OFFICE OF THE ATTORNEY GENERAL ▪ STATE OF TEXAS
JOHN CORNYN

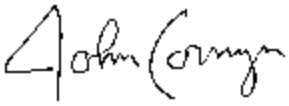
November 24, 1999

Dear Texan:

Democracy thrives in the light of day and corruption breeds in darkness. It is vital for the citizens of this state to understand their rights to access public information and for government officials to understand their obligations to provide such access. In that spirit, this handbook is provided as an in-depth guide to the Texas Public Information Act, for use by the members of the public and Texas public officials.

None of my responsibilities as Attorney General is more important to me than those I have under the Texas Public Information Act. Please know that I and my staff are always available to assist you with your public information questions and concerns.

Sincerely,



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2000 Public Information Handbook

V. Disclosure to Selected Persons

VI. Attorney General Determines Whether Information Is Subject to an Exception

A Preface to the Public Information Handbook

The Act. The Texas Public Information Act (the "Act") gives the public the right to request access to government information. Below is a description of the basic procedures, rights, and responsibilities under the Act.

Making a Request. The Act is triggered when a person submits a written request to a governmental body. The request must ask for records or information which are already in the governmental body's files. The Act does not require a governmental body to create new information, to do legal research, or to answer questions. In preparing a request, a person may want to ask the governmental body what information is available. To make a request, a requestor may be required to submit the request in writing.

Charges to the Requestor. A person can ask to view the information, get copies of the information, or both. If a request is for copies of information, then the governmental body may charge for the copies. If a request is only for an opportunity to inspect information, then usually the governmental body may not impose a charge on the requestor. However, under certain limited circumstances a governmental body may impose a charge for access to information. All charges imposed by a governmental body for copies or for access to information must comply with the General Services Commission's rules.

Exceptions to the Act. Although the Act makes most government information available to the public, some exceptions exist. If an exception might apply and the governmental body wishes to withhold the information, then the governmental body must, within ten business days of receiving the open records request, refer the matter to the Office of the Attorney General (the "OAG") for a ruling on whether an exception applies. If the OAG rules that an exception applies, the governmental body will not release the information. If a governmental body improperly fails to release information, the Act authorizes the requestor or the OAG to file a civil lawsuit to compel the governmental body to release the information.

Questions or Complaints. To reach the OAG's Open Government Hotline, call (877) 673-6839 (877-OPEN TEX). The Hotline staff answer questions about the proper procedures for using and complying with the Act. The Hotline staff assist both governmental bodies and people requesting information from a governmental body. The Hotline also accepts written complaints about alleged violations of the Act. If a complaint relates to charges, contact the General Services Commission (the "GSC") at (512) 475-2497. Certain violations of the Act involve possible criminal penalties and those items should be reported to the county attorney or criminal district attorney.

Federal Agencies. The Act does not apply to the federal government or to any of its departments or agencies. If you are seeking information from the federal government, the appropriate law is the federal Freedom of Information Act. That law's rules and procedures are different from the Texas Public Information Act.

Rights of Requestors

All persons who request public information have the right to:

- Receive treatment equal to all other requestors
- Receive a statement of estimated charges in advance
- Choose whether to inspect the requested information, copy the information, or both
- Be notified when the governmental body asks the OAG for a ruling on whether the information must be withheld
- Lodge a complaint with GSC regarding any improper charges for responding to a public information request
- Lodge a complaint with the OAG Hotline or the county attorney or criminal district attorney regarding any alleged violation of the Act

Responsibilities of Requestors

All persons who request public information have the responsibility to:

- Submit a written request according to a governmental body's reasonable procedures
- Include enough description and detail of the information that you want so that the governmental body can accurately identify and locate the items you are requesting
- Cooperate with the governmental body's reasonable requests that you clarify the type or amount of information that you are requesting
- Respond promptly in writing to all written communications from the governmental body (including any written estimate of charges)
- Make a timely payment for all valid charges
- Keep all appointments for inspection of records or for pick up of copies

Rights of Governmental Bodies

All governmental bodies responding to information requests have the right to:

- Establish reasonable procedures for inspecting or copying information
- Request and receive clarification of vague or overly broad requests
- Request an OAG ruling regarding whether any information may be withheld
- Receive timely payment for all copy charges or other charges
- Obtain payment of overdue balances exceeding $100.00, or obtain a security deposit, before processing additional requests from the same requestor
- Request a bond, prepayment or deposit if estimated costs exceed $100.00 (or, if the governmental body has fewer than sixteen employees, $50.00)

Responsibilities of Governmental Bodies

All governmental bodies responding to information requests have the responsibility to:

- Treat all requestors equally
- Be informed about open records laws and educate employees on the requirements of those laws
- Inform requestor of cost estimates and any changes in the estimates
- Confirm that the requestor agrees to pay the costs before incurring the costs
- Provide requested information promptly
- Inform requestor if the information will not be provided within ten business days and give estimated date on which it will be provided
- Cooperate with requestor to schedule reasonable times for inspecting or copying information
- Follow General Services Commission regulations on charges; not overcharge on any items; not bill for items that must be provided without charge
- Request an OAG ruling regarding whether any information must be withheld
- Inform third parties if their proprietary information is being requested from the governmental body
- Inform requestor when the OAG has been asked to rule whether any information may be withheld or must be withheld
- Comply with any OAG ruling on whether an exception applies, or file suit against the OAG within 30 days
- Respond in writing to all written communications from the GSC or the OAG regarding complaints about violations of the Act

This handbook is also available online at the Office of the Attorney General's Web site at **www.oag.state.tx.us**. The Web site also provides access to the following opinions: 1) Attorney General Opinions dating from 1939 through the present; 2) all formal Open Records Decisions (ORDs); and 3) all informal Open Records letter rulings (ORs) issued since January 1999. Additional tools found on the site include the Open Meetings Handbook, the text of the Public Information and Open Meetings Acts, and other valuable publications and resources for governmental bodies and citizens.

Hard copies of Attorney General publications and opinions may be obtained through the Support Services Division's Opinion Library by calling (512) 936-1730 or faxing (512) 462-0548. Written requests for publications and opinions may be mailed to:

Office of the Attorney General
Support Services Division
Opinion Library
P.O. Box 12548
Austin, Texas 78711-2548

The following is a list of telephone numbers that may be helpful to persons needing answers to open government questions.

Open Government Hotline *for questions regarding TPIA and TOMA*	TOLL-FREE *or*	(877) OPEN TEX (512) 478-6736
Opinion Library, Office of the Attorney General *for copies of handbooks and opinions*		(512) 936-1730
General Services Commission *for questions regarding the costs of copies*		(512) 475-2497
Freedom of Information Foundation *for questions regarding FOIA*		(800) 580-6651
State Board of Medical Examiners *for questions on access to medical records*		(512) 305-7065
State Library and Archives Commission Records Management Assistance *for records retention questions*		(512) 452-9242
U.S. Department of Education Family Policy Compliance Officer *for questions regarding FERPA and education records*		(202) 260-3887

Note on Terminology

In previous publications and rulings, the Office of the Attorney General (the "OAG") has referred to Chapter 552 of the Government Code as the "Open Records Act." The OAG, in conformity with the statute, has now adopted the term "Public Information Act" to refer to the provisions of chapter 552. However, the OAG will continue, in this handbook and elsewhere, to use the term "open records" in other contexts, such as "open records request," and "open records decision."

