

**Tampering with a Governmental Document:
Criminal Consequences in Texas**

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TAMPERING WITH A GOVERNMENT DOCUMENT

I. Introduction

Tampering with a governmental record is a more expansive criminal offense than most local government employees and staff members anticipate. The Texas Legislature wrote a broad sweeping statute allowing for prosecution when governmental records of any kind are altered, counterfeited, destroyed or concealed. In the normal course of business for local governments, staff members and officials handle a large number of documents which are defined as “governmental records” by statute. Without realizing the consequences, government personnel are creating these records on a regular basis and the law requires that each entry made is complete and exact. The purpose of this paper is to explore the wide-range of conduct covered by the Texas Penal Code while also encouraging greater attention to how routine governmental records are handled.¹

II. What is a Governmental Record?

A “Governmental Record” is defined in the Texas Penal Code (in relevant part) as:

(A) anything belonging to, received by, or kept by government for information, including a court record²; [or]

(B) anything required by law to be kept by others for information of government; [or]

(C) a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States;³

¹ Although Federal prosecution can also result from the conduct discussed in this paper, Federal Laws will not be explored.

² Court Record is defined by Tex. Penal Code §37.01(1) as a decree, judgment, order, subpoena, warrant, minutes or other document issued by a court...

The Penal Code goes on to describe three additional types of governmental records including proof of motor vehicle liability insurance or financial responsibility, official ballots and election records, as well as the written documentation required for mobile food units by the Health and Safety Code.⁴ While this paper focuses on the conduct of local government employees, agents, and officials, the Code does apply equally to individuals who are not associated with the government. For example, the average citizen who decides to make a false entry in their application for a municipal permit or sell fraudulent motor vehicle insurance cards is also in violation of Chapter 37.10.

Penal Code Section 37.01(2)(C) sets out a list of documents that most people instinctively describe as governmental records including licenses, certificates and permits, all of which are routinely issued by municipalities. However, under the broad definition in Section 37.01(2)(A) and 37.01 (2)(B), a governmental record is essentially every document, correspondence, report, application or financial statement that a local government would likely handle. The record does not have to be a physical document with written statements, it can be in the form of audio or video files, charts and diagrams, or even the information provided on a final plat submitted to the municipal planning commission. A governmental record need only serve the purpose of providing information, in some form or fashion, to the government. There is no requirement that the record was actually relied on by the government, to its detriment; nor does the record have to contain information that

³ Tex. Penal Code§ 37.01(2)(A)-(C)

⁴ Tex. Penal Code§ 37.01(2)(D)-(F)

is used to promote the public health, safety, or general welfare.⁵ Similarly, if the local government imposes a legal duty on a business or resident to collect information for the government's use, the record is covered by Statute.⁶ For example, if a municipal ordinance requires local apartment complexes to document any incident involving physical violence that is not subsequently referred to law enforcement, then this record is now covered by the statute. Based on the definition under Section 37.01(2) the best practice is to presume that any information received, maintained or requested by the government is a record subject to the restrictions of Penal Code Section 37.10.

III. Tampering with a Government Record- Texas Penal Code§ 37.10

A governmental record can be tampered with through a variety of actions, both overt and inconspicuous. Texas Penal Code Section 37.10(a) creates an offense when a person:

- (1) knowingly makes a false entry in, or false alteration of, a governmental record;
- (2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record;
- (3) intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record;
- (4) possesses, sells, or offers to sell a governmental record or a blank governmental record form with intent that it be used unlawfully;
- (5) makes, presents, or uses a governmental record with knowledge of its falsity; or
- (6) possesses, sells, or offers to sell a governmental record or a blank governmental record form with knowledge that it was obtained unlawfully.

⁵ *But see* Tex. Penal Code § 37.10(f). It is a defense to prosecution under [37.10] Subsection (a)(1), (a)(2), or (a)(5) that the false entry or false information could have no effect on the government's purpose for requiring the governmental record.

