

TEXAS PUBLIC INFORMATION ACT MADE EASY

*Answers to the most frequently asked questions
about the Texas Public Information Act*

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Texas Public Information Act Made Easy

After each legislative year, the Attorney General's Office has produced this publication that addresses certain key issues that public officials face in their day-to-day operations.¹ In a question-and-answer format, this article will provide guidance to public officials on the most frequently asked questions on the Texas Public Information Act. For example, the article addresses the types of records and entities that fall under the Act, the time deadlines and mandatory notices that apply when a governmental body handles an open records request, and when a governmental body is required to ask for an Attorney General open record ruling.

The stakes are high for public officials that handle open record requests. There are strict time lines for making determinations on what records to release and public officials must make such decisions knowing that there are potential criminal penalties if the governmental body releases information that is considered confidential under state law. Similarly, public officers face criminal penalties if they refuse to release information that is considered open to the public.

This "made easy" article provides answers in easy to understand language to the most frequently asked questions regarding the Public Information Act. The Act does apply to a variety of governmental entities, so although this information is geared towards the Act's application to local public bodies, it will be useful to other officials and Texas citizens as well.

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I. Application of the Public Information Act

What types of information generally fall under the Public Information Act?

Public information includes any information that is collected, assembled, or maintained by or for a governmental entity. The Public Information Act (hereinafter “The Act”) applies to records regardless of their format. It includes information that is maintained in paper, tape, microfilm, video, electronic data held in a computer memory, as well as other mediums specified under law.²

What types of entities are subject to the Public Information Act?

The Act applies to information that is held by or for any “governmental body”.³ The term governmental body has a broad definition that includes, in applicable part:

1. City governmental bodies;
2. County governmental bodies;
3. Deliberative bodies that have rule-making or quasi-judicial power and that are classified as a department, agency, or political subdivision of a city or county;
4. The part, section or portion of a public or private entity that spends or that is supported in whole or in part by public funds;
5. Local workforce development board;
6. Non-profit corporations that are eligible to receive funds under the federal community services block grant program and that are authorized by this state to serve a geographic area of the state;
7. Certain property owners’ associations.⁴

In other words, governmental entities and certain non-governmental entities are subject to the Act. Additionally, entities that are considered departments, agencies, or political subdivisions of a city or county are also subject to the Act if the involved entity has rule-making or quasi-judicial powers.⁵ For example, zoning boards of adjustment have rule-making or quasi-judicial powers and are considered agencies or departments of a city. Therefore, the records of such entities would be subject to the Act.

Are the records of nonprofit and for-profit entities that receive public funds subject to the Public Information Act?

Records in the hands of non-governmental entities may also be covered by the Act to the extent that they reflect the expenditure or support of public funds, or to the extent that a governmental body has a right of access to the records. For example, when governmental bodies make unrestricted grants of funds to nonprofit and for-profit entities, the records relating to the part of the entity that is publicly funded would be subject to the Act.⁶

Rulings in this regard have held that the records of volunteer fire departments and records of certain chambers of commerce that involve expenditures of public funds are subject to the Public Information Act. However, the portion of the entity that is not supported by public funds is not necessarily subject to the Act.

Finally, it should be noted that certain entities are specifically made subject to the open records laws under the state law that governs that entity. For example, economic development corporations are specifically made subject to the provisions of the Public Information Act under the Development Corporation Act of 1979 found in Texas Revised Civil Statutes Article 5190.6.

Are records that are kept or owned by a consultant to the governmental body subject to the Public Information Act?

The fact that a private entity may own or retain a record does not prevent the record from being subject to release under the Public Information Act. For example, if a consultant maintains or holds records for a governmental body, the documents are still considered public information if the governmental body owns the information or has a right of access to it.⁷

It is important to note that a governmental body usually cannot contract away its right to access documents that are held by a consultant if the information would otherwise be considered public. For example, an open record decision has held that a city manager could not contract away the city's right to inspect a list of applicants for a city job even though the list was developed by a private consultant for the city.⁸

Are court records subject to the Public Information Act?

Records of the judiciary are not subject to the Public Information Act.⁹ Courts must look to the rules adopted by the Texas Supreme Court to determine the court's duty to provide access to court records.¹⁰ Additionally, courts must consider court rulings, Attorney General opinions, and certain state statutes that give the public a right to obtain copies of court records. For example, higher courts have held that there is an "open courts" concept that must guide judges in giving public access to court documents. This legal concept provides that the public has a right to inspect and copy judicial records subject to the court's inherent power to control access to such records to preserve justice. In other words, the public's right of access to court documents is not an absolute right.¹¹

It should be noted that the public's right to access court records is in addition to the right of parties to a lawsuit to obtain information through discovery or through other court procedures. Legislation has clarified that subpoenas and motions for discovery are not considered a request for information under the Public Information Act.¹² Such requests should be handled as required by the applicable civil or criminal procedural statutes. Additionally, state law indicates that probable cause affidavits for a search warrant are considered public records once the warrant has been executed. The magistrate who issued the warrant must make the affidavits available for public inspection in the court clerk's office.¹³

Do the elected officials of the governmental body have a special right of access to the governmental body's records?

The elected officials have an inherent right of access to the governmental body's records if the official is requesting the records in his/her official capacity. The transfer of information to officials

of the governmental body is not considered a release to the public as long as the official is asking for the information in his official capacity.¹⁴ However, the ability to release such information to elected officials may be limited by the state or federal law that pertains to such documents.

II. What Constitutes an Open Records Request

Must an open records request be directed to a specific governmental officer?

Except in the case of faxed and e-mailed requests, the Public Information Act does not require that the public direct its open records requests to any specific public employee or officer.¹⁵ Generally, the deadlines involved in handling an open records request are not tolled merely because the wrong staff member received the request. For this reason, it is important that a governmental body clearly inform all of its employees what to do if they receive a request for records.

What is the governmental body's duty to respond to e-mailed or faxed requests for copies of records?

The governmental body has a duty to respond to any written requests for open records including those that are made through e-mail or by fax. However, state law provides that the governmental body can designate a person that is authorized to receive e-mail or faxed requests for open records. If the governmental body makes such a designation, the Act is only activated if the e-mail or faxed request is directed to the assigned individual.¹⁶ If the governmental body has not made such a designation, the e-mail or faxed request can be directed to any official or staff member.

Must a governmental body respond to verbal requests for copies of records?

The Act is only activated by a written request for information.¹⁷ Governmental bodies often develop forms for the public to use to request public records, but the governmental body cannot require the requestor to use that form. The governmental body's duty to provide the record would apply to any written request for the information, regardless of the format of the document used by the requestor. For example, an open records request is often contained within a complaint letter or within other citizen correspondence sent to a governmental body.

If a governmental body provides copies of records upon a verbal request, the governmental body must be consistent in its treatment of all requestors. In other words, if the governmental body doesn't require a written request from certain individuals, it should not insist on a written request from others.

III. Administration of Open Records Requests

Timing Issues Under the Public Information Act

How much time does a governmental body generally have to comply with an open records request?

There is often a misconception that the Public Information Act requires that copies of public information must be produced within 10 business days of the written request to the governmental body for the record. However, the standard under the Act is actually that the governmental body must “promptly produce” the public information.¹⁸ Further, the Act states that all open records requests must be handled with good faith and must be accomplished within a reasonable time period.¹⁹ What is considered reasonable and prompt will vary depending on the number of documents sought by the requestor. In certain circumstances, the records can be produced in less than 10 days. However, requests for a substantial number of documents may take several weeks to produce.

If it will take a governmental body longer than 10 business days to provide the records, the governmental body must certify that fact in writing to the requestor. In the notice to the requestor, the governmental body must indicate a set date and hour within a reasonable time that the information will be available for inspection or duplication.²⁰

When does a governmental body have a time deadline for handling an open records request?

