



Record votes passes; more needed

Advocates of recorded votes in the Legislature hailed the passage of a constitutional amendment Nov. 6, but Katherine Garner, executive director of the Freedom of Information Foundation of Texas Inc., called it "a start."

The amendment will not guarantee recorded votes on key changes made to bills before final passage.

Keven Ann Willey, vice president and editorial page editor for *The Dallas Morning News*, called it "an important victory for the voters of Texas." The paper has led the drive for recorded votes since 2003, publishing nearly 80 editorials on the subject.

About 85 percent of those voting in the constitutional amendment election statewide voted for the amendment, Proposition 11.

"A vote taken by either house must be by record vote with the vote of each member entered in the journal of that house if the vote is on final passage of a bill, a resolution proposing or ratifying a constitutional amendment, or any other resolution other than a resolution of a purely ceremonial or honorary nature," the new amendment reads.

"It is hard to

believe that Texans put up with this secret government for so long," the *Denton Record-Chronicle* said in an editorial.

"Proposition 11, as good a first step as it is, has not yet got us to the Promised Land," the paper said. "Recorded votes on final passage are a fine place to begin; the next step will be to extend the record-votes mandate to votes on major amendments and the first- and second-readings of bills.

"Much political maneuvering—and not a little flimflamming—goes on when those preliminary steps are being taken."

Madison Award goes to Dallas editor

Keven Ann Willey, vice president and editorial page editor of *The Dallas Morning News*, received the James Madison Award at the FOIFT State Conference in Austin for her efforts to get the Legislature to record the votes of the members so citizens can know how their representatives vote.

Many times the votes on important issues in the Legislature have not been recorded.

When Willey came to Texas in 2002 as editorial page editor of *The News* she discovered that Texas was one of only 10 states that did not require the Legislature to record its votes.

"What she did over the next five years shows how the freedom of speech and the press that Madison etched into the Constitution with the First Amendment can be a powerful force for positive change," FOIFT Board Member Paul Watler said in presenting the award.

She enlisted dozens of civic groups across the state in the cause including the League of Women Voters. The list of groups endorsing the change ran to eight pages, Watler said.

"James Madison passed from the scene long ago, but he left a legacy as the Father of the Constitution and author of the First Amendment. Today, we present the James Madison Award to Keven Willey, who has extended that legacy in noteworthy fashion."

Editorial writer Rodger Jones of the *Morning News* accepted the award in her absence.



Public officials have 'circled the wagons' on information

By Timothy M. Kelly
FOIFT president

The more that citizens and groups pursue the information they are entitled to by law, the more it seems that government officials circle the wagons.

Over time, even officials who at one point had a measure of oversight responsibility, such as district attorneys, assume us-vs.-them mentality. The "us," naturally, ends up being the people they see in the hallway every day.

Take school boards, for instance. Once upon a time, they were expected to look out for the best interests of the people who elected them. Over time they were co-opted by the superintendents and bureaucrats they were supposed to be holding accountable. So long, scrutiny. Goodbye, independent thinking. Hello, unanimous votes.

The Internet has presented another dimension to this. To be sure, it has made government entities even more skittish about public information, making readily accessible information that was once kept private simply because of the effort involved in its retrieval. "Get that wagon moved over there. Quick!"

On the other hand, as anyone who has faced the fury of a blogger-done-wrong well knows, the Internet is a tremendous vehicle for aggregating and galvanizing communities of interest.

Enter Peyton Wolcott (www.peytonwolcott.com/), who has taken on what she calls "Education, Inc.," the potentially unhealthy intersection of public education and private business interests, from a laptop computer in Horseshoe Bay, near Austin.

With clarity of purpose and a determination to succeed, she has spent the past year focused on a mission to get all Texas school districts' check registers posted online.

As one of my newspaper's bloggers put it: "Every check . . . free for taxpayer viewing. No Freedom of Information requests, no churlish secretaries, no unreturned phone calls . . . just a click."

At this point in her quest, 60 Texas districts, including Dallas and Houston, as well as the Texas Education Agency, have posted their check registers online. That's \$31.3 billion worth of transparency for the parents and taxpayers footing the state's education bill.



FOI FOCUS

A quarterly publication
of

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Information
Foundation of Texas**

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From the AG...

