

DISCLOSURE ISSUES FOR TAX-EXEMPT ORGANIZATIONS

KATHERINE E. DAVID

Clark Hill Strasburger
2301 Broadway
San Antonio, Texas 78215
(210) 250-6122
kdavid@clarkhill.com

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FEDERAL DISCLOSURE REQUIREMENTS	2
A.	In General.....	2
B.	Exempt Status Application Materials	2
C.	Annual Information Returns	3
D.	Rules for Public Inspection.....	3
1.	Monitoring the Inspector.....	3
2.	Organizations Without Offices	4
E.	Rules for Copies.....	4
1.	Same-Day Turn-Around for In-Person Requests.....	4
2.	30-Day Turn-Around for Other Requests	4
3.	Copies of Parts of Documents.....	5
4.	Use of Agents.....	5
5.	Fees for Copies	5
6.	Forms of Payment.....	6
7.	Exception When Documents are “Widely Available”	6
F.	Exceptions to Disclosure Requirements	7
G.	Whistleblowers	7
H.	Harassment Protection	7
1.	Identifying “Harassment”	7
2.	Multiple Requests from a Single Individual or Address	9
III.	STATE DISCLOSURE REQUIREMENTS.....	9
B.	Member’s Right to Inspect Books and Records.....	15
D.	Public Disclosure of Financial Information	16
E.	Exception to Public Disclosure Requirements.....	16
F.	Financial Records Required to be Produced	16
G.	Nonprofit Periodic Report.....	19
IV.	CONCLUSION.....	19

I. INTRODUCTION

Tax-exempt organizations are not immune from crises and reputational attacks. In extreme cases, a crisis might arise from serious mismanagement, egregiously improper conduct, and even systemized criminal activity. In these cases, public inquiry and media scrutiny can have the salubrious effect of bringing about fundamental change or causing a true bad-actor to close its doors, preventing future harm.

More frequently, an otherwise well-run organization may experience an unfortunate accident, lapse in judgement or protocol, or financial challenges that affect important programs. It is critical that stakeholders and the general public have appropriate information about these events. At the same time, the public interest is not served if a single unfortunate event destroys a good organization or prevents an organization from righting itself and continuing its good works.

Like all organizations, exempt organizations should consider doing contingency planning, to think through the things that could affect the organization if a crisis were to occur.¹ As part of the planning, organization leaders should “practice” for a crisis, perhaps through a table-top exercise in which participants mimic a crisis, and talk through the various constituents who would need to be involved in responding to it.² While the crisis an organization role-plays often is not the one that actually arises in the real world, by doing the exercise, organization leaders will develop muscle memory for responding to crises and will be better able to “kick into gear” when any crisis arises.³

Exempt organizations also should consider implementing a crisis communication plan, which provides a roadmap for information flow and decision-making when a serious and acute crisis occurs.

Not every unfortunate event justifies the use of a crisis communication plan, however. A challenging situation might require special attention without rising to the level of “crisis.” Or, a reputational attack may develop slowly, giving the organization enough time to respond to and diffuse the situation before it rises to the level of “crisis.” In these less-urgent situations, the full crisis communication plan would be out of proportion to the threat. In these situations, organization leaders use their own judgement to balance the competing concerns of candor, privacy, reputation, and disclosure.

As a general rule, it rarely is a good idea to unnecessarily withhold information that is going to “come out” eventually. BNYMellon President and Johns Hopkins University Carey Business School Financial Business Advisory Board member, Karen Peetz states that “transparency equals trust” and is one of the most critical elements beneath the surface in any crisis.⁴ Further, tax-exempt nonprofit organizations are subject to a variety of public disclosure rules pursuant to which they have to make certain information available to the public. At the same time, an organization reasonably might want to manage the flow of information, whether to limit disclosure of damaging facts, slow the pace of a frenetic attack, or protect itself from a harassment campaign. By understanding the applicable rules, an organization can meet its legal obligations while avoiding undue (or overly swift) disclosure.

The following sections describe the disclosure regimes that nonprofit corporations that are described in I.R.C. §501(c) and exempt from tax under I.R.C. §501(a) are subject. This information is designed to help organization leaders balance the need for disclosure and privacy as they navigate challenging situations.

¹ See generally, Karen Peetz “The Tylenol Strategy,” Carey Business (Spring 2016) p.13, available at www.carey.jhu.edu/careybusiness.

² *Id.*

³ *Id.*

⁴ *Id.*

II. FEDERAL DISCLOSURE REQUIREMENTS

A. In General

Section 6014 of the Internal Revenue Code requires that certain information (namely, tax exempt status materials and annual information returns) required from tax-exempt organizations be made public.⁵ Any person who is required to comply with the public disclosure requirements and who willfully fails to do so is subject to a penalty of \$5,000 with respect to each document that is not properly disclosed.⁶

The information must be made available for inspection during regular business hours at the principal office of the organization.⁷ If, the organization regularly maintains one or more regional or district offices having three or more employees, the materials must be made available at each regional or district office.⁸ A “regional or district office” is any office of the organization, other than its principal office, that has paid employees, whether full-time or part-time, whose aggregate number of paid hours a week are normally at least 120.⁹ A site is not considered a regional or district office if:

- The only services provided at the site further exempt purposes (such as day care, health care, or scientific or medical research); and
- The site does not serve as an office for management staff, other than managers who are involved solely in managing the exempt function activities at the site.¹⁰

The organization must provide a copy of its information to any individual upon request.¹¹ The copy must be furnished at no charge, except that the organization may charge a reasonable fee for any copying or mailing charges.¹²

B. Exempt Status Application Materials

An organization must make its exempt status application materials available for public inspection.¹³

For purposes of the disclosure rules, the term “exempt status application materials” includes:

- The prescribed application form (Form 1023, Form 1023-EZ, or Form 1024);
- All documents and statements the Internal Revenue Service requires applicants to file with the Form;
- Any statement or other supporting document submitted by the organization in support of its application (such as a legal brief or a response to questions from the Internal Revenue Service during the application process); and
- Any letter or other document issued by the Internal Revenue Service concerning the application (such as a favorable determination letter or a list of questions about the application).¹⁴

Under the regulations, the term “application for tax exemption” does not include:

- Any application for tax exemption filed by an organization that has not yet been recognized, on the basis of the application, by the Internal Revenue Service as exempt from taxation for any tax year;

⁵ Special rules apply regarding documents that must be provided by local and subordinate organizations covered by a group exemption letter. *See* Treas. Reg. §301.6104(d)-1(f).

⁶ I.R.C. §6685.

⁷ I.R.C. §6104(d)(1)(A).

⁸ *Id.*

⁹ Treas. Reg. §301.6104(d)-1(b)(5).

¹⁰ *Id.*

¹¹ I.R.C. §6104(d)(1)(B).

¹² *Id.*

¹³ I.R.C. §6104(d)(1)(A)(iii).

¹⁴ Treas. Reg. §301.6104(d)-1(b)(3)(i).

- Any application for tax exemption filed before July 15, 1987, unless the organization filing the application had a copy of the application on July 15, 1987;
- In the case of a tax-exempt organization other than a private foundation, the name and address of any contributor to the organization; and
- Any material that is not available for public inspection under I.R.C. §6014.¹⁵

Form 8976, "Notice of Intent to Operate Under Section 501(c)(4)"¹⁶ is not subject to public inspection because it is not an "application" within the meaning of I.R.C. §6104.¹⁷

C. Annual Information Returns

An organization must make its annual information return (Form 990, Form 990-PF, Form 990-EZ) available for public inspection.¹⁸ An I.R.C. §501(c)(3) organization also must make available for public inspection and copying any Form 990-T, *Exempt Organization Business Income Tax Return*, filed after August 17, 2006.¹⁹ The requirement extends to any amended return the organization files with the Internal Revenue Service after the date the return is filed.²⁰ Each annual return must be made available for a period of three years beginning on the date the return is required to be filed (including extensions) or is actually filed, whichever is later.²¹ Stated differently, an organization does not need to provide access to or copies of returns that are more than three years old.