The star symbol  is used throughout the handbook to indicate sections that discuss significant changes in the law that have occurred since publication of the 1998 handbook.

PART ONE: How the Public Information Act Works

I. Overview

A. Historical Background

The Texas Public Information Act (the "Public Information Act" or the "Act") was adopted in 1973 by the reform-minded Sixty-third Legislature.[1] The Sharpstown scandal, which occurred in 1969 and came to light in 1971, provided the motivation for several enactments opening up government to the people.[2]

The Act was initially codified as V.T.C.S. article 6252-17a, which was repealed in 1993.[3] The Public Information Act is now codified in the Texas Government Code at chapter 552.[4] The codification of the Act was a nonsubstantive revision.[5]

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[1] Act of May 19, 1973, 63rd Leg., R.S., ch. 424, 1973 Tex. Gen. Laws 1112.

[2] *See generally Mutscher v. State*, 514 S.W.2d 905 (Tex. Crim. App. 1974) (summarizing events of Sharpstown scandal).

[3] Act of May 4, 1993, 73rd Leg., R.S., ch. 268, § 46, 1993 Tex. Gen. Laws 583, 986.

[4] *Id.* § 1, 1993 Tex. Gen. Laws 583, 594-607.

[5] *Id.* § 47, 1993 Tex. Gen. Laws 583, 986.

B. Policy; Construction

The preamble of the Public Information Act is now codified at section 552.001 of the Government Code. It declares the basis for the policy of open government expressed in the Public Information Act. It finds that basis in "the American constitutional form of representative government" and "the principle that government is the servant and not the master of the people." It further explains this principle in terms of the need for an informed citizenry:

> **The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.**

The purpose of the Public Information Act is to maintain the people's control "over the instruments they have created." The Act requires the Office of the Attorney General to construe the Act liberally in favor of open government.[6]

C. Attorney General to Maintain Uniformity in Application, Operation, and Interpretation of the Act.

A new provision, section 552.011 of the Government Code, authorizes the attorney general to prepare, distribute, and publish materials, including detailed and comprehensive written decisions and opinions, in order to maintain uniformity in the application, operation, and interpretation of the Act.[7]

D. Section 552.021

Section 552.021 of the Government Code is the starting point for understanding the operation of the Public Information Act. It provides as follows:

> **Public information is available to the public at a minimum during the normal business hours of the governmental body.**

This provision tells us that information in the possession of a governmental body is generally available to the public. Section 552.002(a) defines "public information" as information "collected, assembled, or maintained . . . by a governmental body," or for such a body if it

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[6] Gov't Code § 552.001(b).

[7] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 4, (codified at Gov't Code § 552.011).

"owns . . . or has a right of access to" the information.[8] If the governmental body wishes to withhold information from a member of the public, it must show that the requested information is within one of the exceptions to required public disclosure. (For a discussion of the governmental body's duty to make this showing, refer to the section beginning on page 39 of this handbook.) Subchapter C of the Act, sections 552.101 through 552.132, lists the specific exceptions to required public disclosure; these exceptions are discussed in part two (beginning on page 64) of this handbook.

II. Entities Subject to the Public Information Act

The Public Information Act applies to information of every "governmental body." "Governmental body" is defined in section 552.003(1)(A) of the Government Code to mean:

> **(i) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;**
>
> **(ii) a county commissioners court in the state;**
>
> **(iii) a municipal governing body in the state;**
>
> **(iv) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;**
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> **(v) a school district board of trustees;**
>
> **(vi) a county board of school trustees;**
>
> **(vii) a county board of education;**
>
> **(viii) the governing board of a special district;**

[8] Open Records Decision No. 363 (1983) (concluding that information is public unless it falls within specific exception).

(ix) the governing body of a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code; and

(x) the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds.

The judiciary is expressly excluded from the definition of "governmental body."[9] The required public release of records of the judiciary is governed by Rule 12 of the Texas Rules of Judicial Administration.[10] (For a discussion of the judiciary exclusion, refer to page 10 of this handbook.)

An entity that does not believe it is a "governmental body" within this definition is advised to timely request a decision from the attorney general under subchapter G of the Act if there has been no previous determination regarding this issue and it wishes to withhold the requested information. *See Blankenship v. Brazos Higher Educ. Auth., Inc.*, 975 S.W.2d 353 (Tex. App.—Waco 1998, pet. denied) (entity does not admit that it is governmental body by virtue of request for opinion from attorney general). (For a discussion of the governmental body's duty under subchapter G, refer to page 33 of this handbook.)

A. State and Local Governmental Bodies

The definition of the term "governmental body" encompasses all public entities in the executive and legislative branches of government at the state and local levels. Although a sheriff's office, for example, is not within the scope of section 552.003(1)(A)(i)-(ix), it is supported by public funds and is therefore a "governmental body" within section 552.003(1)(A)(x).[11]

B. Private Entities That Are Supported By or That Spend Public Funds

An entity that is supported in whole or in part by public funds or that spends public funds is a governmental body under section 552.003(1)(A)(x) of the Government Code. Public

[9] Gov't Code § 552.003(1)(B).

[10] Rule 12 of the Texas Rules of Judicial Administration is located at Appendix A in this handbook.

[11] Open Records Decision No. 78 (1975) (discussing statutory predecessor to section 552.003(1)(A)(x)); *see Permian Report v. Lacy*, 817 S.W.2d 175 (Tex. App.—El Paso 1991, writ denied) (suggesting that county clerk's office is subject to Public Information Act as agency supported by public funds).

funds are "funds of the state or of a governmental subdivision of the state."[12] The Public Information Act does not apply to private persons or businesses simply because they provide goods or services under a contract with a governmental body.[13] An entity that receives public funds is not a governmental body if its agreement with the government imposes "a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser."[14]

For example, in *Kneeland v. National Collegiate Athletic Ass'n,*[15] an appellate court examined the financial relationships between Texas public universities and the National Collegiate Athletic Association ("NCAA") to determine whether the NCAA was a governmental body within the statutory predecessor to section 552.003(1)(A)(x). The court below had concluded that the NCAA was subject to the Public Information Act, finding that its receipt of dues, assessments of television rights fees, and unreimbursed expenses from state universities constituted general support with public funds. The appellate court reversed, holding that the NCAA fell outside the definition of a governmental body because the public university members received a quid pro quo in the form of specific, measurable services.[16]

If, however, a governmental body makes an unrestricted grant of funds to a private entity to use for its general support, the private entity is a governmental body subject to the Public Information Act.[17] If a distinct part of an entity is supported by public funds within section 552.003(1)(A)(x) of the Government Code, the records relating to that part or section of the entity are subject to the Public Information Act, but records relating to parts of the entity not supported by public funds are not subject to the Act.[18]

The following formal decisions found certain private entities to be governmental bodies under section 552.003(1)(A)(x) or its statutory predecessor:

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[12] Gov't Code § 552.003(5).

