

## CHAPTER ONE

### **Municipal Law**

Cities and towns operate within an elaborate framework of state mandates and requirements, and city administrators must be aware of these constraints in their day-to-day management. This awareness is important, but it does not eliminate the need for good legal advice.

This first chapter in the handbook is designed to give the city administrator some basic information on municipal organization and law. Although the city administrator should be familiar with the legal environment in which he/she operates, he/she should not take any action with potential legal ramifications without prior legal advice. Any time that might be gained by making a risky decision on the spot, without legal counsel, is likely to be lost many times over in costly litigation arising out of hasty—and possibly illegal—actions.

This chapter touches briefly on laws applicable to the various types of cities; municipal powers; the requirements of the state open meetings law; proper procedures for enacting ordinances; personal liability of city officials; and standards of official conduct. Information presented in this chapter is, of course, very general, and should not be relied upon as substitute for competent legal assistance.

### **Home-Rule Cities**

Each Texas city falls under one of three classifications: general-law municipalities, home-rule municipalities, and a very few cities that operate under special laws granted by the legislature prior to the early 1900's. For purposes of this manual, those special law cities will be treated as either a Type A general-law municipality or as a home-rule charter city, depending upon the enacting statute. General-law municipalities are those, most of which are under 5,000 population, which operate under the general-laws of the state, which prescribe their specific powers and duties. Home-rule cities are municipalities, most of which are over 5,000 population, whose citizens have adopted home-rule charters setting forth the powers and duties of such cities.<sup>1</sup>

### ***The Home-Rule Concept***

The legal position of home-rule cities is the reverse of general-law cities. Rather than looking to the state law to determine what they may do, as general-law cities must, home-rule cities look to the state constitution and state statutes to determine what they may not do. Thus, if a proposed home-rule city action has not been prohibited or pre-empted by the state, the city generally can proceed, if authorized under the charter.

In the case of *Forwood v. City of Taylor*, Texas' home-rule doctrine was summarized by the Texas Supreme Court as follows:

It was the purpose of the Home-Rule Amendment. . . to bestow upon accepting cities and towns of more than 5,000 population full power of self-government, that is full

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<sup>1</sup> As of March 1, 1998, there were 300 home-rule cities in Texas--approximately one fourth of the total number of cities in the state. There were approximately 928 general-law cities.

authority to do anything the legislature could therefore have authorized them to do. The result is that now **it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.** (Emphasis supplied.)<sup>2</sup>

As a result of *Forwood* and other cases upholding their broad powers, home-rule cities have the inherent authority to do anything which qualifies as a “public purpose” and is not contrary to the constitution or laws of the state or the federal government. From the city attorney’s perspective, this means that the presumption will be in favor of ordinances and other acts of a home-rule city whenever the city is a party to a lawsuit. From the viewpoint of the city council<sup>3</sup> and administrator, it means that new programs can be initiated to solve problems whenever they occur.

### ***Inherent Powers of Home-Rule Cities***

An “inherent power” is one that is possessed by a city without its having been specifically granted by the state. It is the right to perform an act without having received that right from the Texas Constitution or the state legislature.

Home-rule cities have many inherent powers. A discussion of some of the powers of special significance may explain why so many cities have chosen to adopt charters.

### ***Municipal Organization***

In contrast to general-law cities, whose organization is fixed by state law, the governmental structure of a home-rule city is left entirely to the discretion of local voters. Subject to compliance with the federal Voting Rights Act,<sup>4</sup> the citizens of a home-rule city are free to decide their form of municipal government (mayor-council, council-manager, etc.); choose between a large or small governing body; and provide for the election of the city council at large, by single member districts, or by a combination of the two.

The citizens of a home-rule city also have total discretion over the city’s administrative structure. Subject only to local preferences, the charter can establish a simple administrative framework or a complex one; provide for the appointment or election of major administrative officials; and so on. And finally, the charter can provide for the creation of such boards or commissions as local voters decide are needed to make the city government machinery function effectively.

### ***Annexation***

The inherent power of unilateral annexation is one of the most important of all home-rule prerogatives. There is no state law forbidding a home-rule city from annexing land adjacent without the consent of the inhabitants thereof; the city therefore has the inherent

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<sup>2</sup> *Forwood v. City of Taylor*, 214 S.W. 2nd 282. (1948)

<sup>3</sup> Depending upon the particular city, the governing body is variously referred to as the “city council,” the “board of aldermen,” or the “board of commissioners.” For purposes of simplicity, this handbook refers to the governing body as the “city council” and to members of the governing body as “councilmembers,” unless the use of other titles is indicated for reasons of clarity.

<sup>4</sup> The Federal Voting Rights Act, 42 U. S. C. requires that all changes in the composition of the city council or the manner of electing the council be submitted to the U.S. Justice Department for approval.

right to do so if permitted under the charter. There are specific limitations on the annexations such as: (1) the area must be within the city's extraterritorial jurisdiction, (2) the area must not be less than 1,000 feet in width, (3) the city must adopt an annexation plan, (4) the city must prepare a service plan, etc., (5) in case of annexations of an area containing 100 or more tracts on which one or more residential dwellings are located, the city must comply with extensive requirements as provided by the Legislature in 1999, and (6) the city must submit the annexation proposal to the U.S. Justice Department for approval. Still, the unilateral annexation authority is a very important prerogative that is not available to most general-law cities.

The power of unilateral annexation is important for several reasons, including the fact that it enables a growing city to achieve orderly physical development. Also, it permits the city to maintain a strong economic base by extending its boundaries to encompass the tax valuations and other resources required to finance municipal services.

### ***Initiative, Referendum, and Recall***

Initiative, referendum, and recall are inherent home-rule powers reserved by the people unto themselves. There is no constitutional or statutory authority for these powers; they are unique to home-rule cities, and are not available to voters at any other level of government, including the state.

Initiative is a process under which local voters can directly propose (initiate) legislation. Citizen lawmaking through the initiative process allows local voters to circumvent the city council by direct ballot-box action on new ordinances that have wide support in the community but which the city council refuses to enact.