Although a regional or district office ordinarily must satisfy the same rules as the principal office with respect to allowing public inspection and providing copies of documents, it is not required to make its annual information return available for inspection or to provide copies until 30 days after the date the return is required to be filed (including extensions) or is actually filed, whichever is later.²²

The return made available for inspection or provided as a copy must be an exact copy of the return that was filed.²³ It must include all information furnished to the Internal Revenue Service on the return, as well as all schedules, attachments, and supporting documents.²⁴ For example, in the case of a Form 990, the copy must include Schedule A to Form 990 and those parts of the return that show compensation paid to specific persons.²⁵

In the case of a tax-exempt organization other than a private foundation, the name and address of any contributor to the organization does not need to be included.²⁶

D. Rules for Public Inspection

1. Monitoring the Inspector

An organization may have an employee present in the room during an inspection of its exemption application materials or annual information returns.²⁷ The organization must allow the individual conducting the inspection to

¹⁵ Treas. Reg. §301.6104(d)-1(b)(3)(iii).

¹⁶ Electronic form required by new I.R.C. §506, added by the Protecting Americans from Tax Hikes Act ("PATH Act") in December 2015.

¹⁷ T.D. 9775, Preamble §5.

¹⁸ I.R.C. §6104(d)(1)(A)(i).

¹⁹ I.R.C. §6104(d)(1)(A)(ii).

²⁰ Treas. Reg. §301.6104(d)-1(b)(4)(i).

²¹ Treas. Reg. §301.6104(d)-1(a).

²² Treas. Reg. §301.6104(d)-1(e).

²³ Treas. Reg. §301.6104(d)-1(b)(4)(i).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Treas. Reg. §301.6104(d)-1(b)(4)(ii).

²⁷ Treas. Reg. §301.6104(d)-1(c)(1).

take notes freely during the inspection.²⁸ If the individual provides photocopying equipment at the place of inspection, the organization must allow the individual to photocopy the document at no charge.²⁹

2. Organizations Without Offices

If an organization does not maintain a permanent office, it must comply with the public inspection requirements by making its application for exemption and annual information returns available for inspection at a reasonable location of its choice.³⁰ The organization must permit public inspection within a reasonable amount of time after receiving a request for inspection (normally not more than two weeks) and at a reasonable time of day.³¹ At the organization's option, it may mail, within two weeks of receiving the request, a copy of its application for tax-exemption and annual information returns to the requester in lieu of allowing an inspection.³² The organization may charge the requester for copying and actual postage costs only if the requester consents to the charge.

An organization that has a permanent office, but has no office hours or very limited hours during certain times of the year, must make its documents available during those periods when office hours are limited or not available as though it were an organization without a permanent office.³³

E. **Rules for Copies**

1. Same-Day Turn-Around for In-Person Requests

If a request for copies is made in person at an organization's principal, regional, or district office during regular business hours, the organization ordinarily must provide the copies on the day the request is made.³⁴ If unusual circumstances exist such that fulfilling the request on the same business day places an unreasonable burden on the organization, the organization must provide the copies no later than (i) the next business day following the day that the unusual circumstances exist; or (ii) the fifth business day after the date of the request, whichever occurs first.³⁵ "Unusual circumstances" include, but are not limited to:

- Receipt of a volume of requests that exceeds the organization's daily capacity to make copies;
- Requests received shortly before the end of regular business hours that require an extensive amount of copying; and
- Requests received on a day when the organization's managerial staff capable of fulfilling the request is conducting special duties, such as student registration or attending an off-site meeting or convention, rather than significant administrative duties.³⁶

2. 30-Day Turn-Around for Other Requests

An organization must honor a written request for a copy of documents if the request:

- Is addressed to, and delivered by mail, electronic mail, facsimile, or a private delivery service to, a principal, regional, or district office of the organization; and
- Sets forth the address to which the copy of the documents should be sent.³⁷

An organization receiving a written request must mail the copy of the requested documents within 30 days from the date it receives the request.³⁸ However, if the organization requires payment in advance, it is only required to

²⁸ *Id.*

²⁹ *Id.*

³⁰ Treas. Reg. §301.6104(d)-1(c)(2).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Treas. Reg. §301.6104(d)-1(d)(1)(i).

³⁵ Treas. Reg. §301.6104(d)-1(d)(1)(ii).

³⁶ *Id.*

³⁷ Treas. Reg. §301.6104(d)-1(d)(2)(i).

provide copies within 30 days from the day it receives payment.³⁹ In the absence of evidence to the contrary, a request or payment that is mailed is deemed to be received by an organization seven days after the date of the postmark.⁴⁰ A request that is transmitted to the organization by electronic mail or facsimile is deemed to be received the day the request is transmitted successfully.⁴¹ If an organization requiring payment in advance receives a written request without payment or with insufficient payment, the organization must, within seven days from the date it receives the request, notify the requester of its prepayment policy and the amount due.⁴² A copy is deemed provided on the date of the postmark or private delivery mark (or if sent by certified or registered mail, the date of registration or the date of the postmark on the sender's receipt).⁴³ If an individual making a request consents, the organization may provide a copy of the requested document exclusively by electronic mail.⁴⁴ In such case, the material is provided on the date the organization successfully transmits the electronic mail.

3. Copies of Parts of Documents

An organization must fulfill a request for a copy of the organization's entire application for tax exemption or annual return or any specific part or schedules of its application or return.⁴⁵ A request for a copy of less than the entire application or less than the entire return must specifically identify the requested part or schedule.

4. Use of Agents

A principal, regional, or district office may retain an agent to process requests for copies of its documents.⁴⁶ For in-person requests, an agent must be "local" and located within reasonable proximity of the applicable office.⁴⁷ A local agent that receives an in-person request for copies must provide the copies within the time limits and under the conditions that apply to the organization itself.⁴⁸ For example, a local agent generally must provide a copy to a requester on the day the agent receives the request.⁴⁹ When a principal, regional, or district office receives a request made in person, it must immediately provide the name, address, and telephone number of the local agent to the requester.⁵⁰ If an organization received a written request for copies before the agent, the deadline for providing a copy is determined by reference to when the organization received the request, not when the agent received the request.⁵¹ An organization that provides the required information about the agent (in the case of an in-person request) or that transfers a request to the agent (in the case of a written request) is not required to respond further to the requester.⁵² However, the organization still is subject to penalty provisions if the organization's agent fails to provide the documents that are required under I.R.C. §6104.⁵³

5. Fees for Copies

An organization may charge a reasonable fee for copies. A fee is "reasonable" only if it is no more than the total of the applicable per-page copying fee schedule under the Freedom of Information Act (FOIA) and the actual postage costs incurred by the organization to send the copies.⁵⁴ The applicable per-page copying charge is determined without regard to any applicable fee exclusion provided in the fee schedule for an initial or de minimis number of

³⁸ Treas. Reg. §301.6104(d)-1(d)(2)(ii)(A).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Treas. Reg. §301.6104(d)-1(d)(2)(ii)(B).

⁴⁶ Treas. Reg. §301.6041(d)-1(d)(1)(iii); (2)(ii)(C).

⁴⁷ Treas. Reg. §301.6041(d)-1(d)(1)(iii).

⁴⁸ *Id.*; Treas. Reg. §301.6041(d)-1(d)(2)(ii)(C).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Treas. Reg. §301.6041(d)-1(d)(2)(ii)(C).

⁵² Treas. Reg. §301.6041(d)-1(d)(1)(iii); (2)(ii)(C).