[13] Open Records Decision No. 1 (1973) (concluding that bank that holds funds of governmental body is not subject to Act).

[14] Open Records Decision No. 228 at 2 (1979); *see also* Attorney General Opinion JM-821 (1987).

[15] 850 F.2d 224 (5th Cir. 1988), *rev'g* 650 F. Supp. 1047 (W.D. Tex. 1986), *cert. denied,* 488 U.S. 1042 (1989).

[16] *See also A. H. Belo Corp. v. Southern Methodist Univ.*, 734 S.W.2d 720 (Tex. App.—Dallas 1987, writ denied) (finding that funds distributed by Southwest Conference to private university members were not public funds; thus, private universities were not governmental bodies).

[17] Open Records Decision No. 228 (1979).

[18] Open Records Decision No. 602 (1992).

Attorney General Opinion JM-821 (1987) — a volunteer fire department receiving general support from a fire prevention district;

Open Records Decision No. 621 (1993) — the Arlington Chamber of Commerce and the Arlington Economic Development Foundation, through which the chamber of commerce receives support of public funds;

Open Records Decision No. 602 (1992) — the portion of the Dallas Museum of Art that is supported by public funds;

Open Records Decision No. 601 (1992) — the El Paso Housing Finance Corporation, established pursuant to chapter 394 of the Local Government Code and supported by public funds;

Open Records Decision No. 509 (1988) — a nonprofit corporation established under the federal Job Training Partnership Act[19] and supported by federal funds appropriated by the state and advances of state funds in anticipation of receipt of federal funds;

Open Records Decision No. 273 (1981) — a search advisory committee that was established by a board of regents to recommend candidates for university president and that expended public funds;

Open Records Decision No. 228 (1979) — a private, nonprofit corporation, with the purpose of promoting the interests of the area, that received general support from the city; and

Open Records Decision Nos. 201, 195 (1978) — entities officially designated as community action agencies under the federal Economic Opportunity Act of 1964[20] and supported by funds of the state or a political subdivision.

The following decisions found other private entities not to be governmental bodies under the statutory predecessor to section 552.003(1)(A)(x):

Open Records Decision No. 602 (1992) — the portion of the Dallas Museum of Art not supported by public funds, in particular, a specific privately donated art collection;

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[19] 29 U.S.C. § 1501.

[20] 42 U.S.C. § 2781 (repealed August 13, 1981).

Open Records Decision No. 569 (1990) — the Fiesta San Antonio Commission, which leases facilities from the city and receives permits and licenses to use public streets for parades and other events;

Open Records Decision No. 510 (1988) — a private university whose students receive state tuition grants; and

Open Records Decision No. 317 (1982) — task forces appointed by a mayor-elect's campaign staff to examine the city government.

See also Blankenship v. Brazos Higher Educ. Auth., Inc., 975 S.W.2d 353 (Tex. App.—Waco 1998, pet. denied) (nonprofit organization which issues revenue bonds to purchase student loans pursuant to city's request is not governmental body subject to Act; fact that city approves organization's bond issuance does not amount to being supported by public funds).

Additionally, in recent informal letter rulings, the Attorney General found that various entities are considered governmental bodies under section 552.003(1)(A)(x) or its statutory predecessor, including: Hale County Crisis Center;[21] Las Casas Foundation;[22] SER-Jobs for Progress, Inc.;[23] Del Mar College Foundation;[24] Community Development Corporation of Brownsville;[25] Fort Worth Dallas Ballet;[26] Caritas, Inc.;[27] University of Texas Investment Management Company ("UTIMCO");[28] the West Columbia Volunteer Fire Department;[29] the City of Arlington Housing Authority;[30] the Tarrant County Bail Bond Board;[31] the Houston/Harris County Sports Facility Public Advisory Committee;[32] the Valley Initiative for

[21] Open Records Letter No. 99-1519 (1999).

[22] Open Records Letter No. 98-2310 (1998).

[23] Open Records Letter No. 98-2252 (1998).

[24] Open Records Letter No. 98-1026 (1998).

[25] Open Records Letter No. 98-0286 (1998).

[26] Open Records Letter No. 97-2733 (1997).

[27] Open Records Letter No. 97-1447 (1997).

[28] Open Records Letter No. 97-1776 (1997).

[29] Open Records Letter No. 97-0205 (1997).

[30] Open Records Letter No. 96-1943 (1996); *see also* Open Records Decision No. 268 (1981) (noting that because housing authorities "perform essential governmental functions," and because funds they collect from rentals are "public moneys," housing authorities are governmental bodies within meaning of Act).

[31] Open Records Letter No. 96-1625 (1996).

[32] Open Records Letter No. 96-1318 (1996).

Development and Advancement;[33] the Houston Regional HIV/AIDS Resource Group;[34] the Buffalo Springs Lake Volunteer Fire Department;[35] and the Dallas Plan.[36] Conversely, in other recent informal letter rulings, the Attorney General found that certain entities are not governmental bodies under section 552.003(1)(A)(x) or its statutory predecessor, including: the University of Texas Foundation;[37] Austin Community Television;[38] the Sabine Fund and Cannata Houses Divisions of the Greater Houston Preservation Alliance;[39] and Santo Water Supply Corporation.[40]

C. Certain Property Owners' Associations Subject to Act

In House Bill 3407, the Seventy-sixth Legislature added section 552.0035 to the Act.[41] Section 552.0035 provides:

> **A property owners' association is subject to [the Act] in the same manner as a governmental body if:**
>
> > **(1) membership in the property owners' association is mandatory for owners or for a defined class of owners of private real property in a defined geographic area *in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more*;**
> >
> > **(2) the property owners' association has the power to make mandatory special assessments for capital improvements or mandatory regular assessments; and**
> >
> > **(3) the amount of the mandatory special or regular assessments is or has ever been based in whole or in part on the value at which the state or a local governmental body assesses the property for purposes of ad valorem taxation under Section 20, Article VIII, Texas Constitution.** [Emphasis added.]

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[33] Open Records Letter No. 96-0993 (1996).

[34] Open Records Letter No. 96-0766 (1996).

[35] Open Records Letter No. 96-0079 (1996).

[36] Open Records Letter No. 95-078 (1995) (group of consultants working on long-range plan for City of Dallas).

[37] Open Records Letter No. 97-1595 (1997).

[38] Open Records Letter No. 95-1628 (1995).

[39] Open Records Letter No. 94-871 (1994).

[40] Open Records Letter No. 96-1133 (1996).

[41] Act of May 26, 1999, 76th Leg., R.S., H.B. 3407, § 2 (codified at Gov't Code § 552.0035).

The only county in Texas currently having a population of 2.8 million or more is Harris County. The counties adjoining Harris County are Waller, Fort Bend, Brazoria, Galveston, Chambers, Liberty, and Montgomery counties. Thus, property owners' associations located in those counties and otherwise within the parameters of section 552.0035 are considered to be governmental bodies for purposes of the Act.

