

Public Information Act

Riley Fletcher Basic Municipal Law Seminar

Austin, Texas

February 5, 2015

Presented by Christy Drake-Adams



Personnel Changes at the Office of Attorney General



- Ken Paxton, Texas Attorney General
- Brantley Starr, Deputy Attorney General for Legal Counsel - oversees various divisions including Open Records
- Justin Gordon, Open Records Division Chief, Office of Attorney General
- Amanda Crawford, former Open Records Division Chief now General Counsel, Office of Attorney General



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TML Legislative Update

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Videoclip of testimony is available in this article.

January 23, 2015, Number 4

.pdf Version: *TML Legislative Update* Number 4

- State-Imposed Revenue Mandates
- Numerous Interim Legislative Reports Released
- Public Utility Commission Hearing on Rate Case Participation
- TML E-List Project: Choose Your Area of Interest
- City-Related Bills Filed This Week
 - *Property Tax
 - *Sales Tax
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 - *Other Finance and Administration
 - *Municipal Courts
 - *Community and Economic Development
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Interim Reports

House Committee on Government Efficiency and Reform

Charge: Review the application of the Public Information Act regarding requests for large amounts of electronic data. Examine whether the procedures and deadlines imposed by the Act give governmental bodies enough time to identify and protect confidential information in such requests.

Recommendations:

- Allow public entities to satisfy the requirements of the Act by directing appropriate requests to the entities website where the information could be regularly posted, and easily accessible.
- Add “utility billing” information (i.e. new water customer lists) to the current list of exceptions identified in ORD No. 684. If the customer has marked their application as confidential, it would eliminate the need to request an Attorney General’s opinion.
- Add copyrighted material to the current list of exceptions identified in ORD No. 684, which would eliminate the need to request an Attorney General’s opinion. The Attorney General’s office currently denies the release of copyrighted materials, however, the Act allows for viewing and review of this material by requestor.



Senate Committee on Open Government

Charge: Review the Texas Public Information Act to ensure that access to public records and information by the public remains fully transparent, but that governmental entities have the authority to protect the privacy interests of citizens, including primary and higher education students, from improper public disclosure.

Recommendations:

- Add to the Texas Public Information Act a definition of student records that includes students records covered under the Family Educational Rights and Privacy Act (FERPA) of 1974, as well as records of an applicant for transfer or attendance regardless of whether or not the applicant attends the agency or institution.
- Continue to monitor the extent to which the Public Information Act ensures transparent access to public records and information, but also protects private citizens' interests.



City-Related PIA Bills Filed

as of the date this slide was prepared

S.B. 46 (Zaffirini) – Public Information Act: would make confidential a photograph that is taken by an appraisal district for property tax appraisal purposes and shows the interior of an improvement to property.

H.B. 685 (Sheets) – Public Information: would provide that a public information officer complies with the requirement to promptly produce public information by referring a requestor to a publically accessible website maintained by the city if the requested information is identifiable and readily available on that website.



S.B. 336 (V. Taylor) – Public Information: would, among other things:

- (1) provide that a **municipal officer has a right of access to public information** of the city;
- (2) provide that a municipal governmental body on request by a municipal officer who oversees the **governmental body shall provide public information, including confidential information or information otherwise excepted from disclosure**, to the municipal officer in accordance with the Public Information Act;
- (3) authorize a municipal governmental body to require a requesting municipal officer or the employees of the requesting municipal officer who will view or handle information that is confidential or otherwise excepted from disclosure to sign a **confidentiality agreement**
- (4) allow an individual required to sign a confidentiality agreement as described in (4), above, to seek a **decision from the attorney general about whether the information is actually confidential or excepted from disclosure**, and void any such agreement that is determined by the attorney general to cover information that is not confidential or otherwise excepted from disclosure

Austin

American-Statesman FEB 07 2014

UT board approves new policy for regents' information requests

By Ralph K.M. Haurwitz

The University of Texas System's governing board adopted tighter procedures Thursday for its members' information requests, while also granting the members wide latitude to obtain records and data.

The action was a response to complaints about Regent Wallace Hall Jr.'s demands for massive amounts of records from UT-Austin. Campus officials say they have turned over about 800,000 pages, though system officials say the number is far smaller, perhaps fewer than 100,000.

