

Transparency:

Social Media & Open Government

Alan Bojorquez – Attorney at Law – March 7, 2018
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*“For there is nothing hidden that will not become visible,
and nothing secret that will not be known and come to light.”*

LUKE 8:17

Introduction

As I began to share my remarks as the featured speaker at a TML Region 10 quarterly dinner meeting, I asked if everyone had silenced their cellphones. I doubted it, and quipped that they were probably checking in on Facebook. I was certain the last thing the audience of city officials did before walking in tonight was check Twitter to see if we're at war with North Korea. I *hate* social media (except to the extent I *love* social media).

In terms of examples, I'd like to set the president aside as an anomaly, but is there any doubt that more and more Americans want to hear news straight from the horse's mouth? They don't want to learn what's happening from press releases, spin doctors, or the traditional media. They want *Transparency*. Honesty. Real thoughts in real time. Many public officials want to give it to them.

In Bastrop, Texas, we just recently experienced a phenomenon as a Top 5 Finalist in a competition to be featured on the reality show, *Small Business Revolution- Main Street*.¹ That's not my story to tell, but it was amazing to see city hall, without time to equip or strategize, successfully utilize social media to unite, focus, engage and empower a diverse citizenry with no history of coming together (outside of 4 natural disasters in 10 years).

Leaders on Social Media

As community leaders, we feel the pressure to be more involved with social media. People want to see you and get to know you that way. Recent studies show that when corporate executives are active on social media their employees are more trusting and productive, and their customers are more loyal. Recruitment improves when prospective employees see their future bosses online. Leaders and celebrities alike have higher approval ratings if they are active on social media because it makes them more human, likeable and approachable.² However, before

¹ <https://www.deluxe.com/small-business-revolution/main-street/season-three/>

² Joanna Belbey, The Social CEO: Executives Are Using Social Media To Transform Firms, <https://www.forbes.com/sites/joannabelbey/2016/11/30/the-social-ceo-executives-are-using-social-media-to-transform-firms/#146b4f322a88>; Rohan Jagan, Hootsuite Report Finds That CEOs on Social Media Boost Credibility, June 14, 2017, <https://martechseries.com/social/social-media-marketing/hootsuite-report-finds-that-ceos-on-social-media-boost-credibility13634/>

mindlessly hurtling each thought into cyberspace, you're encouraged to define your goals and your brand, consider the law, then gauge your messages before hitting the send button.

The Demand for Openness

Beyond social media, there's increasing pressure to be open with how we govern. Citizens demand we crack open the black box and expose the inner workings of government. Some newly-elected city council members insist they've got nothing to hide and pressure staff to share data widely. Furthermore, there are special interest groups insisting on sunshine.³ There are advocacy groups representing the media.⁴ Some newspapers routinely have a sting operation where they file open records requests across a region then report the response in a front page series.⁵ In fact, March 11-17, 2018 is **SUNSHINE WEEK!**⁶

There are commercial enterprises who market services and software almost as if they were advocacy groups.⁷ There's even a new form of online survey that uses crowdsourcing and data visualization to identify areas of possible consensus, not just division.⁸

Finally, there are awards, such as the Texas Comptroller of Public Accounts' *Transparency Stars* program, which recognizes local governments for going above and beyond in their financial transparency efforts.⁹ Conversely, there are more dubious distinctions, such as the *Golden Padlock Award* recognizing the most secretive publicly-funded agency or person in the U.S.¹⁰

Matter of Trust

Ultimately, what we should be working toward is enhancing public trust. We should want our citizens to be confident we're working on the community's behalf. Because we serve democracies, we should also want our citizens to feel informed, engaged, and capable of influencing city hall. In that regard, Texas is failing.

Released last month was a 2017 study on Civic Engagement by the University of Texas that ranked our state 47th in voter turnout, which is 3 points higher than where we were 5 years ago. We ranked 44th among other states for voter registration, which is also a little bit better than where we were 5 years ago (but still disappointing).¹¹

³ e.g., Public Citizen, www.citizen.org.

