

**OPEN MEETINGS, ACT!**  
**OPEN RECORDS, ACT!**

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# Open Meetings, Act! Open Records, Act!<sup>1</sup>

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## I. Introduction

Generally speaking, Section 501(c)(3) organizations that are organized or operated in Texas are not subject to the Texas Open Meetings Act nor the Texas Public Information Act, sometimes referred to as the Open Records Act. Section 501 (c)(3) organizations that receive public funds may be subject to the Texas Public Information Act.

Yet, all Section 501(c)(3) organizations whether public charities or private foundations, may be subject to limited open meetings or open records requirements. These requirements, to the extent that they exist, mostly come from state law, but Federal law also imposes limited meeting and more expansive open records rules.

## II. Texas Open Meetings Act

The Texas Open Meetings Act imposes a requirement that the covered entities hold open meetings, with advance posting of agendas that set forth the meeting time and place and what will be discussed and acted upon in the meeting. TEXAS GOV. CODE, Ch. 551.

Entities covered by the Open Meetings Act must conduct business in an open form in which the general public can watch and listen. TEXAS GOV. CODE § 551.002.

These open meeting requirements are almost exclusively limited to governmental bodies and do not apply to charitable or nonprofit organizations. For purposes of the Open Meetings Act, “governmental body” is defined in §551.001(3) to include the following traditional forms of government:

- (A) a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members;
- (B) a county commissioners court in the state;
- (C) a municipal governing body in the state;
- (D) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;
- (E) a school district board of trustees;
- (F) a county board of school trustees;
- (G) a county board of education;
- (H) the governing board of a special district created by law;
- (I) a local workforce development board created under Section 2308.253.

The definition of “governmental body” proceeds to include two nonprofit corporations organized for limited purposes:

- (J) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and
- (K) a nonprofit corporation organized under the Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code.

TEXAS GOV. CODE § 551.0015 also treats certain property owners’ associations the same as governmental bodies subject to the Open Meetings Act, and imposes the rule on the governing body of the association, a committee of the association, and members of the governing body or of a committee of the association. *Id.*, § 551.0015(b). The applicable property owners’ associations are those in which:

- (1) membership in the property owners’ association is mandatory for owners or for a defined class of owners of private real

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property in a defined geographic area in a county with a population of 2.8 million or more [Harris County] or in a county adjacent to a county with a population of 2.8 million or more;

- (2) the property owners' association has the power to make mandatory special assessments for capital improvements or mandatory regular assessments; and
- (3) the amount of the mandatory special or regular assessments is or has ever been based in whole or in part on the value at which the state or a local governmental body assesses the property for purposes of ad valorem taxation under Section 20, Article VIII, Texas Constitution.

Another important imposition of the Texas Open Meetings Act upon charitable organizations occurs with respect to the operation of an open-enrollment charter school, and the treatment as a governmental body of the governing body of a charter holder and the governing body of an open-enrollment charter school. TEXAS EDUCATION CODE § 12.1051. When in operation, the open-enrollment charter school is considered to be a public school district and such schools receive tax revenues from the State.

Thus with few limited exceptions, the Texas Open Meetings Act does not apply to nonprofit organizations, and then only to those that are considered to be governmental bodies. This quote comes from *2006 Open Meetings Act Handbook*, Office of the Attorney General, p. 4.

Nonprofit corporations established to carry out governmental business generally are not subject to the act because they are not within the act's definition of "governmental body." A nonprofit corporation created under the Texas nonprofit Corporation Act to provide services to a county's senior citizens was not a governmental body because it was not a governmental structure and had no power to supervise or control public business. [fn Tex. Att'y Gen. Op. No. DM-7 (1991) at 3].

A private entity does not become a governmental body within the Open Meetings Act merely because it receives

public funds. [fn: Tex. Att'y Gen. LO-98-040, at 2.] A city chamber of commerce, a private entity, is not a governmental body within the act although it receives public funds. [fn: Tex. Att'y Gen. LO-93-055, at 3.] Nor is the Daughters of the Republic of Texas, a private corporation that acts as trustee for the Alamo on behalf of the state, a governmental body within the act, despite its control of public funds, [fn: Tex. Att'y Gen. LO-98-061.].

This publication is authoritative and is available online at the Texas Attorney General's Website.

A nonprofit corporation otherwise not subject to the terms of the Texas Open Meetings Act could become subject to its terms by contract. A nonprofit organization that receives funding from a governmental body may have a provision in its funding agreement that the organization will be subject to the Texas Open Meetings Act.