⁵³ *Id.*

⁵⁴ Treas. Reg. §301.6041(d)-1(d)(3)(i).

pages (e.g., the first 100 pages).⁵⁵ An organization may require that the requester pay the fee before it provides copies of the documents.⁵⁶ If the organization has provided an individual making a request with notice of the fee, and the individual does not pay the fee within 30 days, or if the individual pays the fee by check and the check does not clear upon deposit, the organization may disregard the request.⁵⁷

If an organization does not require prepayment and a requester does not enclose payment with a request, an organization must receive consent from a requester before providing copies for which the fee charged for copying and postage exceeds \$20.⁵⁸ In order to facilitate a requester's ability to receive copies promptly, an organization must respond to any questions from potential requesters concerning its fees for copying and postage.⁵⁹

6. Forms of Payment

If an organization charges a fee for copying, it must accept payment by cash and money order for requests made in person.⁶⁰ It may accept other forms of payment such as credit cards and personal checks.⁶¹ If an organization charges a fee for copying and postage, it must accept payment by certified check, money order, and either personal check or credit card for requests made in writing. The organization may accept other forms of payment.⁶²

7. Exception When Documents are "Widely Available"

An organization is not required to comply with a request for a copy of its application for tax-exemption or an annual information return if the organization has made the document "widely available."⁶³ A document can be made "widely available" by posting on the organization's webpage, or by having the document posted as part of a database of similar documents of other tax-exempt organizations on a webpage established and maintained by another entity (such as Guidestar).⁶⁴ A document is considered "widely available" only if:

- The webpage through which the document is available clearly informs readers that the document is available and provides instructions for downloading it;
- The document is posted in a format that when accessed, downloaded, viewed, and printed in hard copy, exactly reproduces the image of the document that was filed with the Internal Revenue Service, except for any information permitted by statute to be withheld from public disclosure; and
- Any individual with access to the internet can access, download, view, and print the document without special computer hardware or software required for that format (other than free software available to the public) and without payment of a fee to the tax-exempt organization or to another entity maintaining the webpage.⁶⁵

In order for a document to be "widely available" through an internet posting, the entity maintaining the webpage must have procedures for ensuring the reliability and accuracy of the document that it posts on the page and must take reasonable precautions to prevent alteration, destruction, or accidental loss of the document when posted on its webpage.⁶⁶ In the event the document is altered, destroyed, or lost, the entity must correct or replace the document. If an organization has made its application for tax exemption and/or an annual information return widely available, it must notify any individual requesting a copy where the documents are available (including the web address, if

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Treas. Reg. §301.6104(d)-1(d)(3)(iii).

⁵⁹ Treas. Reg. §301.6104(d)-1(d)(3)(iv).

⁶⁰ Treas. Reg. §301.6104(d)-1(d)(3)(ii)(A).

⁶¹ *Id.*

⁶² Treas. Reg. §301.6104(d)-1(d)(3)(ii)(B).

⁶³ Treas. Reg. §301.6104(d)-2(a). This exception does not affect the requirement that the documents be available for public inspection. *Id.*

⁶⁴ Treas. Reg. §301.6104(d)-2(b)(2)(i).

⁶⁵ *Id.*

⁶⁶ Treas. Reg. §301.6104(d)-2(b)(2)(iii).

applicable).⁶⁷ If the request is made in person, the organization must provide the notice immediately. If the request is made in writing, the notice must be provided within 7 days of receiving the request.

F. Exceptions to Disclosure Requirements

Notwithstanding the fact that an organization must make its exemption application and annual returns available for public inspection, certain information is not required to be disclosed:

- In the case of a tax-exempt organization other than a private foundation, the name and address of any contributor to the organization;
- Any information that was withheld by the Internal Revenue Service from inspection at the Internal Revenue Service national office under I.R.C. §6104(a)(1)(D) (which provides for withholding from public inspection any information relating to a trade secret, patent, process, style of work, or apparatus of the organization if the Internal Revenue Service determines that public disclosure of the information would adversely affect the organization).⁶⁸

G. Whistleblowers

In an organization denies an individual's request for inspection or a copy of an application for tax exemption or an annual information return as required under I.R.C. §6104(d), and the individual wants to alert the Internal Revenue Service to the possible need for enforcement action, the individual may provide a statement to the district director for the key district in which the applicable tax-exempt organization's principal office is located (or such other person as the Commissioner may designate) that describes the reason why the individual believes the denial was in violation of the requirements of I.R.C. §6104(d).⁶⁹

H. Harassment Protection

Upon the Internal Revenue Service's determination that an organization is the subject of a "harassment campaign" and that compliance with the requests that are part of the harassment campaign would be in the public interest, the organization is not required to fulfill a request for a copy that it reasonably believes is part of the campaign.⁷⁰

1. Identifying "Harassment"

A group of requests for an organization's application for tax exemption or annual information returns is indicative of a harassment campaign if the requests are part of a single coordinated effort to disrupt the operations of the organization, rather than to collect information about the organization.⁷¹ Whether a group of requests constitutes a harassment campaign depends on the relevant facts and circumstances, including:

- A sudden increase in the number of requests;
- An extraordinary number of requests made through form letters or similarly-worded correspondence;
- Evidence of a purpose to deter significantly the organization's employees or volunteers from pursuing the organization's exempt purpose;
- Requests that contain language hostile to the organization;
- Direct evidence of bad faith by organizers of the purported harassment campaign;
- Evidence that the organization has already provided the requested documents to a member of the purported harassing group; and

⁶⁷ Treas. Reg. §301.6104(d)-2(d).

⁶⁸ I.R.C. §6104(d)(3)(A),(B).

⁶⁹ Treas. Reg. §301.6104(d)-1(h).

⁷⁰ Treas. Reg. §301.6104(d)-3(a).

⁷¹ Treas. Reg. §301.6104(d)-3(b).

- A demonstration by the organization that it routinely provides copies of its documents upon request.⁷²

Example 1 (Not Harassment): ABC Charity receives an average of 25 requests per month for copies of its three most recent information returns. In the last week of May, ABC Charity was mentioned in a national news magazine story that discusses information contained in ABC Charity's most recently-filed information return. Over the month of June, ABC Charity receives 200 requests for a copy of the return. Other than the sudden increase in the number of requests for copies, there is no other evidence to suggest that the requests are part of an organized campaign to disrupt ABC Charity's operations. Although fulfilling the requests will place a burden on ABC Charity, the facts and circumstances do not show that ABC Charity is subject to a harassment campaign. Therefore, ABC Charity must respond timely to each of the 200 requests it receives in June.⁷³

Example 2 (Not Harassment): The Freedom Fund is a tax-exempt organization that receives an average of 10 requests a month for copies of its annual information returns. From March 1 to March 31, The Freedom Fund receives 25 requests for copies of its documents. Fifteen of the requests come from individuals who The Freedom Fund knows to be active members of the board of organization Americans for Liberty. In the past Americans for Liberty has opposed most of the positions and policies that The Freedom Fund advocates. None of the requesters have asked for copies of documents from The Freedom Fund during the past year. The Freedom Fund has no other information about the requesters. Although the facts and circumstances show that some of the individuals making requests are hostile to The Freedom Fund, they do not show that the individuals have organized a campaign that will place enough of a burden on The Freedom Fund to disrupt its activities. Therefore, The Freedom Fund must respond to each of the 25 requests it receives in March.⁷⁴