⁴ e.g., Freedom of Information Foundation of Texas, "Protecting the Public's Right to Know", www.foift.org (mostly comprised of the newspaper industry and their lawyer); and the Texas Press Association, www.texaspress.com

⁵ Deborah McKeon, Open record requests shine light through sometimes cloudy issues Mar 17, 2017, http://www.tdtnews.com/news/article_b89f09a2-0b76-11e7-9666-0b7e56eb01ca.html

⁶ Sunshine Week, March 11-17, 2018, by the American Society of News Editors and Reporters Committee for Freedom of the Press, <http://sunshineweek.org/>

⁷ e.g., see ClearGov, www.ClearGov.com ; and <https://www.pagefreezer.com/government/texas-public-record-laws-for-website-socialmedia/>

⁸ Tom Simonite, The Internet Doesn't Have to Be Bad for Democracy, MIT Review, June 2, 2017, <https://www.technologyreview.com/s/607990/the-internet-doesnt-have-to-be-bad-for-democracy/>

⁹ <https://comptroller.texas.gov/transparency/local/stars/>

¹⁰ given by Investigative Reporters and Editors, Inc. (IRE), <https://www.ire.org/awards/>

¹¹ 2017 Texas Media & Society Survey, Annette Strauss Institute for Civic Life, Moody College of Communication, University of Texas at Austin, https://moody.utexas.edu/sites/default/files/TMASS_2017Topline_final.pdf ;

On a federal level, it gets even worse. A 2017 survey by the Pew Research Center found that the public's trust in the federal government continues to be at historically low levels. Only 19% of Americans today say they can trust the government in Washington to do what is right "just about always" (3%) or "most of the time" (16%). Twenty-seven percent of registered voters say they think of government as an enemy. Just 50% say ordinary citizens can do a lot to influence the government in Washington, if they are willing to make the effort, while about as many (47%) say there's not much ordinary citizens can do to influence the government.¹²

Perhaps we can consider it good news that a Gallup poll in 2016 confirmed that for the past 15 years, Americans have expressed more confidence in their local government than their state government to handle problems.¹³ With the statistics demonstrating a considerable level of disconnect between the government and those we serve, I've wondered why we are so closed off.

State Secrets

Early 20th Century scholars observed that governments and bureaucracies tend to protect, rather than share, information. There was a time when *arcana imperii* ("state secrets") was the prevailing characterization of information in the hands of the government, and that data was not routinely shared with those outside. Empirical studies confirmed that organizations consistently put rules and regulations in place to enforce secrecy, particularly in relation to controversial or competitive matters.¹⁴ More recent research into organizational theory reveals the informal elements that permeate an organization such as group dynamics and culture.¹⁵

Seldom in my 22 years of municipal lawyering have I seen city officials who purposefully strive to keep the masses in the dark. Instead, I've observed opaqueness as a result of:

- **Absentmindedness:** a genuine lack of awareness that someone would want to know what's going on.
- **Protectiveness:** a sincere instinct to shelter and preserve data that, if released into the wild, may cause harm to the city or others.
- **Frugality:** an inability to prioritize the resources needed to gather, filter, and present data in a manner that would make it easily accessible or meaningful.
- **Time:** not enough hours in a day to implement procedures or install equipment to make data sharing easier.

<https://communityimpact.com/guides/austin/news/top-stories/2018/02/14/texas-ranks-among-lowest-u-s-political-civic-participation-new-study-finds/>

¹² Pew Research Center, <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/>

¹³ 71% trust local government, compared with 62% for state. Gallop,

<http://news.gallup.com/poll/195656/americans-trusting-local-state-government.aspx>

¹⁴ Moon, Danielle and Carolyn Adams, "Too Much of a Good Thing: Balancing Transparency and Government Effectiveness in FOI Public Interest Decision Making," AIAL Forum 82 (Nov), 2015 [commenting on the work of Max Weber and Carl J Friederich].

¹⁵ Moon and Adams citing Florence Heffron, "Organization Theory and Public Organizations: the Political Connection" (Prentice Hall, 1989) 219.