The amount of time that governmental bodies have to produce copies of governmental records will vary depending on the amount of information that is requested. However, there are six situations that present a timing deadline for governmental bodies to take a particular action when handling an open records request. These six situations are described below:

- 1. Notice to Requestor that Governmental Body Needs Additional Time to Produce Records.** If the governmental body is unable to produce a requested record within 10 business days for inspection or for duplication, the governmental body must certify that fact in writing to the requestor and set a date and hour within a reasonable time that the information will be available for inspection or for duplication.²¹
- 2. Notice to Requestor that Governmental Body Needs Additional Time to Produce Records That Are in Active Use or in Storage.** If the governmental body needs additional time to produce a record because it is in active use or because it is in storage, the governmental body must notify the requestor of this fact in writing. This notice must be given within 10 business days of the governmental body’s receipt of the request for the documents. The notice must set a date and hour within a reasonable time that the information will be available for inspection or duplication.²² It should be noted that the fact that a document has not been formally approved by the governmental body usually would not justify a delay of the document’s release under the “active use” provision.²³

- 3. Notice to Requestor of Programming or Manipulation Costs.** If production of the requested information in a particular format would require additional computer programming or manipulation of data, the governmental body must provide a written notice of this fact to the requestor. The notice must indicate: (1) that the information is not available in the requested format; (2) a description of the forms in which the information is available; (3) a description of any contract or services that would be required to provide the information in the requested form; (4) an estimated cost of providing the information in the requested form; and (5) the time that it would take to provide the information in that format.²⁴ Generally, this notice must be provided to the requestor within 20 days of the governmental body's receipt of the request.²⁵
- 4. Request by Governmental Body for an Open Record Ruling from the Attorney General.** If a governmental body plans to withhold certain documents or information, it usually must request an Attorney General's ruling on the ability to withhold such information.²⁶ The written request for an Attorney General's ruling must be made within 10 business days after the date the governmental body receives the written request for information.²⁷ However, the ten-day deadline is tolled during the time that the governmental body and the requestor are actively clarifying or narrowing the scope of the information requested.²⁸
- 5. Notice to Requestor that Governmental Body Sought an Attorney General Open Record Ruling.** The city must give written notice to a requestor if the governmental body seeks an Attorney General open record ruling on the request. This notice must be given within 10 business days of the governmental body's receipt of the request for the documents. Also, the governmental body must send a copy of their written comments to the requestor.²⁹ If the written comments contain any information that the governmental body is trying to withhold, they can redact that information from the copy they send to the requestor.
- 6. Notice to Person or Entity with Proprietary Interest in Information of Attorney General Open Record Ruling Request.** If an open records request may result in the release of proprietary information, the governmental body must make a good faith attempt to notify the person or entity that has such an interest in the open record ruling request. The written notice must be sent by the governmental body within 10 business days of the date the governmental body received the original request for the information.³⁰

This notice must include: (1) a copy of the written request for the information; and (2) a statement that the person is entitled to submit a letter, brief, or memorandum to the Attorney General in support of withholding the information. The notice must inform the person that any briefing must include each reason why the person believes the information should be withheld. The person with a proprietary interest must submit their brief within 10 business days of the date the person receives the written notice from the governmental body.³¹ Also, the person who submits a brief to withhold the information, must provide a copy of their brief to the requestor.³²

What can a governmental body do if it is unclear about what information is being requested or that the scope of the information is unduly broad?

If a governmental body in good faith has determined that the request for information is unclear or that the scope of the information being asked for is unduly broad, the governmental body should ask the requestor to clarify or narrow the scope of the request.³³ The time used in clarifying or narrowing the scope of a request does not count as part of the governmental body's statutory allotment of 10 business days to request an open records decision.³⁴

The Texas Attorney General has concluded that the Public Information Act allows a tolling of the statutory 10 business days during the interval in which the governmental body and a requestor is communicating in good faith to clarify or narrow a request. However, this does not give the governmental body an additional 10 full business days from the date the requestor responds to the request for clarity. Once the requestor's clarification or narrowing response is received, the original 10 business days resumes.³⁵

For example, the governmental body receives a request on May 1st. Its 10 business days start on May 2nd. The governmental body is not clear about what the requestor is asking for and, in good faith, sends a clarification letter on May 3rd (2nd business day) to the requestor. On May 8th, the governmental body receives clarification from the requestor. The governmental body's 10 business days would start back up on May 9th (3rd business day).

When is a governmental body required to ask for an open records ruling from the Attorney General?

A governmental body is required to ask the Attorney General for an open record ruling in almost all cases if the governmental body wants to withhold requested documents or information.³⁶ The fact that a particular document request may arguably fall within one of the statutory exceptions to disclosure does not in itself eliminate the need to ask for an open records ruling. Unless, the governmental body can point to a previous determination that addresses the exact information that the governmental body now wants to withhold, the governmental body must request a ruling to withhold the information.³⁷

A request for an Attorney General open records ruling must be made within 10 business days of the date the governmental body received the written request. Such a request can only be made by the governmental body.³⁸ If the governmental body does not make such a request within the deadline, the information is presumed as a matter of law to be open to the public and the information must be released. The presumption of openness and the duty to release the information can only be overcome by a compelling reasoning that the information should not be released.³⁹ A compelling reasoning may in certain cases involve a showing that the information is deemed confidential by some other source of law or that third-party interests are at stake.⁴⁰ It should be noted that if the governmental body is going to release all of the requested information, there is no need to ask for a ruling. The governmental body can seek advice on any of these issues from the Attorney General's Open Government Hotline at (877) 673-6839 or (512) 478-6736.

Can a governmental body request an Attorney General decision when the governmental body has determined the requested information is not subject to one of the Act's exceptions?

The Texas Attorney General has concluded a governmental body may not request an open records decision from the Attorney General if the governmental body reasonably believes the requested information is not excepted from required disclosure. Instead, the governmental body must promptly produce the requested public information to the requestor.⁴¹

Can a governmental body withhold information because of a previous determination?

The Public Information Act provides that a governmental body must request an Attorney General open records ruling if the governmental body wishes to withhold requested information unless there has been a previous determination about that particular information.⁴² The Act does not define previous determination. However, the Attorney General has concluded there are two types of "previous determinations."⁴³ If you have any questions regarding whether your governmental body has a previous determination, you should contact the Open Government Hotline at (877) 673-6839 or (512) 478-6736.

What must the governmental body do when it requests an Attorney General open records ruling?

If a governmental body wants to withhold a record, it has 10 business days from the date it receives the request to ask for an open records ruling from the Attorney General. On the tenth business day, the governmental body must do the following⁴⁴:

1. **Write the attorney general requesting an open records decision and state which exceptions apply to the requested information:** The original request for a ruling must indicate the specific exception that the governmental body is relying on to withhold the information. If the governmental body fails to cite the applicable exceptions in this request, the governmental body will generally be barred from raising them in any additional briefing that it may provide.
2. **Provide the requestor with a written statement that the governmental body wishes to withhold the information and that it has asked the attorney general for a decision.**
3. **Provide the requestor with a copy of the governmental body's correspondence to the attorney general.**
4. **Make a good faith attempt to notify any affected third parties of the request.**

The governmental body has an additional five business days (a total of fifteen business days from the date the governmental body received the original request for the record) to provide the Attorney General with a signed statement that indicates when the governmental body received the request, or other evidence that establishes that date.⁴⁵ During the additional five business days, the governmental body may also provide additional written documentation that supports withholding the requested information. By the fifteenth business day, the governmental body must:

1. **Write the attorney general and explain how the claimed exceptions apply.**

2. **Provide a copy of the written request for information to the attorney general.**
3. **Provide a signed statement or evidence sufficient to establish the date the request for information was received:** It is important to note that the initial deadline for requesting an Attorney General open records ruling is put on hold during the time the governmental body and the requestor are actively discussing the scope of the information requested.⁴⁶ If the governmental body contends that the 10 business-day deadline has been tolled while the governmental body and the requestor have been narrowing or clarifying the request, the governmental body must explain this fact in its request for an open records ruling. Along with tolling, the governmental body must explain if there were holidays, natural disasters, and any other days when the governmental body was officially closed. In its explanation, the governmental body should include all dates relevant to the calculation of the 10 business-day deadline.
4. **Provide copies of documents requested or a representative sample of the documents to the attorney general:** The documents must be labeled to show which exceptions apply to which parts of the documents. Representative samples are not appropriate when each document sought to be withheld contains substantially different information or when third-party proprietary information is at issue.
5. **Provide the requestor with a copy of the written comments submitted to the attorney general:** This does not mean that the governmental body has to send the requestor a copy of the information that you are trying to withhold. The governmental body must send copy of its comments. If there is information contained in the comments that the governmental body is trying to withhold, the governmental body can redact that information.⁴⁷

The Attorney General may also ask the governmental body for additional information. The governmental body must respond to an Attorney General's request of additional information within seven calendar days.⁴⁸ If the governmental body fails to respond, the information is presumed to be open and must be released unless there is a compelling reason to withhold the information.⁴⁹

How long does the Attorney General have to respond to a request for an open records ruling?