By Greg Abbott

A primary function of the Attorney General's Office is to issue rulings and decisions that determine whether information is open to the public under Texas' public information laws.

In Texas, if a governmental body receives a written request for information and wishes to withhold some or all of the requested information, it must seek a ruling from the attorney general. To provide some perspective on the number of rulings we issue, in 1998 we issued about 3,300 rulings, and in 2006, our office issued more than 15,000 rulings. That's about 60 rulings a

day or eight rulings every hour!

These rulings balance the requestor's right to access public information with the government's interest in protecting certain types of information.

As is the case with most contested legal issues, not everyone is going to be happy with the result of an open records ruling. From time to time, governmental bodies, third parties and even requestors may file suit to contest a ruling made by this office.

While reconsideration of an attorney general ruling is prohibited by law, the Public Information Act does permit governmental bodies and affected third parties who disagree with a ruling to file suit against the attorney general.

Within the Administrative Law Division of the Attorney General's Office, the Open Records Litigation Section is responsible for defending these lawsuits. It is staffed by section chief Brenda Loudermilk and Assistant Attorney General Ann Bedford.

Despite the increase of attorney general rulings, the number of lawsuits challenging these rulings has remained fairly steady over the past few years, a testament to the accuracy of these rulings. In fiscal year 2007, lawsuits filed totaled less than 0.4 percent of all rulings issued.

The Open Records Litigation Section receives about 66 new cases each year, with the open records litigation docket averaging 100 lawsuits at any given time. The majority of lawsuits challenging attorney general rulings are resolved either by settlement or dismissal. Only about one in five lawsuits actually goes to trial.

In addition to defending attorney general rulings, the Open Records Litigation Section is charged with enforcing the Public Information Act.

Section 552.321 of the Texas Government Code authorizes the attorney general to "file suit against a governmental body for a writ of mandamus compelling a governmental body to make information available for public inspection if the governmental body refuses to request an attorney general's decision or refuses to supply public information."

Thus, in a situation in which a governmental body is improperly withholding requested information, the attorney general may ask a court to require a governmental body to release the public information to the requestor.

Fortunately, of the 1,500 open records complaints our office received last year, most were disposed of informally without the need for court intervention because governmental bodies generally want to comply with the Public Information Act.

Complaints that cannot be resolved informally are referred to the Open Records Litigation Section for enforcement.

Defending attorney general rulings and enforcing the Public Information Act are means by which the Attorney General's Office can ensure that governmental bodies take their obligations under the Public Information Act seriously. In doing so, we further our commitment to ensuring that government operates in the sunshine.

Paper wins tape of illegal closed meeting

Because a school board's agenda listed personnel matters as a subject for a closed meeting without saying who the staff member was who was going to be discussed, the *Brazosport Facts* won the settlement of a lawsuit and got a recording of a March closed meeting.

Danbury ISD had to turn over the recording as part of a settlement of a lawsuit filed by the newspaper.

The Facts sued the district alleging the board violated

the Texas Open Meetings Act because the closed session was not about personnel matters, students were improperly allowed to participate in the executive session and the meeting was improperly noticed.

Brazoria County District Judge Ed Denman approved the settlement, finding the school board violated the open meetings law because it did not specify on the agenda which member of the district's personnel would be discussed.



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*- Attorney General
Greg Abbott*



FOI Forum



Joel White is an FOIFT director and former president. He is an attorney with Joel R. White & Associates in Austin.

Question: "A local attorney says the law has been changed and my city council members may now discuss public business at a social function without the public knowing what they discussed. Is that right?"

Answer: The short answer is no. The Open Meetings Act generally applies to any meeting in which a quorum of a governmental body is present, if the governmental body is responsible for the meeting, or a member of the governmental body participates in a discussion of the governmental body's public business.

For example, if five members of a nine-member city council conduct (as opposed to simply attend) a social function, they violate the Act if there is any discussion of the council's public business, even if none of the city council members actively participate in those discussions.

The Texas attorney general has ruled that such informal events are subject to the Act unless they "are purely social in nature and do not in any way involve discussion or consideration of public business or public policy."

However, if the same five members simply attend (as opposed to conduct) a social function, they do not violate the act unless they participate in a discussion of the city council's business.