The process begins with the circulation of a petition setting forth the text of the desired ordinance, and then obtaining the number of voter signatures needed to force the city council to submit the ordinance to the people. If, at the election conducted on the proposed ordinance, a majority of those voting favor its adoption, the ordinance is put into effect.

Referendum is a mechanism providing for direct voter repeal of unpopular (existing) ordinances the council refuses to rescind by its own action. The procedures for forcing the city council to call a referendum election usually are the same as for initiative elections. Petitions calling for an election to repeal "Ordinance X" are circulated. When the required number of signatures is obtained, the petition is submitted to the city council, which can either repeal the ordinance by its own action, or call an election to let local voters decide whether to repeal or ratify the ordinance. If a majority of those voting favor retaining the ordinance, it is left on the books; if a majority favor repeal, the ordinance is rescinded as of the time the council canvasses the election returns.

Recall is a process by which local voters can remove council members from office prior to the expiration of their regular terms. The process requires submission of a petition, signed by the requisite number of voters, calling for an election to determine whether a specified councilmember should be recalled; if the proposition carries, the councilmember immediately forfeits his or her office.

## ***Forms of Government***

Every home-rule city in Texas operates under one of two forms of government: mayor-council or council-manager.<sup>5</sup>

### ***Mayor-Council Government***

The mayor-council plan has two versions: weak-mayor and strong-mayor. Under the weak-mayor system, political and administrative powers are diffused. Councilmembers are usually elected by wards or by single member districts. In addition to the council other high-level municipal officials, such as treasurer, city clerk, or even police chief, may be elected. The mayor simply serves as presiding officer of the council, and most key administrative appointments are made by the council as a whole.

By contrast, the strong-mayor version of the mayor-council plan concentrates most key administrative and appointive powers in the hands of a full-time mayor who also presides over meetings of the city council. Members of the council, as under the weak-mayor plan, serve primarily as legislators. They act on ordinances and resolution, confirm or reject appointments made by the mayor, and function as the policy-making body of the city.

### ***Council-Manager Government***

Under the council-manager form of government, all administrative powers are vested in the city manager. The manager is directly accountable to the council and, until recently, serves at its pleasure. Now the manager still serves at the pleasure of the city council, but most are being given contracts for certain periods of time and with some type of severance benefit package.

The city manager is responsible for the general supervision of the city and for implementing policies established by the city council. He/she ordinarily appoints all department heads, and prepares operating and capital budgets for the council's consideration.

The manager also attends council meetings, prepares reports, makes recommendations to the council, keeps the council advised of the financial condition of the city, and performs such other duties as the council may prescribe.

The functions of the mayor in a council-manager city differ significantly from those exercised by the mayor under the mayor-council plan. The bulk of the administrative powers normally held by the mayor are vested in the city manager under the council-manager plan.

As Table 1-1 indicates, approximately 95 percent of all home-rule cities operate under the council-manager plan.

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<sup>5</sup> The commission form of government (the Galveston Plan) is not mentioned because no Texas city uses it. The main feature of the plan is a combination of elected commissioners simultaneously serving as legislators and as heads of administrative departments or groups of departments. The commission usually is small (three to nine members), and the mayor usually is elected directly by the people rather than being elected by the members of the governing body or by some other method.

**Table 1-1**

***Forms of Government***

*Texas Home-rule Cities (1998)*

Form of Government	Number of Cities	Percent of Total
Council-Manager	284	94
Mayor-Council	17	6

Source: Terrell Blodgett, resulting from his study of the City Manager in Texas

**General-law Cities**

Most municipalities of less than 5,000 population are general-law cities or towns, though there are some municipalities over 5,000 population that have not exercised the option of adopting home-rule charters and still operate under the general-laws.<sup>6</sup> All general-law cities<sup>7</sup> operate according to specific state statutes prescribing their powers and duties. General-law cities are restricted to doing what the state statutes authorize them to do. If state law does not grant general-law cities the express or implied power to initiate a particular action, none may be taken. Cities that have adopted a home-rule charter do not lose that charter even though its population drops below the 5,000 figure.

Approximately 75 percent of Texas' approximately 1228 cities operate under the general-laws; the remainder are home-rule cities which operate under local charters. General-law city officials occasionally call the Texas Municipal League office to request a copy of their "city charter." Unlike home-rule cities, general-law cities do not have charters; the creation of a general-law city is documented in its incorporation papers, filed at the county courthouse, which describe when the city was established, the type of city or the sections of the statutes under which the city was incorporated, and its original boundaries.

***Types of General-law Cities***

Until 1987 there were two types of general-law cities: towns and villages, and cities and towns. As the term "town" was used in both, it was often difficult to distinguish between the two. With the codification of the local government statutes into the *Texas Local Government Code* in 1987, the legislature formally established three types of general-law cities.

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<sup>6</sup> For various reasons, some cities over 5,000 have not elected to adopt home-rule charters. In 1983, there were approximately 40 of these. In 1998, we find approximately 28 such cities that have chosen to continue to operate as general-law cities.

<sup>7</sup> "General-law is a term used to describe all of the state laws applicable to a particular class of items. A general-law municipality therefore is one that is subject to all of the state laws applicable to such cities, most of which are found in the *Texas Local Government Code*.

The three, Type A general-law municipalities, Type B general-law municipalities, and Type C general-law municipalities, correspond to the different chapters of the statutes under which cities were incorporated prior to the 1987 codification. Exhibit 2 portrays the form of government and size of the governing bodies of 914 general-law municipalities as listed in the *1998 Directory of Texas City Officials* published by the Texas Municipal League. As both Type A and Type B general-law municipalities have, unless the city has adopted the ward system, one mayor and five aldermen, and the *Directory* does not distinguish between the two types, we have no way to determine the number of these cities that are of these two types. We do note that several cities reported numbers of aldermen that do not correspond to the prescribed number. Some of these may have been reported in error, some may have unfilled vacancies, some may have come up with a different number some years back and just kept the number not realizing that there may have been an error, some may have unusual structures as a result of judgments in civil rights litigations, and some may have adopted the ward system in which the city will have a mayor elected at large and two aldermen elected from each ward.