The law requires us to reveal some things, and shield others. As we work to develop protocols and processes to foster a more open environment at city hall, we should keep in mind that transparency is just one value among many.

Safeguard Data

While I want to encourage the use of social media to let the people know what's going on, my profession requires me to remain mindful of the duty to protect certain secrets. I've spent most of my career telling city officials when they can and can't have closed meetings. When they must and mustn't release documents. How many times have I stated that it's not prudent to openly discuss pending litigation? Legally, it's prudent to play with your cards close to your vest. It is unwise to divulge too much, and possibly unlawful.

There are many times when there are very good legal reasons to be cautious with what data is released and how. There are mandates in state and federal statutes demanding privacy protections.¹⁶ There is common law and constitutional privacy doctrines.¹⁷ We must remember that certain proprietary information, trade secrets and financial data is confidential by law.¹⁸ Often, we have a duty to safeguard the sensitive information that has been entrusted to us (or that in some cases, we actually demanded from others).

Beyond mandatory exceptions to disclosure, there are discretionary exceptions, such as the privileges regarding law enforcement, like the Informer's Privilege.¹⁹ Would the public interest truly be served if cities had to release all information regarding competitive bidding prior to a contract being awarded,²⁰ or data on a real estate transaction?²¹ Is it not in the best interest of the citizenry and the public treasury for municipal decision-makers to receive candid legal guidance in private?²² If we become too carefree or sloppy with social media, we risk unlawfully disclosing data that could be harmful to the city, its citizenry, or others.

Open Meetings & Records

As you prepare to hit send, be prepared for the open records requests seeking your text messages, and your blog posts. The federal Freedom of Information Act (FOIA) was enacted in 1967 – 50 years ago.²³ As a municipal lawyer who was born in 1967, I've seen the tension between the withholding and releasing of data rise to become one of the most pressing challenges for government agencies. Since Texas enacted its open records law six years later, there has been steadily increasing pressure from a growing segment of the population to disclose *more* info,

¹⁶ e.g., U.S. Health Insurance Portability and Accountability Act of 1996 (HIPPA), Pub.L. 104-191, privacy and security rules enacted as 45 CFR Part 160 and 164; Tex. Gov't Code §§ 552.102 [Certain Personnel Info]; .119 [Peace Officer Photos] and .1175 [Peace Officer's Home], .136 [Credit Card Numbers]; Tex. Loc. Gov't Code §143.090 [Peace Officer Photos]; Tex. Fam. Code §§ 58.007 [Juvenile Criminal Records] and 261.201 [Child Abuse Records];

¹⁷ Tex. Gov't Code §§ 552.101, .108, and .1085.

¹⁸ Tex. Gov't Code § 552.110.

¹⁹ *Roviaro v. U.S.*, 353 U.S. 53(1957); Tex. Gov't Code 552.101.

²⁰ Tex. Gov't Code § 552.104.

²¹ Tex. Gov't Code § 552.105.

²² Tex. Gov't Code § 551.10__ and 552.107; see also Texas Rules of Evidence and Texas Rules of Civil Procedure.

²³ The Texas Public Information Act, originally known as the Texas Open Records Act, was approved by the Legislature in 1973 in a reform atmosphere following the Sharpstown stock fraud scandal involving state officials.

faster. It's not enough to tell the public *who* we are, *what* we're doing, *when* it will occur, or *how* it will happen. They want to know that 5th W. They want to know *why*.

Twenty-one years ago this month, I joined the Texas Municipal League (TML) as a staff attorney. Since that time, I've conducted training multiple times a year on the topic of Open Government, explaining the intricacies of Records Retention²⁴, Open Records²⁵, and Open Meetings²⁶. The Texas Attorney General has told us that social media posts fall under the Public Information Act.²⁷ The AG has also ruled that email can constitute a "deliberation" under the Open Meetings Act.²⁸ I can say with certainty that your city-related text messages and tweets fall under that umbrella.