Example 3 (Potential Harassment). The facts are the same as in Example 2, except that during March, The Freedom Fund receives 100 requests. In addition to the fifteen requests from members of organization Americans for Liberty's board, 75 of the requests are similarly worded form letters. The Freedom Fund discovers that several individuals associated with Americans for Liberty have urged the Americans for Liberty's members and supporters, via the Internet, to submit as many requests for a copy of The Freedom Fund's annual information returns as they can. The message circulated on the Internet provides a form letter that can be used to make the request. Both the appeal via the Internet and the requests for copies received by The Freedom Fund contain hostile language. During the same year, but before the 100 requests were received, The Freedom Fund provided copies of its annual information returns to the headquarters of Americans for Liberty. The facts and circumstances show that the 75 form letter requests are coordinated for the purpose of disrupting The Freedom Fund's operations, and not to collect information that has already been provided to an association representing the requesters' interests. Thus, the fact and circumstances show that The Freedom Fund is the subject of an organized harassment campaign. To confirm that it may disregard the 90 requests that constitute the harassment campaign, The Freedom Fund must apply to the applicable district director (or such other person as the Commissioner may designate) for a determination. The Freedom Fund may disregard the 90 requests while the application is pending and after the determination is received. However, it must respond within the applicable time limits to the 10 requests it received in March that were not part of the harassment campaign.⁷⁵

Example 4 (Media Request): The facts are the same as in Example 3, except that The Freedom Fund receives five additional requests from five different representatives of the news media who in the past have published articles about The Freedom Fund. Some of these articles were hostile to The Freedom Fund. Normally, the Internal Revenue Service will not consider a tax-exempt organization to have a reasonable belief that a request from a member of the news media is part of a harassment campaign absent additional facts that demonstrate that the organization could reasonably believe the particular requests from the news media to be part of a harassment campaign. Thus, absent such additional facts, The Freedom Fund must respond within the applicable time limits to the five requests that it received from representatives of the news media.⁷⁶

⁷² *Id.*

⁷³ Treas. Reg. §301.6104(d)-3(f) *Example 1.*

⁷⁴ Treas. Reg. §301.6104(d)-3(f) *Example 2.*

⁷⁵ Treas. Reg. §301.6104(d)-3(f) *Example 3.*

⁷⁶ Treas. Reg. §301.6104(d)-3(f) *Example 4.*

2. Multiple Requests from a Single Individual or Address

An organization may disregard any request for copies of all or part of any document beyond the first two received within any 30-day period, or the first four received within any one-year period from the same individual or same address, regardless of whether the Internal Revenue Service has determined that the organization is subject to a “harassment campaign.”⁷⁷

III. STATE DISCLOSURE REQUIREMENTS

In addition to the federal disclosure requirements that apply to organizations exempt under I.R.C. §501(a), a Texas nonprofit corporation also must comply with certain state-law disclosure requirements.

A. Texas Public Information Act

The primary purpose of the Texas Public Information Act⁷⁸ (“TPIA”) is to grant the people access to information “so that they may retain control over the instruments they have created.”⁷⁹ TPIA is liberally construed to implement this policy.⁸⁰ TPIA does not prohibit a governmental body or its public information officer from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.⁸¹ Public information made available voluntarily must be made available to any person.⁸²

1. What is “Public Information”?

Public information is information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business, either (i) by a governmental body; (ii) for a governmental body, if the governmental body owns the information, has the right to access the information, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or (iii) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity, if the information pertains to official business of the governmental body.⁸³ Categories of public information are listed at **Exhibit A**. However, the specific statutory categories of public information do not limit the broad definition of public information in TPIA.⁸⁴

The term “governmental body” can refer to non-governmental entities, including a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by the state of Texas to serve a geographic area of the state.⁸⁵ It also includes the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by funds of the state or of a governmental subdivision of the state.⁸⁶

The Texas Supreme Court has defined “‘supported in whole or part by public funds’ to include only those private entities or their sub-parts sustained, at least in part, by public funds, meaning they could not perform the same or similar services without the public funds.”⁸⁷ Thus, this provision applies only to those private entities that are

⁷⁷ Treas. Reg. §301.6104(d)-3(c).

⁷⁸ Tex. Gov. Code §552.001 et seq.

⁷⁹ *Dominguez v. Gilbert*, 48 S.W.3d 789.

⁸⁰ Tex. Gov. Code §552.001(b).

⁸¹ Tex. Gov. Code §552.007(a).

⁸² Tex. Gov. Code §552.007(b).

⁸³ Tex. Gov. Code §552.002(a).

⁸⁴ *City of Garland v. Dallas Morning News*, 22 S.W.3d 351. (Tex. 2000).

⁸⁵ Tex. Gov. Code §552.003(1)(A)(xi).

⁸⁶ Tex. Gov. Code §552.003(1)(A)(xii), (5).

⁸⁷ *Greater Houston P’ship v. Paxton*, No. 13-0745, 2015 WL 3978138, at *9 (Tex. June 26, 2015), cited in Texas Attorney General, “Public Information Handbook 2016” at 8, available at https://www.texasattorneygeneral.gov/files/og/publicinfo_hb.pdf.

dependent on public funds to operate as a going concern, and only those entities acting as the functional equivalent of the government.⁸⁸

An entity receiving public funds is treated as a governmental body (1) unless the private entity's relationship with the government imposes a specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser; (2) if the private entity's relationship with the government indicates a common purpose or objective or creates an agency-type relationship between the two; or (3) if the private entity's relationship with the government requires the private entity to provide services traditionally provided by governmental bodies.⁸⁹

A property owners' association is subject to TPIA in the same manner as a governmental body if certain conditions are met (See **Exhibit B**).⁹⁰ The governing body of a public retirement system is subject to TPIA in the same manner as a governmental body.⁹¹ A campus police department of a private institution of higher education is a law enforcement agency and a governmental body for purposes of TPIA only with respect to information relating solely to law enforcement activities.⁹²

Information is in connection with the transaction of official business if the information pertains to official business of the governmental body and is created by, transmitted to, received by, or maintained by (i) an officer or employee of the governmental body in the officer's or employee's official capacity; or (ii) a person or entity performing official business or a governmental function on behalf of a governmental body.⁹³ "Official business" means any matter over which a governmental body has any authority, administrative duties, or advisory duties.⁹⁴ These rules take into account the use of electronic devices and cellular phones by public employees and officials in the transaction of official business. TPIA does not distinguish between personal and employer-issued devices; it focuses on the nature of the communication or document. If the information was created, transmitted, received, or maintained in connection with the transaction of "official business," the information constitutes public information subject to disclosure under TPIA.⁹⁵

Public information can exist in a variety of formats, including paper; film; a magnetic, optical solid state, or other device that can store an electronic signal; tape; Mylar; and any physical material on which information can be recorded, including linen, silk, and vellum.⁹⁶ The term "public information" applies to and includes any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.⁹⁷ Thus, public information can exist in books, papers, letters, documents, emails, Internet postings, text messages, instant messages, other electronic communications, printouts, photographs, films, tapes, microfiches, microfilms, photostats, sound recordings, maps, drawings, voice data, and video representations.⁹⁸

2. Requests for Public Disclosure

Generally, a request for information does not need to reference TPIA or be addressed to the organization's public information officer.⁹⁹ (The chief administrative officer of a governmental body is the public information officer.¹⁰⁰) A written communication that reasonably can be considered to be a request for public information is a request for

⁸⁸ *Id.*

⁸⁹ *Texas Ass'n of Appraisal Districts, Inc. v. Hart (App. 3 Dist. 2012) 382 S.W.3d 587.*

⁹⁰ Tex. Gov. Code §552.0036.

⁹¹ Tex. Gov. Code §552.0038.

⁹² Texas Educ. Code §51.212(f) (added by Act of May 21, 2015, 84th Leg., R.S., S.B. 308).

⁹³ Tex. Gov. Code §552.002(a-1).

⁹⁴ Tex. Gov. Code §552.003(2-a).

⁹⁵ Texas Attorney General, "Public Information Handbook 2016," *supra* at 16-17.

⁹⁶ Tex. Gov. Code §552.002(b).

⁹⁷ Tex. Gov. Code §552.002(a-2).

⁹⁸ Tex. Gov. Code §552.002(c).