Hall's activities are under investigation by a state House panel, which could recommend impeachment or some other censure. His critics say he is on a witch hunt to oust UT-Austin President Bill Powers, but supporters say he has raised questions about campuses' compliance with open-records laws and about possible undue influence by legislators in admissions at the Austin flagship.

Under the new rules adopted by the Board of Regents, requests by a regent must be submitted to the system's chancellor, who will review those seeking "significant quantities" of information with the board's chairman. Within 72 hours of receiving a request, the chancellor's office must give the regent an estimated date for producing the material.

The new rules apparently would not bar massive requests like Hall's because of a clause that says a regent cannot be stymied in obtaining information that the regent "deems is necessary to fulfill his or her official duties and responsibilities."

The regents withheld action on a proposed rule that would have "strongly encouraged" them to use UT System email accounts rather than the private accounts they currently use.

Board Chairman Paul Foster told the Statesman that regents want to learn how other universities and state agencies handle email.

"We really felt like we hadn't vetted it properly, and so we'll bring it forward at the next meeting," Foster said. "And I'm relatively sure the board will pass it."

In other action Thursday, the regents:

— Tweaked the source of funds for construction of the first phase of UT-Austin's Dell Medical School, which includes an education and administration building, a research building, a medical office building and a parking garage. The source for the \$334.5 million price tag had previously been listed as bond proceeds. Now, \$250,000 of that sum will come from the UT System's endowment and \$250,000 will come from operation of the Erwin Center.

— Granted preliminary approval for a \$20 million office building at UT-Austin's Texas Advanced Computing Center at the J.J. Pickle Research Campus in North Austin. Half of the money will come from bond proceeds and half from donations.

— Approved UT-Austin employment agreements for men's athletics director Steve Patterson, head football coach Charlie Strong and several assistant coaches. Patterson's annual base salary is \$1.4 million; Strong's, \$5 million, with raises of \$100,000 a year; and the assistants as much as \$760,000.



HB 628 - 83rd Legislature (2013)

Codified at Section 11.1512, Texas Education Code

- Establishes a **school board member's** inherent right of access to information maintained by the district when the board member is acting in an official capacity.
- Board member does not need to submit a public information request in order to obtain such information.
- Information does not need to be the subject of an upcoming meeting.
- "The district may withhold or redact information, a document, or a record requested by a member of the board to the extent that the item is excepted from disclosure or is confidential under Chapter 552, Government Code, or other law. This subsection does not require the district to provide information, documents, and records that are not subject to disclosure under the Family Educational Rights and Privacy Act of 1974."



Councilmember Request for Information

Tex. Op. Att'y Gen. No. JM-0119 (1983):

Members of a governmental body have an inherent right of access to records that they seek in their official capacity



Examples of recent city open records rulings:

OR2013-20531 (Nov. 25, 2013)

“There is no indication the requestor is requesting the information in her official capacity as a city council member. Therefore, we find the requestor is making the present request in her personal capacity as a member of the public.”

OR2014-19835 (Nov. 3, 2014)

“The internal procedures of the city for releasing information to city officials govern whether a city commissioner, acting in his official capacity, may access information held by the city. This office cannot resolve an internal dispute about document-management policy that may exist within the city.”

The of the PIA

(Gov't Code § 552.002)

(a) In this chapter, “public information” means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body .

(a-1) Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

(a-2) The definition of “public information” provided by Subsection (a) 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.

(b) The media on which public information is recorded include:

(1) paper;

(2) film;

(3) a magnetic, optical, solid state, or other device that can store an electronic signal;

(4) tape;

(5) Mylar; and

(6) any physical material on which information may be recorded, including linen, silk, and vellum.

(c) The general forms in which the media containing public information exist include a book, paper, letter, document, e-mail, Internet posting, text message, instant message, other electronic communication, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map, and drawing and a voice, data, or video representation held in computer memory.



