

7. Section Review of Proposed Amendment

In a point-by-point format, the following matrix sets forth the amendment language and outlines corresponding key arguments raised by amendment supporters and opponents in the debate about the Open Government Amendment.

SECTION 1: Policy		
<p>The citizens of the City of Austin establish Austin as a leader in open, online, and participatory government. An open and online government allows our community to benefit from and respond to the wisdom, knowledge, experience and interests of everyone. The Austin community is ideally suited to utilize technology to open our city government to greater public oversight and participation. Public oversight and participation require that public servants do not have the right to decide what is good for the citizens to know and what is not good for them to know. The citizens insist on remaining informed so they may retain control over the instruments of government they have created. The purpose and subject of this amendment is to assure open government. This amendment and other open government laws shall always be liberally construed to favor openness.</p>		
SECTION 2: PRIVACY PROTECTED		
Amendment Language	Pro Argument	Con Argument
<p>Nothing within this amendment should be interpreted in a manner that would violate an individual's existing constitutional or common law rights to privacy.</p>	<p>This section reiterates that this amendment will not trump or pre-empt or limit statutory privacy rights granted under state and federal laws like medical privacy, criminal investigation protections, or any other state or federal privacy law or right.</p>	<p>Even though the intent of this section appears to be protection of the privacy of individuals whose email or other communications with the City would be made public, it is in conflict with other sections of the amendment where "all" communications must be made public "online" and in "real time."</p> <p>The legal interpretation of this short section is at the heart of much of the opposition to this amendment on individual privacy grounds. The amendment states an intent to protect common law and constitutional privacy rights, but not statutorily (by state or local law) created privacy rights, which is a much broader area.</p>

SECTION 3: OPEN GOVERNMENT ONLINE		
Amendment Language	Pro Argument	Con Argument
<p>The City must, as expeditiously as possible and to the greatest extent practical, make all public information available online in real time and accessible to the public. This move to online access is a more efficient, timely, and open substitute for the manual and slow processing of public information requests. The City's actions to make public information accessible should be integrated with a move to carry out city business online, so that the processes of managing and governing the city and of public disclosure become one and the same.</p>	<p>This sets a general policy that the City attempt to do more of its business online on a 'possible and "practical" standard. The city is already moving in that direction with some programs like AMANDA, but has not moved towards giving the public access to those systems.</p>	<p>There are no definitions of key terms such as "expeditiously as possible," "greatest extent practical," "real time." Because these definitions are lacking (and perhaps have been strategically left undefined) the City must assume a liberal interpretation, per Section 1, which is what drives cost estimates of initial implementation over \$30 million dollars. In addition, the city will likely have to interpret the charter amendment literally and liberally because prohibitive cost alone does not make implementation "impractical" for a governmental body.</p>
(A) OPEN ACCESS TO CITY BUSINESS		
<p>(1) Within one year of the date this Amendment takes effect, applications and proposals for any permit or contract of significant value must be provided to the City in an electronic format.</p> <p>(2) The City must assign a name and number and create a website or similar online electronic format to manage all matters that seek: (a) a permit for development of more than two acres or for development anticipating development costs of more than \$1 million; (b) a contract involving the expenditure of \$500,000 or more of city funds; (c) economic development assistance of more than \$50,000 in value; and (d) all other instances where it is reasonably anticipated that there is significant public interest in the matter.</p> <p>(3) With respect to each matter subject to Section 3(A)(2), the City must maintain a system for electronic notification (such as email lists) to interested persons of any event or new information relating to the matter. Any individual</p>	<p>Everyone wishing to do significant business with the City provide their documents electronically, saving the City the costs of scanning paper documents. E-filing is an emerging trend in some other parts of the country. A minor redesign of the AMANDA system, for instance, would allow public review of development documents not currently easily available.</p>	<p>While these clauses add some shape to the nature of what specific information is desired, there are no clauses saying what information would <i>not</i> be subject to open access, therefore the City must assume "all" information should be made open. By mentioning only "constitutional and common law privacy" the amendment may be implicitly declining to protect other privacy rights and waiving other discretionary safeguards of confidentiality currently existing under the Texas Public Information Act (TPIA).</p>