⁹⁹ See Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974).

¹⁰⁰ Tex. Gov. Code §552.201(a).

information under TPIA.¹⁰¹ However, a request made by electronic mail or fax must be sent to the public information officer or the officer's designee.¹⁰² A governmental body must make a good faith effort to relate a request to information that it holds.¹⁰³ A governmental body may ask a requestor to clarify a request for information if the request is unclear.¹⁰⁴ If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of the request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.¹⁰⁵

A request for information is considered withdrawn if the requestor does not respond in writing to a governmental body's written request for clarification or additional information within 61 days.¹⁰⁶ The governmental body's written request for clarification or additional information must include a statement as to the consequences of the failure by the requestor to timely respond.¹⁰⁷ If the requestor's original request for information was sent by electronic mail, a governmental body may consider the request for information withdrawn if the governmental body sends its request for clarification to the electronic mail address from which the original request was sent or another electronic mail address, and the governmental body does not receive a timely written response or response by electronic mail from the requestor.¹⁰⁸ If the requestor's original request for information was not sent by electronic mail, a governmental body may consider the request for information withdrawn if the governmental body sent its request for clarification by certified mail to the requestor's physical or mailing address, and the governmental body does not receive a timely written response from the requestor.¹⁰⁹ When a governmental body, acting in good faith, requests clarification or narrowing of an unclear or overbroad request, the ten business day period to request an attorney general ruling is measured from the date the requestor responds to the request for clarification or narrowing.¹¹⁰

TPIA applies only to information that already exists,¹¹¹ so a governmental body does not need to create or prepare new information in response to a request. Further, TIPA does not require a governmental body to inform a requestor if the requested information comes into existence after the request has been made.¹¹²

TPIA prohibits a governmental body from inquiring into a requestor's reasons or motives for requesting information,¹¹³ and a governmental body must treat all requests for information uniformly.¹¹⁴

Upon receipt of a request, the public information officer of a governmental body must promptly produce public information for inspection, duplication, or both.¹¹⁵ "Promptly" means as soon as possible under the circumstances, that is, within a reasonable time, without delay.¹¹⁶ The Attorney General acknowledges that "it is a common misconception that a governmental body may wait ten business days before releasing the information."¹¹⁷ In reality, the ten-day period is not a safe-harbor. What constitutes a reasonable amount of time depends on the facts in each case, including the volume of information requested.¹¹⁸

The officer can comply with the disclosure requirement by:

¹⁰¹ Open Records Decision No. 44 at 2 (1974).

¹⁰² Tex. Gov. Code §552.301(c).

¹⁰³ Open Records Decision No. 561 at 8 (1990).

¹⁰⁴ Tex. Gov. Code §552.222(b).

¹⁰⁵ *Id.*

¹⁰⁶ Tex. Gov. Code §522.222(d).

¹⁰⁷ Tex. Gov. Code §552.222(e).

¹⁰⁸ Tex. Gov. Code §552.222(g).

¹⁰⁹ Tex. Gov. Code §552.222(f).

¹¹⁰ *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

¹¹¹ *See* Tex. Gov. Code §§552.002, .021, .227, .351.

¹¹² Open Records Decision No. 452 at 3 (1986).

¹¹³ Tex. Gov. Code §552.222.

¹¹⁴ Tex. Gov. Code. §552.223.

¹¹⁵ Tex. Gov. Code §552.221(a).

¹¹⁶ *Id.*

¹¹⁷ Texas Attorney General, "Public Information Handbook 2016," *supra* at 22.

¹¹⁸ Open Records Decision No. 467 at 6 (1987).

- Providing the public information for inspection or duplication in the offices of the governmental body;
- Sending copies of the public information by first class United States mail if the person requesting the information requests that copies be provided and pays the postage and any other applicable charges that the requestor has accrued under Subchapter F of TIPA;¹¹⁹ or
- Referring the requestor to an exact Internet location or uniform resource locator (URL) address on a website maintained by the political subdivision and accessible to the public if the requested information is identifiable and readily available on that website. If the person requesting the information prefers a manner other than access through the URL, the political subdivision must supply the information by one of the other two methods.¹²⁰ Further, an e-mail providing the URL must contain a statement in a conspicuous font clearly indicating that the requestor may nonetheless access the requested information by inspection or duplication or by receipt through United States mail.¹²¹

Generally, if a requestor chooses to inspect the public information, he or she must complete the inspection within ten business days after the date the governmental body makes the information available, or the request will be withdrawn by operation of law.¹²² However, a governmental body is required to extend the inspection period upon receiving a written request for additional time.¹²³ If the information is needed by the governmental body, the public information officer may interrupt a requestor's inspection of the information.¹²⁴

If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information must certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.¹²⁵ A number of Open Records Opinions discuss when information is in "active use:"¹²⁶

- Open Records Decision No. 225 (1979): a secretary's handwritten notes are in active use while the secretary is typing minutes of a meeting from them.
- Open Records Decision No. 148 (1976): a faculty member's file is not in active use the entire time the member's promotion is under consideration.
- Open Records Decision No. 96 (1975): directory information about students is in active use while the notice required by the federal Family Educational Rights and Privacy Act of 1974 is being given.
- Open Records Decision No. 57 (1974): a file containing student names, addresses, and telephone numbers is in active use during registration.

If an officer for public information cannot produce public information for inspection or duplication within 10 business days after the date the information is requested, the officer must certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.¹²⁷

¹¹⁹ Tex. Gov. Code §552.221(b).

¹²⁰ Tex. Gov. Code §552.221(b-1).

¹²¹ Tex. Gov. Code §552.221(b-2).

¹²² Tex. Gov. Code §552.225(a); *see also* *Open Records Decision No. 512 (1988)* (statutory predecessor to Tex. Gov. Code §552.225 did not apply to requests for copies of public information or authorize governmental body to deny repeated requests for copies of public records), *cited in* Texas Attorney General, "Public Information Handbook 2016," *supra* at 25.

¹²³ Tex. Gov. Code §552.225(b).

¹²⁴ Tex. Gov. Code §552.225(c).

¹²⁵ Tex. Gov. Code §552.221(c).

¹²⁶ Texas Attorney General, "Public Information Handbook 2016," *supra* at 22-23.

¹²⁷ Tex. Gov. Code §552.221(d).

3. Exceptions to Public Disclosure

Subchapter C of TPIA¹²⁸ sets out a number of exceptions to the public disclosure requirements. The exceptions fall into two categories: “mandatory exceptions,” which protect information that is confidential by law and that a governmental body is prohibited from releasing subject to criminal penalties;¹²⁹ and “permissive exceptions,” which give the governmental body the discretion to either release or withhold the information.

The mandatory exceptions that might be most likely to apply to nonprofit organizations that constitute governmental bodies include:

- Information that is confidential by constitutional or statutory law or judicial decision (such as employment records, medical and health records, reports, records and working papers used or developed in an investigation of alleged child abuse or neglect, etc.);¹³⁰
- Information in a personnel file;¹³¹
- Certain trade secrets and commercial and financial information;¹³²
- Student records;¹³³
- Certain addresses, telephone numbers, Social Security Numbers, and personal family information;¹³⁴
- Credit card, debit card, charge card, and access device numbers;¹³⁵
- Email addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body;¹³⁶ and
- Family violence shelter center and sexual assault program information.¹³⁷

Mandatory exceptions are not waivable.

The permissive exceptions that might be most likely to apply to nonprofit organizations that constitute governmental bodies include:

- Information related to competition or bidding;¹³⁸
- Information related to the location or price of property;¹³⁹
- Memoranda or letters that would not be available by law to a party in litigation with the agency;¹⁴⁰
- A test item developed by an educational institution that is funded wholly or in part by state revenue or by a licensing agency or governmental body.¹⁴¹

The permissive exceptions do not require the requested information to be withheld, so the governmental body can choose not to raise a permissive exception and to release the information to the public. A governmental body’s failure to comply with the requirements to request an Attorney General’s decision on whether a permissive exception applies may constitute a waiver of the exception.¹⁴²

¹²⁸ Tex. Gov. Code §552.101 *et seq.*

¹²⁹ Tex. Gov. Code §552.352

¹³⁰ Tex. Gov. Code §552.101.