### **III. Open Meetings**

#### **A. Meetings of Members Open to Members**

Texas nonprofit corporations will be subject to the terms of Texas statutes, either the Texas Non-Profit Corporations Act for corporations organized before January 1, 2006, or the Texas Nonprofit Corporation Law for nonprofit corporations formed after December 31, 2005. The Texas Nonprofit Corporation Law consists of Chapters 20 and 22 and the provisions of Title 1 to the extent applicable to nonprofit corporations of the Texas Business Organizations Code (BOC). BOC § 1.008(d). Chapters 20 and 22 are contained in Title 2, entitled "Corporations." Chapter 20 is entitled "General Provisions" and Chapter 22 is entitled "Nonprofit Corporations." On or after January 1, 2010 the provisions of the BOC will generally become applicable to all nonprofit corporations formed before January 1, 2006. BOC § 402.005. But, before January 2010, a nonprofit corporation formed before January 1, 2006, can voluntarily agree to come under the BOC by filing a certificate of amendment (previously we called these articles of amendment) voluntarily electing to adopt and become subject to the

code. BOC § 402.003(a). In this article statutory provisions from the Texas Non-Profit Corporations Act will start with “Art. 1396.” (A nonprofit corporation organized under another jurisdiction and doing business in Texas will be subject to the statutes of the state of organization.)

Texas nonprofit corporations that are membership organizations are required to hold meetings of members at such place, within or without the state, as may be provided in the bylaws, Art. 1396-2.10A(1), or the governing documents. BOC § 6.001.

In the absence of an explicit provision in the bylaws, all meetings are to be held in the registered office of the corporation in the State of Texas, Art. 1396-2.10A(1) and BOC § 6.001, or at the principal office of the entity, BOC § 6.001.

The Texas statutes also call for the holding of an annual meeting and if there is more than one meeting, then any meeting can be used to elect directors. Art. 1396-2.10A(2) and BOC § 22.153.

In the event the board of directors fails to call an annual meeting at the designated time then any member can make a demand that the meeting be held in a reasonable time. Art. 1396-2.10A(2) and BOC § 22.154. If the annual meeting is not called within 60 days of a member’s demand in writing, then any member may compel the holding of the annual meeting by court action against the board. *Id.*

A special meeting may be called in addition to the president or board of directors, by one-tenth of the members and such officer or persons at the bylaws or articles of incorporation may provide. Art. 1396-2.10A(3) and BOC § 22.155.

Art 1396-2.11, entitled “Notice of Members’ Meetings,” and BOC § 22.155 “Special Meetings of Members,” sets forth the requirements for notice, and it is implicit in both statutes that members are entitled to attend such meetings of members. The BOC adds a

provision in § 6.051(b) permitting notice to members of a meeting to be made by email. Neither statute says that meetings of members of nonprofit corporations are open to the general public.

The Texas Non-Profit Corporations Act does not apply to unincorporated associations. The Uniform Unincorporated Nonprofit Associations Act has been changed for Vernon’s Ann.Civ.St. art. 1396-70.01 to Chapter 252 of the BOC. The provisions applicable to unincorporated nonprofit associations have no provisions regarding meetings of members.

## **B. Meetings of Directors Open to Directors**

Specific sections of the Texas Non-Profit Corporations Act set forth the requirements for directors, notice and voting at meetings.

- Art. 1396-2.14 Board of Directors
- Art. 1396-2.15 Number, Election, Classification, and Removal of Directors
- Art. 1396-2.16 Vacancies
- Art. 1396-2.17 Quorum and Voting Directors
- Art. 1396-2.18 Committees
- Art. 1396-2.19 Place and Notice of Directors Meetings

The BOC has parallel provisions:

- § 22.201 Management by Board of Directors
- § 22.202 Management by Members
- §22.203 Board Member Eligibility Requirements
- §22.204 Number of Directors
- §22.205 Designation of Initial Board of Directors
- §22.206 Election or Appointment of Board of Directors
- §22.207 Election and Control by Certain Entities
- §22.208 Term of Office
- §22.209 Classification of Directors
- §22.210 Ex Officio Member of Board
- §22.211 Removal of Director
- §22.2111 Resignation of Director
- §22.212 Vacancy
- §22.213 Quorum
- §22.214 Action by Directors

- §22.215 Voting in Person or by Proxy
- §22.216 Term and Revocability of Proxy
- §22.217 Notice of Meeting; Waiver of Notice
- §22.218 Management Committee

None of these provisions of state law require that directors' meetings be open to the general public or even to the members who are not directors. There is no state law addressing director's meetings of an unincorporated association, and the Texas Trust Code does not require that trustee's meetings of a charitable trust be open to the general public.

