

## **8. Liveable City Study Team Discussion**

The Liveable City Study Team believes government should be as open and accessible as needed to ensure that citizen participation is meaningful and that citizens can trust the decision-making process about how public resources are used.

Ongoing national stories about privacy rights, the access of lobbyists and private interests to government, and the influence of money on government are reflected in similar accounts closer to home. These serious national and local concerns have done much to shape the current context in which the Open Government Charter amendment goes before voters. While the frustrations that led to the drafting of the proposed amendment have been brewing for years, the City has in fact been moving in the right direction of increasing access to information – albeit too slowly to satisfy many in the community.

The Liveable City Study Team believes the Open Government Amendment, whether or not it passes, is an important step in raising these concerns and moving toward a city government culture that is even more equitable with respect to public involvement in decision-making.

### ***Problems with the Language and Lack of Pragmatism***

The Liveable City Study Team agrees that the amendment aims to address an important community issue. However, we observe that the language appears to be overly broad in some areas and very specific in others and has not been well-scoped or prioritized from an implementation standpoint, although we hypothesize this may be intentional in some areas. The amendment is not as well crafted as it could have been and may represent a certain degree of "overreaching."

The drafters left many questions conspicuously unanswered, such as the definition of "real time," which greatly affects understanding the scope of the amendment and thus the true cost of implementing it. In general, the proposal would have benefited from more expertise regarding scope, priorities and recommended funding strategies.

These shortcomings in the amendment's language lend merit to the argument that certain questions have been left intentionally unanswered in order to set the stage for how the amendment is interpreted through litigation. From the Study Team's standpoint, litigation should be the last resort, not the default mechanism for achieving important community goals. The community needs, expects and deserves more clarity from its leading community advocates.

### ***Problems with City's Reaction to the Language***

The Austin City Council and staff have also done the community a disservice by making extreme assumptions, even if made based on a literal reading of the amendment language, rather than prioritizing the amendment's directives from a pragmatic standpoint. They have tried, but not succeeded in working closely with drafters to devise a practical funding approach and set of definitions, an effort that could have - and should have - been achieved early on in this process.

We are especially disappointed at the city's implication that other priorities, such as a general obligation bond package, would become impossible if the amendments pass. The state of the caption language, recently struck down by the courts and sent back to the City for redrafting, highlights the missed opportunity for the city to reframe for the community some of the vagueness in the original language and to offer pragmatic solutions. Instead the City appears to be fighting transparency to its own citizens, a difficult position at best for a government to defend.

A technology industry truism is that "scope drives content and content drives cost." Opponents of the amendment, including the City of Austin, argue that the scope of the amendment is so vague that the City must assume that *all* city documents must be available online immediately, including all citizen emails to council and staff, no matter the content. For the resulting \$36 million initial cost, Austin taxpayers would get online access to many thousands of pages of information that has not been prioritized in any way and that is generally irrelevant to their needs. For example, there is no pressing public need to post the City's "vehicle fleet maintenance schedules."

The drafters of the amendment point to numerous "qualifying phrases" such as "to the greatest extent practical" in an effort to negate the need for assuming the scope is wide open. These phrases are not definitional. The opponents assume the worst case scenario instead of suggesting a pragmatic solution. The lack of consensus about simple definitional terms and basic scoping issues is what makes the rhetoric around the campaigns for and against the amendment so confusing and, ultimately, so unproductive.

### ***The Heat of the Battle***

Sadly, it appears that any potential step forward initiated by either the drafters or the City has been severely crippled because both sides seem focused on political one-upmanship instead of pragmatic give and take. Both sides have allowed campaign rhetoric to replace reason and realism. The Study Team finds it frustrating that real discussion and dialog have so far been grossly obscured. This issue and the Austin community need and deserve better. We hold out hope that, in the weeks before the May 13 election, a more productive debate may yet ensue.

Setting aside the pros and cons of this particular amendment's language, its

implementation challenges, the quality of the debate to date and even whether or not the amendment passes, the stage is set for continued debate on this topic. How we act on that stage will be our community legacy.

We note that in the days before finalizing this study, there are some indications that City Council, along with some community members, intend to begin drafting possible ordinance language aimed at defining a practical approach to achieving some of the amendment's primary goals. Of course, these efforts should be viewed both as intended to influence voters prior to May 13, but more importantly as beginning to set the stage for what happens after May 13.

## **9. Study Team Recommendations**

The Liveable City Study Team advocates for pragmatic, cost-effective and timely improvements to the open government process in Austin. To do this will require a strong sense of community priorities, effective funding strategies and meaningful cooperation between the City and all segments of the community.

The Liveable City Study Team recognizes that the full impact of any charter amendment can only be established over time by the amendment language itself, by applicable state and federal law, by city council ordinance, by administrative action, and in some cases by litigation.