⁶ *See* Tex. Penal Code§ 37.01(2)(B)

The offenses listed are Class A misdemeanors unless the person commits the offense intending to defraud or harm another, which upgrades the offense to a state jail felony.⁷ However, there are two exceptions to the general punishment ranges for tampering with the governmental records discussed in this paper. First, the Statute specifically enhances the punishment range to a Felony of the third degree when a person tampers with a governmental record defined by Penal Code Section 37.01(2)(C), (licenses, certificates, permits, seals, titles, letters of patent or similar documents issued by government, by another state or the United States). Second, tampering with the aforementioned 37.01(2)(C) records is upgraded yet another punishment level if the person intends to defraud or harm another, which makes it a second degree felony.⁸ Prosecutors proceeding under this code section also benefit from a legal presumption that a defendant who tampers with two or more Section 37.01(2)(C) records, intended to defraud or harm another as a matter of law.⁹ Also of note, the Legislature provides specific punishments when the conduct involves records relating to public schools, written appraisals submitted to the appraisal review board, expert reports in criminal cases, and documents used to establish public school residency requirements.¹⁰

Although a person can tamper with a governmental record in furtherance of another criminal act like theft, the law can also apply to a public servant who has no intention of becoming a hardened criminal. The latter individual is the type of person who could find themselves in the situations discussed in the following hypotheticals.

⁷ Tex. Penal Code§ 37.10(c)(1)

⁸ Tex. Penal Code§ 37.10(c)(2)(A)

⁹ Tex. Penal Code§ 37.10(g)

¹⁰ *See generally* Tex. Penal Code§ 37.10(c) -(d)

IV. Hypothetical Situations: Applying the Law to local Government Personnel

The vast majority of local government employees, agents, elected officials, and staff members would never contemplate violating the Penal Code by tampering with a governmental document. However, the law punishes the good-intentioned public servant with poor judgment, the same as a person who readily commits this criminal offense to further a deceitful purpose. The following hypotheticals are an attempt to imagine a set of circumstances where a person involved with or working for a local government might violate Section 37.10 through a series of misguided decisions. The common thread among these examples is a willingness to cut corners rather than “speak” the whole truth and accept undesirable consequences.

a. EMS Paramedic “A”

- i. Facts: EMS Paramedic “A” is dispatched to the scene of a shooting. The paramedic fills out a report and the injured party is transferred to the hospital. The injured party dies and a criminal case as well as civil suit is filed. EMS Paramedic “A” gets word that the doctors made a few questionable calls with the victim’s treatment and now the lawyers are fighting about whether or not the victim could have survived. EMS staff members believe the patient had no chance of survival. EMS Paramedic “A” adds a few notes in the report about the victim ‘never gaining consciousness’, even though the patient did wake up for several seconds. EMS Paramedic “A” doesn’t think this had any real effect on the patient’s outcome, but knows how savvy attorneys can make a fuss about it in trial.*
- ii. Crime Committed: Tampering with a Governmental Record under Section 37.10(a)(1)- possibly with intent to defraud or harm another*

b. Police Officer “B”

- i. Facts: Officer “B” makes the scene of a DWI and makes an arrest after his investigation. While writing the offense report, the officer realizes he did not*

follow the latest policies issued by the police chief regarding the transport of intoxicated suspects and the vehicle tow. The officer removes a few details in his report to make sure it reads as though he was in compliance to avoid reprimand.

- ii.** Crime Committed: *Tampering with a Governmental Record under Section 37.10(a)(3)*

c. Municipal Economic Development Corporation Board Member

“C”

- i.** Facts: *EDC Board Member “C” is charged with writing an official memo and report for the City Council to review about a potential land development coming to town. In an effort to get developers and the city on the same page regarding the project, EDC Board Member “C” summarizes the project’s anticipated economic impact for the Council’s review. Knowing that the financials on one of the retail stores will be a huge concern for the Council, he removes a few paragraphs from the Board’s final report and memo he sends over.*
- ii.** Crime Committed: *Tampering with a Governmental Record under Section 37.10(a)(3)*

d. Taskforce Officer “D”