D. A Governmental Body Holding Records for Another Governmental Body

One governmental body may hold information on behalf of another governmental body. For example, state agencies may transfer noncurrent records to the Records Management Division of the Texas State Library and Archives Commission for storage.[42] State agency records held by the library under the state records management program should be requested from the originating state agency, not the state library.[43] The governmental body by or for which information is "collected, assembled, or maintained" pursuant to section 552.002(a) retains ultimate responsibility for disclosing or withholding information in response to a request under the Public Information Act, even though another governmental body has physical custody of it.[44] (For a general discussion on the transfer of information between governmental entities, refer to page 31 of this handbook.)

E. Private Entities Holding Records for Governmental Bodies

On occasion, when a governmental body has contracted with a private consultant to prepare information for the governmental body, the consultant keeps the report and data in their office, and the governmental body reviews it there. Although the information is not in the physical custody of the governmental body, the information is in the constructive custody of the governmental body and is therefore subject to the Public Information Act.[45] The private consultant is acting as the governmental body's agent in holding the records.

The Public Information Act was amended in 1989 to codify this interpretation of the Act.[46] The revision made by this amendment is now codified in section 552.002(a) of the Government Code and is emphasized in the following quotation:

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[42] Open Records Decision No. 617 (1993).

[43] *Id.*; *see also* Open Records Decision No. 576 (1990) (concluding that Alcoholic Beverage Commission remains responsible for responding to open records requests for records of commission held by Comptroller pursuant to interagency contract).

[44] Open Records Decision No. 576 (1990).

[45] Open Records Decision No. 462 (1987).

[46] Act of May 29, 1989, 71st Leg., R.S., ch. 1248, § 9, 1989 Tex. Gen. Laws 4996, 5023; (1990).

> **(a) In this chapter, "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:**
>
> **(1) by a governmental body; or**
>
> **(2) *for a governmental body and the governmental body owns the information or has a right of access to it.*** [Emphasis added.]

The following decisions recognized that various records held for governmental bodies by private entities are subject to the Public Information Act:

> Open Records Decision No. 585 (1991) — the city manager may not contract away the right to inspect the list of applicants maintained by a private consultant for the city;
>
> Open Records Decision No. 499 (1988) — the records held by a private attorney employed by a municipality that relate to legal services performed at the request of the municipality;
>
> Open Records Decision No. 462 (1987) — records regarding the investigation of a university football program prepared by a law firm on behalf of the university and kept at the law firm's office; and
>
> Open Records Decision No. 437 (1986) — the records prepared by bond underwriters and attorneys for a utility district and kept in an attorney's office.[47]

F. Judiciary Excluded from the Public Information Act

Section 552.003(1)(B) of the Government Code excludes the judiciary from the Public Information Act. However, the Seventy-sixth Legislature, in Senate Bill 1851, added section 552.0035 to the Act[48] which specifically provides that access to judicial records is governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules.[49] (See Appendix A for Rule 12 of the Texas Rules of Judicial Administration.)

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[47] *See also* Open Records Decision No. 585 (1991) (overruling Open Records Decision Nos. 499 (1988), 462 (1987), 437 (1986) to extent that they suggest that governmental body can waive its right of access to information gathered on its behalf).

[48] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 1 (codified at Gov't Code § 552.0035).

[49] *Id.; see* R. Jud. Admin. 12; *see also, e.g., Ashpole v. Millard*, 778 S.W.2d 169, 170 (Tex. App.—Houston [1st Dist.] 1989, no writ) (public has right to inspect and copy judicial records subject to court's inherent power to control public access to its records); Attorney General Opinion DM-166 (1992); Open Records Decision No. 25 (1974).

This provision, however, expressly provides that it does not address whether particular records are judicial records.

The purposes and limits of section 552.003(1)(B) were discussed in *Benavides v. Lee*.[50] At issue in that case were applications for the position of juvenile probation officer submitted to the Webb County Juvenile Board. The court determined that the board was not "an extension of the judiciary" for purposes of the Public Information Act, even though the board consisted of members of the judiciary and the county judge. The court stated as follows:

> The Board is not a court. A separate entity, the juvenile court, not the Board, exists to adjudicate matters concerning juveniles. Nor is the Board directly controlled or supervised by a court.
>
> Moreover, simply because the Legislature chose judges as Board members, art. 5139JJJ, § 1, does not in itself indicate they perform on the Board as members of the judiciary. . . . [C]lassification of the Board as judicial or not depends on the functions of the Board, not on members' service elsewhere in government.[51]

The decisions made by the board were administrative, not judicial, and the selection of a probation officer was part of the board's administration of the juvenile probation system, not a judicial act by a judicial body. The court continued:

> The judiciary exception, § 2(1)(G) [now section 552.003(1)(B) of the Government Code], is important to safeguard judicial proceedings and maintain the independence of the judicial branch of government, preserving statutory and case law already governing access to judicial records. But it must not be extended to every governmental entity having any connection with the judiciary.[52]

The Texas Supreme Court also addressed the judiciary exception in *Holmes v. Morales.*[53] In that case, the court found that "judicial power" as provided for in article V, section 1 of the Texas Constitution "embraces powers to hear facts, to decide issues of fact made by pleadings, to decide questions of law involved, to render and enter judgment on facts in accordance with law as determined by the court, and to execute judgment on

[50] *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ).

[51] *Id.* at 151-52 (footnote omitted).

[52] *Id*. at 152.

[53] 924 S.W.2d 920 (Tex. 1996).

sentences."[54] Because the court found that the Harris County District Attorney did not perform these functions, it held that the District Attorney is not a member of the judiciary, but is a governmental body within the meaning of the Public Information Act.

A recent ruling of the attorney general, Open Records Decision No. 657 (1997), concluded that telephone billing records of the supreme court did not relate to the exercise of judicial powers but rather to routine administration and were not "records of the judiciary" for purposes of the Public Information Act. The Texas Supreme Court subsequently overruled Open Records Decision No. 657 (1997), finding that the court was not a governmental body under the Act and that its records were therefore not subject to the Act.[55]

The State Bar of Texas is a "public corporation and an administrative agency of the judicial department of government."[56] Section 81.033 of the Government Code provides that, with certain exceptions, all records of the State Bar are subject to the Public Information Act.[57] Compare *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768 (Tex. 1999) (Unauthorized Practice of Law Committee of State Bar is judicial agency and therefore subject to Rule 12 of Rules of Judicial Administration).

The following decisions address the judiciary exclusion:

> Open Records Decision No. 646 (1996) — a community supervision and corrections department is a governmental body and is not part of the judiciary for purposes of the Public Information Act. Administrative records such as personnel files and other records reflecting the day-to-day management of a community supervision and corrections department are subject to the Public Information Act. On the other hand, specific records regarding individuals on probation and subject to the direct supervision of a court that are held by a community supervision and corrections department are not subject to the Public Information Act because such records are held on behalf of the judiciary;[58]

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[54] *Id.* at 923.

[55] *Order and Opinion Denying Request Under Open Records Act*, No. 97-9141, 1997 WL 583726 (Tex. August 21, 1997) (not reported in S.W.2d).

[56] Gov't Code § 81.011(a); *see* Open Records Decision No. 47 (1974) (concluding that records of state bar grievance committee were confidential pursuant to Texas Supreme Court rule; not deciding whether state bar was part of judiciary).