<p>or organization may register as an interested person.</p> <p>(4) All public information concerning the matter subject to Section 3(A)(2) must be posted to the website. All written communications between the City and the applicant relating to the matter must be posted online in real time in a manner searchable by the public.</p>		
<p>(B) OPEN ACCESS TO CITY CALENDARS</p>		
<p>(1) For all matters involving City business, the following people must maintain calendars of all meetings and maintain logs of all telephone calls: (a) City Councilmembers and their staff; (b) City Manager and his or her staff; (c) Assistant City Managers and their staff; and (d) all department heads.</p> <p>(2) These calendars and logs must contain the time, date, subject matter, and persons involved in all meetings and telephone calls involving City business. These calendars must be used to schedule and record all past and future meetings that occur after the implementation date of this section.</p> <p>(3) Calendars and logs must be posted online in real time and be accessible to the public.</p> <p>(4) "Meetings" includes all informal and formal meetings including but not limited to telephone conferences, videoconferences, happy hours, and luncheons.</p> <p>(5) This provision must be implemented within six months of approval of this amendment.</p>	<p>This creates a "lobby log" for the top level staff and Council members in order to give the public a clear picture of how city officials made decisions and from whom they get their information and input.</p> <p>The amendment gives broad flexibility to decide the "subject matter" and would also be free to establish a protocol whereby it would be the responsibility of any commercial interest/lobbyist to register their calls and meetings.</p>	<p>The calendars of these individuals are public information and so are already subject to open records requests, even though maintaining a calendar is currently discretionary. Failure to maintain the calendar with all the details mentioned in the amendment – as defined by whoever is reviewing the calendar (could a city official ever again have a private, "informal" conversation?) – could result in a \$500 penalty.</p> <p>Again, while appearing to add shape to the intent of open access and the deceptively simple idea of just wanting to know who is speaking to the City when and about what, several phrases seems unreasonable and strategically overreaching, such as retroactive application to "all past" meetings, "real time" posting (again, a problem due to lack of definition), and all informal meetings including "happy hours."</p> <p>The six month timeline for implementation also constrains the City and increases cost assumptions.</p>

(C) OPEN ACCESS TO CITY ELECTRONIC COMMUNICATIONS		
<p>(1) In order to better preserve written electronic communication for public disclosure, the City must establish a system that automatically archives all incoming and outgoing electronic communication that deals with City business to and from the following people in their official capacity: (a) City Councilmembers and their staff; (b) City Manager and his or her staff; (c) Assistant City Managers and their staff; and (d) all department heads.</p> <p>(2) The above people are prohibited from discussing City business via any form of written electronic communication, such as a private email account, that is outside of the City's automatic archiving system.</p>	<p>This only requires archiving of email for top City officials, not all City employees. It also prohibits the use of non-city email accounts for conducting city business.</p>	<p>Archiving is consistent with current City policy.</p>
(D) OPEN ACCESS TO CITY FUNCTIONS		
<p>Within six months of approval of this Amendment, the City must maintain online in a manner directly accessible to the general public the following:</p> <p>(1) A chart showing the organizational structure of the City and its staff along with phone numbers and other contact information together with statements of the general course and method by which City functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;</p> <p>(2) Statements of general policy or interpretations of general applicability;</p> <p>(3) Administrative staff manuals and instructions to staff of general applicability that affect a member of the public;</p>	<p>This would put online information that is already considered public information including documents related to how the City handles public information requests with the Attorney General's Office, court-filed pleadings either by or against the City, and "previously requested" public information.</p>	<p>The City strives to make available extensive information about City functions while still protecting the City's ability to pursue legal opinions confidentially which enables the City to protect the rights of all citizens, including those who disagree with the City. Again, the six month timeline drives high implementation costs.</p>

<p>(4) All public information requests made to the City and all communications to the Attorney General or to the requestor regarding these public information requests, except to the extent the City is otherwise entitled to withhold and keep confidential specific documents or portions of documents;</p> <p>(5) All public information that has previously been released to someone making a public information request and which, because of the nature of the subject matter, the City determines is or is likely to become the subject of a subsequent public information request for substantially the same information;</p> <p>(6) The style, docket number, and a short description of the subject matter of any litigation in which the City is a party, together with all court-filed pleadings in any litigation that the City is a party; and</p> <p>(7) Agendas, minutes, and transcripts or recordings, except for executive sessions, of all meetings of the City Council, City Boards, and City Commissions.</p>		
<p>(E) EFFECTIVE ACCESS TO INFORMATION</p>		
<p>The City must create and maintain online tables of contents and indexes to enable the general public to easily find and access online City documents and public information. Information must be searchable, and be able to be located by author/submitter, individual recipient, date, and subject matter.</p>	<p>Information provided online should be easy to find.</p>	<p>The City always strives to make easily accessible all information provided online.</p>