**(1) The Study Team believes that, whether or not the proposed Open Government amendment passes, the Council can and should, through a well-crafted ordinance, meet the intent of the amendment while minimizing administrative costs and reducing the degree of litigation.**

Such an ordinance should not attempt to implement the amendment as broadly as its opponents have depicted it (the online publication of every city document and email at a high cost to the city). Rather, the ordinance should lay out an implementation strategy that prioritizes the areas of most concern to amendment proponents--land development issues, police records, incentive negotiations, and City Council and high level city staff meetings and communications on pending city business of significant value. Information about these areas should be put online as expeditiously as possible.

For example, the Study Team estimates, and has confirmed with the City, that under a scenario that prioritizes the above information and that we believe would satisfy the current supporters of the amendment, capital cost could be in the \$2 to \$3 million dollar range, with recurring costs in the under \$1 million per year range. This would result in a dramatically improved bottom line, well under the opponents' current projected \$36 million in capital costs and up to \$12 million annually.

The community could further restrict the need for openness to transactions over a specified dollar amount and/or those that will or could appear on the City Council agenda, or do not contain personal information covered under existing privacy laws.

In our view, the city cannot and should not spend \$36 million to achieve the broadest goals of open government – but it likely can spend a tenth of that to achieve nearly all of what the current advocates consider most critical, if there is community consensus for such a move.

**(2) The Liveable City Study Team further recommends that—whether or not the voters approve this amendment-- the City Council establish a Citizen’s Task Force with the purpose of presenting a set of implementation recommendations on how to move towards more open government, including priorities and fiscal constraints.**

The Task Force should include representatives from key stakeholder groups including: neighborhood associations, environmental groups, public safety and civil liberty organizations; the business community; and at least one public or private sector Chief Information Officer (CIO) or equivalent. The Task Force should conduct a series of public meetings to take citizen input before completing its recommendations.

Council should direct the Task Force to give definition to terms in the amendment language such as 'real time' and 'significant city business'; recommend a plan to phase in the requirements of the amendment in a way that prioritizes the areas of most concern to amendment proponents in a fiscally prudent manner; establish guidelines on how to screen electronically emails from citizens to determine which ones should be posted online and which ones archived; and establish criteria to determine what kinds of 'informal meetings' need to be reported on-line."

If the open government charter amendment passes, this Task Force should present its recommendations to the Council within one month, to allow the City to meet the deadlines of the charter amendment in a timely fashion.

If the charter amendment does not pass, this Task Force should make its recommendations to the Council within three months. Council should give due consideration to incorporating these recommendations into an ordinance.

Ideally, the City Manager and City Council would also work with the Task Force to come to consensus with the Austin community on the costs and benefits of opening government. While we recognize that this level of cooperation is unlikely to coalesce before the May 13 election, we believe it is not too early to set the stage for these much-needed next steps.

## **10. Conclusions**

Liveable City Study Team believes that the concept of the proposed Open Government amendment is valid and that it is intended to address critical community concerns and values. We further believe that our City would be better served if our city government were more open. Cogent arguments exist on both sides about how well the language of the current proposal will address these issues and at what cost.

We recommend that the community insist on an end to the escalating rhetoric surrounding the current amendment and ask instead for more consensus and pragmatism. As a community, we can best move forward toward the amendment's goals with concrete dialog about implementation priorities and funding strategies.

Whether or not the amendment passes, Liveable City Study Team calls on our elected officials, as well as community leaders, to continue to work purposefully toward a more open government. We present this ballot study as a hopeful first step in that direction.

**Respectfully submitted, Liveable City Ballot Study Team:**

David Foster  
Robin Rather  
Jim Walker

A PETITION TO AMEND THE CITY OF AUSTIN CHARTER TO ADD THE “OPEN GOVERNMENT ONLINE” AMENDMENT, THE ENTIRE TEXT OF WHICH READS: THE CITY CHARTER FOR THE CITY OF AUSTIN IS AMENDED TO INCLUDE THE FOLLOWING “OPEN GOVERNMENT ONLINE” AMENDMENT.

**SECTION 1: Policy.** 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.

**SECTION 2: Privacy Protected.** Nothing within this amendment should be interpreted in a manner that would violate an individual’s existing constitutional or common law rights to privacy.

**SECTION 3: Open Government Online.** 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.

**(A) OPEN ACCESS TO CITY BUSINESS**

- (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.
- (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.
- (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 or organization may register as an interested person.
- (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.

**(B) OPEN ACCESS TO CITY CALENDARS**

- (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.
- (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.
- (3) Calendars and logs must be posted online in real time and be accessible to the public.
- (4) “Meetings” includes all informal and formal meetings including but not limited to telephone conferences, videoconferences, happy hours, and luncheons.
- (5) This provision must be implemented within six months of approval of this amendment.

**(C) OPEN ACCESS TO CITY ELECTRONIC COMMUNICATIONS**

- (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.