[57] *See* Open Records Decision No. 604 (1992) (considering request for list of registrants for Professional Development Programs).

[58] *But see* Gov't Code § 76.006 (document evaluating performance of officer of community supervision and corrections department who supervises defendants placed on community supervision is confidential).

Open Records Decision No. 610 (1992) — the books and records of an insurance company placed in receivership pursuant to article 21.28 of the Insurance Code are excluded from the Public Information Act as records of the judiciary;

Open Records Decision No. 572 (1990) — certain records of the Bexar County Personal Bond Program are within the judiciary exclusion;

Open Records Decision No. 527 (1989) — the records of the Court Reporters Certification Board, which is supervised by the Texas Supreme Court, are not records of the judiciary;

Open Records Decision No. 513 (1988) — records held by a district attorney on behalf of a grand jury are in the grand jury's constructive possession and are not subject to the Public Information Act;

Open Records Decision No. 204 (1978) — information held by a county judge as a member of the county commissioners court is subject to the Public Information Act; and

Open Records Decision No. 25 (1974) — the records of a justice of the peace are not subject to the Public Information Act but may be inspected under statutory and common law rights of access.

III. Information Subject to the Public Information Act

A. Public Information Is Contained in Records of All Forms

Consistent with attorney general rulings that construed the statutory predecessor to section 552.002(b),[59] section 552.002(b) confirms that the Public Information Act applies to recorded information in practically any medium, including paper; film; a magnetic, optical, or solid state device that can store an electronic signal; tape; mylar; linen; silk; and vellum. Section 552.002(c) specifies that "[t]he general forms in which the media containing public information exist include a book, paper, letter, document, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map and drawing and a voice, data, or video representation held in computer memory."

[59] Open Records Decision Nos. 492 (1988) (raw data collected by outside consultant, but accessed by comptroller through data link and stored on comptroller's computer system), 432 (1985) (photographic negatives), 413 (1984) (sketches), 364 (1983) (videotapes), 352 (1982) (computer tapes), 35 (1974) (tape recordings).

B. Exclusion of Tangible Items

Despite the assumption in Open Records Decision No. 252 (1980) that the Public Information Act applies to physical evidence, the prevailing view is that tangible items such as a tool or a key are not "information" within the Act, even though they may be copied or analyzed to produce information. In Open Records Decision No. 581 (1990), the attorney general dealt with a request for the source code, documentation, and the computer program documentation standards of computer programs used by a state university. The requested codes, documentation, and documentation standards contained security measures designed to prevent unauthorized access to student records. The attorney general noted that the sole significance of the computer source code, documentation, and documentation standards was "as a tool for the storage, manipulation, and security of other information."[60] While acknowledging the comprehensive scope of the term "information," the attorney general nevertheless determined that the legislature could not have intended that the Public Information Act compromise the physical security of information management systems or other government property.[61] The attorney general concluded that information used solely as a tool to maintain, manipulate, or protect public property was not the kind of information made public by the statutory predecessor to section 552.021 of the Public Information Act.[62]

C. Personal Notes

A few early decisions of the attorney general found that certain personal notes of public employees were not "information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business."[63] Thus, such personal notes were not considered subject to the Public Information Act.[64] More recent decisions, however, have concluded that personal notes are not necessarily excluded from the definition of "public information" and may be

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[60] Open Records Decision No. 581 at 6 (1990).

[61] *Id.* at 5-6 (drawing comparison to door key, whose sole significance as "information" is its utility as tool in matching internal mechanism of lock).

[62] *Id.* at 6 (overruling in part Open Records Decision No. 401 (1983), which had suggested that implied exception to required public disclosure applied to requested computer programs); *see also* Attorney General Opinion DM-41 (1991) (concluding that formatting codes are not "information" subject to Act).

[63] Open Records Decision No. 77 (1975) (quoting statutory predecessor to section 552.021).

[64] *See* Open Records Decision No. 116 (1975) (concluding that portions of desk calendar kept by governor's aide comprising notes of private activities and aide's notes made solely for his own informational purposes are not public information); *see also* Open Records Decision No. 145 (1976) (concluding that handwritten notes on university president's calendar are not public information).

subject to the Act.[65] Relevant factors to be considered in determining whether a personal document is subject to the Act may include, but are not limited to, the following: who prepared the document; who possesses or controls the document and who has access to it; the nature of its contents; whether the document is used in conducting the business of the governmental body; and whether public funds were expended in creating or maintaining the document.[66] Governmental bodies are advised to use caution in relying on early open records decisions that address "personal notes."

D. Commercially Available Information

Section 552.027 provides:

> **(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.**
>
> **(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.**
>
> **(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.**

This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. Therefore, section 552.027 provides exemptions from the definition of "public information" under section 552.002 for commercially available research material. However, pursuant to subsection (c) of section 552.027, a governmental body must allow inspection of a publication which is made a part of, or referred to in, a rule or policy of the governmental body.

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[65] *See, e.g.,* Open Records Decision Nos. 635 (1995) (public official's or employee's appointment calendar, including personal entries, may be subject to Act), 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are subject to Act), 450 (1986) (handwritten notes taken by appraiser while observing teacher's classroom performance are subject to Act), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam are subject to Act).

[66] *See* Open Records Decision No. 635 (1995).

IV. Procedures for Access to Public Information

A. Informing Public of Basic Rights and Responsibilities Under the Act

In Senate Bill 1851, the Seventy-sixth Legislature added section 552.205 to the Act.[67] Section 552.205 requires the officer for public information of a governmental body, beginning January 3, 2000,[68] to display a sign in the form required by the General Services Commission that contains basic information about the rights of a requestor, the responsibilities of a governmental body, and the procedures for inspecting or obtaining a copy of public information under the Public Information Act. The sign is to be displayed at one or more places in the administrative offices of the governmental body where it is plainly visible to members of the public requesting information and employees of the governmental body whose duties involve receiving or responding to requests under the Act. The sign's format as prescribed by the General Services Commission will be made available to governmental bodies in time to enable their compliance with the requirements of section 552.205.[69] A chart outlining various deadlines to which governmental bodies and requestors are subject can be found at Appendix B of this handbook.

B. The Governmental Body's Duty to Produce Public Information Promptly

The Act designates the chief administrative officer and each elected county officer as the officer for public information for a governmental body.[70] In general, the officer for public information must protect public information and promptly make it available to the public for copying or inspecting.[71] Section 552.221 specifies the duties of the officer for public information upon receiving a request for public information. Section 552.221 reads in part:

> **(a) An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer.**

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[67] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 11 (codified at Gov't Code § 552.205).

[68] *Id.* § 35.

[69] *Id.*

[70] *See Keever v. Finlan*, 988 S.W.2d 300 (Tex. App.—Dallas 1999, pet. filed) (school district superintendent, rather than school board member is chief administrative officer and custodian of public records).

[71] *See* Gov't Code §§ 552.201, .202 (designating officer for public information and identifying department heads as agents for that officer), .203 (listing general duties of officer for public information).

(b) An officer for public information complies with Subsection (a) by:

(1) providing the public information for inspection or duplication in the offices of the governmental body; or

(2) sending copies of the public information by first class United States mail if the person requesting the information requests that copies be provided and pays the postage and any other applicable charges that the requestor has accrued under Subchapter F.