- i.** Facts: *This police agency maintains trespass affidavits and keeps them on file for various properties in the jurisdiction. Taskforce Officer “D” is assigned to a crime reduction taskforce and works in an area of town where there are always groups of people hanging out and causing trouble. Taskforce Officer “D” knows that all the property owners have not filed trespass affidavits, but in an effort to help clean up the area he carries around a form that looks like the agency’s official trespass affidavit, so that he can show to loiterers as needed. It has helped him move along troublemakers with much more ease and he just fills in the information as needed. Besides, he knows the business owners will probably file it later.*
- ii.** Crime Committed: *Tampering with a Governmental Record under Section 37.10(a)(2) or 37.10(a)(4) or 37.10(a)(6)*

e. Assistant Clerk for permits “E”

- i. *Facts: Assistant Clerk “E” collects fees for permits and processes applications for permits. This staff member knows almost everyone in town by name and often changes information on the permit applications to make sure they get approved. The employee knows the changes are slightly inaccurate, but she believes the permits should be granted since the applicants are all good people. She knows what her boss requires and this just saves time.*
- ii. *Crime Committed: Tampering with a Governmental Record under Section 37.10(a)(1)*

V. How a bad situation can get worse

No one anticipates becoming the subject of a criminal investigation or a defendant in a criminal case based on a governmental record they handled. In such circumstances people often try to elude prosecution in a moment of panic and fear. A state prosecutor has several statutes at his or her disposal to use against a suspect who attempts to hinder prosecution.

a) Tampering with a Witness, Texas Penal Code § 36.05

A person should never attempt to persuade, offer benefits, coerce¹¹, or convince a potential witness to act in any particular way when it comes to an investigation or proceeding.¹² The Penal Code prohibits a person from attempting to influence a witness:

- (1) to testify falsely;
- (2) to withhold any testimony, information, document, or thing;

¹¹ Coercive measures that become threatening may be prosecuted as Obstruction or Retaliation under Tex. Penal Code §36.06 if the threat is to harm another by an unlawful act.

¹² Tex. Penal Code § 36.05(a)A person commits an offense if, with intent to influence the witness, he offers, confers, or agrees to confer any benefit on a witness or prospective witness in an official proceeding, or he coerces a witness or a prospective witness in an official proceeding...

- (3) to elude legal process summoning him to testify or supply evidence;
- (4) to absent himself from an official proceeding to which he has been legally summoned; or
- (5) to abstain from, discontinue, or delay the prosecution of another.¹³

In fact, the best practice for local government personnel is to refrain from discussing pending or potential witness testimony altogether. A harmless or inquisitive conversation with a witness can quickly become an attempt to influence testimony, discourage appearance in a proceeding or hamper a witness's cooperation with the process. Similarly, a witness who willingly agrees to accept a benefit or solicit a benefit from another in exchange for testifying falsely, eluding the proceeding, or withholding testimony, is also guilty of a felony offense.¹⁴ The benefit in any instance of tampering need not be conferred and can be "anything reasonably regarded as pecuniary gain or pecuniary advantage."¹⁵ The statute emphasizes the importance of a witness freely and truthfully participating in the fact-finding process, regardless of which governmental body is conducting the inquiry. An official proceeding is not limited to testimony in a courtroom; instead a proceeding can be "any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant."¹⁶ This broad definition extends criminal consequences to witness tampering that may occur during internal affairs investigations, disciplinary proceedings, and city council hearings even if criminal charges are never filed. Punishment for witness tampering is a third

¹³ Tex. Penal Code § 36.05(a)(1)-(5)

¹⁴ Tex. Penal Code § 36.05(b)

¹⁵ Tex. Penal Code § 36.01(3). *But See* § 36.05(c) It is a defense to prosecution under [36.01] Subsection (a)(5) that the benefit received was reasonable restitution for damages suffered by the complaining witness as a result of the offense and a result of an agreement negotiated with the assistance or acquiescence of an attorney for the state who represented the state in the case.