The Attorney General has 45 working days from the date the request was received from the governmental body. However, if the Attorney General is unable to issue the decision within the 45-day period, the Attorney General may extend the time to respond for an additional 10 working days. Such an extension may only be taken if the Attorney General notifies the governmental body and the requestor of the reason for the delay. This notification must take place within the original 45-day time period.⁵⁰

Can a governmental body take longer than 15 business days to determine whether the requested information is confidential if the request is for an excessive amount of information?

There is no statutory provision that provides the governmental body with an extension of time to seek an open records ruling from the Attorney General's office. Even if the request is for an

excessive amount of information, the governmental body must still meet the 15 business-day deadline for making an open records ruling request to the Attorney General. As noted earlier, this request must include the legal arguments that support withholding the information, a marked-up representative sample of the requested information (marked to show which legal arguments apply to what portion of the sample documents), a copy of the open records request, and a signed statement or other evidence of when the governmental body received the request.⁵¹

May a governmental body seek a reconsideration of an open records ruling that was issued by the Attorney General?

If the Attorney General or a court has already ruled that the exact information that is at issue in a particular request is open to the public, the governmental body must release the information and is prohibited from seeking a reconsideration of that issue from the Attorney General.⁵² If the governmental body wants to challenge the ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days.⁵³

Rights and Duties of the Governmental Body and the Open Records Requestor

Is a governmental body required to post information regarding the Public Information Act?

A governmental body's public information officer is responsible for posting a sign which informs the public about its right to access public information.⁵⁴ The sign must be displayed in the governmental body's administrative offices. The Attorney General's Office is responsible for determining what specific information must be displayed on the sign. For more information, a governmental body may contact the Open Government Hotline at (512) 478-6736 or (877) 673-6839 or our website, www.oag.state.tx.us.

What inquiries can a governmental body make of an open records requestor?

Generally, there are only two permissible lines of inquiry that can be made of a requestor. First, the governmental body can ask a requestor for proper identification, but may not inquire into the motives or use that a requestor may have for public information that has been requested.⁵⁵ This inquiry for proper identification should be done if needed, but if the information can be given without any identification, then the inquiry is not necessary. This identification requirement is generally imposed by a governmental body when a state statute limits who may gain access to certain information (e.g., certain state statutes limit who can receive copies of ambulance run information). It should be noted that state law does not indicate how such identification could be accomplished if the request is completely handled through the mail, e-mail, or by fax. It should also be noted that certain statutes regulate who can gain access to information within motor vehicle records such as copies of drivers' licenses. These statutes contain specific rules on what inquiries can be made to determine if the requestor is eligible to receive the information.⁵⁶ If an open records request involves such information, the governmental body should visit with its local legal counsel regarding the applicable law.

Second, a governmental body may ask the requestor for a clarification of what type of information is actually being requested. Often, an initial open records request may involve the production of more documents than the requestor intended. Similarly, many open records requests ask for

information that is not kept by the governmental body in the requested format. In either case, the governmental body can ask the requestor whether a potential narrowing or variation of the request would meet the requestor's needs.⁵⁷ In this way, the governmental body can potentially save its resources and the requestor can avoid receiving unnecessary information.

Does the name and address of an open records requestor become public information?

In certain cases, an open records requestor can be required to provide identification, which may include his or her name or address.⁵⁸ If the governmental body receives this information and it becomes part of a governmental record, there is no statutory provision that would except it from disclosure.

Can a requestor choose the format (paper, computer disc, etc.) in which the governmental body must provide requested information?

If the governmental body has the technological ability to produce the information in the requested format, it is usually required to do so. For example, if a requestor wants a copy of information on a computer floppy disc, he can ask that it be provided in that format. The governmental body cannot insist on providing the information in only a paper format if the governmental body has the ability to provide it in the requested format. However, the governmental body is not required to buy additional hardware or software to accommodate an open records request.⁵⁹

Can an open records request require a governmental body to create a record if none exists?

An open records request does not generally require the governmental body to produce information which is not in existence. If such information could be produced through a minimal computer search, the governmental body would be expected to make such an effort.⁶⁰ However, such a request may be denied if it would require extensive research to create the information.⁶¹ In such cases, the governmental body should inform the requestor in writing of the existing formats in which the records are available and of any costs that may be applicable to gain the information in the requested format.

Does a governmental body have to comply with standing requests for copies of records?

A governmental body has no duty to comply with standing requests for copies of records.⁶² If a requestor seeks documents that are not in existence at the time of the request, the governmental body should notify the requestor of this fact and ask the requestor to resubmit the request at a later time when such a record may be available. The governmental body also has no duty to notify the requestor in the future that the information has come into existence.⁶³ However, some governmental bodies have chosen to accommodate standing requests for certain records. Whether to enter into such agreements is at the governmental body's discretion. Nonetheless, if such an arrangement is made, it should be available to any requestor on an equal basis.

Can an open records request require the governmental body to compile statistics, perform research, or provide answers to questions?

An open records request only requires a governmental body to provide copies of documents that relate to the information sought by the requestor. The Public Information Act does not require a

governmental body to calculate statistics, to perform legal research, or to prepare answers to questions.⁶⁴

Does an open records request require a governmental body to locate information that is not organized or retrievable by the type of information that is requested?

Sometimes an open records request will ask for certain documents or information that is not organized or retrievable by the type of information that is requested. For example, a requestor could ask for a list of all of the out-of-state contractors that a governmental body had hired. However, it is unlikely that the governmental body would have its files or computer data organized by whether a contractor's business was located inside or outside of the state.

If the governmental body could provide this information by making a simple computer search or by some other basic task, it should make such an effort. However, if providing the information would require extensive research or considerable manipulation of data, the governmental body has no duty to take such action. Instead, the governmental body may notify the requestor of the format in which the information is currently available. Additionally, the notice must include a cost estimate for providing the information in the format that meets the requestor's preferences.⁶⁵ In the preceding example, the governmental body could offer to make available all governmental documents that involve government contractors. The requestor could then review the records to determine which contractor businesses were located outside of the state.

Must a governmental body buy new software or equipment to accommodate a request for information in a certain format?

A governmental body has no duty to purchase new software or hardware to accommodate an open records request.⁶⁶ If the governmental body is unable with existing resources to provide the information in the requested format, the record should be provided in a paper format or in another medium that is acceptable to the requestor.⁶⁷ In certain cases, a governmental body can provide the information in the requested format by manipulating the data within a computer system or by making a programming change that allows access to the information. If an open records request would require such manipulation of data or programming, the governmental body can notify the requestor of the applicable cost of putting the information together in that format and require the requestor to agree to pay the cost of production of the material.⁶⁸

Can requestors insist on the right to personally use the governmental body's equipment to access public information?

The Texas Attorney General has concluded that a member of the public does not have the right to personally use a government computer terminal to search for public information.⁶⁹ Instead, the governmental body may require that searches of public information be conducted by government personnel who then provide the requestor with access to or copies of the requested items. Of course, a governmental body may adopt a policy to allow the public to use their computer terminals to access information, but the public cannot demand that such a policy be implemented.

Do requestors have a right to bring in their own copier to make copies of public records?

A governmental body may refuse to allow the use of a requestor's portable copier if such activity would: (1) be unreasonably disruptive, (2) cause a safety hazard, (3) interfere with others' right to

inspect and copy records, or (4) if the requested records contain confidential information that needs to be excised.⁷⁰

Can requestors require the governmental body to copy information onto supplies provided by the requestor?

The Texas Public Information Act specifically provides that a governmental body is not required to copy information onto material provided by an open records requestor. For example, a governmental body does not have to copy information onto paper or onto a computer disk that is provided by the requestor. Instead, the governmental body may choose to use its own materials.⁷¹

Does the governmental body have to release information that is also available commercially?

Generally, a governmental body is not required to allow access to or to make a copy of information from a commercial book or publication that is in the governmental body's possession. If the publication was purchased by the governmental body and it is still available commercially, the governmental body can alert requestors of this fact. However, a governmental body is under a duty to allow inspection of the commercial book or publication if portions of the publication are specifically made a part of, incorporated into, or referred to in a governmental body rule or policy.⁷²

Does a governmental body have to release information that is copyrighted?

If a request is made for documents that are copyrighted, the governmental body will have to provide access to those records, unless there is an applicable exception that would allow those records to be withheld. However, the governmental body is not required to make copies of copyrighted material for a requestor.⁷³ Instead, the governmental body should provide the requestor access to the information; the requestor bears the duty of compliance with federal copyright law.

Must a governmental body respond to repeated requests for the same information?