¹³¹ Tex. Gov. Code §552.102.

¹³² Tex. Gov. Code §552.110.

¹³³ Tex. Gov. Code §552.114.

¹³⁴ Tex. Gov. Code §552.117.

¹³⁵ Tex. Gov. Code §552.136.

¹³⁶ Tex. Gov. Code §552.137.

¹³⁷ Tex. Gov. Code §552.138.

¹³⁸ Tex. Gov. Code §552.104.

¹³⁹ Tex. Gov. Code §552.105.

¹⁴⁰ Tex. Gov. Code §552.111.

¹⁴¹ Tex. Gov. Code §552.122.

¹⁴² Tex. Gov. Code §552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ).

4. Requests for Attorney General Decisions

A governmental body that wishes to withhold information from public disclosure under one of the exceptions must ask for a decision from the Attorney General about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.¹⁴³

Within 10 business days of receiving the request for information, the governmental body must ask for an Attorney General decision and state which exceptions apply to the information.¹⁴⁴ The governmental body must provide to the requestor a written statement that the governmental body wishes to withhold the requested information and that the governmental body has asked for an Attorney General decision¹⁴⁵ and must provide a copy of its written communication to the Attorney General in which it asks for a decision.¹⁴⁶ If the governmental body's written communication to the Attorney General discloses the requested information, a redacted copy must be provided.

If the information involves another party's personal or property interests, the governmental body must make a "good faith attempt" to notify the affected parties in writing, in a the form prescribed by the Attorney General.¹⁴⁷

Within 15 business days of receiving the request for information, the governmental body must submit to the Attorney General:

- Written comments stating why the stated exceptions apply (with a copy to the requestor).¹⁴⁸
- A copy of the written request.¹⁴⁹
- A signed statement stating the date the request for information was received by the governmental body or evidence sufficient to establish the date the request was received.¹⁵⁰
- Copies of the documents at issue or a representative sample of the documents at issue, labeled to indicate which exceptions apply to which parts of the documents.¹⁵¹

A governmental body's duty to request a ruling that an exception applies arises only after it receives a written (not verbal) request for information.¹⁵² "Writing" includes electronic mail.¹⁵³

5. The Attorney General's Practical Tips on Writing Effective Briefs to the Open Records Division¹⁵⁴

- Consult The Public Information Handbook¹⁵⁵ and follow the standards set forth in the Handbook to meet the requirements of the claimed exceptions. For example, if claiming exception under TPIA §552.103 (the "litigation exception"), explain how the litigation is either pending or reasonably anticipated AND how the documents at issue relate to the pending or anticipated litigation.
- Be sure to explain everything in the briefing. Assume the audience knows absolutely nothing about the situation at hand. If it is not abundantly clear, accurately and adequately describe the submitted documents. For example, how are these documents responsive to the instant request for information? Who are the parties described in the documents? What is their relationship to the governmental body? If claiming that any of the documents are privileged under either the attorney-client or work product privileges, explain whether or not any of the parties are attorneys for the governmental body.

¹⁴³ Tex. Gov. Code §552.301(a).

¹⁴⁴ Tex. Gov. Code §552.301(b).

¹⁴⁵ Tex. Gov. Code §552.301(d)(1).

¹⁴⁶ Tex. Gov. Code §552.301(d)(2).

¹⁴⁷ Tex. Gov. Code §552.305(d).

¹⁴⁸ Tex. Gov. Code §552.301(e)(1)(A), (e-1).

¹⁴⁹ Tex. Gov. Code §552.301(e)(1)(B).

¹⁵⁰ Tex. Gov. Code §552.301(e)(1)(C).

¹⁵¹ Tex. Gov. Code §552.301(e)(1)(D), (2).

¹⁵² Open Records Decision No. 304 at 2 (1982).

¹⁵³ Tex. Gov. Code §552.301.

¹⁵⁴ Taken from <https://texasattorneygeneral.gov/og/open-government>.

¹⁵⁵ Available at https://www.texasattorneygeneral.gov/files/og/publicinfo_hb.pdf.

- Do not redact the documents submitted for review. The Open Records Division must be able to read them if it is to rule on them.
- Provide adequate background information on the governmental body and the documents submitted. If not clear, explain how the submitted documents are responsive to the request for information. Explain what, if anything, has already been released to the requestor.
- Proofread all correspondence. Have someone else re-read the submission for minor clerical or typographical errors. Make sure section numbers for claimed exceptions are typed correctly (*e.g.*, 552.103 vs. 552.130). Also check for incorrectly-typed names, dates, and spelling errors.
- Mark all submissions clearly, carefully, and consistently. Make sure the exhibit numbers on the documents match up with the exhibit numbers in the brief. Reference previous correspondence with Open Records Division office on all future, related correspondence.
- Be sure to comply with the deadlines required under TIPA §§552.301 and 552.305

B. Member’s Right to Inspect Books and Records¹⁵⁶

A member of a nonprofit corporation, on written demand stating the purpose of the demand, is entitled to examine and copy at the member’s expense, in person or by agent, accountant, or attorney, at any reasonable time and for proper purpose, the books and records of the corporation relevant to that purpose.¹⁵⁷

Regarding the definition of “books and records,” Texas law requires a nonprofit corporation to maintain:

- Books and records of accounts;
- Minutes of the proceedings of the members or the governing authority of the entity and committees of the members or the governing authority of the entity;
- At its registered office or principal place of business, or at the office of its transfer agent or registrar, a current records of the name and mailing address of each member of the entity.¹⁵⁸

Courts have recognized that the statute is not absolute in its disclosure requirements. For example, the statutory right of inspection does not trump the attorney-client privilege.¹⁵⁹ Orders to protect confidential information are proper in requests made under the statute, and a member’s own right to inspect and copy books and records does not trump privileges or other rights to confidentiality provided by Texas law.¹⁶⁰ However,

in the absence of a showing that the right of inspection has been used by a member for harassment or to impede the management of the corporation, the right of inspection is not limited in number and certainly not to only one inspection...

The furnishing of a financial statement of the corporation in lieu of the original financial records...is not sufficient to satisfy a right to inspect the corporate books.¹⁶¹

C. Financial Records Required to be Kept

Section 22.352(a) of the Texas Business Organizations Code (“TBOC”) provides that a nonprofit corporation “shall maintain current and accurate financial records with complete entries as to each financial transaction of the corporation, including income and expenditures, in accordance with generally accepted accounting principles.” Further, TBOC §22.352(b) requires the corporation’s board of directions to:

¹⁵⁶ **The author gratefully acknowledges the significant contribution to this portion of the article made by Nicola Toubia of Fuentes Toubia, PLLC, Houston, Texas.**

¹⁵⁷ Tex. Bus. Org. Code §22.351.

¹⁵⁸ Tex. Bus. Org. Code §3.151(a).

¹⁵⁹ *Huie v. DeShazo*, 922 S.W.2d 920, 924 (Tex. 1996).

¹⁶⁰ *Gaughan v. National Cutting Horse Ass’n*, 351 S.W.3d 408, 416 (Tex.App.—Ft. Worth 2011, pet. denied).

¹⁶¹ *Citizens Ass’n for Sound Energy v. Bolz*, 886 S.W.2d 283, 290 (Tex.App.—Amarillo 1994, writ denied).

annually prepare or approve a financial report for the corporation for the preceding year. The report must conform to accounting standards as adopted by the American Institute of Certified Public Accountants and must include:

- (1) A statement of support, revenue and expenses;
- (2) A statement of changes in fund balances;
- (3) A statement of functional expenses; and
- (4) A balance sheet for each fund.