An officer for public information is not responsible for how a requestor uses public information or for the release of information after it is removed from a record as a result of an update, a correction, or a change of status of the person to whom the information pertains.[72]

The officer for public information must "promptly produce public information" in response to an open records request.[73] To "promptly produce public information" means that a governmental body may take a reasonable amount of time to produce the information.[74] What constitutes a reasonable amount of time depends on the facts in each case. The volume of information requested is highly relevant to what constitutes a reasonable period of time.[75]

If the request is to inspect the information, the Public Information Act requires only that the officer in charge of public information make it available for review within the "offices of the governmental body."[76] Temporarily transporting records outside the office for official use does not trigger a duty to make the records available to the public wherever they may be.[77]

Subsection 552.221(c) states that "[i]f the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication." The following decisions discuss when requested information is in "active use":

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[72] Gov't Code § 552.204; Open Records Decision No. 660 (1999).

[73] *Id.* § 552.221(a).

[74] Open Records Decision No. 467 at 6 (1987).

[75] *Id.*

[76] Gov't Code § 552.221(b).

[77] *Conely v. Peck*, 929 S.W.2d 630, 632 (Tex. App.—Austin 1996, no writ).

Open Records Decision No. 225 (1979) — a secretary's handwritten notes are in active use while the secretary is typing minutes of a meeting from them;

Open Records Decision No. 148 (1976) — a faculty member's file is not in active use the entire time the member's promotion is under consideration;

Open Records Decision No. 96 (1975) — directory information about students is in active use while the notice required by the federal Family Educational Rights and Privacy Act of 1974 is being given; and

Open Records Decision No. 57 (1974) — a file containing student names, addresses, and telephone numbers is in active use during registration.

If an officer for public information cannot produce public information for inspection or duplication within ten business days after the date the information is requested, section 552.221(d) requires the officer to "certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication."

C. The Request for Public Information

A governmental body that receives a verbal request for information may require the requestor to submit that request in writing because the governmental body's duty under section 552.301(a) to request a ruling from the attorney general arises only after it receives a written request.[78] Open Records Decision No. 654 (1997) found that the Public Information Act did not require a governmental body to respond to a request for information sent by electronic mail. However, the Seventy-fifth Legislature amended section 552.301 by defining a written request for information to include "a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission."[79] Therefore, Open Records Decision No. 654 (1997) is superseded by the 1997 amendment of section 552.301.

Generally, a request for information need not name the Act or be addressed to the officer for public information.[80] A hypertechnical reading of the Act does not effectuate the purpose of the Act; a written communication that reasonably can be judged to be a request for public information is a request for information under the Public Information Act.[81] However, a request made by electronic mail or facsimile transmission must be addressed

[78] Open Records Decision No. 304 (1982).

[79] Gov't Code §552.301(c).

[80] *See* Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974).

[81] *Id.*

to the officer for public information or the officer's designee.[82] Requests for a state agency's records that are stored in the Texas State Library and Archive Commission's Records Management Division should be directed to the originating agency, rather than to the state library.[83]

A governmental body must make a good faith effort to relate a request to information which it holds.[84] A governmental body may ask a requestor to clarify a request for information if the request is unclear.[85] Section 552.222(b) also provides that if a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of the request might be narrowed,[86] but the governmental body may not inquire into the purpose for which information will be used.[87] A governmental body may, however, make certain inquiries of a requestor who seeks information relating to motor vehicle records to determine if the requestor is authorized to receive the information under the governing statute.[88]

It is implicit in several provisions of the Act that the Act applies only to information already in existence.[89] Thus, the Act does not require a governmental body to prepare new information in response to a request.[90] Nor does the Act require a governmental body to inform a requestor if the requested information comes into existence after the request has been made.[91] Consequently, a governmental body is not required to comply with a continuing request to supply information on a periodic basis as such information is prepared in the future.[92] Nor does the Act require a governmental body to prepare answers to questions or to do legal research.[93] Section 552.227 states that "[a]n officer for public information or the officer's agent is not required to perform general research within the reference and research archives and holdings of state libraries."

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[82] Gov't Code § 552.301(c).

[83] Open Records Decision No. 617 (1993).

[84] Open Records Decision No. 561 at 8 (1990).

[85] Gov't Code § 552.222(b); *see also* Open Records Decision No. 304 (1982).

[86] Open Records Decision No. 87 at 3 (1975).

[87] Gov't Code § 552.222(a), (b).

[88] *Id.* § 552.222(c) (referencing chapter 730, Transportation Code).

[89] *See* Gov't Code §§ 552.002, .021, .227, .351.

[90] Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

[91] Open Records Decision No. 452 at 3 (1986).

[92] Attorney General Opinion JM-48 at 2 (1983); Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987).

[93] *See* Open Records Decision Nos. 563 at 8 (1990) (considering request for federal and state laws and regulations), 555 at 1-2 (1990) (considering request for answers to fact questions).

Senate Bill 1851 of the Seventy-sixth Legislature added section 552.232 to the Act, providing for the handling of repetitious or redundant requests.[94] The new section permits a governmental body which receives a request for information for which it determines it has already furnished or made copies available to the requestor upon payment of applicable charges under Subchapter F, to respond to the request by certifying to the requestor that it has already made the information available to him. The certification must include a description of the information already made available, the date of the governmental body's receipt of the original request for the information, the date it furnished or made the information available, a certification that no changes have been made to the information, and the name, title, and signature of the officer for public information, or his agent, who makes the certification.

Another new provision added by Senate Bill 1851 is section 552.0055.[95] This section provides that a subpoena duces tecum or request for discovery issued in compliance with a statute or rule of civil or criminal procedure is not considered to be a request for information under the Public Information Act.

D. The Requestor's Right of Access

The Public Information Act prohibits a governmental body from inquiring into a requestor's reasons or motives for requesting information. In addition, a governmental body must treat all requests for information uniformly. Sections 552.222 and 552.223 provide as follows:

§ 552.222. Permissible Inquiry by Governmental Body to Requestor.

> **(a) The officer for public information and the officer's agent may not make an inquiry of a requestor except to establish proper identification or except as provided by Subsection (b) or (c).**
>
> **(b) If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request. If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.**
>
> **(c) If the information requested relates to a motor vehicle record, the officer for public information or the officer's agent may require the**

[94] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 13 (codified at Gov't Code § 552.232).

[95] *Id.* § 2 (codified at Gov't Code § 552.0055).

requestor to provide additional identifying information sufficient for the officer or the officer's agent to determine whether the requestor is eligible to receive the information under Chapter 730, Transportation Code. In this subsection, "motor vehicle record" has the meaning assigned that term by Section 730.003, Transportation Code.

§ 552.223. Uniform Treatment of Requests for Information.

The officer for public information or the officer's agent shall treat all requests for information uniformly without regard to the position or occupation of the requestor, the person on whose behalf the request is made, or the status of the individual as a member of the media.