If a governmental body has previously provided copies of certain information, the governmental body has no duty to provide the same information to the requestor again.⁷⁴ Similarly, if a governmental body has previously made the information available and the requestor has not paid the costs associated with the prior request, the governmental body may respond to a second request for such documents by providing a special notice to the requestor.⁷⁵ The governmental body's public information officer or his agent must provide the requestor a letter or form which certifies that all or part of requested information was previously furnished to the requestor, or was made available upon payment of costs. Additionally, the certification must include: (1) a description of the information that was previously furnished or made available; (2) the date the governmental body received the previous request; (3) the date the governmental body previously furnished or made available the information to the requestor; (4) a statement that no further additions, deletions, or corrections have been made to that information; and (5) the name, title, and signature of the public information officer or his agent who is making the certification.⁷⁶ A governmental body may not charge the requestor for the preparation of the certification.⁷⁷

Of course, a governmental body may choose to provide the requested information, which makes providing a certification to the requestor unnecessary.⁷⁸ It is important to note that a governmental body must furnish or make available upon payment of applicable charges any information that has not been previously supplied to the requestor.⁷⁹

IV. Statutory Exceptions That Allow Information To Be Withheld

Information Which is Presumed Public

Is there a list of items which are presumed to be public information?

The Public Information Act lists 18 categories of information which are presumed to be public information. Texas Government Code section 552.022 (a) states that “(w)ithout limiting the amount that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other laws.” For example, completed reports⁸⁰, public court record information⁸¹, and settlement agreements to which a governmental body is a party⁸² are just a few of the items that are presumed public.

Is a discretionary exception considered “other laws” for the purpose of withholding information that is presumed public?

Generally, information that falls within the 18 categories of information that is presumed public cannot be withheld under a discretionary exception in the Act. Discretionary exceptions are designed to protect the interests of the governmental body and are not considered “other laws” for purposes of section 552.022 of the Texas Government Code.⁸³ Information that is presumed public can only be withheld if it is “expressly confidential” by law.⁸⁴ However, there are two exceptions to this general rule. Sections 552.104 (Information Related to Competition or Bidding) was amended to allow a governmental body to withhold information under these sections even if the information falls within one of the categories of information listed in section 552.022(a).⁸⁵

Are there “other laws” which may be relied upon to withhold information under section 552.022 of the Texas Government Code?

The Texas Supreme Court has concluded the term “other laws” as it is used in section 552.022 of the Government Code does include the Texas Rules of Civil Procedure and Texas Rules of Evidence.⁸⁶ Accordingly, the attorney-client privilege and work-product doctrine could be considered “other laws” for the purpose of withholding public information.⁸⁷

General Issues Regarding Confidential Records

Is there a laundry list of items that are confidential under the Public Information Act and other state laws?

At this time, there does not appear to be an entity that publishes a single, comprehensive list of all the types of information that are confidential under state law. A governmental body will want to review the Attorney General’s *Public Information Handbook* and consult closely with its attorney regarding what records that state or federal law specifically require to be withheld from the public.

Can staff promise confidentiality for certain records that are provided to the governmental body?

A promise of confidentiality from staff or a related promise within a governmental contract generally does not give the governmental body the right to withhold certain information from public disclosure. Such promises are only enforceable if a state statute specifically allows the governmental body to guarantee the confidentiality of the information.⁸⁸

Can a governmental body substitute a new document or produce a redacted copy of a record in response to an open records request?

The governmental body is required to make copies of the actual records that exist. If authorized by law, the city can cross through or otherwise excise the confidential information. However, a governmental body may not substitute a new document in which only the non-confidential information is presented, unless the requestor consents to the substitution.⁸⁹

Information about Public Officials/Employees

Can a governmental body disclose a public official or public employee's home address, home phone, social security number, or family information?

Public employees may request that the governmental body not reveal their home address, home phone number, social security number, or information about family members. In fact, governmental bodies are required to ask each employee whether they want such information to be treated as confidential. This inquiry to each employee must be made within 14 days of the employee being hired, appointed, elected or ending service with the governmental body. If the employee indicates in writing a preference for such confidentiality, the governmental body must refuse to release the personal information.⁹⁰

Although the governmental body is required to make this inquiry to employees at the time of their starting or leaving employment with the governmental body, the ultimate duty to make a written request for confidentiality rests with the employee. If the governmental body receives a request for this information and no confidentiality request has been filed by the employee, it is too late for the governmental body to ask the employee whether such confidentiality is preferred. In such a case, the governmental body would have to release the personal information to the requestor. However, if the employee makes a request for confidentiality afterwards, that request would be good for any future open records requests.

It is important to note that a peace officer is not required to file a written request to keep his/her personal information confidential. A peace officer's home address, home phone number, social security number, and any information about family members are all automatically confidential while employed by the governmental body.⁹¹ Additionally, the home address, home phone number, social security number, and any information about family members relating to a peace officer killed in the line of duty will remain confidential after his death.⁹²

Can a governmental body withhold social security numbers without requesting an Attorney General ruling?

A governmental body can withhold the social security number of a living person from any information without requesting an Attorney General ruling.⁹³ Governmental bodies must release the requestor's social security number to the requestor or an authorized representative of the requestor.

Are personal notes kept by an official subject to the Public Information Act?

Personal notes that are made by an official are generally considered a public record. A governmental body should consider the following factors if it receives a request for such information: (1) who prepared the notes; (2) who possesses or controls the document; (3) who has access to it; (4) the nature of its contents; (4) whether the document is used in conducting the business of the governmental body; and (5) whether public funds were expended in creating or maintaining the document.⁹⁴

Are e-mail addresses protected from disclosure under the Public Information Act?

A governmental body cannot release the e-mail address of a member of the public that is provided for the purpose of communicating electronically with the governmental body. However, the member of the public can allow their e-mail address to be disclosed if the member of the public affirmatively consents to its release. Also, if the email address is provided to the governmental body either: 1) by a person who has a contractual relationship with the governmental body; 2) by a vendor who seeks a contract with the governmental body; 3) during the bidding process; or 4) to the governmental body on a letterhead, coversheet, printed document or other document made available to the public it is not excepted under section 552.137.⁹⁵

General Exceptions That May Permit Withholding Records

What information is protected from disclosure under the exception for intra-agency and inter-agency memoranda or letters?

The Public Information Act allows a governmental body, in limited circumstances, to withhold certain information that is contained in an inter-agency or intra-agency memorandum or letter.⁹⁶ This exception has been held to only apply to internal staff communications consisting of advice, recommendations, or opinions that reflect the policymaking process.⁹⁷ This exception does not apply, however, to purely factual information that could be severed from the opinion portions of the document. Additionally, this exception does not protect routine memoranda or letters on administrative and personnel matters, unless those matters involve policy issues of a broad scope.⁹⁸ For example, the evaluation of an individual employee would probably not be protected from disclosure under this exception.⁹⁹ On the other hand, a university report addressing systematic discrimination against minorities has been found to be protected by this exception.¹⁰⁰ It should be noted that information created by outside consultants acting on the governmental body's behalf may in certain cases be covered by this exception.¹⁰¹

Personnel Information

What information within a public employee's personnel file is an open record?

The vast majority of information within a public employee's personnel file is considered an open record and accessible to the public. For example, information about a public employee's job performance, dismissal, demotion, promotion, resignation, and salary information are generally considered open.¹⁰² Similarly, job-related test scores of public employees or applicants for public employment are generally treated as open records,¹⁰³ as are letters of recommendation, and opinions and recommendations concerning other routine personnel matters.¹⁰⁴ However, Attorney General rulings have required information about an employee's withholding information on a federal tax form to be withheld, as well as information about an employee's beneficiary under governmental body life insurance programs. A governmental body may seek a ruling to withhold information under the "personnel exception" if its release would constitute an unwarranted invasion of the employee's privacy.¹⁰⁵ In making its determination whether information falls within the "personnel exception," the Attorney General considers:

1. whether the information contains highly intimate or embarrassing facts about the person; and
2. whether there is any legitimate public interest in the release of or access to this information.

Under the above two part-test, a court has held that a governmental body did not have to release the names and statements of victims and witnesses alleging sexual harassment.¹⁰⁶ The court found that the information at issue was intimate or embarrassing and that the public had no legitimate interest in the release of that information.

Do employees have a special right of access to information contained in their own personnel file?

Most information within an employee's personnel file can be accessed by the involved employee or the employee's designated representative.¹⁰⁷ However, a governmental body may withhold the employee's personnel information from the employee under some exceptions. For example, under some circumstances, the governmental body may be able to refuse to release information to an employee from his personnel file if the information relates to issues that are currently under civil or criminal litigation.¹⁰⁸

Law Enforcement Information

What information within the records of a law enforcement entity may be withheld?