¹⁶ Tex. Penal Code § 1.07(a)(33)

degree felony, unless a criminal proceeding is involved, in which case the offense is the same category as the most serious offense charged.¹⁷

b) Tampering with Physical Evidence, Texas Penal Code § 37.09

Facts which tend to support prosecution under Section 37.10 in many situations could also be prosecuted under Texas Penal Code Section 37.09; Tampering with Physical Evidence. Under this code section it is a third degree felony, if a person tampers with a governmental record by altering, destroying or concealing the record and with the intent to *impair its verity, legibility or availability as evidence* in an investigation or official proceeding he knows is pending or in progress.¹⁸ If the record made, presented or used is fictitious with the aforementioned intentions, then a criminal offense is also committed if the person's aim is to *affect the course or outcome* of the investigation or official proceeding.¹⁹ Similarly if a person alters, destroys or conceals evidence, *knowing that a criminal offense has been committed* and intending to keep the record from use in any *subsequent* investigations or official proceedings related to the offense²⁰, he is also guilty. Section 37.09 is not limited to governmental records; instead the statute protects any record, document or thing that can be used as evidence. This statute can easily be used to prosecute a person who knows of a looming investigation into his criminal activities, who then conceals his actions by tampering with related governmental records. Clearly, the actor can be charged with a Class A misdemeanor for tampering with a governmental document under Section 37.10, but a prosecutor would readily file a third degree felony under Section 37.09 since it carries a much more severe range of punishment.

¹⁷ Tex. Penal Code§ 36.05(d)

¹⁸ Tex. Penal Code§ 37.09(a)(1)

¹⁹ Tex. Penal Code§ 37.09(a)(2)

²⁰ Tex. Penal Code§ 37.09(d)(1)

Perjury and Aggravated Perjury, Texas Penal Code § 37.02 and §37.03

Perjury is a more narrow statute than tampering with physical evidence or tampering with a witness because the law only applies to statements made under oath. A criminal charge for perjury requires the State to prove that the person intended to deceive and had knowledge of the false statement's meaning when making it under oath, but only in circumstances where the statement is required or authorized by law to be made under oath.²¹ The statement can be a verbal declaration made in a court hearing, grand jury proceeding,²² or a sworn written affidavit provided to the Court, so long as it is a representation of fact (Tex. Penal Code §37.01(3)). If the declarant makes two inconsistent statements, the Prosecutor need not prove which statement is false; it is sufficient for the State to show that both statements were made under oath and both statements could not be true. Essentially, the statements would be mutually exclusive factual assertions like an affiant who swears he was in Texas and Georgia on the same date and at the same time.

Although perjury is a Class A misdemeanor, the offense can be enhanced to a third degree felony charge of Aggravated perjury in certain circumstances. The Penal Code provides that a person, who commits perjury by making a false *material* statement in connection with or during an official proceeding, is guilty of the aggravated offense.²³ A material statement is one that *could have* affected the course or outcome of an official proceeding even if the statement would not be admissible under the Texas Rules of Evidence.²⁴ Even if the declarant mistakenly

²¹ Tex. Penal Code §37.02(a)(1)

²² Although Grand Jury testimony is secret, a petition may be filed under Tex. C.C.P. Art. 20.02 to reveal statements made under oath in Grand Jury proceedings which can then be used to file a Perjury case.

²³ Tex. Penal Code § 37.03(a)

²⁴ Tex. Penal Code § 37.04(a)

believed the statement was immaterial, a criminal case may still be filed if the evidence can show otherwise²⁵.

VI. Conclusion

Local Government employees and agents should always strive to document information in the most accurate way possible to avoid criminal consequences in Texas. Although the law provides that a person can only be punished if they intentionally and knowingly commit these offenses, a person's intent may also be inferred by a series of deceitful or dishonest acts. As always, staff members should seek to maintain accurate and detailed records to make sure the letter and spirit of Section 37.10 is followed.

²⁵ Tex. Penal Code§ 37.04(b)