The Eighty-third Legislature amended the definition of “public information” in section 552.002 to specifically include:

any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.⁵²

The Eighty-third Legislature further defined “information . . . in connection with the transaction of official business” as:

information . . . created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.⁵³

Adopting the attorney general’s long-standing interpretation, the definition of “public information” now takes into account the use of electronic devices and cellular phones by public employees and officials in the transaction of official business.⁵⁴ The Act does not distinguish between personal or employer-issued devices, but rather 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,” meaning, “any matter over which a governmental body has any authority, administrative duties, or advisory duties,” the information constitutes public information subject to disclosure under the Act.⁵⁵

***El Paso v. Abbott*, 444 S.W.3d 315 (Tex. App.–Austin 2014)**

- the PIA does not authorize a requestor to file suit for a writ of mandamus compelling a governmental body to make information available when the city has made reasonable efforts (i.e., is not refusing or unwilling) to comply with the PIA;
- other than requiring that information be produced promptly for inspection, duplication, or both, the PIA provides no guidance regarding the efforts a governmental body must take to locate, secure, or make available the public information requested; and
- a city doesn't have to resort to suing an individual in district court under the Local Government Records Act when it is believed that the person holds, but has not provided, a responsive document.

Dallas Morning-News Article Jan. 25, 2015

Access to Public Records Inconsistent

Argyle ISD Superintendent Telena Wright said the district does not have a dedicated position to handle public information requests. "This is a very small district," she said. "It's not possible for us to have a single position [to handle requests]."

Wright said the district tries to be as transparent as possible, posting information about public meetings and check registers on its website.

But, Wright said, the district does not get requests very often.

"If there's a topic of concern of general interest to the community, we might get a few at once," she said. "Generally speaking, maybe four or five a year."

By contrast, the city of McKinney, a much larger entity, has created a database to track requests and deadlines, according to Sonya Paul, the city's records coordinator.

Public information officers have to stay up to date on changes in the law to know what records they can and can't release, said Will Hampton, president of the Texas Association of Municipal Information Officers, who is also communications director for the city of Round Rock.

"You have to be careful," Hampton said. "I know of a school district that got in a little bit of hot water because they provided emails, along with email addresses from private citizens, and that's a no-no."

The Texas Municipal League and other nonprofits that serve government officials, including the Texas District & County Attorneys Association, have historically sought to loosen the public information law's burden on local government, said Laura Prather, an attorney who works with the Freedom of Information Foundation of Texas. They often oppose open government efforts, she said.

"They're very powerful lobbyists. They come out in droves, usually against the things that we are supportive of to increase transparency," Prather said. "What

If information is withheld, a member of the public may file a lawsuit to compel a government agency to release it. But that can be difficult when a citizen lacks time, money and legal knowledge.

The agencies "know that if they're willing to throw down that gauntlet and run that risk, then the only thing left for the requester to do is to sue," said Aleshire, who once served as Travis County tax collector and county judge.

Conversely, some governmental entities have also sued people who have requested records.

Aleshire's law firm successfully represented David Lovelace, who was taken to court by Lake Travis ISD in 2006 after he filed numerous open records requests for archived school board agendas.

A balancing act

The law is a good one, said Kelley Shannon, executive director of the Freedom of Information Foundation of Texas, but putting it into practice can give rise to problems.

"We do see from time to time foot dragging, withheld information or stalling on the release of information," Shannon said. "In general, what we see is that Texas has a very strong open records law. The hiccup is how it's enforced; how it's carried out."

Despite the legal penalties outlined in the Texas Public Information Act, Austin American-Statesman investigative reporter Eric Dexheimer said there appears to be few repercussions for agencies that blow deadlines mandated by law.

Several agencies withheld public information or stalled in providing it to *The News*, citing confidentiality under the Health Insurance Portability and Accountability Act or the Family Educational Rights and Privacy Act.

When he was attorney general, Gov. Greg Abbott issued a ruling saying the Texas Public Information Act took precedence over HIPAA.

information that should remain private."

Closing loopholes

With the legislative session now open, the first order of business should be to close loopholes that government agencies may use, Prather said.

She is among a group of open government advocates working to propose legislation in the coming months.

Governmental agencies, she said, are taking advantage of a technicality in a state law that allows them to deny access to public information generated by a public official's phone or other device.

"They're saying that the governmental body would be the 'custodian,' and they can't force the individual office-holder to produce the materials even though those materials are clearly defined as public information," Prather said.