Section 552.108 of the Government Code contains what is generally referred to as the "law enforcement exception." This exception allows the governmental body to withhold four types of information:

- 1) Information that if released would affect the governmental body's ability to investigate or prosecute;**

2) Information pertaining to investigations and prosecutions of crime that did not result in a conviction or a deferred adjudication;

3) Threats Against Peace Officers: Information that deals with threats against a peace officers collected or disseminated under Government Code section 411.048; or

4) Attorney Work Product: Information that the attorney of the governmental body prepared for use in criminal litigation or information reflecting the mental impressions or legal reasoning of the attorney regarding such litigation.

It is important to note that the law enforcement exception does not except from disclosure basic information about an arrested person or basic information within a criminal citation or police offense report.¹⁰⁹ Information that has been held to be open includes:

1. The name, age, address, race, sex, occupation, and condition of an arrested person.
2. The date and time of the arrest.
3. The offense charged and the booking information.
4. The location of the crime and the involved property.
5. The names of the arresting and investigating officers.

Section 552.108 only applies to criminal investigations and prosecutions. Where no criminal investigation or prosecution results from an investigation of a police officer for alleged misconduct, section 552.108 is inapplicable.¹¹⁰

It is also important to note that the law enforcement exception may apply to departments other than the police department if those departments are, by law, charged with the detection, investigation, or prosecution of crime. For example, the Attorney General has determined that the arson investigation unit of a fire department may cite the law enforcement exception to protect some of its records.¹¹¹

Can motor vehicle accident report information be disclosed under the Public Information Act?

The disclosure of motor vehicle accident reports, also known as ST-3 or CRB-3 forms, are governed by the Texas Transportation Code.¹¹² In order to obtain a copy of a motor vehicle accident report, the requestor must: (1) make the request in writing, (2) pay any required fee, and (3) provide the governmental body with two or more of the following information:

- (a) the date of the accident;
- (b) the specific address or the highway or street where the accident occurred; or
- (c) the name of any person involved in the accident.¹¹³

Purchasing / Public Works Information

What information must be disclosed if there is an open records request regarding a competitive bid?

Section 552.104 allows governmental bodies to withhold information that is submitted for competitive bids if its disclosure would give advantage to a competitor or bidder.¹¹⁴ This exception does not apply, however, if there is only one entity that is bidding on the project.¹¹⁵ Additionally, this exception does not apply to bid information after the bidding is completed and the contract has been awarded.¹¹⁶ However, section 552.104 (b) allows a governmental body to withhold information under section 552.104(a) even if the information falls within one of the categories of information listed in section 552.022(a).¹¹⁷ It is also possible that certain information that is not protected under the bidding exception may still be withheld if it is protected under section 552.110 of the Government Code or is confidential under other statutory or common law provisions.¹¹⁸ This exception can be used only by governmental bodies, not third parties.

What information may be withheld regarding the acquisition of real estate or personal property by a city?

Section 552.105 provides governmental bodies with limited authority to withhold information that relates to the governmental body's acquisition of real estate or personal property.¹¹⁹ The authority to withhold this information generally ends once the governmental body acquires the involved property.¹²⁰ This exception also has equal application to information pertaining to a lease of real or personal property.¹²¹ Similarly, the information about the lease is considered an open record once the governmental body enters into the lease agreement. It should be noted that if the information falls under section 552.022, the governmental body cannot withhold it under this exception.

What information is protected under the exception for trade secrets or for commercial or financial information that would give an advantage to competitors?

Section 552.110 provides that certain information within bids and other documents may be protected as trade secrets or commercial or financial information that would give an advantage to competitors. A "trade secret" that is privileged or confidential by court order or by statute must be withheld.¹²²

In determining whether particular information constitutes a trade secret, the Attorney General's office considers the Restatement of Torts' definition of trade secret as well as the Restatement's list of six trade secret factors.¹²³ These factors are:

- (1) the extent to which the information is known in the market place;
- (2) the extent to which the information is known by employees and others involved in the business;
- (3) the measures taken to guard the secrecy of the information;
- (4) the value of the information to the company and to its competitors;
- (5) the amount of effort or money spent to develop the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.¹²⁴

It should be noted that information submitted to a governmental body is not automatically protected from disclosure just because the company submitting that information claims the information is a trade secret or is "proprietary." This office cannot conclude that section 552.110(a) applies unless

it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.¹²⁵

Alternatively, there are varying standards that determine whether information is protected under the exception for commercial or financial information. The information is confidential if its release is likely to cause substantial harm to the competitive position of the entity that provided the information.¹²⁶ To qualify under this prong of section 552.110, it must be shown with specific factual evidence that disclosure of the commercial or financial information would cause substantial competitive harm to the person or business that supplied the information to the governmental body.¹²⁷ The substantial injury or harm must be more than speculative, it must be likely to occur if disclosure is made.¹²⁸

Economic Development Information

What information is protected under the exception for economic development negotiations?

Section 552.131 allows governmental bodies to withhold certain information related to economic development negotiations between a governmental entity and a business that the governmental body is seeking to have locate, stay or expand within or near the territory of the governmental body. Under this provision, the governmental body must withhold trade secrets of the business prospect that were related to economic development negotiations.¹²⁹ Similarly, governmental bodies must withhold certain commercial and financial information about the business prospect that was acquired during economic development negotiations if release of the information would result in substantial competitive harm to the business prospect.¹³⁰ The test for trade secret and commercial and financial information is the same for this exception as it is in section 552.110.

Additionally, until an agreement is made with the business prospect, the governmental body may withhold information about a financial or other incentive being offered to the business prospect if the incentive directly or indirectly results in the expenditure of public funds or in a reduction of funds received by a governmental body.¹³¹ Any information about a financial or other incentive that is withheld under this provision would have to be released after an agreement is executed with the business prospect.¹³²

Litigation or Other Legal Information

What type of information is excepted from disclosure under the attorney-client privilege?

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue.¹³³ First, a governmental body must demonstrate that the information constitutes or documents a communication.¹³⁴ Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body.¹³⁵ The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body.¹³⁶ Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to

communications between or among clients, client representatives, lawyers, and lawyer representatives.¹³⁷ Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication,¹³⁸ meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”¹³⁹ Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated.¹⁴⁰ Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body.¹⁴¹

When is information relating to pending or anticipated litigation excepted from disclosure?

Under Section 552.103, a governmental body can seek a ruling to withhold information about pending or reasonably anticipated civil or criminal litigation. The litigation must be pending or reasonably anticipated as of the date the open records request is received by the governmental body.¹⁴² The governmental body, its officials, or its staff must be a party to such litigation.

Whether litigation is reasonably anticipated is a question that involves both factual and legal issues.¹⁴³ There must be concrete evidence that litigation is likely; it must be more than mere conjecture. When a governmental body requests an open record ruling to withhold information under the litigation exception, the governmental body’s request must identify the issues that are involved in the litigation and explain how the information to be withheld relates to those issues. The governmental body should also provide a copy of the relevant pleadings if the case has been filed. Information that falls under the litigation exception generally can be withheld until the litigation has concluded or is no longer anticipated.¹⁴⁴ Criminal litigation is considered concluded once the statute of limitations has expired or when the defendant has exhausted all appellate and post-conviction remedies in state and federal court.¹⁴⁵ State law does not specifically define when civil litigation is considered to be concluded. Generally, civil litigation is considered to be concluded when all right of appeal has been exhausted and/or a final judgment has been entered. However, if the parties to civil or criminal litigation have inspected the records under discovery or through other means, the litigation exception would no longer apply.

V. Ability to Recover Costs for Providing Copies of Open Records

What is the general ability of a governmental body to charge for documents?

The Public Information Act allows governmental bodies to set a charge for providing copies of public information.¹⁴⁶ The Attorney General’s Office has set a charge of 10 cents per page for making simple photocopies or printouts. A governmental body may not charge more than 25% above the charges set by the Attorney General’s Office. If a governmental body’s actual cost for producing copies of open records exceeds the Attorney General’s Office charges by more than 25%, the governmental body may apply to the Attorney General’s Office for permission to charge more. In no case may the charge by the governmental body exceed the actual cost of producing the requested copies.

When can a governmental body recover labor charges for an open records request?

Labor to Produce Paper Copies: A governmental body may recover labor charges to handle an open records request for paper copies in three circumstances: 1) If the responsive records will result in over fifty pages of paper copies; 2) If the records to be copied are located in two or more separate buildings or in a remote storage facility;¹⁴⁷ or 3) If the governmental body provides access to paper documents that meet certain specifications.¹⁴⁸ The Attorney General's office presently allows a maximum labor charge of \$15 per hour.

