach to open government and pass that mindset on to local officials."

Those attitudes could change, he said, if two bills were passed. Senate Bill 286 by State Sen. Jeff Wentworth, R-San Antonio, and House Bill 634 by Rep. Baxter, would require that public officials receive training in open government.

He said a bill by State Rep. Toby Goodman, R-Arlington, to allow private meetings among members of a governmental body in less than a quorum was a "smokescreen for giving a few powerful individuals cover to make back-room deals for personal gain or simply to keep the unwashed general public from joggling their elite elbows."

  
"Typically, these groups take a somewhat adversarial approach to open government and pass that mindset on to local officials."

—Richard Stone,  
chairman of TPA's  
Grassroots Legislative  
Committee and the  
TPA/Texas Daily  
Newspaper  
Association Legislative  
Advisory Committee



# FOI Briefs...

Some East Texas public officials want help with people who abuse the open records law.

Vanessa Curry, writing in the *Tyler Courier-Times-Telegraph*, said they also don't want any more mandates adding to their responsibilities.

They were reacting to the attorney general's proposal that the state should require training of public officials in open meetings and open records laws.

Williamson County District Attorney John Bradley said there are already enough opportunities available to the public through the AG's office. He is a member of the board of directors of the Texas County and District Attorneys Association. He said he was more concerned about abuse that costs tax dollars and his employees' time.

"There needs to be something done," he said. Defense attorneys often misuse the law to obtain information not accessible through discovery. He also mentioned the law that says officials may deny public records to prison inmates and their agents, yet the officials are not allowed to ask requestors questions that might reveal if they are inmates.

Superintendent Lynn Whitaker of the Pine Tree School District, however, supports training for public officials because the law is complex. "I think it would be a good idea to have some training instead of us having to call an attorney all the time," he said.

However, he said some staff time is wasted complying with requests made for no other purpose than to harass the officials.

Gilmer City Manager Ron Stephens said abuse is not common, but it happens more often than many realize. "It can be used as a harassment tool, but the law doesn't address that," he said. "I get aggravated when we're trying our best to follow the law and I know someone is filing open records requests just for harassment."

A state district judge in Waco has given *The Dallas Morning News* access to the financial records of Baylor University's Bear Foundation.

*The News* asked for the records in the summer of 2003 after allegations of illicit payments made in connection with the men's basketball program.

The foundation sued the newspaper in September 2003 claiming it was exempt from state law that requires charitable organizations to give public access to its books.

Lubbock City Councilman Gary Boren says he is a strong believer in openness. And he wants to see some openness from the group in Austin that represents local governments' interests.

Boren sent a letter to the Texas Municipal League asking

disclosure of the salaries paid to the group's employees as well as information on who lobbies for the TML in Austin.

The *Denton Record-Chronicle* ran a front page story with sidebars about the First Amendment and the lack of understanding about it. Included was a list of common misconceptions, and a First Amendment historical timeline.

Students at the University of Texas at Tyler presented plaques to the Tyler and Gilmer police departments recognizing them as examples of agencies striving to meet open government law requirements, the *Tyler Courier-Times-Telegraph* reported. The journalism students had done a survey of 120 East Texas government agencies to see how they complied with the laws.

The *Conroe Courier* complained in an editorial that the Conroe City Council complied with the letter of the law on notification about a meeting regarding a \$1.4 million settlement with the contractor and architect involved in the construction of the Conroe Police Station, but didn't really give the public sufficient notice.

The editorial pointed out that the council normally posts meetings on its Web site, but didn't post this one. The council traditionally doesn't meet the fourth Thursday in November and December because of the holidays, but met when it wasn't expected to meet. The meeting was at 8 a.m. instead of the normal time.

No one except city officials attended. No reporter attended.

"However, while city officials complied with the letter of the law...we believe it could have given the public more of an opportunity to learn about the meeting, such as posting a public notice in the newspaper or even informing the media by telephone or fax, as required for an emergency meeting."

San Antonio Mayor Ed Garza was cleared of violating the Open Meetings Act when he and City Council members discussed the fate of then-City Manager Terry Brechtel in August.

District Attorney Susan Reed said a Texas Rangers investigation turned up insufficient evidence of any violation.

After a series of phone conversations with council members, the mayor called Brechtel to a late-night meeting at City Hall on Aug. 25 and asked her to resign, noting that a council majority supporter her ouster, the *San Antonio Express-News* reported.