The smaller municipalities, now classified as Type B general-law municipalities, are those which had incorporated as a Type B general-law municipality under chapter 7 of the *Local Government Code*, or operated immediately preceding September 1, 1987, under Chapter 11, Title 28, Revised Statutes. The Type B city must have had at least 201 inhabitants in an area not to exceed 2 square miles to incorporate.

The larger general-law municipalities are those which have incorporated as a Type A general-law municipality, have changed to a Type A general-law municipality under Subchapter B of Chapter 6 of the *Local Government Code*, or operated, immediately preceding September 1, 1987, under Chapters 1-10, Title 28, Revised Statutes. This larger general-law city must have had at least 600 inhabitants or one or more manufacturing plants to incorporate as a Type A city.

The third type of general-law cities is identified as Type C general-law municipalities. This city is one that has incorporated as a Type C general-law municipality under Subchapter A of Chapter 8 of the *Local Government Code*, has changed to a Type C general-law municipality under Subchapter B of Chapter 8, or operated, immediately preceding September 1, 1987, under Chapter 12, Title 28, Revised Statutes.

The Type A and Type B general-law municipalities will have a mayor and five aldermen, all elected at large, unless they have adopted the ward system, in which case they will have a mayor and two aldermen elected from each ward. The Type C general-law municipality will have a mayor and two commissioners, all elected at large.

There are some statutes that are specific to each type of city, but the Type B city has the same authority, duties, and privileges as a Type A general-law municipality, unless the Type B general-law municipality in exercising the authority or privilege or performing the duty would be in conflict with another provision of this code or other state law that relates specifically to Type B general-law municipalities.

A Type C general-law municipality with 501 to 4,999 inhabitants has the same authority and is subject to the same duties as a Type A general-law municipality unless the authority or duties conflict with a provision of this code relating specifically to a Type C

general-law municipality. A Type C general-law municipality with 201 to 500 inhabitants has the same authority as a Type B general-law municipality unless the authority conflicts with a provision of this code relating specifically to a Type C general-law municipality. Additionally, a Type C general-law municipality with \$500,000 or more in assessed valuation for tax purposes may adopt the powers of a Type A general-law municipality.

Type B or Type C cities that grow to have at least 600 inhabitants or have one or more manufacturing establishments may change to a Type A general-law municipality by following the procedures contained in Section 6.012 of the *Texas Local Government Code*. A Type A or B city may change to a Type C city should it determine that the change would be appropriate and the procedures of Chapter 8, Subchapter B, are followed.

### ***Type A General-Law Municipalities***

Chapter 22 of the *Texas Local Government Code* contains the general provisions relating to a Type A general-law municipality. Generally, cities originally incorporated under Chapter 11, Title 28, V.T.C.S. and, after reaching 600 inhabitants or containing one or more manufacturing establishments, exercised the option of adopting the provisions of Chapters 1 - 10, or the provisions to change to a Type A general-law municipality. As noted earlier, the Type A city will have a mayor and five aldermen, all elected at large unless the city has been divided into wards, and then it will have a mayor, who is elected at large, and two aldermen from each ward. In addition to the governing body, the other officers of a Type A city are the secretary, treasurer, assessor and collector, municipal attorney, marshal or police chief, municipal engineer, and any other officers or agents authorized by the governing body. The governing body shall provide by ordinance for the election or appointment of the officers and may confer on other municipal officers the powers and duties of an officer provided in the *Local Government Code*. A Type A general-law municipality has somewhat more authority than does the Type B city; however, now the Type B city has all of the authority as does the Type A city unless the statutes specify otherwise. One principal difference is that a Type A general-law municipality has authority to tax up to \$1.50, or in some cases \$2.50, per \$100 valuation, while a the Type B city is limited to a tax rate of \$.25 per \$100 valuation.

### ***Type B General-Law Municipalities***

Chapter 23 of the *Texas Local Government Code* contains the general provisions relating to a Type B general-law municipality. The governing body is also known as a board of aldermen, which contains a mayor and five aldermen, all elected at large. In addition to the board of aldermen, the municipal government must first elect a marshal, but the city may abolish the position of marshal and confer the duties of the office on a municipal police officer appointed by the governing body or on any other peace officer of the county. The mayor, aldermen, and marshal are elected for a one-year term unless the governing body, by ordinance, provides for two-year terms. The governing body may appoint other officers as necessary to carry out the municipality's functions as required by the *Local Government Code*. As noted above, a Type B general-law municipality is limited to a maximum tax rate of 25 cents.

### ***Type C General-Law Municipalities***

Chapter 24 of the *Texas Local Government Code* contains the general provisions relating to a Type C general-law municipality. The governing body is called a board of commissioners and contains a mayor and two commissioners. The board of commissioners shall appoint a competent person as clerk of the municipality and may appoint other such officers as the governing body considers necessary. The clerk has the same powers and duties that are imposed by the general-laws on the clerk, treasurer, and tax-assessor-collector of a Type A or Type B general-law municipality.

In Chapter 51 of the *Texas Local Government Code*, we find that a Type C general-law municipality under 500 population has the same duties and authority as a Type B general-law municipality, and a Type C city with a population of 501 to 4,999 has the same authority and is subject to the same duties as a Type A general-law municipality unless the authority or duties conflict with a provision of the *Local Government Code* relating specifically to a Type C general-law municipality. In addition, a Type C general-law municipality that has \$500,000 or more of assessed valuation for taxable purposes may adopt the powers of a Type A general-law municipality.

### ***City Manager Plan***

The city manager plan can, under Chapter 25 of the *Local Government Code*, be adopted in any general-law municipality with a population of less than 5,000 according to the most recent federal census. The procedure requires:

1. Upon presentation of a petition signed by at least 20 percent of the number of voters who voted for all mayoral candidates in the last preceding city election, the mayor must call an election on the question of the adoption of the city manager plan.
2. If a majority of the votes cast at the election favor appointing a city manager, the council must, within 60 days after the election, appoint a city manager and fix his or her salary by ordinance.
3. The administration of the city is to be placed in the hands of the city manager, who serves at the pleasure of the city council.
4. In any city where the city manager plan has been approved, all offices of the city except the governing body thereafter shall be appointive.
5. Procedures for repealing the city manager plan are essentially the same as for adopting the plan.