SECTION 4: PUBLIC INFORMATION		
Amendment Language	Pro Argument	Con Argument
(A) INFORMATION RELATING TO CIVIL LITIGATION		
<p>That the City is a party to litigation does not render information relating to that litigation less important; rather it often means the information is a matter of heightened public interest. Therefore, the City must not withhold information relating to civil litigation under Texas Government Code § 552.103, but it may withhold under other Public Information Act exceptions.</p>	<p>Some exceptions to disclosure of public information are not mandatory. This section requires the City to use its discretion on these exceptions in favor of openness in one situation – information that is “related to” litigation but not otherwise protected as attorney work product or under attorney client privilege.</p> <p>This section intends to reduce disputes between the City and requestors over information that can be released with no harm to the City’s position in litigation.</p>	<p>The City faces many types of civil litigation. To broadly say the City the “must not withhold” any information the City might deem “related to” such litigation will greatly undermine the City’s ability to win civil suits, regardless of the parties involved. Currently such information is available through a legal process called “discovery” in which the city could raise legal objections to releasing vital information. The amendment would allow adversaries of the city to simply file open records requests and obtain sensitive information regardless of potential reasonable legal objections that could be raised in court. This could have great unintended consequences that ultimately hurt the City’s ability to protect the public interest – even those interests of the proponents.</p>
(B) ECONOMIC DEVELOPMENT INFORMATION		
<p>Information relating to economic development assistance or incentives is public information to which the public has a right of access.</p> <p>(1) The City must require all businesses and individuals seeking to engage in the type of economic development negotiations referenced in Texas Government Code § 552.131 to execute and deliver to the City a waiver of any rights to prevent the public disclosure of all information exchanged with the City. The City is without authority to engage in economic development negotiations with any company that has not first executed a waiver.</p> <p>(2) The City is without authority to shield economic development offers under Texas</p>	<p>This intends to reestablish the decision-making process of offering tax abatements and other public benefits to the public realm. To be effective, this change also requires that businesses must waive confidentiality on information if they wish to negotiate with the City for tax abatements and other incentives.</p>	<p>Forcing the City to make potential economic development partners waive their right to strategic company information will undermine the City’s ability to compete in the global marketplace – major employers, including “good” ones – will be less likely to want to continue to do business with the City and may just move to the jurisdiction next door where no such rules exist. The community will never get to have the public conversation about improving incentives policy, because the most desirable and competitive employers will not want to subject themselves to this degree of public scrutiny.</p> <p>Many of these other clauses broadly “waive” the City’s rights to protect certain types of</p>

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<p>Government Code § 552.131(b). (3) Nothing in section 4(B) prevents a City from withholding documents under Texas Government Code §§ 552.104, 552.105, or 552.108.</p>		<p>information which is a right intended to be applied on a case by case basis – broad waiving of this right will have severe unintended consequences.</p>
<p>(C) AGENCY MEMORANDA</p>		
<p>Open government in Austin ensures the people have access not only to the final decisions made by government officials but also to the process by which those decisions are made. The City must not use Texas Government Code § 552.111 to withhold information reflecting advice, opinion, and recommendations on policymaking matters, except the City may withhold attorney work product.</p>	<p>Again, this requires the City to use its discretionary rights on certain information in favor of openness. This requires the City to make PUBLIC not only its final decision public, but also the process and factual information used to arrive at that FINAL decision.</p>	<p>While the nod to “attorney work product” is important, this clause opens strategy, opinion, and advice documents to anyone (unless they fall under another TPIA exception such as attorney client privilege). There are good policy reasons for city officials to seek frank advice from staff and advisors. Such advice may not be forthcoming or candid if it will be widely disseminated. This clause could more greatly benefit those wishing to do the City harm than to protect it.</p>
<p>(D) PERSONNEL FILES</p>		
<p>The City of Austin must not maintain an optional personnel file as authorized under Texas Local Government Code § 143.089(g) for employees of the Austin Police Department, nor does the City have authority to enter into any meet and confer or other agreement with any police officer association that requires creation or maintenance of a separate file that is closed to the public.</p>	<p>Improves the accountability of the Austin Police Department by eliminating secret personnel files that describe officer misconduct, if any, and the response to misconduct by police management, if any.</p>	
<p>(E) EMAILS RELATED TO CITY BUSINESS</p>		
<p>Email or other written electronic communication to or from a public official concerning City business is public information, including communications to or from privately owned email accounts or computers.</p>	<p>This section acts as a reminder that City officials cannot delete email, even if they are using a non-City, private account. It encourages city officials to only use their city email accounts for city business.</p>	<p>This appears to be redundant and inconsistent to language in earlier sections related to email content and privacy exemptions which creates confusion as to which section should be interpreted. It could mean that all described emails must be made public, regardless of privacy concerns, or that all emails (thousands daily) will first have to be screened for privacy concerns before going online.</p>