Stated simply, the Act does not apply to social functions that are attended by a quorum, if all of the members refrain from discussing public business. The same rule applies to conventions and workshops.

On May 22, 2007, Governor Perry signed Senate Bill 1306 (House Bill 2374) into law. The new law makes it clear that the same rules that apply to social functions also apply to "ceremonial events and press conferences," if formal action is not taken and any discussion of public business is "incidental" to the ceremonial event or press conference.

Judge says a city council's e-mails are public

Messages from the personal e-mail accounts or hand-held devices used to conduct city business in most cases must be released, a district judge in Dallas has ruled.

"This case is very significant. It's the first Texas court decision addressing whether e-mails relating to city business that are sent or received on a personal e-mail account are subject to disclosure under the Texas Public Information Act," said David Starr, vice president and deputy general counsel of Belo Corp., parent company of *The Dallas Morning News*.

E-mails sent or received on personal computers should not be treated differently than e-mails on city computers, as long as they deal with public business, Starr said.

The Morning News filed suit in 2005 requesting access to the e-mails of the city manager, the mayor and the housing director of the City of Dallas. *The News* took the position that government business is government business, no matter where or how transacted, according to a story in *The Morning News*.

The city asked for an attorney general's opinion and the AG's office said the city could withhold some information protected under the attorney-client privilege or that

was part of an FBI investigation.

In response to the *News*' lawsuit, the city argued that messages sent via the mayor's BlackBerry and her personal e-mail account were not public because the BlackBerry was not owned by the city and the city would not even have access to the information.

The News contended that the mayor did use her BlackBerry and personal e-mail for government business and that those messages should be public.

"This is a really important decision," said Charles Davis, executive director of the National Freedom of Information Coalition, according to the newspaper. "One of the arguments we're seeing emerge among public officials is that certain delivery platforms or technological devices should be by their very nature, private because they own them, or they keep them in their pocket.

"The delivery platform doesn't make any difference. It's what the content of the message is. If the content of the message is about governing, then it should be public," he said.

State District Judge Gina Slaughter also ordered the city to pay *The News*' legal expenses.



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- Charles Davis, executive director of the National Freedom of Information Coalition



FOI Briefs...

DPS fights tape release

The Texas Department of Public Safety has spent more than \$165,000 on attorney's fees to keep secret videotapes recorded by security cameras in the back hall of the Capitol, according to the *Austin American-Statesman*.

The Texas attorney general and a state district judge have ruled that the tapes should be made public. The case may go to the Texas Supreme Court, the newspaper said.

The Texas Observer requested the tapes from a day in May of 2005 when the House was debating a private school voucher program. The *Observer* wanted to see if wealthy San Antonio businessman James Leininger, a major Republican donor and voucher proponent, was trying to persuade legislators in the hallway.

Note may be public record

Is a note passed between two city council members during a meeting a public record?

The *Waco Tribune-Herald* thinks so.

The problem is, the council member who wrote the note threw it away before it could become a public record.

After the Waco City Council voted to give \$63,000 to the Cen-Tex Hispanic Chamber of Commerce, Councilwoman Alice Rodriguez, who is married to the director of the chamber, sent a note to Councilman Rick Allen apparently asking why he voted as he did.

The *Tribune-Herald* asked for the note immediately after the council meeting. When the request was refused, the paper immediately submitted a written request, alleging that it was a public record.

Assistant City Attorney Ken Johnson received the request, but didn't ask Rodriguez for the note. He said it was usual procedure on an open records request for attorneys to review the request and reply to it the next day.

Too late. The dog had eaten the homework. At least the councilwoman had destroyed the evidence. She had torn up the note.

Rodriguez, who has been on the council for more than 12 years, said she didn't know it was a public record. "It was something personal between a council member and another council member," she said.

Red-light runners were cops

The Houston Chronicle used ticket data for a story about red-light camera enforcement. The data showed that more than 520 tickets had been issued to public agencies, mainly police cars running red lights without emergency lights. More than 100 Houston police vehicles were cited. Tickets were issued to public schools, governments and the area's transit agencies, the *Chronicle* reported.

Commissioners warned

Potter County Judge Arthur Ware issued what was called "a stern warning" to county commissioners about possible violations of the Open Meetings Act, according to the *Amarillo Globe-News*.