The city manager is responsible for the general supervision of the city and for implementing policies established by the council. The city manager usually appoints all department heads and prepares the budget for the consideration of the council. The manager also attends meetings of the council, prepares reports and makes recommendations to the council, and performs other such duties as the council may prescribe.

Cities which have not formally adopted a Chapter 25 city manager form of government may, nonetheless, delegate managerial powers to an appointed manager or administrator.

The powers of such an administrator will be defined by the ordinance or resolution creating the office or position.

**Table 1-2**

***Form of Government***

Form of Government	Number
General Law	281
General Law – Type A	508
General Law – Type B	90
General Law – Type C	21
Home Rule	320
Unknown or Other	3
Total	1223

Adopting the city manager plan does not change the basic framework of a city or town operating under the commission or aldermanic form of government. Rather, it is an administrative mechanism added to the basic structure.

**Open Meetings Act**

It is imperative that every meeting of the city council (we use the generic term city council to apply to the board of aldermen, board of commissioners, city commission, or city council) be conducted in an orderly and legally correct manner. If the council's procedures are improper, the validity of its actions may be successfully challenged in court.

Every meeting of the council must be conducted in accordance with Chapter 551, *Texas Government Code, Title 5*, the Texas Open Meetings Act. Among all of the state laws affecting city officials, this is the one most often violated because of lack of knowledge, and according to the courts, lack of knowledge of the law is no defense.

The Open Meetings Act requires that written notice of the date, hour, and place of every council meeting, together with an agenda specifically describing all of the items to be considered, be posted 72 hours in advance of such meeting on a bulletin board accessible to the public day and night. There are only two exceptions to the 72-hour posting requirement:

- (1) Only 2 hours advance notice is required for special meetings called in case of "emergency or urgent public necessity" and;
- (2) If an item of "emergency or urgent public necessity" arises and a meeting is already scheduled with the proper 72-hour notice, the emergency item may be added as a supplemental notice, but this must be still at least two hours prior to the time when the emergency item is to be considered.

In the event that an emergency item is added to the agenda of an already scheduled meeting or is scheduled as a special called meeting, the nature of the emergency must be stated in the advance notice, and the emergency must be a genuine emergency requiring immediate action by the city council. Upon scheduling an emergency meeting or posting an emergency item on a supplemental listing on a posted agenda, notice must be given to every news media that has made a formal request for such notice.

The Open Meetings Act requires that all council meetings, with very narrow exceptions, be open to the public. While the Act requires that the meetings be open to the public so that citizens can observe their government in action, it does not require that the public be permitted to participate in the deliberations. Certain exceptions to the Open Meetings requirements are provided:

- (1) Section 551.071: Consultations between the city council and its lawyers to discuss pending or contemplated litigation, settlement offers, and other legal matters. Note: The city's attorney *must* be present at any closed meeting at which litigation is discussed.
- (2) Section 551.072: Discussions regarding the purchase, exchange, lease, or value of real property, when a discussion of these items in public would have a detrimental effect on the negotiating position of the city.
- (3) Section 551.073: Deliberations about gifts and donations if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.
- (4) Section 551.074: Deliberation involving the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a city officer or employee, or to hear complaints or charges against such officer or employee, unless such officer or employee requests a public hearing; however, deliberations about a class of employees must be held in an open session.
- (5) Section 551.076: Discussions regarding the deployment of security personnel or devices.
- (6) Section 551.086: Competitive matters regarding public power utilities.
- (7) Section 551.087: Deliberation regarding Economic Development Negotiations.
- (8) Section 551.088 Deliberations regarding Test Items.
- (9) Tax Code Section 321.3022: Certain deliberations regarding sales tax information received from the Comptroller.
- (10) Government Code Chapter 421: Certain deliberations regarding homeland security.

Closed meetings, or executive sessions, are permitted for the discussion of items that legitimately fall within these ten areas. There are other exceptions that apply to medical and health care and to school boards, but these do not apply to cities. Before an executive session can take place, the council must first convene in open session, the presiding officer must announce that a closed meeting will take place and then cite the specific section of the Open Meetings Act authorizing the closed meeting. Most attorneys advise that the presiding officer also announce the exact time that the council goes into the closed session and the exact time that the body returns from the closed session and goes back into open session.

No final action on any matter considered in a closed meeting may be taken except in an open meeting. Therefore, after the council has deliberated in executive session and arrived at the point of making a decision, it must reconvene in open session. The presiding officer must clearly describe the nature of the matter discussed in private and the effect of the action the council is about to take; a motion and a second must be made to initiate a vote on the matter discussed in private; and the council then must publicly vote on the matter. (If the closed meeting did not lead the council to the point of making a decision, no public action is called for after an executive session.) A certified agenda or recording of an executive session must be kept (if for homeland security discussions, a recording must be taken).

Stiff penalties are provided for violation of the Open Meetings Law. A council member or any other person who participates in an illegal secret meeting can be punished by a fine of \$100 to \$500, confinement in the county jail for one to six months, or both. The same penalty can be applied to a council member who circumvents the requirements of the act by using the telephone, or other means, to poll other council members, or who meets with them individually to deliberate over some matter of city business in order to arrive at a decision, and with the intent to circumvent the Open Meetings Act. While the fine may be stiff, legal fees to deal with a complaint could be much worse.

### **The Public Information Act**

#### Background on the Texas Public Information Act

In 1995, the Texas Legislature changed the name of the “Open Records Act” to the “Public Information Act.” The current version addresses the need to provide the public with information generally, even if not in paper form. Information covered includes that held by third parties, such as independent contractors. As technological capabilities expand, so does the broad application of the Public Information Act. Governmental entities are responsible for more than just paper “records.”

Implicit in the PIA is that it only governs information already in existence. The PIA does not require a governmental body to continually inform the public when information comes into existence. The statute does not require that information on hand be compiled into a separate record, if so requested.

The term “public information” covers almost everything. The term is defined in the PIA as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body and the governmental body owns the information or has a right of access to it. Examples include paper, film, magnetic, optical, or solid state device that can store an electronic signal. Examples of general forms in which the media containing public information exist, include a book, paper letter or document, printout, film, tape, microfiche, sound recording, map, and a voice, data, or video held in computer memory.

