TRANSPARENCY AND ITS LIMITS: RECENT COURT PRONOUNCEMENTS IN THE AREA OF OPEN GOVERNMENT

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Texas Open Meetings Act

***Riley v. Commissioners Court of Blanco County*, __ S.W.3d __, 2012 WL 2348272 (Tex. App.—Austin May 23, 2013, pet. filed).**

CCBC held three closed, but recorded, meetings regarding a property purchase. CCBC then convened an open meeting and adopted a resolution authorizing the purchase.

Riley filed an open records request to obtain copies of the recorded closed meetings. CCBC denied Riley's open-records request for copies of the recordings and Riley sued.

The district court granted CCBC's plea to the jurisdiction on immunity grounds. Riley filed an interlocutory appeal.

On appeal, CCBC argued that an ultra vires claim must be brought against the commissioners in their individual capacities, not against the entity. The court of appeals disagreed. According to the court of appeal, the open meetings act waives immunity for violations of the act and expressly authorizes suits against governmental bodies. *Id.* at *2.

The court of appeals next addressed whether Riley had to first present his claim before filing suit. CCBC argued that Riley had to first present his claim under Local Government Code § 89.004 before filing suit. CCBC argued that the presentment requirement was a jurisdictional prerequisite with which Riley failed to comply thus barring his lawsuit. *Id.* at *4.

Without deciding whether the presentment requirement was jurisdictional, the court of appeals concluded the provision did not apply. According to the court section 89.004 applies to monetary claims against a county. *Id.* at *5. Riley was not raising monetary claims and instead sought relief for violations of the open meetings act. Thus, Riley was not required to present his claim before filing suit.

The court reversed and remanded.

***Texas State Bd. of Public Accountancy v. Bass*, 366 S.W.3d 751 (Tex. App.—Austin 2012, no pet.).**

Bass and other accountants worked for Arthur Anderson and participated in the audit of Enron's financial statements in 1997 and 1998. Texas State Board of Public

Accountancy instituted disciplinary proceedings against the accountants. The ALJ's PFD recommended that the CPAs, Bass and Bauer, be allowed to continue practicing accounting and pay penalties and costs, and that the remaining accountant, Grutzmacher, not be disciplined since she was not a CPA when she worked on the Enron audit.

The Board met four times to consider the PFDs before making a final decision. The Board went into two executive sessions to confer with it is counsel. The Board concluded the ALJ misapplied the law and revoked the Bass and Bauer's licenses and suspended Grutzmacher's license for three years.

The accountants sought judicial review of the Board's orders. The accountants contended that the Board violated the open meetings act. The accountants alleged that the Board deliberated almost exclusively in the lengthy closed sessions and immediately voted during the open session without meaningful discussion.

The trial court held that Board violated the Texas Open Meetings Act and declared the disciplinary orders void. The trial court also enjoined the Board from re-prosecuting the accountants. The Board appealed.

The accountants contended that the Board deliberated and made its decision in closed session and its public hearing only confirmed what had already been decided. The court of appeals noted at the outset that violations of the open meetings act result in voidable, not void, acts. *Id.* at 760. The court also noted that the act contemplates some deliberations to occur in an executive session but requires that the final resolution be made in an open session. *Id.* at 762; TEX. GOV'T CODE § 551.102. The act does not bar board members in an executive session from expressing their opinions or announcing how they expect to vote in an open meeting. *Bass,* 366 S.W.3d at 762. Thus, for the accountants to prevail, they had to prove that the actual vote or decision was not made in an open session. *Id.*

The court of appeals rejected accountants' argument that Board violated the Act by conducting votes to adopt the sanctions orders in closed, executive sessions and ratified "secret straw polls" in open sessions. The hearing transcripts revealed that Board members participated in extensive, substantive debate after executive sessions and the parties' oral arguments. According to the court, this was "conclusive evidence" that the members had not made final decisions in closed sessions. The court reversed, rendered partial summary judgment for Board and remanded.