Councilwoman Patti Radle suspected Garza of polling members on their support for asking Brechtel to resign.



"It can be used as a harassment tool, but the law doesn't address that. I get aggravated when we're trying our best to follow the law and I know someone is filing open records requests just for harassment."

—Gilmer City Manager Ron Stephens



# FOI Forum



*Jeffrey S. Boyd is an FOIFT Hotline attorney and a member of the Austin law office of Thompson & Knight LLP. He provided answers to some current FOI questions.*

**Question:** A citizen requested information from a state agency and received all of the

information that the agency had in its possession. But the citizen knew from other sources that the agency had hired an outside consultant, and that consultant has possession of additional responsive public information. How can the citizen get access to public information in private hands?

**Answer:** Generally, information that relates to official public business is public information even if it is held solely by a private consultant that the governmental body hired. Under section 552.002(a) of the Texas Public Information Act, such information is public information if it (a) was collected, assembled or maintained “for a governmental body;” and (b) “the governmental body owns the information or has a right of access to it.”

Although the private consultant has no duty to produce the information, the governmental body that receives a request for the information must retrieve it from the private consultant and provide it to the requestor.

Occasionally, a governmental body will fail to provide information held by a private consultant, either because they forget that the consultant has the information, they believe it is too burdensome to retrieve it from the consultant, or—in the worst case—they are hoping to shield the information by leaving the only copy with the private consultant.

Under the Public Information Act, none of these reasons is sufficient. Of course, a requestor who does not know that the information exists can do very little to ensure that it is produced. A requestor who knows or believes that a private party holds responsive public information should expressly

explain that the request includes all information that the governmental body owns or has a right of access to, even if it is in the possession of a private party. The requestor should specifically mention section 552.002(a) and, unless inappropriate for other reasons, should name the private party who may possess the information.

**Question:** For years, the City Council has publicly distributed a weekly “Administrative Activity Report,” summarizing activities and issues that are important to the community. Recently, the city manager has stopped distributing the report and, instead, has started preparing a “Friday Confidential Report,” which he distributes only to the member of the City Council. Is this report really “confidential?”

**Answer:** A governmental body’s decision to call or treat information as “confidential” does not make it confidential. Under section 552.101 of the Public Information Act, all “public information” must be available to the public unless a statute, a court decision, or the constitution makes it confidential. The Act itself is one of the statutes that includes numerous provisions that make certain information confidential.

For example, section 552.111—which protects an “intra-agency memorandum...that would not be available by law to a party in litigation with the agency”—could protect the portions of the Friday Confidential Reports that contain “advice” or “opinions” for the council members.

But section 552.022—the so-called “Super-Public” provision—provides that certain information, including a “completed report,” must be made available to the public unless it is “expressly confidential under *other* law.” In other words, the exceptions contained in the Public Information Act—such as section 552.111—generally do not apply to “Super-Public” information under section 552.022.

So if the Friday Confidential Report is a “completed report” (it certainly sounds like it is), then the city must produce it unless it can show that some other statute or court decision protects information in the report. The city’s decision to call it a “Confidential” report is irrelevant.



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## ‘I vote for what we discussed in the closed meeting’

Comal school district trustees met in executive session in February to consult their attorney, according to law. They came out of the meeting and voted in public session, according to law.

However, what they voted on was not quite clear.

The *San Antonio Express-News* reported that the board,

in public session, voted “to authorize counsel to proceed as discussed in closed session and allow the board president to execute any necessary agreement on behalf of the board.”

The paper filed an open records request to find out what that meant.



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Suite 240  
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Office Telephone  
(214) 977-6658  
Fax (214) 977-6666  
**HOTLINE**  
1(800) 580-6651  
Web site -  
[www.foift.org](http://www.foift.org)  
e-mail - [foift@foift.org](mailto:foift@foift.org)

Keith Shelton, Editor  
Katherine Garner,  
Contributing Editor



**Joel R. White, President, FOIFT**

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Staff Writer, The Dallas Morning News

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Jackson Walker, L.L.P.

**Brett Thacker**

Managing Editor, San Antonio Express-News

**Tommy Thomason, PhD.**

Schieffer School of Journalism, Texas Christian University

**Nick Voinis**

Senior Associate Athletics Director for Communications,  
University of Texas at Austin

**Thomas J. Williams**

Haynes and Boone, L.L.P.

**Fred Zipp**

Managing Editor, Austin American-Statesman

**Katherine Garner**

Executive Director, FOIFT