Although the public may have access to certain computer files, the PIA does not give a member of the public a right to use a computer terminal to make his own computer search for public records due primarily to the risk that confidential records will be inspected.

#### E-Mail and Confidentiality

Electronic mail regarding public business is public information. The term “public information” is very broad and specifically includes a magnetic, optical, or solid state device that can store an electronic signal or held in computer memory. The Attorney General has specifically stated that Texas recognizes that work related electronic mail is information that may be subject to public disclosure. All governmental entities should have a strong policy about e-mail and Internet usage.

#### Drafts and Public Information

A document, even if labeled “draft,” is public information if under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained by or for a governmental body. The mere creation of a draft is not “transacting official business,” thus many may be withheld from the public. However, if the draft is used in the course of conducting public business, the government cannot protect the document by simply labeling it a “draft.”

#### Personal v. Official Correspondence

The fact that a message is of a nature generally regarded as “personal” is not as dispositive as in the past. Personal notes are now subject to the PIA. Correspondence related to public business in the possession of a member of a governing body is subject to the PIA even if it was sent to the member’s home address. The Attorney General has stated that “if information maintained on a privately-owned medium is actually used in connection with the transaction of official business, it is subject to the PIA.

#### Requests for Information

The public can request copies of information and request to inspect information on site.

Governmental bodies must display a sign giving basic information about the PIA. Governmental bodies cannot inquire into the requester’s motives.

Governmental bodies should date stamp the request, require that requests be in writing, establish identification of requester, and have a policy for handling all requests.

Cities wishing to withhold information from disclosure must petition the Attorney General within ten business days of receipt of the request.

## Ordinances and Resolutions

The city council takes official action by one of two means: resolutions or ordinances. Both play important roles in their own respective ways, and they share certain similarities. But there are distinctions between the two, and it is important to know the differences.

The difference between an ordinance and a resolution is in subject matter, not terminology. An ordinance cannot be changed into a resolution merely by calling it a resolution, nor may the requirements for enacting an ordinance be bypassed by calling a resolution an ordinance.

A resolution is an expression of the will of the city council. Resolutions usually are passed in connection with items of a temporary or administrative nature, such as approving a resolution authorizing the mayor to sign a contract, approving purchases, or entering into agreements with other governmental units. Resolutions also are to state the council's opinion on various matters—as, for example, supporting or opposing legislation pending in Congress or the state legislature, or recognizing an outstanding individual.

An ordinance is more formal and authoritative than a resolution. An ordinance is a local law that *usually* relates to a matter of a general and permanent nature.

Passage of an ordinance involves three steps, the first of which is the introduction of the proposed ordinance at a council meeting.

Next the city clerk or city secretary (often the city attorney will be called on for this task) either reads the ordinance in its entirety or reads just the caption of the ordinance and allows the person proposing it to provide an explanation. There is no state requirement that ordinances be read aloud in their entirety, but if the ordinance is short, the council may wish to have it read in full for the benefit of any citizens present. If the ordinance is long and technical, the usual practice is to read the caption and settle for a brief summary and a general explanation of the purpose of the ordinance. The caption is a brief summary of the contents of an ordinance, and it must contain any penalties that may be assessed for violation of the terms.

Third, the ordinance is debated by the council, and either defeated, postponed, referred to a committee for study, or finally approved. The approved ordinance is then signed by the mayor, and attested to (certified) by the city secretary or city attorney. Often the city's practice will be for the mayor to sign the ordinance, the city secretary to attest, and the city attorney to approve the ordinance as to form.

Because of the relatively cumbersome procedures involved in enacting an ordinance, it is important to know when an ordinance is required and when less formal kinds of council action will suffice. Though there are no foolproof standards that can be applied, these three rules of law may help:

- (1) Any council enactment which regulates persons or property and imposes a fine for violations, *must* be in the form of an ordinance. This requirement is based on the principle that there must be a printed law and the citizen must have some notice that it is in effect before he or she can be subjected to a fine.
- (2) An enactment must always be in the form of an ordinance if the state law authorizing the particular action requires an ordinance. Examples include the creation of a

planning and zoning commission (Chapter 211.007, *Texas Local Government Code*), extending the city's subdivision regulations into the extraterritorial jurisdiction (Chapter 212.003 (a), *Texas Local Government Code*), or authorizing the placement of traffic control devices.

- (3) An ordinance is required to amend or repeal an existing ordinance. It cannot be changed or repealed by a resolution.

There is no requirement in the statutes that requires more than one reading of an ordinance; however, many home-rule cities, in their charters, require two or three readings. We frequently see a home-rule city read an ordinance on first reading at one meeting and on a subsequent meeting, have the second reading and then declare an emergency and have the third reading. There are some general-law cities that, as a matter of custom, consider ordinances on more than one reading, but only one reading is required.

If a Type A city adopts an ordinance that imposes a penalty, fine, or forfeiture, the ordinance or a caption that summarizes the purpose of the ordinance and the penalty for violating the ordinance shall be published in:

- (1) every issue of the official newspaper for two days; or
- (2) one issue of the newspaper if the official newspaper is a weekly paper.

The ordinance does not take effect until it has been published. (Chapter 52.011, *Texas Local Government Code*.)

An ordinance that does not impose a penalty, fine, or forfeiture does not have to be published; and takes effect when adopted unless the ordinance provides otherwise.

Before an ordinance of a Type B city may be enforced, the ordinance or a caption that summarizes the ordinance and the penalty for violating the ordinance must be posted in three public places or published in a newspaper that is published in the municipality. If no newspaper is published in the municipality, the ordinance or summary may be published in a newspaper with general circulation in the municipality. (Chapter 52.012, *Texas Local Government Code*.)

A home-rule city may publish a caption of an adopted ordinance and any penalty for violating the ordinance in lieu of a requirement in the municipality's charter that the text of the ordinance be published. If the charter of the home-rule city does not provide for the method of publication of an ordinance, the full text or a caption that summarizes the purpose of the ordinance and the penalty for violating the ordinance may be published at least twice in the municipality's official newspaper. (Chapter 52.013, *Texas Local Government Code*.)