(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.

(D) OPEN ACCESS TO CITY FUNCTIONS - Within six months of approval of this Amendment, the City must maintain online in a manner directly accessible to the general public the following:

(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;

(2) Statements of general policy or interpretations of general applicability;

(3) Administrative staff manuals and instructions to staff of general applicability that affect a member of the public;

(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;

(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;

(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

(7) Agendas, minutes, and transcripts or recordings, except for executive sessions, of all meetings of the City Council, City Boards, and City Commissions.

(E) EFFECTIVE ACCESS TO INFORMATION - 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.

#### **SECTION 4: Public Information.**

The term "public information" means information that is required to be produced under Texas Government Code § 552.021. Public information also includes the following categories that must be produced in response to a public information request:

(A) INFORMATION RELATING TO CIVIL LITIGATION. 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.

(B) ECONOMIC DEVELOPMENT INFORMATION. Information relating to economic development assistance or incentives is public information to which the public has a right of access.

(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.

(2) The City is without authority to shield economic development offers under Texas 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.

(C) AGENCY MEMORANDA. 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.

(D) **PERSONNEL FILES.** 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.

(E) **EMAILS RELATED TO CITY BUSINESS.** 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.

**SECTION 5: Open Meetings.**

(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.

(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.

(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.

**SECTION 6: Retention of Public Information.**

(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.

(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.

(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.

**SECTION 7: Online Access.** 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.

**SECTION 8: Enforcement.** 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.

**SECTION 9: Severability.** 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.

**SECTION 10: Adoption and Implementation.** 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.

## **Background on Charter Amendments**

The City of Austin was originally chartered in 1909 under a Legislative Act which the City later amended to assume home rule status as allowed in the Texas Constitution. An election held on February 12, 1953, totally revised the Charter. The Charter includes a preamble, twelve articles and an appendix. Our Charter establishes the form of government for the City of Austin and lays out the powers and limitations of government. The Charter of any city, and similarly the Constitution of the state, may be amended by citizen petition as allowed in Article IV, Section 1 of the Charter. See Appendix for select sections of the Charter, the full text of the Charter can be found at [www.amlegal.com/austin\\_tx/](http://www.amlegal.com/austin_tx/).

Charter campaigns, as with campaigns to enact ordinances or other legislation affecting city government, represent important milestones in a community's evolution – even when not passing they often point the way towards changing community values, expanding freedom or tightening existing loopholes

Amendments to the Charter are different from ordinances in that the Charter describes the form and obligations of city government whereas ordinances describe how the government will go about meeting those obligations. When a referred (citizen petition), authorized (enough petition signatures are deemed valid) amendment to the Charter passes, the Council then is obligated to enact the ordinance as described in the petition language.

How charter amendments are written is important – the written word sets the policy intention and the legal framework. For purposes of succinct description on a ballot, Council must create a “caption” of the amendment language – the wording of the caption was the subject of recent news headlines and court action. Regardless of the caption language, if the amendment is passed, the language used in the petition shall guide interpretation of the amendment by the city. Once a charter amendment passes it immediately becomes effective.

Charter amendments are often litigated and interpreted over time, which is why the petition language is critical. Legal and administrative interpretation of the amendment language is often the subject of debate as intense as the original petition.

## **Understanding Police “G” Files**

The Open Government amendment seeks to achieve two goals in the area of transparency in matters of public safety, specifically in the area of Austin’s police department. The two goals are to open to public scrutiny the “meet and confer” negotiations, as well as provide greater access to police “G files.” The latter is discussed here in greater detail.

### **Understanding “G” Files in Austin**

Two kinds of information are typically contained in “G files.” These include copies of misconduct complaints submitted by citizens or by other officers and the files of subsequent investigations by the Police Department. Currently, only about 3% to 7% of these files are available to the public. Specifically, only the files that contain complaints where the officer was found guilty and also disciplined with 3 or more days of leave are made public.

The rest of the “G files” not available to the public because Austin opted in to Chapter 143 of the Civil Service Code along with about 20 other Texas cities, including Houston and San Antonio in the late 1990s. All Chapter 143 cities follow the same guidelines about restricting access to “G files.” However, over 2,000 other Texas public safety agencies including the Travis County Sheriff’s Department, did NOT opt in to Chapter 143 and thus have close to 100% of their “G” files available to the public.

The public interest in access to “G” files revolves around the following:

- Understanding performance patterns of individual policepersons
- Understanding performance patterns of the overall police force
- Understanding the management responses to complaints in general as well as particular types of complaints

There are also inherent risks in greater access to files, including increasing the fear of potential retribution for filing a grievance against the police and increasing concerns about privacy.

### **List of Interviews**

Copyright 2006

**liveablecity**

611 S. Congress, Suite 200  
Austin, TX 78704  
(512) 326-3331