***Foreman v. Whitty*, 392 S.W.3d 265 (Tex. App.—San Antonio 2012, no pet.).**

City of Junction Development Board vice-president and treasurer sued board and its individual members for violations of the open meeting act. The trial court granted the

defendants' motions for summary judgment and also awarded attorney's fees. The San Antonio Court of Appeals affirmed in part and reversed and remanded in part.

The dispute began when a board treasurer questioned expenses made by the board's president. The president refused to turn over documentation regarding the questioned expenses. Around the same time, questions about compliance with the open meetings act were raised. The evidence indicated certain board members attempted to initiate discussions with other board members by phone or email but that these discussions never materialized.

The court noted that the open meetings act requires every regular, special or called meeting of a governmental body to be open to the public unless otherwise provided. TEX. GOV'T CODE § 551.002; *Foreman*, 392 S.W.3d at 271. The open meetings act is violated when a quorum of a governmental body meets in private to deliberate public business. TEX. GOV'T CODE § 551.002. The Act defines a meeting as a verbal exchange between a quorum of a governmental body where public business or policy is discussed. *Id.* at § 551.001(4)(A), (2).

The court of appeals concluded that there was no evidence that the open meetings act was violated. While attempts were made by certain board members to discuss public business with other members, board members refused to engage in the conversation or to respond to email inquiries. No evidence showed a quorum of the board met and deliberated public issues.

According to the court, one board member asking another board member her opinion on a matter does not constitute a deliberation of public business. *Foreman*, 392 S.W.3d at 277. Further, the court noted that there is no open meetings violation when members of a governmental body confer one-on-one outside a public meeting, unless the members are meeting with less than a quorum with the intent to avoid the Act's requirements. *Id.*

Having concluded that the evidence showed no open meetings act violation, the court affirmed. The court reversed an award of attorney's fees.

***York v. Texas Guaranteed Student Loan Corp.*, __ S.W.3d __, 2012 WL 4056182 (Tex. App.—Austin August 8, 2013, no pet. h.).**

The issue in this case is the application of the Public Information Act on the Open Meetings Act.

A requestor filed a PIA request on the Texas Guaranteed Student Loan Corp. seeking the minutes and any attachments to the minutes of TGSL's board meetings. Included in the request were documents that contained pricing information. TGSL contended the information was excepted from disclosure under PIA § 552.104 (excepts information that

would give advantage to a competitor or bidder) and PIA § 552.110 (excepts commercial or financial information that would cause substantial competitive harm to the person from whom the information was obtained). TGSL argued that the PIA exceptions trumped the open meetings act.

The attorney general ruled that the requested information was public and should be produced, other than the pricing information. On cross-motions for summary judgment, the district court ruled that the all the information other than the pricing information was subject to disclosure, but denied requestor's request for attorney's fees. Both TGCL and the requestor appealed.

The court of appeals first addressed whether the TGSL's board meeting minutes were subject to disclosure. The Open Meetings Act requires a governmental body to either record or prepare and keep minutes of each open meeting. OMA § 551.021(a). These minutes must record each vote, decision or other action taken. *Id.* § 551.021(b). Thus, standing alone, OMA mandates disclosure of meeting minutes.

The court went on to address TGSL's argument that the PIA's exceptions govern and trump the OMA. TGSL argued that the exceptions in the PIA apply to matters subject to disclosure under the OMA. The court disagreed. Both PIA §552.104 and §552.110 expressly state that they are limited to the PIA. According to the court of appeals, the PIA exceptions from disclosure do not operate against the OMA's requirement that open-meetings minutes must be made available upon request.

The court of appeals next addressed whether attachments to the board's minutes were subject to disclosure. TGSL argued that the attachments to the minutes are not "minutes," and thus not subject to disclosure. The court of appeals disagreed. The court noted that "minutes" means a record of a proceeding. Here, the minutes included as exhibits various documents referenced in the board meetings and many times incorporated the document in verbatim in the minutes. Accordingly, the court concluded that under the OMA, the minutes and attachments must be produced.