D. Public Disclosure of Financial Information

Section 22.353 of the TBOC sets forth a nonprofit corporation's obligation to make its financial information available to the general public. In particular, it provides that:

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

If the nonprofit corporation does not maintain a financial record, prepare an annual report, or make these documents available to the general public, then it commits a Class B misdemeanor.¹⁶² Currently, a Class B misdemeanor would trigger a \$2,000.00 fine, confinement in jail not to exceed 180 days, or both the fine and jail time.¹⁶³

E. Exception to Public Disclosure Requirements

Section 22.355 of the TBOC provides exemptions from certain the reporting and disclosure requirements of TBOC §§22.352, 22.353, and §22.354. Specifically, those sections do not apply to:

- (1) A corporation that solicits funds only from its members;
- (2) A corporation that does not intend to solicit and receive and does not actually raise or receive during a fiscal year contributions in an amount exceeding \$10,000 from a source other than its own membership; or
- (3) Certain private or independent institutions of higher learning and related organizations.

F. Financial Records Required to be Produced

Only one recent Texas decision has analyzed the scope of TBOC §22.353 and what records a nonprofit corporation must produce.¹⁶⁴ In *Knapp Medical Center v. Grass*, 443 S.W.3d 182 (Tex.App.—Corpus Christi 2013, no pet.), the court considered whether the Knapp Medical Center, a hospital and Texas nonprofit corporation, met the statutory exception to the disclosure rule. Specifically, Knapp argued that it did not have to disclose any records because it fell under the exemption of TBOC §22.355(2), above.

The hospital received grants from a foundation, the sole purpose of which was to provide financial support for the hospital. The hospital did not solicit charitable contributions from the general public. The court agreed with

¹⁶² Tex. Bus. Org. Code §22.354.

¹⁶³ Tex. Pen. Code §12.22.

¹⁶⁴ In *Denton County Electric Cooperative v. Hackett*, 368 S.W.3d 765 (Tex.App.-Fort Worth 2012, pet denied), a member of a nonprofit electric cooperative sued, among other things, for the cooperative to disclose certain records under the Texas Electric Cooperative Corporation Act ("ECCA"). The court noted that the ECCA does not give cooperative members the same rights as nonprofit members to inspect books and records under TBOC §22.351.

the hospital's interpretation of the statute and reasoned that the grants that the hospital received from its related foundation were not charitable contributions from the general public. Because the hospital's grants were not contributions, it met the exception of section TBOC §22.355(2). In reaching its decision, the court relied on *Texas Appellate Practice & Educ. Resource Ctr. v. Patterson*, 902 S.W.2d 686 (Tex.App.—Austin 1995, writ denied). In that case, discussed more fully below, a Texas nonprofit corporation successfully argued that grants from the government or other charitable organizations were distinguishable from contributions from the general public. Thus, the nonprofit corporation did not have to produce any of its financial records because it received all of its income from grants.

Although the court decided the *Knapp* case on a narrow exception, the opinion provides a good explanation and interpretation of TBOC §22.353. Importantly, the court construes that the plain meaning of section TBOC §22.353 requires all Texas nonprofit corporations “to keep records, books and annual reports of the nonprofit corporation’s *financial activity* on file at the nonprofit corporation[’s] registered or principal office for at least three years after the close of the nonprofit’s fiscal year.”¹⁶⁵ The court clarifies that section TBOC §22.353 only require that certain financial information be made available. It noted that the legislative intent behind article 1396-22.23A of the Texas Nonprofit Corporation Act, the predecessor to TBOC §22.353, was to “open the windows of transparency to nonprofit organizations who solicited money from the public by keeping financial records on file and opening those records for public inspection, if so requested.”¹⁶⁶ The *Knapp* decision is relevant because it clarifies that TBOC §22.353 is limited to financial information.

Because there is a dearth of case law interpreting the current disclosure statute, it is important to review those cases that analyzed its predecessor statute—Article 1396-2.23A of the Texas Nonprofit Corporation Act—to determine whether the requirement to provide financial records is broad or narrow in scope. The earlier cases support a narrow meaning of financial records. Article 1396-2.23A provides:

- A. A corporation shall maintain current true and accurate *financial records* with full and correct entries made with respect to all *financial transactions* of the corporation, including all income and expenditures, in accordance with generally accepted accounting practices.
- B. Based on these records, the board of directors shall annually prepare or approve a *report of the financial activity* of the corporation for the preceding year ...
- C. All records, books and annual reports *of the financial activity of the corporation* shall be kept at the registered office or principal office of the corporation in this state for at least three years after the closing of each fiscal year and shall be available to the public for inspection and copying there during normal business hours. The corporation may charge for the reasonable expense of preparing a copy of a record or report.¹⁶⁷

Several courts have interpreted this statute and found that it is narrow in scope. For example, in *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998), members of the general public wanted the Bay Area Citizens Against Lawsuit Abuse, a Texas nonprofit corporation (“BACALA”), to produce the names of its contributors in response to a trial court’s discovery orders. BACALA did not want to disclose its contributors’ names and argued that the First Amendment prohibited disclosure. The public demanding the disclosure countered that because BACALA voluntarily incorporated as a Texas nonprofit corporation, it waived any constitutional rights to protecting its contributors’ identities and that article 1396-2.23A of the TNPCA required BACALA to disclose them. Although the court found—and BACALA agreed—that some financial records, such as financial statements and tax returns, are subject to disclosure, the court ruled that the statute does not require disclosure of contributors’ names. In reaching this decision, the Texas Supreme Court analyzed the legislative history to article 1396-2.23A of the TNPCA and stated:

[T]he purpose of the legislation was not to force non-profit corporations to identify the exact sources of their income; rather, it was to expose the nature of the expenditures of that money once received from the

¹⁶⁵ *Knapp, supra*, at 188(emphasis added).

¹⁶⁶ *Id.*

¹⁶⁷ Tex. Rev. Civ. Stat. Ann. art. 1396-2.23A (expired Jan. 2010) (emphasis added).

public and to make non-profit organizations accountable to their contributions for those expenditures. Thus, the seemingly broad scope of the statute's language is not matched by the legislative intent behind the statute.¹⁶⁸

The Texas Supreme Court found that the statute should be narrowly interpreted.

The appellate court for the district of Austin also found that article 1396-2.23A of the TNPCA should be narrowly interpreted.¹⁶⁹ In reviewing whether State Senator Patterson had access to financial records of the Texas Resource Center, the court concluded that he did not. It reasoned:

the legislative history of Article 1396-2.23A sustains the Resource Center's narrow interpretation of the scope of the statute. Several times during the Senate hearings on S.B. 857, the bill's author, Senator Gene Jones, emphasized that the bill was a narrowly drawn law that was only meant to apply to certain non-profit corporations:

[The bill] would simply give the right of people who are considering making a contribution, the right to know that there are records kept consistent with proper accounting principles in the office of the organization soliciting those funds during business hours.¹⁷⁰

The opinion continues to cite several other places in the legislative history to article 1396-2.23A of the TNPCA where Senator Jones emphasizes that the bill is "narrowly drawn."

In *Gaughan v. National Cutting Horse Association*, 351 S.W.3d 408 (Tex.App.—Fort Worth 2011 pet. denied), the appellate court also held that article 1396-2.23A of the TNPCA means that a member of the general public may only inspect the records, books and annual reports of the financial activity of the nonprofit corporation. Citing the *BACALA* decision, the appellate court said that financial records do not include the names of contributors or members and that article 1396-2.23A of the TNPCA "does not require the blanket disclosure of contributors' names for public inspection."¹⁷¹ Further, it summarized, like prior cases, the purpose of the disclosure statute is to make a nonprofit corporation accountable to its contributors for expenditures of the contributions that the nonprofit corporation receives.