### ***Compatibility of Ordinances with State and Federal Laws***

An ordinance is void if it conflicts with the U.S. Constitution, the Texas Constitution, or federal or state laws. Also, even though an ordinance might be valid at the time that it was passed, if a law subsequently enacted by the state legislature or the congress conflicts with the ordinance, the ordinance is invalid.

An ordinance also is invalid if the courts determine that the state legislature intended to pre-empt the field with regard to the subject addressed in the ordinance. Conversely, if an ordinance supplements and is in harmony with the law, the ordinance will be sustained. But if the legislature has pre-empted the field, no ordinance except those specifically authorized by statute may be enacted.

Examples of conflicts which have caused ordinances to be ruled invalid are: an ordinance prescribing a different penalty from that imposed by state law where the subject matter was the same; an ordinance limiting the hours of operation of a business to less than those permitted by state law; an ordinance legalizing an activity or business which was prohibited by state law; and an ordinance in conflict with the Interstate Commerce Clause of the U.S. Constitution.

### ***Reasonableness***

The courts have no general power to nullify ordinances, but they can inquire into their validity to prevent private injury. The courts ordinarily will not substitute their judgment for that of the city council; but if an ordinance or act of the council is arbitrary, oppressive, capricious, or fraudulent, or the effect of the ordinance or act is to work some private injury, or is not in keeping with the council's role as trustee for the people, the courts may overturn it.

### **Liability of City Governments**

The liability of city governments for torts<sup>8</sup> has been an accepted doctrine in Texas since passage of the Tort Claims Act in 1969. Under the act, cities and other governmental units are financially liable for property damage, personal injuries, and deaths "proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his or her employment or office." (Section 101.0215 of the *Texas Civil Practice and Remedies Code*.)<sup>9</sup>

Within the context of the Tort Claims Act, governmental liability hinges on three elements: existence of a legal duty from defendant to plaintiff, breach of such duty, and damage as a proximate result. As one illustration, a Texas court held in *City of Gatesville v. Truelove* that the city had a legal duty to provide safe working conditions for its sewer employees, that the city breached this duty by failing to properly train the operator of a back-hoe, and that the city was liable for payment of financial damages to an employee who lost a leg as a proximate result of the negligent operation of the back-hoe.<sup>10</sup>

Under the Tort Claims Act, city governments are liable for damages resulting from the tortious acts of city administrators and other municipal officials when the city is involved

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<sup>8</sup> A "tort" is a wrongful act, which results in injury to persons or property. A tort can result from negligence in the proper performance of a public servant's duty, or from intentional acts--such as libel, false arrest, or slander.

<sup>9</sup> The Texas Tort Claims Act applies to torts resulting from the acts of municipal officers and employees engaged in *governmental* functions. Notwithstanding the Tort Claims Act, cities have always been liable for torts resulting from the acts of municipal officers and employees engaged in *proprietary* functions. The Tort Claims Act defines acts that are governmental and those that are proprietary.

<sup>10</sup> *City of Gatesville v. Truelove*. (Tex. Civ. App. 1976) 546 S.W. 2nd 79.

in “governmental” functions, such as fire or police operations. The city may also be legally liable for injuries or damages which occur when the city is involved in a “proprietary” function, such as gas or electric utility or other “ultra hazardous” activities.

But what of the *individual* liability of city officials? Can they be held personally responsible for damages resulting from decisions that they make (or refuse to make) in their official capacity?

### ***Personal Malpractice Liability of City Officials***

City officials routinely make decisions affecting the lives and property of thousands of people. Using their best judgment to determine the “lowest and most responsible” bids on city contracts, city officials’ decisions can mean the difference between prosperity and insolvency for contractors. Policies set by the city council and administration guide the actions of police officers who wield life and death powers. The list goes on and on; the point being that city officials make a variety of decisions that can benefit many persons and lead to irreparable harm to others.

Until recently, the federal courts generally held that city officials were not personally liable for torts resulting from their official action, so long as they were made in good faith. It is important to note that recent U.S. Supreme Court decisions have made some changes in this area. There are indications now of an emerging concept of “public official malpractice” with serious personal financial implications for city officials—which is borne out by a significant increase in the number of lawsuits filed against municipal officers and employees.

In the private sector, the legal and medical professions are experiencing similar increases in the number of malpractice suits. In view of these trends, it would be inconsistent for courts to hold physicians liable for damages in malpractice actions involving patients and lawyers liable for damages to clients, and yet allow local officials to “practice” without regard to the harmful effects of their actions on citizens and their property.

These factors point to a situation calling for city administrators to be aware of their potential liability problems and to have a basic understanding of the legal practices involved.

### ***Liability Under State Law for Discretionary Acts***

Generally speaking, Texas courts have held that city officials are not personally liable for torts resulting from discretionary acts made within their authority and in “good faith”—that is, without intent to do harm. “Discretionary” acts are those involving personal judgment. For a city administrator, examples of discretionary acts would include the approval of city purchases, deciding where to deploy police units, and hiring, disciplining, and firing subordinate employees.

Discretionary acts involve decisions, or choices, by the administrator, based on his or her evaluation of all of the available facts. As the city’s purchasing agent, he or she has the discretion to personally determine whether the goods or services offered by a particular supplier are superior to those offered by competitors. And as chief executive officer, he or she exercises the discretionary authority to make decisions regarding employees hired

by the city, their compensation, and whether a particular employee will remain on the city payroll and under what conditions.

One example of liability arising out of a discretionary act concerned a mayor who, acting by himself, initiated legal proceedings against a delinquent taxpayer. The taxpayer then sued the mayor for damages, claiming that the mayor had no individual power to order the city attorney to file suit because state law requires the *city council* to authorize such suits. The court agreed, declared the mayor's act "wholly without authority of law," and ruled that he was personally liable for damages resulting from his tortious act.<sup>11</sup>

### ***Liability Under State Law for Ministerial Acts***

Again, generally speaking, city officials are personally liable for torts resulting from their ministerial acts. Ministerial acts are those performed as a matter of duty, and which the city official has no choice except to perform. Ministerial acts also include those performed in obedience to state or federal laws which are so plain and explicit as to leave nothing to discretion or judgment.