An interesting twist on the concept of open meetings comes from the intermediate sanctions and excess benefit rules under the federal income tax law. If a director enters into a transaction with the organization a "rebuttable presumption" that the transaction was at arms' length can be created if the director was absent from the room when the discussion on the matter is made and the vote is taken. Such absence should be noted on the minutes of the meeting and the director and any other interest director can rejoin the meeting after the vote is taken.<sup>2</sup>

#### IV. Texas Public Information Act

Sometimes referred to as The Texas Open Records Act, the Texas Public Information Act generally requires Texas governmental bodies at all levels to maintain certain records of meetings and financial matters open to the general public for inspection. TEXAS GOV. CODE, Ch. 552.

The Public Information Act applies to "public information," which is information collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body. TEXAS GOV. CODE § 552.002(a).

"Governmental body" has a definition very similar to the definition of the same term in

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<sup>2</sup> More discussion can be found at Yale, *Am I Liable? Responsibilities and Liabilities in Texas Nonprofit Organizations*, pp. 51-52.

the Open Meetings Act, meaning that the Public Information Act is applicable to traditional governmental bodies, excluding the judiciary, TEXAS GOV. CODE § 552.0035, and applicable to certain limited classes of nonprofit organizations: a nonprofit corporation organized under Chapter 67, Water Code, TEXAS GOV. CODE § 552.003(1)(A)(ix); a local workforce development board created under Section 2308.253, TEXAS GOV. CODE § 552.003(1)(A)(x); a nonprofit corporation that is eligible to receive funds under the federal community services block grant program, TEXAS GOV. CODE § 552.003(1)(A)(xi); and the governing body of the charter holder and the governing body of an open enrollment charter school, TEXAS EDUCATION CODE § 12.1051.

The Public Information Act contains another exception quite broad in its scope and that pulls many nonprofit organizations into its applicability:

- (xii) 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.

TEXAS GOV. CODE § 552.003(1)(A)(xii).

At first reading this would indicate that all records of such an organization, including a nonprofit organization, are public information where funds or grants are received from a governmental body. Yet, just as the Act does not apply to a private person or business simply because they provide goods or services under a contract with a governmental body, the Act does not apply to an entity that receives public funds if its agreement with the governmental body imposes "a specific and definite obligation ... to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract between a vendor and a purchaser." *2006 Public Information Handbook*, Office of the Attorney General, p. 8. This publication is the best source to consult on the application of the Public Information Act to nonprofit organizations. But, there is a flip side to this

rule. If a governmental body makes an unrestricted grant of funds to a private entity to use for its general support, the private entity is a governmental body subject to the Public Information Act. *Id.*, p. 9 and at Appendix A to this article is a portion of the *2006 Public Information Handbook* applicable to nonprofit organizations.

## V. Open Records

### A. Access by Attorney General

The Texas Miscellaneous Corporation Laws Act, applicable to nonprofit and for profit corporations, provides in Art. 1302-5.01:

Every corporation, domestic or foreign, doing business in Texas, shall permit the Attorney General or any of his authorized assistants or representatives, to make examination of all the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and bylaws, and other records of said corporation as he may deem necessary.

This is supplemented by Art. 1302-5.03, which gives the ability to examine and copy.

The Attorney General, or any of his assistants or representatives, when authorized by the Attorney General, has the power and authority to make investigation into the organization, conduct and management of any corporation, domestic or foreign, authorized to do business within this State, and has authority to inspect and examine any of its said books, records, and other documents, and take such copies thereof as in his judgment may show or tend to show said corporation has been or is engaged in acts or conduct in violation of its charter rights and privileges, or in violation of any law of this State.

The Attorney General or assistants or representatives are not to make public disclosure of the records or documents derived in the course of such an inspection. Art. 1302-5.04. A foreign corporation failing to permit

examination by the Attorney General's Office, shall forfeit its right to do business in the State of Texas and a domestic corporation failing to permit examination shall forfeit its charter. Individual presidents, vice-presidents, treasurers, secretary, managers, agents or other officers who fail or refuse to permit the Attorney General or the Office to examine the books shall be fined from \$100 to \$1000 and be jailed from 30 to 100 days with each day of such failure or refusal to count as a separate offense.

For corporations formed after December 31, 2005, and for all corporations on January 1, 2010, regardless of when formed, the BOC offers the Attorney General the same access to examine the books and records of a business filing entity as the Texas Miscellaneous Corporation Laws Act provided. Art. 1302-5.01 is parallel to BOC § 12.151.

Each filing entity and foreign filing entity shall permit the attorney general to inspect, examine, and make copies, as the attorney general considers necessary in the performance of a power or duty of the attorney general, of any record of the entity. A record of the entity includes minutes and a book, account, letter, memorandum, document, check, voucher, telegram, constitution, and bylaw.