"Accusations have been made that caused concern for the County Attorney's Office to issue a stern warning regarding possible violations of the Open Meetings Act," Judge Ware said. "I'm not real sure who was involved, but I damn sure wasn't involved."

Commissioner Joe Kirkwood said there was no violation of the act. He said there were rumors about a raise for a collection employee, but that was just "jealous employees."

There was one item on the agenda concerning the Collections Department, a \$2,000 raise for one employee. After meeting in executive session, commissioners denied the request.

Subject of meeting secret, too

The Hunt Memorial Hospital District held an emergency meeting in August but won't say what the subject was or what happened, according to the *Greenville Herald-Banner*.

There was later a motion that said, "(The board) voted to overturn the decision of the Medical Executive Committee and they voted to reinstate the initial action."

The district asked for an attorney general's opinion on whether requested information should be released, including why the district called the emergency meeting to start with.



"Accusations have been made that caused concern for the County Attorney's Office to issue a stern warning regarding possible violations of the Open Meetings Act. I'm not real sure who was involved, but I damn sure wasn't involved."

- Potter County Judge
Arthur Ware



Speakers review legislative session

The Texas Legislature took some steps backward in the area of open government, according to a panel of speakers at the 2007 State Conference in Austin.

What the Legislature did or didn't do was among the hot topics at this year's conference, which also discussed the unintended consequences of laws passed by the Legislature and Congress, whether government is too open as some have alleged and whether the government watchdogs have been leashed.

Speakers on the panel about the Legislature were Harvey Kronberg, editor of *Quorum Report*; Michael Schneider, director of programs for the Texas Association of Broadcasters; Kelley Shannon, AP correspondent in Austin; and Eileen Smith, editor of *In the Pink Texas*, an online publication.

Kronberg said the proposed shield law died in the House, which he said was "totally dysfunctional" because of a leadership fight. Republicans in the House used complaints by prosecutors as an excuse to oppose the shield bill, he said.

"Open government is not a right, but a privilege in the eyes of some legislators," Kronberg said.

Shannon of the AP said one step backward was a new law allowing search warrant affidavits to be sealed for 60 days. Any affidavit filed requesting a search warrant involving a public official "would reveal a lot," she pointed out.

Another backward step she cited was sealing records on concealed handgun permits.

"There is no evidence that anyone has used these records for bad purposes. It was a solution for no problem."

Schneider said the TAB watched 350 to 400 bills out of the almost 6,000 filed. Very few bills get to the governor and it is easier to kill a bill than pass one, he said.

The bill to seal search warrant affidavits arose from an incident in which public officials in Montgomery County were embarrassed by details in a search warrant affidavit, he said.

Schneider cited three good bills that died: one that would open check registers of school districts, one that would require that contracts be published and one that would have made the names of finalists for school superintendent public.

"School districts did very, very well," in keeping information secret, Schneider said.

The qualified privilege bill or shield law was more about protecting sources than protecting reporters, he said. The bill was approved by the Senate and approved by a House committee 8-0 and placed on the House calendar for passage, but was killed on a point of order, he said.

Smith, referring to bloggers, said public information "has just been shut down" for what she called "citizen journalists." Public officials, she said, "still haven't found out how the Internet works."

The rise of "citizen media" is going to continue to meet resistance, she said. "When public information is withheld, the public makes up information."

On the panel about the unintended consequences of new laws, Allen Gwinn, publisher of *Dallas.Org*, said listing teachers' salaries had "a smoothing effect" on pay parity.

Juan Elizondo, managing editor of the *Longview News-Journal*, said when FERPA, the federal student records law was changed, it was made worse. He cited the case of complaints about a volleyball coach by students. Most of the resulting records were deleted. The definitions in the law are too broad and vague, he said. Now the law "leaves it to reason" whether an educational institution releases student records.

Allen Place Jr., legislative counsel to the Texas Land Title Association, cited the chaos that resulted from an AG opinion that took land records off the Internet. "County clerks' offices shut down," until the Legislature amended the law, he said.

Randy Sanders, founder of Sanders Communications, said HIPPA, the federal health privacy law, was designed to protect patients from unscrupulous people, but had been used to close public information. Lubbock police officers would not confirm if a person died in an accident or homicide because they said that would reveal private health information.