Balancing Transparency with Effectiveness

Some have suggested that transparency is not an absolute or an end in itself; instead, it is argued that it has value only insofar as it enhances *accountability*. A proper balance must be struck between transparency, efficiency and effectiveness.²⁹ For all that transparency does to drive out wasteful practices and promote collaboration and shared learning, too much of it can trigger distortions of fact and counterproductive inhibitions.³⁰

Involvement Beyond Data

Transparency extends not just to data and gatherings, but to the selection of the people who function in the process. Even in towns where city hall functions smoothly there's increasing pressure to open up volunteer advisory boards and commissions to broader, more diverse groups of citizens. In the 1920s, it was not enough that Mussolini *made the trains run on time* (which he didn't).³¹ In 2018, those of us in government service are expected to get results and do so in a more open and inclusive manner. The old system might be working just fine in terms of results, yet there's growing political demands to be more inclusionary and to recruit from beyond customary social circles.³² That sometimes creates pressure to amend ordinances or home-rule charter provisions detailing how volunteers are selected and appointed so we can involve a more diverse cross-section of our communities.

Closing

There's an expectation that we use social media to keep our citizens informed (about more than just road closures). I'm encouraging you to think about transparency not just as a regulatory mandate, but as a cultural value, and as an ethical imperative. Rather than curse transparency as a distraction or hindrance, I urge you to please ponder how transparency isn't just an obligation,

²⁴ Local Government Records Act, Tex. Loc. Gov't Code Chs. 201, 202, and 203.

²⁵ Texas Public Information Act, Tex. Gov't Code Ch. 552.

²⁶ Texas Open Meetings Act, Tex. Gov't Code Ch. 551.

²⁷ Op. Tex. Att'y Gen. No. OR2016-23161 (___).

²⁸ Op. Tex. Att'y Gen. No. GA-0896 (___).

²⁹ Moon, Danielle and Carolyn Adams, "Too Much of a Good Thing: Balancing Transparency and Government Effectiveness in FOI Public Interest Decision Making," AIAL Forum 82 (Nov), 2015.

³⁰ Ethan Bernstein, October 2014 Issue Harvard Business Review, <https://hbr.org/2014/10/the-transparency-trap>

³¹ <https://www.citylab.com/transportation/2016/11/the-problem-with-mussolini-and-his-trains/507764/>

³² Lakeway to Make Board and Committee Selections More Transparent <https://communityimpact.com/austin/lake-travis-westlake/city-county/2018/02/12/lakeway-make-board-committee-selections-transparent/>

but is a means to an end, that being *an informed, engaged citizenry that trusts City Hall*. Consider how transparency changes the way we govern. Ponder the opportunity to reboot and reword our approach to daily tasks.

The difficulty is not whether to be open and accessible. The law clearly favors disclosure. Politically, the demands – the expectation, the *assumption* – of openness is ever-increasing. Does anyone really think that millennials are going to accept having to file an open records request, or tolerate waiting 10 business days or longer to receive data? They’ll want an app with which they can search for whatever they want using just their index finger (probably while they are in the backseat of a rideshare driving them to pick up the \$10 double soy mochaccino they purchased online).

Rather, the challenges stem from the questions of *when, how much*, through *what means*, and *how to balance* a desire to be open and honest with a duty to protect the privacy of 3rd parties, plus safeguard the agency’s financial, legal and strategic positions.

What I am asking you to accept and wrestle with is the reality that we are in an *Age of Transparency*, and that’s good, but transparency isn’t an end itself, and there are limitations we must acknowledge and reconcile. Every city must devise a means of coping with these countervailing pressures and sometimes reconcile your conflicting goals.

Thank you Lynda Humble and Mayor Schroeder for inviting me to speak.

Ok, I’m a lawyer, so here’s the legal stuff. The views expressed from this soap box are mine alone and don’t necessarily reflect the views of the City of Bastrop. If you hate what I’ve written, please don’t take it out on our team at the law firm. However if you found what I’ve shared worthwhile, a copy of it is available on LinkedIn!

“Information is the currency of democracies.”

Ralph Nader, 1971