Labor to Produce Electronic or Microfilm Copies: Charges for copies of records that are stored in other formats such as electronic information or microfilm may include reasonable costs of materials, labor, and overhead. If the governmental body assesses a charge for labor, the requestor may require the governmental body to provide a statement of the amount of time that was needed to prepare the requested copies. This statement must be signed by the officer for public information or the agent of that officer with the signer's name clearly typed below the signature. The governmental body is not permitted to charge for providing this statement.¹⁴⁹

A governmental body can also recover labor charges for providing access to electronic records if providing such access requires programming or manipulation of data. In such a case, the governmental body must provide a special written notice to the requestor as provided under the Public Information Act.¹⁵⁰ The governmental body must also obey the rules of the Attorney General's Office in determining how much to charge for the labor.¹⁵¹

Can a governmental body charge for the labor cost to retrieve materials from remote locations?

A governmental body may charge for the labor cost of retrieving records that are located in two or more separate buildings that are not connected to each other or in a remote storage facility.¹⁵² Buildings are considered to be "separate" if they are not connected by a covered or open sidewalk, or by an elevated or underground walkway.¹⁵³ The charge for labor can be recovered in such a situation even if the requestor seeks fewer than 50 pages of copies.

When and how much can a governmental body charge for overhead when handling an open records request?

A governmental body may impose a charge for overhead whenever a personnel (labor) charge is applicable to an open records request. Any overhead charge cannot exceed 20% of the personnel charge.¹⁵⁴

Can a governmental body recover costs for any modifications to its computer program that are necessary to respond to an open records request?

A governmental body may charge a requestor for the cost of any programming or manipulation of data that is necessary to answer an open records request.¹⁵⁵ The Attorney General's office presently allows a maximum programming charge of \$28.50 per hour. Unlike most other charges for public information, this charge may be imposed even if the requestor only wants access to the requested information and does not request any copies.¹⁵⁶ However, before a governmental body may impose such a charge, it must provide the requestor with certain written information in advance, including a statement of the estimated charges.¹⁵⁷

Can a governmental body require a requestor to pay the costs for producing the records prior to the governmental body mailing out the requested information?

If a requestor asks the governmental body to mail the information, the governmental body can send the information by first class mail and can require that the requestor pay in advance for postage, along with other permitted charges related to producing the information.¹⁵⁸ A governmental body is not required to provide public information by mail until the requestor pays all applicable charges.

What duty does a governmental body have to inform a requestor of the estimated charges for copies of or access to public information?

A governmental body is required to provide detailed information to the requestor if the charges for an open records request are likely to exceed forty dollars.¹⁵⁹ The governmental body must do the following:

1. Furnish the requestor, an itemized estimate of the expected costs. The governmental body is required to keep a record of the statement;
2. Inform the requestor if there is an alternative method for supplying the requested records that is less costly;
3. Tell the requestor he has 10 business days to provide the governmental body with a written response stating whether the charges are accepted, the request is modified, or a complaint has been lodged with the Attorney General's office. The requestor's response may be made by hand delivery, mail, fax or e-mail, and must specify the method by which the requestor wants the information supplied;¹⁶⁰
4. The notice must tell the requestor that failure to respond to the statement within 10 business days results in the automatic withdrawal of the open records request;¹⁶¹
5. If the governmental body finds that the costs will exceed more than 20 percent of the original estimate, the governmental body must provide the requestor with an updated itemized statement. The requestor again has 10 days to provide the governmental body with a written response to the updated statement, or the request will be considered to be withdrawn.¹⁶²

If the actual charges are more than \$40, a governmental body may only charge the amount estimated in the latest itemized statement that was provided to the requestor. However, if the governmental body did not provide the requestor with an updated itemized statement, the governmental body is limited to charging no more than 20% more than the amount of the original itemized statement.¹⁶³

Can a governmental body require a monetary deposit in order to comply with an open records request?

A governmental body must provide the requestor with an appropriate estimated itemized statement before the governmental body can require a deposit or bond. If such a statement is provided, a governmental body that has 16 or more full-time employees may require a deposit or bond if the estimated charge for producing copies of the requested records exceeds \$100. A governmental body

with fewer than 16 full-time employees may require a deposit if the estimated charges for producing copies of information are more than \$50.¹⁶⁴

Additionally, a governmental body may in certain situations require a deposit for providing access to public records if the costs of providing access would exceed the above noted thresholds. If the requestor does not make a deposit by the 10th day after the date the deposit is required, then the open records request is considered withdrawn.¹⁶⁵ Governmental bodies are required to follow applicable state law and the guidelines established by the Attorney General's Office for any charges that they would impose for providing access.¹⁶⁶

Can a governmental body reduce or waive the cost for making copies of public information?

A governmental body shall reduce or waive the normal charge for copies of public information if providing a reduced or no-cost copy would benefit the public. The governmental body may waive a charge for such copies if the cost of collecting the fee would exceed the amount of the charge.¹⁶⁷

VI. Enforcement of the Public Information Act

Is a requestor allowed to sue a governmental body for failure to comply with the Public Information Act?

A requestor is allowed to bring certain actions against a governmental body for violations of the Public Information Act. The requestor may file a complaint against a governmental body with the local county or district attorney.¹⁶⁸ The complaint must meet the following requirements:

- 1) Be in writing and signed by the complainant;
- 2) State the name of the governmental body that allegedly committed the violation as accurately as can be done by the complainant;
- 3) State the time and place of the alleged commission of the violation, as definitely as can be done by the complainant; and
- 4) Describe the violation, in general terms.¹⁶⁹

Within 31 days of receiving such a complaint, the local prosecuting attorney must determine if a violation has been committed, decide whether to take action against the governmental body, and notify the person who filed the complaint of that decision.¹⁷⁰

If the local prosecutor declines to proceed with an action against a governmental body, the complainant has 31 days to file a complaint with the Attorney General. The Attorney General must notify the complainant within 31 days of his decision whether to proceed with an action against the governmental body.¹⁷¹

If either the local prosecuting attorney or the Attorney General decides to bring a lawsuit against a governmental body, the governmental body must be notified prior to the filing of the lawsuit. The governmental body has three days to remedy the problem.¹⁷²

What civil remedies can be brought against a governmental body for failure to comply with the Public Information Act?

If a governmental body refuses to release public information or refuses to request an Attorney General ruling, either the requestor or the Attorney General may bring a lawsuit to force the release of the records in question.¹⁷³ Even if the Attorney General has determined that the governmental body may withhold the requested information, the requestor may still file a lawsuit against the governmental body to seek disclosure of the requested information.¹⁷⁴ Under certain circumstances, a third party may also file litigation to prevent the release of records that implicate that person's privacy or proprietary interests.¹⁷⁵ In a lawsuit brought to compel the release of public information, a requestor or the attorney general is entitled to an award of attorney fees and costs if they prevail in their suit. In a lawsuit by a governmental body seeking relief from compliance with an Attorney General ruling, a court may order the losing side to pay litigation costs and attorneys' fees, but is not required to.¹⁷⁶

In addition to a lawsuit of the types just discussed, a requestor that feels he or she has been overcharged for copies of public information may file a complaint with the Attorney General's office. The Attorney General's office may require the governmental body to pay the requestor the amount of any overcharge. If the Attorney General's office finds that the overcharge was due to bad faith on the part of the governmental body, the requestor who is overcharged may recover up to three times the amount of the overcharge from the governmental body.¹⁷⁷

What are the criminal penalties for noncompliance with the Public Information Act?

There are three provisions of the Public Information Act which have criminal penalties if violated:

Failure to Give Access to Public Information. A person responsible for releasing public information commits a crime if he fails to give access to or fails to permit copying of public information as required by the Public Information Act. This violation is a misdemeanor punishable by a fine of up to \$1,000, a six-month jail term, or both. The Public Information Act also states that this sort of violation constitutes official misconduct.¹⁷⁸

Release of Confidential Information. A person commits a crime if he or she distributes information considered confidential under the Public Information Act. Such a violation is a misdemeanor punishable by a fine of up to \$1,000, a six-month jail term, or both. The Act also states that this sort of violation constitutes official misconduct. Thus, a public official may be subject to removal from office for such an offense.¹⁷⁹

Illegal Destruction or Alteration of Public Information. Finally, a person commits a crime if that person, in violation of the Public Information Act, willfully destroys, mutilates, or alters public information or removes such information without permission. An offense of this type is a misdemeanor and is punishable by a fine of between \$25 and \$4,000, three days to three months of jail time, or both.¹⁸⁰ It is important to note that there are provisions of Texas law outside of the Public Information Act that also criminalize tampering with a governmental record, and an offense under one of those provisions may constitute a felony.¹⁸¹

VII. Additional Information about the Public Information Act

Are all elected or appointed governmental officials required to complete training about the Act?