With respect to the city administrator, ministerial acts could include all acts the administrator is commanded to perform pursuant to the requirements of state law or city ordinances. In the first instance, one example of a state-mandated ministerial act is the requirement, under Texas Uniform Budget Law (Chapter 102 of the *Texas Local Government Code*), that the administrator prepare the city budget. In the second instance, an example of ministerial act mandated by city ordinances might be the requirement that he or she supervise the various city departments and ensure that all city ordinances and franchises are enforced.

An improper ministerial act is performed at the peril of the city official, regardless of whether it was performed in good faith—i.e., without intent to do harm. A ministerial act which is required by law, but is not performed at all, also incurs liability on the part of the city official responsible for its performance. Therefore, a city official could be personally required to pay damages to individuals injured because of his or her failure to properly perform a ministerial duty or negligence in not performing it at all.

In Texas, the law relative to the personal liability of city officials for their discretionary and ministerial acts had remained generally unchanged until 1995 when some caps were placed on individual liability. However, there are no legal absolutes in this area, and the city's attorney's advice should be sought if there is any liability question in a given situation.

### ***Liability Under Federal Law***

During the 1950's and 1960's, the federal courts generally held that city administrators and the high-level public officials enjoyed "qualified" immunity for their tortious acts in the civil rights arena. In order to invoke the protection of immunity, a public official had to meet two qualifications: (1) he or she had to be acting in a ministerial capacity; and (2) it had to be demonstrated that the act in question was made in good faith.

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<sup>11</sup> Black v. Baker. 130 Tex. 454. 111 S.W. 2nd 706 (Tex Comm. App. 1938)

Beginning in the 1970's, the federal courts began to narrow the scope of public servant's immunity from personal liability for their official acts. First, in 1974, the U.S. Supreme Court held that when a public official acts under state law in a manner violative of the U.S. Constitution, "he comes into conflict with the superior authority of that Constitution and is stripped of his official or representative character *and subjected in his person to consequences of his individual conduct . . .*"<sup>12</sup> (emphasis supplied). The Court thus made public officials personally liable for torts if their official actions violate federal law—even though the particular action might be proper, or even required, under state law or local ordinances.

The personal liability of public officials was further broadened in the 1975 case of *Wood v. Strickland*, in which school board members were sued for violating the constitutional civil rights of a student. The board members claimed immunity from liability on the basis that their alleged illegal act was made in good faith. In rejecting the school board's defense, and holding its members personally liable for damages, the U.S. Supreme Court ruled that a board member could not claim immunity ". . .if he reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected . . ." Moreover, the Court said, since each school board member should have known he was violating the student's constitutional rights, he could hardly assert that he was acting "in good faith."<sup>13</sup> The Court thus ruled that a public official's violation of an individual's constitutional rights because of ignorance of the law renders him personally liable for damages. Put another way, the Court added the "affirmative duty to be legally informed" as to the qualifications for invoking the protection of immunity.

Although this particular case involved school officials, it is probably safe to assume that the same standard of accountability will be imposed on other public officials in similar situations. Over the years, the courts have uniformly held that ignorance of the law is no defense: in the case described above, the Supreme Court simply extended this principle by ruling that ignorance of the Constitution is not a defense in cases alleging deprivation of legal rights.

### ***Accountability in Public Decision-Making***

The level of accountability in the city organization is another concern in the area of public liability. Previously, legal guidelines established by the federal courts were based on the premise that the higher the rank of the public official, the greater the degree of immunity, if a particular act was made in good faith. Recent court decisions indicate, however, that the laws in this area may be changing.

In 1974, at the height of the civil disorder in a Georgia city, the mayor issued a shoot-to-kill order to police officers confronted by violent rioters and looters. An officer thereupon shot a juvenile who resisted arrest. Subsequently, a suit was filed in federal court alleging that the mayor's shoot-to-kill command made him personally responsible for the teenager's gunshot wounds. The court held the mayor personally liable for \$25,000 actual damages and \$15,000 punitive damages, ruling that even though he did

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<sup>12</sup> *Scheuer v. Rhodes* 416 U.S. 232 (1974)

<sup>13</sup> *Wood v. Strickland*. 420 U.S. 308 (1975)

not actually pull the trigger, his orders at the time created the feeling of authority on the part of the police officer that caused him to do what he did to the plaintiff.

An appellate court later ruled that the mayor was not personally liable for damages, noting that there was no evidence that his shoot-to-kill order influenced the police officer, and observing that the mayor was not even at the scene of the shooting.<sup>14</sup> But though this case was ultimately resolved in favor of the mayor, it should serve as a warning that, pending further judicial clarification, public officials can reduce their risk of liability by temperate and cautious action.

### ***Civil Rights Liability***

Civil rights represent another area in which public officials can be held personally liable for damages. Every city administrator needs to know the risks expressly contained in Section 1983, Title 42, of the United States Code:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .”

Under Section 1983, *all* persons, city administrators included, are personally liable for damages if their acts result in depriving others of their civil rights. Additionally, the U.S. Supreme Court has held that Section 1983 does not require a showing of a specific intent to deprive a person of his or her civil rights; the mere deprivation is itself a violation.

Liability under Section 1983 is not limited to the direct infliction of physical injuries to persons or property. Several types of policy decisions affecting employees or citizens could possibly render city administrators liable under Section 1983. Examples would include the denial of a construction permit on questionable grounds, or disciplining or firing an employee without due process.

### ***Antitrust Liability***

In January 1982, the U.S. Supreme Court opened another new horizon of potential liability for violations of the federal Sherman Antitrust Act, which provides that “Every . . . conspiracy in restraint of trade and commerce is declared illegal.”

Although the full parameters of antitrust liability for city officials may not be known for years, it is clear from the Supreme Court decision that any unreasonable municipal regulatory requirement which restricts or prohibits free competition, or allows an undue advantage or monopoly to one competitor, may subject the city and its officers and employees to liability for treble damages, attorneys’ fees, and court costs.