The court agreed with TGSL on the pricing information that such information is excepted under the PIA. Finally, the court of appeals denied requestor's attorney's fees.

Texas Public Information Act

WHAT ARE "TRADE SECRETS" WITHIN THE PIA

***The Boeing Co. v. Abbott,* __ S.W.3d __, 2012 WL 753170 (Tex. App.—Austin March 9, 2012, pet. filed).**

At issue in this public information act case are portions of a lease agreement between Boeing and the Greater Kelly Development Authority n/k/a the Port Authority of San Antonio.

Requestor, a former employee of Boeing, sought the lease agreement between Boeing and the Port Authority of San Antonio for the former Kelly Air Force Base. Boeing objected to the disclosure, contending information related to rental rates, costs, insurance and lease incentives were excepted from disclosure under the PIA. The attorney general determined that the information was not excepted from disclosure and ordered it released. Boeing sued the attorney general and the Port Authority. The trial court denied Boeing and relief and ordered disclosure of the lease.

Boeing appealed and raised two issues on appeal. First, Boeing contended the information was a trade secret and thus expected under § 522.022. Second, Boeing argued that it had standing to raise § 522.104, which protects information that would give an advantage to a competitor or bidder.

The court of appeal noted at the outset that the motives of the requesting party are not relevant. *Id.* at *2, n.2. Section 522.222 prohibits inquiry into the motives of the requesting party seeking release of information. TEX. GOV'T CODE § 522.222.

In addressing the trade secret issue, rejected Boeing's argument that the lease was confidential as a trade secret. The court explained that a trade secret is a formula, pattern, device or compilation of information used in a business that presents an opportunity to obtain an advantage over competitors who do not know or use it. *Id*. at 5. Courts weigh six factors in determining if a trade secret exists: 1) the extent to which the information is known outside the business, 2) the extent to which the information is known by employees, 3) the measures taken to guard its secrecy, 4) the value of the information to the business and its competitors, 5) the effort and money used to develop the information, and 6) the ease or difficulty by which the information could be duplicated by others. *Id.*

According to the court, Boeing failed to show that it had taken precautions to prevent disclosure. Both Boeing and the Port Authority had access to the Lease information. Boeing had taken no measures to prevent the Port Authority from releasing the information. There were no confidentiality provisions in the contracts and the port had no legal duty to protect the information. Here, the lease had been given to the media and

articles in the newspaper about the amount of rent expected to be paid. Finally, Boeing failed to establish that the release of the information could hurt Boeing competitively. Accordingly, the court of appeals concluded that the information was not a trade secret and should be disclosed.

Further, the court of appeals addressed Boeing's claim that it could invoke section 552.104 as an exception to disclosure. Section 552.104 excepts from disclosure information that would give advantage to a competitor or bidder if released. TEX. GOV'T CODE § 552.104. The court of appeals concluded section 552.104 did not give a private party the right to prohibit a governmental body from disclosing information. The court construed the section as purely discretionary. The court concluded that Boeing lacked standing to claim the lease was excepted from disclosure as information relating to competition or bidding under Government Code §552.104(a). The court affirmed.

The concurring opinion agreed that Boeing failed to conclusively demonstrate that disclosure would advantage Boeing's competitors; but disagreed with the majority's conclusion that private parties can never invoke §552.104. According to the concurrence, section 552.104 implicates both the interests of the government and the private party and thus Boeing had the right to invoke the exception.

***Waste Management of Texas, Inc. v. Abbott*, __ S.W.3d __, 2013 WL 1632069 (Tex. App.—Eastland April 11, 2013, pet. filed).**

Requestor sought from Williamson County pricing information of Waste Management of Texas, Inc., the operator of a local landfill. The requested information included customer names and the volume of waste disposed of by the customer at the landfill. The waste tickets also showed the rate per ton charged and the fee charged to the customer. WMI maintained the tickets but through the operation agreement between WMI and Williamson County, the county had a right of access to the tickets. Requestor sought all waste tickets on a particular day of business.