Texas Miscellaneous Corporation Laws Art. 1302-5.03 also corresponds to two sections of the BOC, § 12.152 and § 12.153. Section 12.152 grants the Attorney General the authority to request an examination.

To examine the business of a filing entity or foreign filing entity, the attorney general shall make a written request to a managerial official, who shall immediately permit the attorney general to inspect, examine, and make copies of the records of the entity.

Section 12.153 then gives the Attorney General the authority and power to examine the management of an entity.

The attorney general may investigate the organization, conduct, and management of a filing entity or foreign filing entity and

determine if the entity has been or is engaged in acts or conduct in violation of:

- (1) its governing documents; or
- (2) Any law of this state.

Any information the attorney general discovers is generally not accessible to the general public, except for three exceptions provided by BOC § 12.154.

Information held by the attorney general and derived in the course of an examination of an entity's records or documents is not public information, is not subject to Chapter 552, Government Code, and may not be disclosed except,

- (1) in the course of an administrative or judicial proceeding in which the state is a party;
- (2) in a suit by the state to:
  - a. revoke the registration of the foreign filing entity or terminate the certificate of formation of the filing entity; or
  - b. collect penalties for a violation of the law of this state; or
- (3) to provide information to any officer of this state charged with the enforcement of its laws.

BOC § 12.155 sets forth the penalties to be applied when a business entity fails to permit the Attorney General to examine their records. When an inspection is not permitted the entity forfeits their right to do business in the state of Texas, and their registration or certificate of formation will be revoked. If a managerial official or another individual with the proper authority denies the examination, his or her offense is punishable as a Class B misdemeanor. BOC § 12.156.

#### **B. Access by Directors**

The Texas Non-Profit Corporations Act does not explicitly give directors access to financial information, but it does so implicitly in

Art. 1396-2.23A, in requiring that directors prepare or approve a report of financial activity.

A. A corporation shall maintain current true and accurate financial records with full and correct entries made with respect to all financial transactions of the corporation, including all income and expenditures, in accordance with generally accepted accounting practices.

B. Based on these records, the board of directors shall annually prepare or approve a report of the financial activity of the corporation for the preceding year. The report must conform to accounting standards as promulgated by the American Institute of Certified Public Accountants and must include a statement of support, revenue, and expenses and changes in fund balances, a statement of functional expenses, and balance sheets for all funds.

Simply put, the directors cannot perform their responsibilities under this statutory provision, unless they have access to the financial records.

This provision was carried over to the BOC and is §22.352 with some slight rewording.

#### **C. Access by Members**

The Texas Non-Profit Corporations Act, in Art. 1396-2.23, containing a subsection requiring maintaining records and a second subsection permitting access, gives broad rights to members to review the records of a nonprofit membership corporation.

A. Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors, and committees having any authority of the board of directors and shall keep at its registered office or principal office in this State a record of the names and addresses of its members entitled to vote.

B. A member of a corporation, on written demand stating the purpose of the demand, has the right to examine and copy, in person or by agent, accountant, or

attorney, at any reasonable time, for any proper purpose, the books and records of the corporation relevant to that purpose, at the expense of the member.

In a recent case applying this section in the context of a church corporation, the appeals court held that the ecclesiastical abstention doctrine did not preclude the trial court from having subject-matter jurisdiction over a church member's claims in a declaratory-judgment action that was brought against a church, a bishop, and other church personnel and that asserted violations of the Texas Non-Profit Corporations Act and breach of contract regarding the church's refusal to allow the member to review the church's financial records. *Lacy v. Bassett*, 2004 WL 612853, (Texas App. 14 Dist. 2004). The member's request to review the church's records merely required the trial court to enforce neutral principles of law, not to involve itself with religious doctrine or principles.

Art. 1396-2.23A is quite similar to BOC §22.353(a).

A corporation shall keep records, books, and annual reports of the corporation's financial activity at the corporation's registered or principal office in this state for at least three years after the close of the fiscal year.

Art. 1396-2.23B is similar to BOC §22.351, just reworded.

A member of a corporation, on written demand stating the purpose of the demand, is entitled to examine and copy at the member's expense, in person or by agent, accountant, or attorney, at any reasonable time and for a proper purpose, the books and records of the corporation relevant to that purpose.

#### **D. Access by the General Public**

In a continuation of Art. 1396-2.23A, quoted above as to directors, there is a general public inspection right as to nonprofit corporations, with several important exceptions.