Moreover, the *Gaughan* court concluded that article 1396-2.23A of the TNPCA is not absolute in scope and that nonprofit corporations may seek orders to protect the confidential information that they maintain. In *Gaughan* a member of the cutting horse association sought to (1) get all of the association's books and records under article 1396-2.23;¹⁷² and (2) disclose them to the general public under article 1396-2.23A of the TNPCA. The court was not impressed and ruled that "a member's own right to inspect and copy books and records under article 1396-2.23 does not trump privileges or other rights to confidentiality provided for by Texas law."¹⁷³ Importantly, the court found that *Gaughan* could not disseminate to the public either records that were covered by a protective order or those that were not financial records under article 1396-2.23A of the TNPCA.

¹⁶⁸ *Bay Area Citizens*, *supra* at 381.

¹⁶⁹ *See Texas Appellate Practice and Educational Resource Center v. Patterson*, 902 S.W.2d 686 (Tex.App.—Austin 1995, *writ denied*)

¹⁷⁰ *Id.* at 688.

¹⁷¹ *Gaughan*, *supra*, at 415.

¹⁷² Article 1396-2.23 of the TNPCA is the predecessor to TBOC §22.351 and similarly gives a member of a nonprofit corporation a broader inspection right than a member of the general public so long as the member has a proper purpose for the inspection.

¹⁷³ *Gaughan*, *supra*, at 418.

G. Nonprofit Periodic Report

Nonprofit entities that are exempt from Texas margin tax do not have to file annual Public Information Reports with the Comptroller of Public Accounts.¹⁷⁴ However, the Secretary of State may require a nonprofit corporation to file a “Nonprofit Periodic Report” not more than once every four years.¹⁷⁵ The report must be made on the form promulgated by the Secretary of State and include:

- (1) The name of the corporation;
- (2) The state or country under the laws of which the corporation is incorporated;
- (3) The address of the registered office of the corporation in this state and the name of the registered agent at that address;
- (4) If the corporation is a foreign corporation, the address of the principal office of the corporation in the state or country under the laws of which the corporation is incorporated; and
- (5) The names and addresses of the directors and officers of the corporation.¹⁷⁶

Reports are not filed annually or on any regular schedule, but only upon request. The Secretary of State requests a report by sending a notice that the report is due and a copy of the proper form to the corporation’s registered agent or to the corporation’s last known address or known place of business.¹⁷⁷ The report must be filed not later than the 30th day after the notice is mailed.¹⁷⁸

A corporation that fails to file its report when it is due forfeits its right to conduct affairs in Texas.¹⁷⁹ A corporation can be relieved of forfeiture by filing the required report, together with the revival fee, not later than the 120th day after the date of mailing of the notice of forfeiture.¹⁸⁰ If the corporation fails to revive its right to conduct affairs, it is subject to involuntary termination (for a domestic corporation) or revocation of its registration to transact business in Texas (for a foreign corporation).¹⁸¹ In order to be reinstated, the corporation must follow the procedures set out in TBOC §22.365. If the corporation’s name is not available at the time of reinstatement, the corporation must amend its corporate name.¹⁸²

On many occasions, the author has seen nonprofit corporations be subject to forfeiture or involuntary termination because they did not receive the notice sent to the registered agent. Typically, this result occurs because the organization moved from its original registered office and failed to change its registered office on file with the Secretary of State.

IV. CONCLUSION

As a general rule, transparency is central to good governance, and organizations that are exempt from tax (and receive tax deductible contributions) have a responsibility to provide information about their operations to the general public. At the same time, an organization should protect its interests, and the interests of its stakeholders, by keeping confidential information that is not required to be disclosed or by managing the flow of information.

By understanding the applicable rules, an organization can meet its legal obligations while avoiding undue (or overly swift) disclosure. In doing so, it may be able to stave off, better manage a crisis.

¹⁷⁴ See Tex. Tax §171.203(a) (imposing filing requirement only on entities subject to tax).

¹⁷⁵ Tex. Bus. Org. Code §22.357(a).

¹⁷⁶ Tex. Bus. Org. Code §22.357(a), (b).

¹⁷⁷ Tex. Bus. Org. Code §22.358.

¹⁷⁸ Tex. Bus. Org. Code §22.359.

¹⁷⁹ Tex. Bus. Org. Code §22.360(a).

¹⁸⁰ Tex. Bus. Org. Code §22.363(a).

¹⁸¹ Tex. Bus. Org. Code §22.364(a).

¹⁸² Tex. Bus. Org. Code §22.364(c).

Exhibit A: Categories of Public Information; Examples (Tex. Gov. Code §552.022)

Sec. 552.022. CATEGORIES OF PUBLIC INFORMATION; EXAMPLES. (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;
- (2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;
- (4) the name of each official and the final record of voting on all proceedings in a governmental body;
- (5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;
- (6) the name, place of business, and the name of the municipality to which local sales and use taxes are credited, if any, for the named person, of a person reporting or paying sales and use taxes under Chapter 151, Tax Code;
- (7) a description of an agency's central and field organizations, including:
 - (A) the established places at which the public may obtain information, submit information or requests, or obtain decisions;
 - (B) the employees from whom the public may obtain information, submit information or requests, or obtain decisions;
 - (C) in the case of a uniformed service, the members from whom the public may obtain information, submit information or requests, or obtain decisions; and
 - (D) the methods by which the public may obtain information, submit information or requests, or obtain decisions;
- (8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;
- (9) a rule of procedure, a description of forms available or the places at which forms may be obtained, and instructions relating to the scope and content of all papers, reports, or examinations;
- (10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;
- (11) each amendment, revision, or repeal of information described by Subdivisions (7)-(10);
- (12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;
- (13) a policy statement or interpretation that has been adopted or issued by an agency;
- (14) administrative staff manuals and instructions to staff that affect a member of the public;
- (15) information regarded as open to the public under an agency's policies;

- (16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege;
- (17) information that is also contained in a public court record; and
- (18) a settlement agreement to which a governmental body is a party.

(b) A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is confidential under this chapter or other law.

Exhibit B: Property Owners' Associations subject to TPIA (Tex. Gov. Code §552.0036)

Sec. 552.0036. CERTAIN PROPERTY OWNERS' ASSOCIATIONS SUBJECT TO LAW. A property owners' association is subject to this chapter in the same manner as a governmental body:

(1) if:

(A) membership in the property owners' association is mandatory for owners or for a defined class of owners of private real property in a defined geographic area in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more;

(B) the property owners' association has the power to make mandatory special assessments for capital improvements or mandatory regular assessments; and

(C) the amount of the mandatory special or regular assessments is or has ever been based in whole or in part on the value at which the state or a local governmental body assesses the property for purposes of ad valorem taxation under Section 20, Article VIII, Texas Constitution; or

(2) if the property owners' association:

(A) provides maintenance, preservation, and architectural control of residential and commercial property within a defined geographic area in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more; and

(B) is a corporation that:

(i) is governed by a board of trustees who may employ a general manager to execute the association's bylaws and administer the business of the corporation;

(ii) does not require membership in the corporation by the owners of the property within the defined area; and

(iii) was incorporated before January 1, 2006.

Note: The only county in Texas with a population of 2.8 million or more is Harris County. The counties adjoining Harris County are Waller, Fort Bend, Brazoria, Galveston, Chambers, Liberty, and Montgomery. Thus, property owners' associations located in those counties and otherwise within the parameters of section 552.0036 are considered to be governmental bodies for purposes of the Act.¹⁸³

¹⁸³ Texas Attorney General, "Public Information Handbook 2016" at 10, available at https://www.texasattorneygeneral.gov/files/og/publicinfo_hb.pdf.