The county sought an attorney general opinion. WMI filed a response, arguing the information constituted a trade secret. The attorney general concluded the customer name information was excluded under section 552.110(a), but also concluded that the volume and pricing information was not excepted. WMI filed suit challenging the ruling. The trial court affirmed the attorney general.

The Eastland Court of Appeals reversed and rendered. The court of appeals noted that some information is considered to be "core" public information under the PIA. *Id.* at 3. Core public information includes, "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." *Id.*; TEX. GOV'T CODE § 552.022(a)(3). Core public information, however, is excepted

from required disclosure if it is made confidential under the PIA or other law. TEX. GOV'T CODE § 552.022(a). Trade secrets are protected under the PIA. Section 552.110(b) excepts from disclosure, "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Waste Management*, 2012 WL 1632069 at *3; TEX. GOV'T CODE § 552.110(b).

The court explained that a trade secret is a formula, pattern, device or compilation of information used in a business that presents an opportunity to obtain an advantage over competitors who do not know or use it. *Id*. at 4. Courts weigh six factors in determining if a trade secret exists: 1) the extent to which the information is known outside the business, 2) the extent to which the information is known by employees, 3) the measures taken to guard its secrecy, 4) the value of the information to the business and its competitors, 5) the effort and money used to develop the information, and 6) the ease or difficulty by which the information could be duplicated by others. *Id.*

Pricing information may qualify as a trade secret. Here, the pricing information was based on the type of customer and amount of tons of waste deposited in the landfill. Many of the landfill users are competitors of WMI's. WMI protected its pricing information. WMI also put on evidence that if its competitors knew its pricing information, the competitors could undercut WMI. Accordingly, the court concluded that WMI put on evidence of each of the six factors. *Id*. at *6-8.

The court also addressed the existence of the contract between the county and WMI. In the negotiations with the county, WMI maintained that its pricing information was confidential. The contract contained confidentiality provisions. That WMI's contract with the county required the waste tickets to be turned over to the county if requested by the county did not waive WMI's trade secret protection. *Id.* at *9.

Finally, the court distinguished *Boeing Co. v. Abbott*, __ S.W.3d __, 2012 WL 753170 (Tex. App.—Austin March 9, 2012, pet. filed). In that case, a lease between Boeing and Port Authority of San Antonio was ruled not a trade secret. The Eastland court distinguished *Boeing* on its facts. There, the contract contained no confidential provisions and Boeing made no effort to prevent disclosure. The court of appeals reversed and rendered in favor or WMI.

WHAT ARE "GOVERNMENTAL BODIES" WITHIN THE PIA

***Texas Assoc. of Appraisal Dists. v. Hart,* 382 S.W.3d 587 (Tex. App.—Austin 2012, no pet.)**

The issue in this case is whether TAAD and Property Tax Education Coalition are "governmental bodies" subject to disclosure under the Texas Public Information Act?

The requestor, Hart, sought financial records from 2007 to 2010 from the Texas Association of Appraisal Districts and from the Property Tax Education Coalition, both private entities.

TAAD is a nonprofit trade organization whose mission is to promote effective and efficient functioning of appraisal districts and aid in property tax administration. TAAD members are CAD employees, ARB members. Members of TAAD pay dues; TAAD gets revenue from conferences it puts on, book sales and ads in its newsletter. The PTEC is a nonprofit, has no employees; TAAD provide administrative services to operate PTEC.

Neither TAAD nor PTEC produced records, contending that they were not governmental bodies subject to the PIA. Neither TAAD nor PTEC requested an Attorney General opinion regarding Hart's request.

Hart filed suit in district court. The district court ordered TAAD to produce its documents, but denied Hart's claim against PTEC.