Others hope not to expand the law, but to rein it in. Bennett Sandlin of the Texas Municipal League said his organization is likely to support legislation that would make it a criminal offense for a person to post the home address or phone number of a public servant or her family member on a public website.

He said the league would also back a reduced administrative fee for requesting an attorney general ruling online.

Aleshire, the Austin lawyer, hopes the Legislature will stand firm against closing records to the public. With no firm rule as to how long government officials must hold onto their records, Aleshire said he hopes lawmakers will take a look at email retention policies.

"There is no telling how much of the government's thinking we're losing for the public to ever be able to see," he said.

This project was reported by staff writers Taylor Danser, Nanette Light, Meredith Shamburger, Julissa Treviño and Allison Wisk and special contributor Andrew Scoggin, and was written by Wisk.

Local Schedule GR

RETENTION SCHEDULE FOR RECORDS COMMON TO ALL LOCAL GOVERNMENTS

(Revised Fourth Edition, Effective July 4, 2012)

13 TAC §7.125(a)(1)

INTRODUCTION

The Government Code, Section 441.158, provides that the Texas State Library and Archives Commission shall issue records retention schedules for each type of local government, including a schedule for records common to all types of local government. The law provides further that each schedule must state the retention period prescribed by federal or state law, rule of court, or regulation for a record for which a period is prescribed; and prescribe retention periods for all other records, which periods have the same effect as if prescribed by law after the records retention schedule is adopted as a rule of the Commission.

The retention period for a record applies to the record regardless of the medium in which it is maintained. Some records listed in this schedule are maintained electronically in many offices, but electronically stored data used to create in any manner a record or the functional equivalent of a record as described in this schedule must be retained, along with the hardware and software necessary to access the data, for the retention period assigned to the record, unless backup copies of the data generated from electronic storage are retained in paper or on microfilm for the retention period. This includes electronic mail (e-mail), websites, and electronic publications.

The use of social media applications may create public records. Any content (messages, posts, photographs, videos, etc.) created or received using a social media application may be considered records and should be managed appropriately. The retention of social media records is based on content and function. Local governments will need to consult the relevant records retention schedule for the minimum retention periods. . . .



**GR1000-
24**

COMPLAINTS

Complaints received from the public by a governing body or any officer or employee of a local government relating to government policy.

Resolution or dismissal of complaint + 2 years.

Retention Note: The 2-year retention period applies only to complaints of a general nature that do not fall into a different category of complaint noted in this or other commission schedules. For example, complaints from the public about potential fire hazards are scheduled in Local Schedule PS (Records of Public Safety Agencies) and have a longer retention period.

*GR1000-26a	CORRESPONDENCE, INTERNAL MEMORANDA, AND SUBJECT FILES	Administrative – Incoming/outgoing and internal correspondence pertaining to the formulation, planning, implementation, modification, or redefinition of the programs, services, or projects of a local government and the administrative regulations, policies, and procedures that govern them. May also include subject files, which are collections of correspondence, memos and printed materials on various individuals, activities and topics.	4 years.	Retention Note: Review before disposal; some correspondence of this type may merit PERMANENT retention for historical reasons.
*GR1000-26b	CORRESPONDENCE, INTERNAL MEMORANDA, AND SUBJECT FILES	General – Incoming/outgoing and internal correspondence pertaining to the regular and routine operation of the policies, programs, services, or projects of a local government. May also include subject files, which are collections of correspondence, memos and printed materials on various individuals, activities and topics.	2 years.	
GR1000-26c	CORRESPONDENCE, INTERNAL MEMORANDA, AND SUBJECT FILES	Routine - Correspondence and internal memoranda such as letters of transmittal, requests for publications, internal meeting notices, and similar routine matters. May also include subject files, which are collections of correspondence, memos and printed materials on various individuals, activities and topics.	AV.	

Other Resources?

<http://www.tml.org/public-information-act>



attorney general's open government hotline

(512) 478-OPEN (6736)

(877) OPEN-TEX (673-6839).

staff answer questions about the Public Information Act

attorney general's open government cost hotline

(512) 475-2497

(888) OR-COSTS (672-6787)

staff answer questions about charges relating to the Public Information Act

https://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb.pdf