Although section 552.223 requires an officer for public information to treat all requests for information uniformly, section 552.028, as amended by the Seventy-sixth Legislature,[96] provides as follows:

(a) A governmental body is not required to accept or comply with a request for information from:

(1) an individual who is imprisoned or confined in a correctional facility; or

(2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

(b) This section does not prohibit a governmental body from disclosing to an individual described Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.

(c) In this section, "correctional facility" has the meaning assigned by Section 1.07(a), Penal Code.

Under section 552.028, a governmental body is not required to comply with a request for information from an inmate or his agent, other than the inmate's attorney, even if the

[96] Act of May 10, 1999, 76th Leg., R.S., S.B. 744, § 1 (codified at Gov't Code § 552.028).

requested information pertains to the inmate.[97] Subsection (b) does not prohibit a governmental body from complying with an inmate's request, but neither does it mandate compliance.[98]

Generally, a requestor may choose to inspect or to copy public information, or to both inspect and copy public information.[99] A governmental body with the appropriate statutory authority may promulgate regulations that prohibit inspection of public records, while providing requestors with copies of the records instead, in the interest of preserving those records.[100] In certain circumstances, a governmental body may charge the requestor for access to or copies of the requested information. (For a discussion of the provisions governing the costs for obtaining access to or copies of public records, refer to page 48 of this handbook.)

1. Right to Inspect

Generally, if a requestor chooses to inspect public information, the requestor must complete the inspection within ten days after the date the governmental body makes the information available.[101] However, a governmental body is required to extend the inspection period upon receiving a written request for additional time.[102] If the information is needed by the governmental body, the officer for public information may interrupt a requestor's inspection of public information.[103] When a governmental body interrupts a requestor's inspection of public information, the period of interruption is not part of the ten-day inspection period.[104] A governmental body may promulgate rules that are consistent with the Public Information Act for efficient, safe, and speedy inspection and copying of public information.[105]

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[97] *See Hickman v. Moya*, 976 S.W.2d 360 (Tex. App.—Waco 1998, pet. denied); *Moore v. Henry*, 960 S.W.2d 82 (Tex. App.—Houston [1st Dist.] 1996, no writ).

[98] *Moore*, 960 S.W.2d at 84; Open Records Decision No. 656 at 3 (1997) (statutory predecessor to section 552.028 of Government Code applies to request for voter registration information under section 18.008 of Election Code when request is from incarcerated individual).

[99] Gov't Code §§ 552.221, .225, .228, .230; Attorney General Opinion JM-292 at 5-6 (1984); Open Records Decision No. 512 at 1-2 (1988).

[100] *See* Attorney General Opinion DM-146 (1992) (considering Texas Department of Health regulations that require local registrars to prohibit physical access to birth records over 50 years old and death records over 25 years old and that require registrars to provide copies of such records).

[101] Gov't Code § 552.225(a); *see also* Open Records Decision No. 512 (1988) (holding that statutory predecessor to section 552.225 did not apply to requests for copies of public information or authorize governmental body to deny repeated requests for copies of public records).

[102] Gov't Code § 552.225(b).

[103] *Id.* § 552.225(c).

[104] *Id.*

[105] *Id.* § 552.230.

2. Right to Obtain Copies

If a copy of public information is requested, a governmental body must provide "a suitable copy . . . within a reasonable time after the date on which the copy is requested."[106] However, the Act does not authorize the removal of an original copy of a public record from the office of a governmental body.[107] If the requested records are copyrighted, they may be open for public inspection, but a governmental body is not required to furnish the requestor with copies of such records,[108] and the requestor assumes the duty of complying with the federal copyright law.[109]

A governmental body may receive a request for a public record that contains both publicly available and excepted information. In a decision that involved a document that contained both publicly available information and information that was excepted from disclosure by the statutory predecessor to section 552.111, the attorney general determined that the Act did not permit the governmental body to provide the requestor with a new document created in response to the request on which the publicly available information had been consolidated and retyped, unless the requestor agreed to receive a retyped document.[110] Rather, the attorney general concluded that the statutory predecessor to section 552.228 required the governmental body to make available to the public copies of the actual public records that the governmental body had collected, assembled, or maintained, with the excepted information excised.[111]

The public's right to suitable copies of public information has been considered in the following decisions:

> Attorney General Opinion JM-757 (1987) — a governmental body may refuse to allow members of the public to duplicate public records by means of portable copying equipment when it is unreasonably disruptive of working conditions, when the records contain confidential information, when it would cause safety hazards, or when it would interfere with other persons' rights to inspect and copy records;
>
> Open Records Decision No. 633 (1995) — a governmental body does not comply with the Public Information Act by releasing to the requestor another record as a substitute for any specifically requested offense report portions that

[106] *Id.* § 552.228(a).

[107] *Id.* § 552.226.

[108] Attorney General Opinion JM-672 at 2-3 (1987); Open Records Decision No. 550 at 8-9 (1990).

[109] Open Records Decision No. 550 at 9 (1990).

[110] Open Records Decision No. 606 at 2-3 (1992).

[111] *Id.*

are not excepted from required public disclosure, unless the requestor agrees to the substitution;

Open Records Decision No. 571 (1990) — the Public Information Act does not give a member of the public a right to use a computer terminal to search for public records; and

Open Records Decision No. 243 (1980) — a governmental body is not required to compile or extract information if the information can be made available by giving the requestor access to the records themselves.[112]

E. Computer and Electronic Information

Section 552.228(b) provides:

> **If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:**
>
> > **(1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;**
> >
> > **(2) the governmental body is not required to purchase any software or hardware to accommodate the request; and**
> >
> > **(3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.**

If a governmental body is unable to provide the information in the requested format for any of the reasons described by section 552.228(b), the governmental body shall provide the information in a paper format or another medium that is acceptable to the requestor.[113] A governmental body is not required to use material provided by a requestor, such as a diskette, but rather may use its own supplies to comply with a request.[114]

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[112] *See also* Open Records Decision Nos. 512 (1988), 465 (1987), 144 (1976).

[113] *Id.* § 552.228(c).

[114] *Id.*

If a request for public information requires "programming or manipulation of data,"[115] and "compliance with the request is not feasible or will result in substantial interference with its ongoing operations,"[116] or "the information could be made available in the requested form only at a cost that covers the programming and manipulation of data,"[117] a governmental body is required to provide the requestor with a written statement describing the form in which the information is available, a description of what would be required to provide the information in the requested form, and a statement of the estimated cost and time to provide the information in the requested form.[118] The governmental body shall provide the statement to the requestor within twenty days after the date that the governmental body received the request.[119] If, however, the governmental body gives written notice within the twenty days that additional time is needed, the governmental body has an additional ten days to provide the statement.[120] Once the governmental body provides the statement to the requestor, the governmental body has no obligation to provide the requested information in the requested form until the requestor responds to the governmental body in writing.[121]

V. Disclosure to Selected Persons

A. General Rule: Under the Public Information Act, Public Information Is Available to All Members of the Public

The Public Information Act states in several provisions that public information is available to "the people," "the public," and "any person."[122] Thus, the Public Information Act deals primarily with the general public's access to information; it does not, as a general matter, give an individual a "special right of access" to information concerning that individual that is not otherwise public information.[123] Information that a governmental body collects, assembles, or maintains is, in general, either open to all members of the public or closed to all members of the public.