Both parties appealed. The court of appeals observed that the PIA defines a "governmental body" among others, as the part, section, or portion of an organization, corporation, commission committee, institution or agency that spends or that is *supported in whole or in part by public funds.* TEX. GOV'T CODE §552.003(1)(A)(xii).

Hart argued that "supported" means to promote, assist, pay costs of or maintain. The court of appeals, however, noted that receiving public funds alone does not make a private entity a "governmental body" under the PIA.

The court of appeals concluded that the phrase "governmental body" has more than one meaning and is ambiguous. The court looked to the Fifth Circuit's analysis in *Kneeland v. National Collegiate Athletic Ass'n*, 850 F.2d 224, 228 (5th Cir. 1988).

In the *Kneeland* test,

> an entity receiving public funds is treated as a governmental body under PIA…

> 1) unless the private entity's relationship with the gov imposes a specific and definite obligation to provide a measurable amount of service in exchange for money as in an arms/-length contract between vendor and purchaser
>
> 2) if the private entity's relationship with the gov indicates a common purpose or objective or creates an agency-type relationship between the two OR
>
> 3) if the private entity's relationship with gov requires the private entity to provide services traditionally provided by the gov.

Id.; *TAAD*, 382 S.W.3d at 593.

Applying the *Kneeland* test, a private entity is not a "governmental body" if it provides a measurable amount of services to its members, including public-entity members. *TAAD*, 382 S.W.3d at 594. In exchange for fees, both TAAD and PTEC provided measurable services and materials to their members. The court concluded neither entity was a governmental body under the PIA.

The court of appeals reversed and rendered in part and affirmed in part.

***Greater Houston P'ship v. Abbott,* __S.W.3d __, 2013 WL 49106 (Tex. App.—Austin January 13, 2013, pet. filed).**

The issue in this case is whether the Greater Houston Partnership is supported in whole or in part by public funds such that it is a "governmental body" subject to the PIA.

GHP is a nonprofit, similar to a chamber of commerce, promoting the economic growth and stability in 10-county area around Houston. GHP helps facilitate relocations and expansions in Houston and works on business development. GHP has an annual operating budget of $11.7 million, the bulk of which comes from its 2100 member companies.

GHP also receives public funds to provide research, advertising and economic development services to City of Houston, Harris County, Port Authority of Houston and the Woodlands.

An individual requested check registers and checks written by GHP during 2007. At issue were two contracts with City of Houston where the city paid GHP $1.67 million in public funds "to improve the economic prosperity of Houston and the Houston Airport

System by performing 7 enumerated services, including identifying new business opportunities, conducting research; and coordinating lobbying efforts.

GHP denied the request for information, contending it was not a governmental body under the PIA and requested an AG opinion. GHP did not object to breadth of the request.

The attorney general ruled that GHP was a governmental body and had to turn over information. GHP sued the attorney general. The trial court ordered GHP to release the information.

As in *TAAD v. Hart*, the court of appeals applied the *Kneeland* test. According to the court of appeals, an entity receiving public funds is a governmental body under the PIA unless there is a "specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money." The contract lacked definite structure and obligated City to make quarterly payments regardless of GHP's activities.

Also, the City and GHP shared a common purpose or objection. Further, under the contract, GHP took on functions traditionally done by a governmental body.

The court of appeals concluded that GHP was "supported" by public funds under the PIA and thus had to release the requested information. The court affirmed.

The dissenting opinion questioned the application of *Kneeland* and concluded "governmental entity" was not ambiguous in context of PIA. According to the dissent, the PIA applies to traditional governmental entities, not to privately-operated organizations performing services under governmental contracts.

REQUESTS FOR AGENCY INVESTIGATIVE FILES

***Abbott v. Texas State Bd. of Pharmacy*, 391 S.W.3d 253 (Tex. App.—Austin 2012, no pet.)**

The issue in this PIA case is whether the Medical Practice Act grants a requestor the right to obtain her prescription record from the State Board of Pharmacy when the record is a part of a confidential, investigative file and otherwise excepted from disclosure.