Attorney Jason Ray said communicating a problem to the Legislature is tricky. Once a bill is passed into law, "We have to wait for a court decision to find out if it means what we think it means."

State Sen. Jeff Wentworth, part of a panel on whether or not the government is too open, indicated he would introduce several bills in the next session of the Legislature to correct problems discussed at the conference.

Several panelists pointed to continuing problems in getting information.

Mike Ward of the *Austin American-Statesman* said that in making a request a requestor must be specific as to what is sought. "You have to ask the right way," he said. Agencies are more careful because they know they can get in trouble for releasing private information, he said.

Attorney Charles Daughtry cited a case in which the Land Office said the records requested didn't exist. His client sued the Land Office and the next day they found the documents. Yet there is no provision in the law for damages, he said.

Attorney Joel White said, "It ought to be easier to get attorneys' fees when



"Open government is not a right, but a privilege in the eyes of some legislators."

- Harvey Kronberg,
editor of *Quorum Report*



Pension fund salaries ruled secret

The salaries of people who manage billions of dollars in public-sector retirement pension funds are no longer public information because of recent court rulings.

The Texas Supreme Court in August refused to hear a petition from Attorney Greg Abbott to overturn a state appeals court's ruling that the pay of pension fund employees is no longer public information.

"Since that ruling, the pay and bonuses of some of the state's highest paid executives—its pension fund managers—are hidden from the public that pays their salaries," the *Austin American-Statesman* said in an editorial.

"It is completely irresponsible for the courts to grant secrecy to the employees managing public funds." The editorial asked the Supreme Court to reconsider its decision.

The case began in 2003 when a Houston TV reporter asked for information about bonuses paid to executives of the Houston Municipal Employees Pension System. Attorney General Abbott ruled that their compensation was public information. The pension leaders sued and Travis

County District Judge Margaret Cooper agreed with Abbott.

The system appealed and the appeals court overturned the ruling and made the compensation of public pension fund managers secret.

Following the ruling, the two biggest public pensions, the Teacher Retirement System and the Employees Retirement System, cited the Supreme Court ruling in declining to release the salaries of any investment division employees.

Both funds have routinely disclosed such information in the past because retirement system employees work for state government, the *American-Statesman* reported. The Austin paper requested the salaries of the two funds for a story on a proposed new compensation plan for the \$111 billion teacher pension fund.

The TRS's investment officer, Britt Harris, could earn more than \$900,000 a year under a compensation plan being considered by the system's trustees and keep it secret, the paper said.



"It is completely irresponsible for the courts to grant secrecy to the employees managing public funds."

— Austin American-Statesman editorial



Panelists said some agencies deny records exist

Continued from page 6
you win."

Some agencies deny that requested records exist, several panelists said, only to produce them when forced to. "People and agencies have learned how to play the game," attorney Buck Wood said.

Several said some agencies have a policy of asking for an AG's opinion on every request, even if they know it is public information.

Wood said there is a problem

with harassment. One woman teaches people how to harass public schools on her website, he said.

One school district has spent more than a million dollars in the last three years responding to 800 requests from three women.

Senator Wentworth, discussing the problem of private vendors that hold public records, said that they should have to respond in the same way as a government agency would have to.

White cited a problem with records

copyrighted by third parties, which frightens some agencies.

"Something ought to be done about both parties agreeing to trade secret provisions. They should never be able to agree to confidentiality," he said.

A panel on whether the watchdogs have been leashed included attorney Sarah Baker of the Save Our Springs Alliance; reporter Joe Ellis of KDFW-TV; and Reggie James of Consumers Union.

DOJ says White House office exempt from FOIA

The U.S. Department of Justice contends that the White House Office of Administration is not subject to the Freedom of Information Act.

The department's position was in response to a lawsuit seeking to force the office to reveal what it knows about the disappearance of White House e-mails, according to The Associated Press, which said the dispute opened a new front in the Bush administration's battle to keep its records confidential.

The Office of Administration provides administrative services, including information technology support, to the Executive Office of the President.

In court papers filed in late August, the Justice Department maintained that the Office of Administration has no substantial authority independent of President Bush and therefore is not subject to the FOI law.



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Upcoming Events!



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Upcoming Open Government seminars in San Antonio, Longview and Lubbock. See www.foift.org for dates and details.