Elected and appointed officials must have a minimum of one hour but no more than two hours of training. Officials who were in office before January 1, 2006 have until January 1, 2007, one year, to complete the required training.¹⁸² Officials that are elected or appointed after January 1, 2006 have 90 days to complete the required training. If the governmental body has designated a public information coordinator, then the officials can opt out of taking the training provided that they designate their public information coordinator to receive the training in their place. The public information coordinator must be the person that is primarily responsible for the processing of open records requests for the governmental body. The official or public information coordinator should receive a certificate of completion. The governmental body shall maintain the certificates and make them available for public inspection.

Where can a governmental body get more information about the Public Information Act?

For additional copies of this article, a governmental body may contact the Municipal Affairs Section of the Attorney General's Office at (512) 475-4683 or the County Affairs Section of the Attorney General's Office at (512) 463-2060. Additionally, the Office of the Attorney General produces the *Public Information Handbook*, an in-depth publication about the Act and its interpretation by Attorney General rulings and court cases. That publication may be ordered by calling (512) 475-4428. Finally, the Open Records Division of the Attorney General's Office sponsors an Open Records Hotline where public officials and concerned citizens can get answers to basic questions about the Public Information Act. The phone number for the Open Government Hotline is (512) 478-6736 or (877) 673-6839.

ENDNOTES

1. This article was originally written by Scott Joslove, and Robert Ray, and revised for 2006 by Zindia Thomas. Much of the material in the article is drawn from the Texas Attorney General's *2006 Public Information Handbook*. In addition, this article was reviewed by June Harden, Hadassah Schloss, Brenda Loudermilk and Julian Grant.
2. TEX. GOV'T CODE ANN. § 552.002 (Vernon 2004).
3. *Id.* § 552.003 (1).
4. *Id.* § 552.0036.
5. *Id.* § 552.003 (1)(A)(iv).
6. *Id.* § 552.003 (1)(A)(xii); *see, e.g.* Op. Tex. Att'y Gen. No. JM-821 (1987), Tex. Att'y Gen. ORD-621 (1993), ORD-602 (1992).
7. TEX. GOV'T CODE ANN. § 552.002 (a) (Vernon 2004). *See also* Tex. Att'y Gen. ORD-363 (1983).
8. Tex. Att'y Gen. ORD-585 (1991).
9. TEX. GOV'T CODE ANN. § 552.003 (1)(B)(Vernon 2004).
10. *Id.* § 552.0035. *See also* Texas Rules of Judicial Administration Rule 12, *reprinted in* TEX. GOV'T CODE ANN., title 2, subtitle F appendix (Vernon 2005).
11. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978); *Ashpole v. Millard*, 778 S.W.2d 169 (Tex.App. – Houston [1st Dist.] 1989, no writ); Op. Tex. Att'y Gen. No. DM-166 (1992), Tex. Att'y Gen. ORD-25 (1974).
12. TEX. GOV'T CODE ANN. § 552.0055 (Vernon 2004).
13. TEX. CRIM. PROC. CODE ANN. art. 18.01(b) (Vernon 2005); *See also Houston Chronicle Publishing Co. v. Woods*, 949 S.W.2d 492, 499 (Tex. App. -- Beaumont 1997, no writ).
14. Op. Tex. Att'y Gen. No. JM-119 (1983); Tex. Att'y Gen. LO-93-89 (1993). *See also*, Tex. Att'y Gen. OR99-2237 (1999).
15. Tex. Att'y Gen. ORD-497 (1988); ORD-44 (1974).
16. TEX. GOV'T CODE ANN. § 552.301 (c) (Vernon Supp. 2005).
17. *Id.* § 552.301 (a); Tex. Att'y Gen. ORD-304 (1982).
18. TEX. GOV'T CODE ANN. § 552.221(a) (Vernon 2004). *See also* Tex. Att'y Gen. ORD-664 (2000).
19. Tex. Att'y Gen. ORD-467 (1987); ORD-664 (2000).

20. TEX. GOV'T CODE ANN. § 552.221 (d) (Vernon 2004).
21. *Id.*
22. *Id.* § 552.221 (c).
23. Tex. Att'y Gen. ORD-148 (1976) (faculty member's file is not in active use the entire time the promotion is under consideration); *But see* Tex. Att'y Gen. ORD-225 (1979) (secretary's handwritten notes are in active use while the secretary is typing minutes of the meeting from them).
24. TEX. GOV'T CODE ANN. § 552.231(b) (Vernon 2004).
25. *Id.* § 552.231 (c).
26. *Id.* § 552.301 (a) (Vernon Supp. 2005).
27. *Id.* § 552.301 (b).
28. Tex. Att'y Gen. ORD-333 (1982); ORD-663 (1999).
29. TEX. GOV'T CODE ANN. § 552.301 (d), (e-1) (Vernon Supp 2005).
30. *Id.* § 552.305 (d)(1) (Vernon 2004).
31. *Id.* § 552.305 (d)(2)(B).
32. *Id.* § 552.305 (e).
33. *Id.* § 552.222 (b).
34. Tex. Att'y Gen. ORD-663 (1999).
35. *Id.*
36. TEX. GOV'T CODE ANN. § 552.301 (a) (Vernon Supp. 2005).
37. Tex. Att'y Gen. ORD-673 (2001) (what constitutes a "previous determination"). *See also* Tex. Att'y Gen. ORD-435 (1986) (city cannot unilaterally decide that material fits within exception unless the city has previously requested a determination involving the exact same material); *see also Houston Chronicle Publishing Co., v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989)(specifying that Attorney General is authorized to determine what constitutes "previous determination.").
38. Tex. Att'y Gen. ORD-542 (1990).
39. TEX. GOV'T CODE ANN. § 552.302 (Vernon Supp.2005).
40. Tex. Att'y Gen. ORD-150 (1977).
41. Tex. Att'y Gen. ORD-665 (2000).

42. TEX. GOV'T CODE ANN. § 552.301(a) (Vernon Supp. 2005).
43. Tex. Att'y Gen. ORD-673 (2001).
44. TEX. GOV'T CODE ANN. § 552.301 (b)-(d) (Vernon Supp 2005).
45. *Id.* § 552.301 (e).
46. Tex. Att'y Gen. ORD-333 (1982); ORD-663 at 5 (1999).
47. TEX. GOV'T CODE ANN. § 552.301(e-1) (Vernon Supp. 2005).
48. *Id.* § 552.303 (d) (Vernon 2004).
49. *Id.* § 552.303 (e).
50. *Id.* § 552.306 (a).
51. *Id.* § 552.301 (e) (Vernon Supp. 2005).
52. *Id.* § 552.301 (f).
53. *Id.* § 552.324 (b) (Vernon 2004).
54. *Id.* § 552.205 (Vernon Supp. 2005).
55. *Id.* § 552.222 (a) (Vernon 2004).
56. *Id.* § 552.222 (c).
57. *Id.* § 552.222 (b).
58. *Id.* § 552.222 (a).
59. *Id.* § 552.228.
60. *Id.* § 552.002 (a); *see also* Tex. Att'y Gen. ORD-452 (1986); Op. Tex. Att'y Gen. No. JM-672 (1987).
61. Op. Tex. Att'y Gen. No. JM-672 (1987).
62. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. -- San Antonio 1978, writ dismissed); Tex. Att'y Gen. ORD-476 at 1 (1987), ORD-452 at 3 (1986).
63. Tex. Att'y Gen. ORD-452 (1986), ORD-476 (1987); Op. Tex. Att'y Gen. No. JM-48 (1983).
64. Tex. Att'y Gen. ORD-563 at 8 (1990); ORD-555 at 1 (1990).
65. TEX. GOV'T CODE ANN. § 552.231 (b) (Vernon Supp. 2005).
66. *Id.* § 552.228 (b)(2) (Vernon 2004).
67. *Id.* § 552.228 (c).