### ***Avoiding Liability***

Unfortunately, there is no way for city officials to totally avoid personal liability, because absolute immunity is nonexistent. But threats of personal liability can at least be limited

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<sup>14</sup> Palmer v. Hall, 517 F. 2nd 705 (5th Cir. 1975).

by ensuring scrupulous regard for the constitutional rights of those with whom the city government comes into contact in the performance of its functions.

Maintaining respect for all citizens is not always easy, for here, as in the case of criminal law, the beneficiaries of the U.S. Constitution sometimes are undesirables whose only seeming purpose is to goad public officials into intemperate action. Nevertheless, the Constitution makes no distinction between upright citizens and obnoxious ones—the preoccupation of the Bill of Rights with the protection of the rights of criminal defendants attests to that. The same principle applies in the area of civil liability. Many years ago, a Texas court, referring to the duty of a city to maintain its streets in good repair, observed that “a drunken man is as much entitled to a safe street as a sober one, and much more in need of it.” The same can be said for the obnoxious citizen’s right to security of person, property, and free speech, and freedom from arbitrary action by the city.

### **Standards of Official Conduct**

Corruption and abuses of public office are as old as government itself. Recognizing the likelihood that some public officials—including some city administrators—cannot resist the temptation to use their offices for unintended purposes or personal gain, the Texas Legislature enacted a series of strict criminal laws to punish bribery, official misconduct, and similar offenses.

#### ***Bribery***

Section 36.02 of the penal Code provides that:

A person commits a (second degree felony) offense<sup>15</sup> if he intentionally or knowingly agrees to accept from another:

- (1) any pecuniary benefit as consideration for the recipient’s decision, opinion, recommendation, vote, or other exercise of discretion as a public servant [or] . . .
- (2) any benefit as consideration for a violation of a duty imposed by law on a public servant. . .

Under Section 36.02, the offense of bribery includes either a solicitation by a public official or a bribe offer by another. The offense focuses on the mental state of the persons involved, and bribery is complete if a private citizen-by conferring or agreeing to confer a benefit, or a public servant-by soliciting, accepting, or agreeing to accept a benefit-*intends* an agreement.

Bribery requires a “benefit,” which includes economic gains, as well as such subtle benefits as lines of credit or information regarding advantageous investment opportunities. Benefits to family members and others in whose welfare the bribee is interested also are included.

The benefit is the influencing factor. It is not bribery, for example, for a citizen to offer to buy lunch for a public servant, unless he or she intends that the lunch will influence the

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<sup>15</sup> A second degree felony offense is punishable by a penitentiary term of 2 to 20 years, a fine not to exceed \$10,000, or both.

individual's official acts. An intent to get the public servant's ear to persuade him or her to act in a particular manner is not bribery, though it may constitute "improper influence."

### ***Coercion of Public Servant or Voter***

Under Section 36.03 of the Penal Code:

A person commits a [Class A misdemeanor] offense<sup>16</sup> if by means of coercion he:

- (1) influences or attempts to influence a public servant in a specific exercise of his official power or specific performance of his official duty; or
- (2) influences or attempts to influence a voter not to vote or to vote in a particular manner. . .

This provision controls the use of threats, rather than money, to extort favorable votes or other actions from public officials.

### ***Compensation for Past Official Behavior***

Under Section 36.07 of the Penal Code:

- (a) A person commits a [Class A misdemeanor] offense if he intentionally or knowingly offers, confers, or agrees to confer any pecuniary benefit on a public servant for the public servant's having exercised his or her official powers or performed his or her official duties in favor of the actor or another.
- (b) A public servant commits a [Class A misdemeanor] offense if he or she intentionally or knowingly solicits, accepts, or agrees to accept any benefit for having exercised his or her official duties in favor of another.

This section covers the offer, solicitation, or acceptance of compensation for the past actions of public servants. It applies to cases of implied bribery where the accused is suspected of bribery, but there is no proof that there was any direct relationship between the expectation of compensation and the official action.

### ***Solicitation of Gifts***

Section 36.08 of the Penal Code provides that:

- . . . (d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits a [Class A misdemeanor] offense if he solicits, accepts, or agrees to accept any pecuniary benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim or transaction involving the exercise of his or her discretion. . .

This section provides penalties for unprovable bribes. As with bribery, the offense punishes any public servant who solicits a gift, as well as one who accepts or agrees to

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<sup>16</sup> A Class A misdemeanor offense is punishable by a fine not to exceed \$2,000, confinement in jail for a term not to exceed one year, or both.

accept one, but it applies only if the public servant knows the donor is interested in his or her official actions. Gifts from disinterested citizens are not covered.

### ***Offering Gifts to Public Servants***

Section 36.09 of the Penal Code provides that:

A person commits a [Class A misdemeanor] offense if he offers, confers, or agrees to confer any benefit on a public servant that he knows the public servant is prohibited by law from accepting.

This section covers the same conduct as Sections 36.08 (above), but from the other side of the transaction. It applies to any person who confers or agrees to confer a gift that the public servant cannot accept under Section 39.08. The donor must know the recipient is a public servant who has official contact with some matter in which he or she is interested.

### ***Official Misconduct***

Under Section 39.01 of the Penal Code:

A public servant commits a [Class A misdemeanor] offense if, with intent to obtain a benefit for himself/herself or to harm another, he intentionally or knowingly:

- (1) Commits an act relating to his or her office or employment that constitutes an unauthorized exercise of his or her official power.
- (2) Commits an act under color of his or her office or employment that exceeds his or her official power.
- (3) Refrains from performing a duty imposed on him or her by law that is clearly inherent in the nature of his office or employment.
- (4) Violates a law relating to his office or employment.

This provision prohibits unauthorized exercises of official power, failure to perform mandatory duties, and violations of laws related to public office. The focus is on wrongdoing by public servants for the purpose of benefiting themselves or harming others.

### ***Misuse of Official Information***

Section 39.03 of the Penal Code provides that:

A public servant commits a [Class A misdemeanor] offense if, in reliance on information to which he or her has access in his or her official capacity and which has not been made public, he or she:

- (1) Acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information; or
- (2) Speculates or aids another to speculate on the basis of the information.

City administrators routinely have access to confidential official information that would be valuable to land speculators and others. This provision makes it a crime for public servants to profit from inside information acquired by virtue of their official position.