

Through the Looking Glass: Adventures in Navigating Nonprofit Legal Compliance

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Presented by:
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Request for Donor Information

Dear Alice –

A few weeks ago, I received an email with a request for a list of all foundation donors, including the donor's name, email address, and donation amount. That's crazy! I don't have time for this nonsense and that information is private! I can just ignore the email, right?

Frazzled Foundation Director

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Access to Foundation Information

- Access to records of a nonprofit organization
- Access under the Public Information Act, if applicable

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Financial Records

- Nonprofit corporations required to 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.” Bus. Org. Code 22.352(a)
- Board of directors must annually prepare or approve a financial report for the preceding year. Bus. Org. Code 22.352(b)
- Must be **available to the public for inspection** for 3 years.

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IRS Regs Do Not Require Disclosure of Donor Names/Addresses

- A tax-exempt organization is generally **not required to disclose** publicly the **names or addresses of its contributors** on its annual return (i.e., IRS Form 990). The regulations specifically exclude the name and address of any contributor to the organization from the definition of disclosable documents.
- Does not apply to private foundations.

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Texas Public Information Act

- Provides the public access to:
 - Information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business; and
 - Held by or for a governmental body

Tex. Gov't Code 552.002

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Texas Public Information Act

- "Governmental body" **includes the part**, section, or portion **of an organization**, corporation, commission, committee, institution, or agency that spends or is **supported in whole or in part by public funds**.
- "Public funds" means funds of the state or of a governmental subdivision of the state.
- Tex. Government Code 552.003

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Texas Public Information Act

If the Act applies to your organization ...

- Review and **respond to written requests** for information in accordance with the procedures of the Act.
- Submit **timely request for Open Records Letter Ruling** if you believe an exception to the Act applies
- For guidance: Texas Public Information Act Handbook (available on Texas Attorney General's website)

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Texas Public Information Act Exceptions

- Tex. Gov't Code Section 552.101 **excepts information from disclosure that is confidential by law** (constitution, statute, or judicial decision).
- *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998) - Texas Supreme Court determined that the First Amendment **right to freedom of association** could protect an advocacy organization's list of contributors from compelled disclosure.
- Relied upon by AG Letter Rulings to withhold donor identity

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Texas Public Information Act Exceptions

- Tex. Gov't Code Section 552.137 – an **email address** of a member of the public that is provided for the purpose of communicating with a governmental body is confidential and not subject to disclosure.

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Use of Foundation Funds

Dear Alice –

Our teachers work so hard! The Foundation would like to show our teachers how much we appreciate them by giving each teacher a gift card for \$100. That way they can treat themselves to something nice.

#1 Teacher Fan

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Use of Foundation Funds

To maintain exempt status as a 501(c)(3), a Foundation must:

- Engage primarily in activities that accomplish one or more of its exempt purposes;
- Ensure the organization's net earnings **do not inure to the benefit of private individuals**; and
- Serve a valid purpose that confers a public benefit.

I.R.C. Reg. § 1.501(c)(3)-1(c) (a failure to satisfy any one of the requirements is fatal to continued entitlement to exempt status).

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Use of Foundation Funds

- *Oliveri v Commissioner* (2019), the U.S. Tax Court reviewed gifts to specific individuals, including a \$500 gift card to a retired police officer, from an exempt organization with the stated purpose to “provide religious and spiritual counsel to people of need, including inmates and hospital patients.”
- Tax Court ruled the **gifts were not in furtherance of the organization’s exempt purpose** and conferred a private benefit because the gifts were made to individuals for whom **no substantial charitable need was established**.

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Use of Foundation Funds

- Unrestricted monetary gifts to teachers likely **do not serve a charitable or educational purpose** and result in a prohibited private benefit to the recipients.
- Private benefit is defined to include a nonincidental benefit to anyone other than the intended recipients of the Foundation’s exempt purpose. The distribution of **substantial, unrestricted financial gifts** to teachers would likely be deemed a private benefit.

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Restrictions on Conducting Raffles

Dear Alice –

This year's Education Foundation raffle is going to be the best ever! All of our board members have agreed to include information about the raffle on their business websites, with a link to the Foundation site where you can purchase tickets online. The board member who sends the most people to the Foundation site will get 10 free raffle tickets. Brilliant, right?

Fundraiser Extraordinaire

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Raffle Defined

A raffle is defined as "the award of one or more prizes by chance at a single occasion among a single pool or group of persons who have paid or promised a thing of value for a ticket that represents a chance to win a prize."

Tex. Occ. Code 2002.002(6)

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Restrictions on Raffle Promotion

- No promotion through paid advertising
- **No statewide promotion** or advertising, **except:**
 - Organization's website
 - Publication or solicitation (including a newsletter, social media, or email) provided only to previously identified supporters
- **Selling** or offering to sell **tickets statewide is prohibited.**
- No court or AG opinion defining "statewide", but it is generally thought that statewide would include the Internet
- **Cannot compensate** person **directly or indirectly** for selling raffle tickets
Tex. Occ. Code 2002.054

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Access to Foundation Meetings

Dear Alice –

I received a call from the newspaper reporter that covers our school board. She asked if she could start attending our Education Foundation board meetings. She also requested copies of our meeting minutes for the last five years. Why is the media so nosey? Can I just say, "no"?

Fed Up Foundation Director

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Access to Meetings

- A 501(c)(3) organization is not required to hold open board meetings.
- Education Foundation is not subject to the Open Meetings Act unless it has agreed to follow those procedures.
- Consider bylaw or policy to address meeting attendees if organization intends to restrict access.

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Meeting Minutes

- **Minutes** of board or committee meetings are **required**.
Tex. Bus. Org. Code 3.151.
- Minutes are the official record of the actions taken at a meeting and are evidence of the actions so taken.
- **Right to inspect:**
 - Directors
 - Attorney General
 - If Foundation is subject to Public Information Act, anyone may request access subject to the Act.

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Board Action Outside of a Meeting

Dear Alice –

Help! Our Foundation Board does not meet again until July, but I need approval for some unexpected expenses as soon as possible. Should I just go ahead and spend the money and ask for forgiveness later?

Foundation Director

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Action Outside of a Meeting

- If **authorized by governing documents**, a nonprofit board may **act without a meeting** if a written consent stating the action to be taken, is signed by the **number of directors necessary to take that same action at a meeting** at which all directors are present and voting.
- Consent must state the date of each director's signature.
- If action passes by less than unanimous written consent, the corporation must provide prompt notice to each director or committee member who did not consent in writing to the action. Tex. Bus. Org. Code §22.220.

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Action Outside of a Meeting

- Any reliable reproduction of a consent in writing signed by a director may be used instead of the original writing for the purpose of taking an action without a meeting. Tex. Bus. Org. Code § 6.205(a).
- Except as otherwise provided by an entity's governing documents, **an electronic transmission of a consent by a director is considered a signed writing** if the transmission contains or is accompanied by information from which it can be determined that the electronic transmission was transmitted by the director; and the date on which the director transmitted the electronic transmission. Tex. Bus. Org. Code § 6.205(b)(1-2).

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Correcting Defective Corporate Acts

- Business Organizations Code Sections 22.501-22.516
- **Procedure to correct** the discovery of transactions, board actions or elections that occurred without formal or completed authorization as required by statute or the corporation's governing documents
- Any act or transaction that would have been within the power of the corporation but is **void or voidable due to a failure of authorization**

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Session Evaluation

Access the evaluation
using the QR Code
on page 19 of the
Conference Program.



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Questions?
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