After filing a complaint against a pharmacist because pharmacist would not fill a prescription, requestor made a PIA request for Board's investigative file relating to the pharmacist. The Board requested an attorney general opinion.

The attorney general ruled that Board's file was confidential and excepted from disclosure under the PIA, *except* for requestor's own prescription record. The attorney

general reasoned that the requestor's own prescription is a medical record under the Medical Practice Act and thus subject to release if requestor properly asks for it.

The Board sued the attorney general. The district court granted summary judgment for the Board and denied the attorney general's motion for summary judgment. The trial court concluded the entire file was confidential.

On appeal, the Board contended entire investigative file including requestor's information is excepted under Government Code §552.101. That is, the entire file is confidential by law because it is confidential under Pharmacy Act, Tex. Occup Code §565.055. Under that section, information gathered in investigative file is confidential and not subject to PIA.

The AG acknowledged extent of Pharmacy Act but argued that the Medical Practice Act permits release of requestor's own prescription record and that the Medical Practice Act prevails over the Pharmacy Act's confidentiality provision.

The court of appeals affirmed. The court first analyzed the Medical Practice Act. According to the court of appeals, chapter 159 provides a statutory right to limit access to information. It is not a statutory right to compel access to information. The MPA only requires a physician and no one else, to provide a patient with her own information. The court concluded the MPA does not provide a patient with a special right of access to her medical records.

The court next analyzed Government Code §552.023. The attorney general argued alternatively that requestor has a right to her prescription record under PIA. According to the court, the PIA provides a special right of access to requestor's personal information held by a governmental body. Under §552.023(b), however, a governmental body may deny access if relying on a law that is not intended to protect personal privacy interests.

Here, the Board denied access to requestor's prescription record under Pharmacy Act §565.055, which renders Board's investigative file confidential. Thus, Board withheld information based on a law designed to protect the integrity of the regulatory process, and not a law intended to protect requestor's personal privacy interest.

Accordingly, the court held that requestor's prescription record was excepted from disclosure and affirmed.

***Texas State Bd. of Chiropractic Exam'rs v. Abbott*, 391 S.W.3d 343 (Tex. App.—Austin 2013, no pet.).**

The issue in this PIA is whether chiropractic records of the requestor as contained in Board's investigative file are subject to disclosure under the PIA.

The requestor sought his own chiropractic records contained in Board's investigative file of a particular chiropractor. Board withheld, contending confidential as part of an investigative file and requested an attorney general opinion. The attorney general concluded that the records were excepted from investigative-file privilege and had to be released.

The Board sued the attorney general. The district court granted the attorney general's summary judgment and denied the Board's motion for summary judgment. Accordingly, the trial court ordered Board to release the records.

On appeal, the Board contended the records are confidential under Occupation Code § 201.206, which protects the board's investigative files from disclosure.

The attorney general argued that Occupations Code § 201.404 and § 201.405 grant requestor a right to compel his own chiropractor records from an investigative file. That is, these two provisions act as a "special provision" to grant access to chiropractor records that under Government Code § 311.026(b) creates an exception to the general provision in §201.206.

The court of appeals concluded that Occ. Code §§201.404 and 201.405, which grant patients access to their own records, do not trump §201.206, the provision that renders Board's investigative files confidential. Sections 201.404 and .405 permit a patient to obtain confidential information. The purpose of the subchapter is to ensure confidentiality by preventing disclosure.

Section 201.206, by contrast, was enacted to make the Board's investigative file confidential and not subject to public disclosure. The three sections do not have a common objective and are not intended to be construed together. Thus, the Board may deny access if relying on law that is not intended to protect personal privacy. Board denied access under a law that protects the regulatory process, and not a law that protects a requestor's personal privacy interest. Thus, Board could deny access to requestor's records in Board's investigative file. The court reversed and rendered.