C. All records, books and annual reports of the financial activity of the corporation shall be kept at the registered office or principal office of the corporation in this state for at least three years after the closing of each fiscal year and shall be available to the public for inspection and copying there during normal business hours. The corporation may charge for the reasonable expense of preparing a copy of a record or report.

D. A corporation that fails to maintain financial records, prepare an annual report, or make a financial record or annual report available to the public in the manner prescribed by this article is guilty of a Class B misdemeanor.

As will be discussed below, this provision is very similar to the requirements of the Internal Revenue Code. The federal provision does not give a member of the general public a cause of action against the organization, and the state statute does not either. The federal statute is broader, being applicable to corporations, trusts, and nonprofit associations, while the state statute is limited to corporations.

The statute goes on to state several important exceptions, set forth in subsection E:

- (1) a corporation that solicits funds only from its members;
- (2) a corporation which does not intend to solicit and receive and does not actually raise or receive contributions from sources other than its own membership in excess of \$10,000 during a fiscal year;
- (3) a career school or college that has received a certificate of approval from the Texas Workforce Commission, a public institution of higher education and foundations chartered for the benefit of such institutions or any component part thereof, a private or independent institution of higher education as defined by Section 61.003, Education Code, a postsecondary educational institution with a certificate of authority to grant a degree issued by the Texas Higher Education Coordinating Board, or an elementary or secondary school;

- (4) religious institutions which shall be limited to churches, ecclesiastical or denominational organizations, or other established physical places for worship at which religious services are the primary activity and such activities are regularly conducted;
- (5) a trade association or professional society whose income is principally derived from membership dues and assessments, sales, or services;
- (6) any insurer licensed and regulated by the Texas Department of Insurance;
- (7) an alumni association of a public or private institution of higher education in this state, provided that such association is recognized and acknowledged by the institution as its official alumni association.

Generally, to what organizations are the public inspection requirements applicable? A non-church, non-membership organization that solicits from the general public. But, while an organization may come within an exception as to public inspection under the Texas Non-Profit Corporations Act, because it is not a corporation, it does not solicit from non-members or another exception, it may have a similar public inspection requirement as to federal tax returns.

These provisions from the Texas Non-Profit Corporation Act have been carried over to the BOC as §22.353(b), to fully understand its terms we need to put it in context with Section (a):

- (a) A corporation shall keep records, books, and annual reports of the corporation's financial activity at the corporation's registered or principal office in this state for at least three years after the close of the fiscal year.
- (b) The corporation shall make the records, books, and reports available to the public for inspection and copying at the corporation's registered or principal office during regular business hours. The corporation may charge a reasonable fee for preparing a copy of a record or report.

The exceptions are in BOC § 22.355.

### **E. Federal Tax Return Requirements<sup>3</sup>**

The general public must be given the ability to inspect an organization's Form 990 or Form 990-PF. Any Section 501(c)(3) organization that is a private foundation, or a public charity with annual receipts of \$25,000 must file a Form 990-PF or Form 990, respectively. Complete copies, with all schedules and attachments must be available, except contributions lists need not be included with the Form 990, but must be available for a Form 990-PF.

Persons reviewing the returns must be allowed to take notes and photo copying should be made possible. Upon requests in person, the organization should provide photo copies the same business day, but the organization may charge fees at the rate of \$1.00 for the first page and 15 cents for each additional page. Requests by mail must be honored within 30 days of receipt and, if the organization charges for copies and requires prepayment it must provide the copies within 30 days of receipt of payment. Regional and local offices with at least three employees must have duplicates of the forms available.

The penalty for noncompliance is \$20 for each day inspection is not allowed and for any one return the maximum amount cannot exceed \$10,000. Managers who willfully refuse to provide such returns can be fined up to \$5,000. A person making a request and being refused can only inform the IRS, because only the IRS can impose and receive these fines.

The Form 1023, Application for Recognition of Exemption, with all IRS letters, documents issued, legal briefs, correspondence, and attachments (which includes the articles of incorporation and bylaws) must be made available on the same terms as provided for the

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<sup>3</sup> This discussion comes from Yale, *Am I Liable? Responsibilities and Liabilities in Texas Nonprofit Organizations*, pp. 72-73.

Form 990 and Form 990-PF. All charitable organizations that are private foundations or are not private foundations that are not churches and that have revenues that normally exceed \$5000 annually, must file a Form 1023. Any organization that applied before July 15, 1987, is excused from this public inspection requirement if it had no copy on July 15, 1987. The regulations provide how the copy requirements can be met by posting the returns on the Internet.

There are also exceptions to the requirements if the organization is the subject of an harassment campaign, a provision placed in the law to protect abortion providers from right-to-life protestors.