68. *Id.* § 552.231 (Vernon Supp. 2005).
69. Tex. Att’y Gen. ORD-571 (1990).
70. Op. Tex. Att’y Gen. No. JM-757 (1987). *See also* Op. Tex. Att’y Gen. No. GA-400 (2006).
71. TEX. GOV’T CODE ANN. § 552.228 (c)(Vernon 2004). *See also* TEX. GOV’T CODE ANN. § 552.230 (governmental body may promulgate rules for efficient, safe, and speedy inspection and copying if not inconsistent with Public Information Act).
72. *Id.* § 552.027.
73. Op. Tex. Att’y Gen. No. JM-672 (1987); Tex. Att’y Gen. ORD-550 (1990).
74. TEX. GOV’T CODE ANN. § 552.232 (a) (Vernon 2004).
75. *Id.*
76. *Id.* § 552.232 (b).
77. *Id.* § 552.232 (c).
78. *Id.* § 552.232 (a)(1-2).
79. *Id.* § 552.232 (d).
80. *Id.* § 552.022(a)(1).
81. *Id.* § 552.022(a)(17).
82. *Id.* § 552.022(a)(18).
83. *Id.*
84. TEX. GOV’T CODE ANN. § 552.022(a) (Vernon 2004).
85. *Id.* §§ 552.104(b); 552.133(d).
86. *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001).
87. *Id.*
88. Op. Tex. Att’y Gen. Nos. H-258 (1974); JM-672 (1987); Tex. Att’y Gen. ORD-455 (1987).
89. Tex. Att’y Gen. ORD-633 (1995); ORD-606 (1992).
90. TEX. GOV’T CODE ANN. §§ 552.024; 552.117 (Vernon 2004).
91. *Id.* §§ 552.117; 552.1175 (Vernon Supp. 2005).
92. *Id.* § 552.117 (a)(4) (Vernon 2004).
93. *Id.* § 552.147 (Vernon Supp. 2005)

94. *See, e.g.*, Tex. Att’y Gen. ORD-635 (1995) (public official’s or employee’s appointment calendar may be subject to Act); ORD-626 (1994) (handwritten notes taken during D.P.S. promotion board oral interviews are subject to Act).
95. TEX. GOV’T CODE ANN. § 552.137 (Vernon 2004).
96. TEX. GOV’T CODE ANN. § 552.111 (Vernon 2004).
97. Tex. Att’y Gen. ORD-615 (1993). *See also* Tex. Att’y Gen. ORD-631 (1995) (report addressing systematic discrimination against minorities and the educational mission of the university in question was not open to public).
98. Tex. Att’y Gen. ORD-631 (1995).
99. Tex. Att’y Gen. ORD-615 (1993).
100. Tex. Att’y Gen. ORD-631 (1995).
101. Tex. Att’y Gen. ORD-462 (1987).
102. TEX. GOV’T CODE ANN. § 552.022 (a)(2) (Vernon 2004); *see also* Tex. Att’y Gen. ORD-444 (1986); ORD-405 (1983).
103. Tex. Att’y Gen. ORD-441 (1986).
104. Tex. Att’y Gen. ORD-615 (1993).
105. TEX. GOV’T CODE ANN. § 552.102 (a) (Vernon 2004).
106. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex.App.-El Paso 1992, no writ).
107. Tex. Gov’t Code Ann. §§ 552.023 (a); 552.102 (Vernon 2004); Tex. Att’y Gen. ORD-288 (1981).
108. Tex. Att’y Gen. ORD-288 (1981). (The Attorney General generally does not allow a governmental body to withhold information pursuant to the litigation exception if the opposing party has had previous access to the information. Thus, if a governmental body is engaged in litigation with its own employee, the litigation exception generally would not protect any information in the employee’s personnel file to which the employee had previously had access.)
109. TEX. GOV’T CODE ANN. § 552.108 (c) (Vernon Supp. 2005); *see also* Tex. Att’y Gen. ORD-127 (1976).
110. *Morales v. Ellen*, 840 S.W.2d 519 (Tex. Civ. App.---El Paso 1992, writ denied) (Gov’t Code § 552.108 not applicable where no criminal investigation or prosecution of police officer resulted from investigation of allegation of sexual harassment); Tex. Att’y Gen. ORD-350 (1982) (predecessor provision of Gov’t Code § 552.108 not applicable to IAD investigation file when no criminal charge against officer results from investigation of complaint against police officer).
111. Tex. Att’y Gen. ORD-127 (1976).

112. TEX. TRANSP. CODE ANN. § 550.065 (Vernon Supp. 2005).
113. *Id.* § 550.065 (c)(4).
114. TEX. GOV'T CODE ANN. § 552.104 (Vernon 2004).
115. Tex. Att'y Gen. ORD-331 (1982).
116. Tex. Att'y Gen. ORD-541 (1990).
117. TEX. GOV'T CODE ANN. § 552.104 (b)(Vernon 2004).
118. Tex. Att'y Gen. ORD-319 (1982).
119. TEX. GOV'T CODE ANN. § 552.105 (Vernon 2004).
120. Tex. Att'y Gen. ORD-222 (1979). (The Attorney General has extended this protection to information about the appraisal of land parcels that were acquired in advance of other land for the same project.)
121. Tex. Att'y Gen. ORD-348 (1982).
122. TEX. GOV'T CODE ANN. § 552.110 (a) (Vernon 2004).
123. Restatement of Torts § 757 cmt. b (1939)
124. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958).
125. *See* Tex. Att'y Gen. ORD-402 (1983).
126. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).
127. TEX. GOV'T CODE ANN. § 552.110 (b) (Vernon 2004).
128. Tex. Att'y Gen. ORD-639 (1996).
129. TEX. GOV'T CODE ANN. § 552.131 (a)(1) (Vernon 2004).
130. *Id.* § 552.131 (a)(2).
131. *Id.* § 552.131 (b).
132. *Id.* § 552.131(c).
133. Tex. Att'y Gen. ORD-676 at 6-7 (2002).
134. *Id.* at 7.
135. TEX. R. EVID. 503(b)(1).
136. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.---Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than

that of attorney).

137. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E).

138. *Id.* 503(b)(1)

139. *Id.* 503(a)(5).

140. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.---Waco 1997, no writ).

141. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

142. TEX. GOV'T CODE ANN. § 552.103 © (Vernon 2004).

143. *See University of Texas Law School v. Texas Legal Foundation*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.).

144. Tex. Att'y Gen. ORD-647 (1996).

145. TEX. GOV'T CODE ANN. § 552.103 (b) (Vernon 2004).

146. *Id.* § 552.262 (Vernon Supp. 2005). *See, generally, Id.* §§ 552.261 - 552.272 (Vernon 2004 & Supp. 2005).

147. *Id.* § 552.261(Vernon 2004).

148. *Id.* § 552.271 (c)-(d).

149. *Id.* § 552.261 (b).

150. *Id.* §§ 552.231 (Vernon Supp. 2005); 552.272 (c)(Vernon 2004).

151. *Id.* § 552.262 (Vernon Supp. 2005).

152. *Id.* § 552.261 (a) (Vernon 2004)

153. *Id.* § 552.261 (b).

154. 1 TEX. ADMIN. CODE §111.63 (West 2005).

155. TEX. GOV'T CODE ANN. § 552.231 (Vernon Supp. 2005).

156. *Id.* § 552.272 (Vernon 2004).

157. *Id.* § 552.231 (Vernon Supp. 2005).

158. *Id.* § 552.221 (b) (Vernon 2004).

159. *Id.* § 552.2615 (Vernon Supp. 2005).

160. *Id.* § 552.2615(a).

161. *Id.* § 552.2615(b).
162. *Id.* § 552.2615 (c).
163. *Id.* § 552.2615(d).
164. *Id.* § 552.263.
165. *Id.* § 552.263(f).
166. *Id.* § 552.262.
167. *Id.* § 552.267 (Vernon 2004).
168. *Id.* § 552.3215.
169. *Id.* § 552.3215 (e).
170. *Id.* § 552.3215 (g).
171. *Id.* § 552.3215 (I).
172. *Id.* § 552.3215 (j).
173. *Id.* § 552.321.
174. *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App. – Austin 1992, no writ). *See also* TEX. GOV'T CODE ANN. § 552.3215 (Vernon 2004).
175. *See, e.g., Morales v. Ellen*, 840 S.W. 2d 519 (Tex. App. – El Paso 1992, writ denied). *See also* TEX. GOV'T CODE ANN. § 552.325 (Vernon 2004).
176. TEX. GOV'T CODE ANN. § 552.323 (Vernon 2004).
177. *Id.* § 552.269 (Vernon Supp. 2005).
178. *Id.* § 552.353 (Vernon 2004).
179. *Id.* § 552.352.
180. *Id.* § 552.351.
181. *See, e.g.,* TEX. PEN. CODE ANN. § 37.10 (Vernon Supp. 2005).
182. TEX. GOV'T CODE ANN. § 552.012 (Vernon Supp. 2005).