SECTION 5: OPEN MEETINGS		
Amendment Language	Pro Argument	Con Argument
(A) SETTLEMENTS		
In any litigation or pre-litigation matter of public interest, no settlement shall be given final approval without at least one public hearing. All terms proposed for settlement must be posted online at least seven days prior to the public hearing.	The city often ends up setting policy through settlement agreements, having open meetings on such agreements will allow more effective public participation in how such policy by settlement occurs.	Not all litigation settlements call for a public hearing, provided that the council properly posts the matter and takes a vote.
(B) ECONOMIC DEVELOPMENT		
Negotiations related to economic development agreements, grants, loans, or programs from the City involving more than \$500,000 will be undertaken in meetings open to a public audience with 72 hours prior notice provided to the public. All presentations of information to the City Council and consideration or deliberation by the City Council of any proposed economic development agreement, grant, loan or other program must occur in lawfully noticed public meetings.	This will prevent the city from creating large incentive packages in private and allow for public input to help shape more cost effective economic development package that are more closely tied to community issues such as affordable housing, environmental and noise standards.	This could hamper the ability of the city and its economic development partners to conduct frank, candid negotiations. Such negotiations last for months and require many meetings – sometimes with several parallel discussions. While there are certainly key decision points where public input is most beneficial, it may not be beneficial at every single step along the way.
(C) MEET AND CONFER NEGOTIATIONS		
Deliberations relating to a meet and confer agreement or proposed agreement between representatives of the City and representatives of any police officers association must be open to the public. The City is without authority to enter into any agreement to close these meetings.	Open meetings for meet and confer will allow more public input on negotiations that could obligate large portions of the general fund budget. Open meetings could also allow for more effective police oversight through public debate about concessions, such as keeping private police officer misconduct in the “g” files.	

SECTION 6: RETENTION OF PUBLIC INFORMATION		
Amendment Language	Pro Argument	Con Argument
<p>(A) The City must preserve in perpetuity all recordings and minutes of City Council, board, and commission meetings and all documents reviewed at these meetings. All executive sessions must be recorded by video and audio.</p> <p>(B) The City will create a records retention schedule as prescribed by the Local Government Code that retains all public information for a minimum of ten years.</p> <p>(C) The City must make a good faith effort to preserve all electronic information in a sustainable format so that future generations may have access. To reach this goal, the City, wherever practical, must use open formats.</p>	<p>Increases record retention and preservation of public information so that citizens making open records requests in the future will be able to understand how decisions were made in the past.</p>	<p>Archiving is consistent with current City policy. The City has been making a “good faith” effort for many years to make information available.</p>
SECTION 7: ONLINE ACCESS		
Amendment Language	Pro Argument	Con Argument
<p>All references within this article to “online” refer to the Internet or future similar technology. Any fees for access to City public information databases and search functions must be waived for individuals, non-profit organizations, and registered neighborhood groups. The City Public Information Officer must assist persons without access to online resources to obtain timely access to online public information.</p>	<p>This is standard implementation language for charter amendments.</p>	<p>It seems odd that the amendment would define “online” yet not define “real time;” adding traction to the idea that such definitions are strategically omitted.</p> <p>Waiving the City’s ability to charge any fees, even nominal fees, undermines the City’s ability to recoup the costs necessary to implement the amendment. Current state law only allows a city to recover its real costs, such as programming time and computer time for major information requests – this amendment would shift those costs to the taxpayers. It would be very beneficial for individuals who request information for commercial purposes or for adversaries searching city data for purposes of litigation or harassment.</p>

SECTION 8: ENFORCEMENT		
Amendment Language	Pro Argument	Con Argument
<p>Noncompliance by the City, any City official, or City employee with this Amendment is enforceable by an action for injunction or mandamus. In addition, each official or other person found to have knowingly and willfully violated this Amendment is liable for a \$500 civil penalty for each violation.</p>	<p>This is standard implementation language for charter amendments.</p>	<p>Noting that the amendment twice mandates a six-month implementation schedule - which is aggressive at best, impossible at worst – this clause intends to be a motivation for the City to not remain inactive, but instead seems as likely to result in litigation about the City’s effort to implement to the plaintiff’s satisfaction rather than a reasonable, prioritized effort to open government itself.</p>
SECTION 9: Severability.		
<p>If any provision or phrase of this charter amendment, or the application of the same to any person, property, or set of circumstances is for any reason held to be unconstitutional, void, or otherwise invalid, the validity of the remaining portions of this charter amendment shall not be affected by that invalidity; and all provisions or phrases of this charter amendment are severable for that purpose.</p>	<p>This is standard implementation language for charter amendments.</p>	
SECTION 10: Adoption And Implementation.		
<p>Upon approval by the voters of the City of Austin, this amendment shall take effect immediately. In the event of any conflict with other provisions of the Austin City Charter, the provisions of this Open Government Online Amendment will prevail. The sections of this Amendment must be codified together as a separate Article of the Austin City Charter captioned “Open Government Online”. Any references to state statutes in this Amendment should be updated in the event that they are re-numbered.</p>	<p>This is standard implementation language for charter amendments.</p>	