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[115] *Id.* § 552.231(a)(1); *see id.* § 552.003(2), (4) (defining "manipulation" and "programming").

[116] *Id.* § 552.231(a)(2)(A).

[117] *Id.* § 552.231(a)(2)(B).

[118] *Id.* § 552.231(a), (b); *see* Open Records Decision No. 661 at 6-8 (1999).

[119] *Id.* § 552.231(c).

[120] *Id.*

[121] *Id.* § 552.231(d); *see* Open Records Decision No. 661 (1999) (section 552.231 enables governmental body and requestor to reach agreement as to cost, time, and other terms of responding to request requiring programming or manipulation of data).

[122] *See, e.g.*, Gov't Code §§ 552.001, .021, .221(a).

[123] Open Records Decision No. 507 at 3 (1988); *see also* Attorney General Opinion JM-590 at 4 (1986); Open Records Decision No. 330 at 2 (1982).

Additionally, section 552.007 prohibits a governmental body from selectively disclosing information that is not confidential by law but that a governmental body may withhold under an exception to disclosure. Section 552.007 provides as follows:

> **(a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.**
>
> **(b) Public information made available under Subsection (a) must be made available to any person.**[124]

If, therefore, a governmental body releases to a member of the public nonconfidential information, then the governmental body must release the information to all members of the public who request it. For example, in rendering an open records decision under section 552.306, the attorney general would not consider a governmental body's claim that section 552.111 authorized the governmental body to withhold a report from a requestor when the governmental body had already disclosed the report to another member of the public.[125]

B. Some Disclosures of Information to Selected Individuals or Entities Do Not Constitute Disclosures to the Public Under Section 552.007

As noted above, the Public Information Act prohibits the selective disclosure of information to members of the public. A governmental body may, however, have authority to disclose records to certain persons or entities without those disclosures being voluntary disclosures to "the public" within the meaning of section 552.007 of the Government Code. In these cases, the governmental body normally does not waive applicable exceptions to disclosure by transferring or disclosing the records to these specific persons or entities.[126]

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[124] *See also* Open Records Decision No. 463 at 1-2 (1987).

[125] *See* Open Records Decision No. 400 at 2 (1983) (construing statutory predecessor to section 552.111).

[126] *But see* discussion of Intra- Intergovernmental transfers at page 31.

1. Special Rights of Access: Exceptions to Disclosure Expressly Inapplicable to a Specific Class of Persons

a. Special Rights of Access Under the Public Information Act

The following provisions in the Public Information Act provide an individual with special rights of access to certain information even though the information is unavailable to members of the general public: sections 552.008, 552.023, 552.026, 552.102, and 552.114.

i. Information for Legislative Use

Section 552.008 of the Government Code states in pertinent part:

> **(a) This chapter does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.**
>
> **(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes.**

Section 552.008 provides that a governmental body shall provide copies of information, including confidential information, to an individual member, agency, or committee of the legislature if requested for legislative purposes. The section provides that disclosure of excepted or confidential information to a legislator does not waive or affect the confidentiality of the information or the right to assert exceptions in the future regarding that information, and provides specific procedures relating to the confidential treatment of the information.[127]

ii. Information About the Person Who Is Requesting the Information

Section 552.023 of the Government Code provides an individual with a limited special right of access to information about that individual. It states in pertinent part:

[127] Gov't Code § 552.008(b).

> **(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests.**
>
> **(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.**

This provision is similar to section 552.102 as the attorney general now construes it. Subsections (a) and (b) of section 552.023 prevent a governmental body from asserting an individual's own privacy as a reason for withholding records from that individual.[128] However, the individual's right of access to private information about that individual under section 552.023 does not override exceptions to disclosure in the Public Information Act or confidentiality laws protecting some interest other than that individual's privacy.[129] Consequently, because the Act prohibits selective disclosure of information, a governmental body's release of information to an individual pursuant to section 552.023 may result in the governmental body's waiver of the Act's other "permissive" exceptions.[130] That is, if the governmental body chooses not to raise permissive exceptions that would otherwise apply, the governmental body waives those permissive exceptions as to requests from any other members of the public. In such an event, the governmental body would be required to release to any member of the public all of the information not protected by common-law privacy or otherwise deemed confidential by law. The following decisions consider the statutory predecessor to section 552.023:

> Open Records Decision No. 587 (1991) — Former Family Code section 34.08,[131] which makes confidential reports, records, and working papers the Department of Human Services uses or develops in an investigation of alleged child abuse, protects law enforcement interests as well as privacy interests; the statutory predecessor to section 552.023, therefore, did not provide the subject of the information with a special right of access to it;

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[128] *See* Open Records Decision No. 481 at 4 (1987) (determining that common-law privacy does not provide basis for withholding information from its subject).

[129] *See* Open Records Decision No. 556 (1990).

[130] *See* discussion of "permissive" and "mandatory" exceptions at page 40. Generally, permissive exceptions are those which will not apply unless the governmental body raises them.

[131] *See* Fam. Code § 261.201.

> Open Records Decision No. 577 (1990) — under the Communicable Disease Prevention and Control Act, information in the possession of a local health authority relating to disease or health conditions is confidential, except that, among other things, the information may be released with the consent of the person identified in the information; because this confidentiality provision is designed to protect the privacy of the subject of the information, the statutory predecessor to section 552.023 authorized a local health authority to release to the subject medical or epidemiological information relating to the person who signed the consent; and
>
> Open Records Decision No. 565 (1990) — statutes making confidential communications between a mental health professional and a patient/client, communications between a physician and a patient, records relating to the diagnosis, evaluation, or treatment of a patient, and criminal history records are designed primarily to protect the privacy of the subject of the information; in general, therefore, the statutory predecessor to section 552.023 provided the subject of such information with a special right of access to it.

iii. Information in Personnel Files

The most frequently exercised of the special rights of access provided in the Public Information Act is that provided in section 552.102, which applies to information in a public employee's personnel file. Section 552.102(a) provides in pertinent part:

> **Information is excepted . . . if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative *as public information is made available under this chapter*.** [Emphasis added.]

The attorney general originally interpreted the statutory predecessor to section 552.102 of the Government Code as providing public employees with an unrestricted special right of access to personnel information about themselves.[132] However, Open Records Decision No. 288 (1981) overruled that approach.[133] Thus, like the right of access provided in section 552.023, section 552.102 does not give an employee a special right of access to records about the

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[132] *See* Open Records Decision No. 31 (1974).

[133] *See* Open Records Decision No. 288 at 3-4 (1981) (concluding that governmental body could withhold from public employee, pursuant to "litigation exception," some personnel information about employee, despite employee's special right of access to information under statutory predecessor to section 552.102(a)).

employee that would override other exceptions to disclosure that would apply to the information; it merely means that a governmental body may not withhold information from an employee on the grounds that disclosing it would constitute "a clearly unwarranted invasion" of the employee's privacy.[134]

iv. Information in a Student or Educational Record

The attorney general has read section 552.114 of the Government Code as creating for students an affirmative right of access to inspect and copy their records.[135] This exception from disclosure applies to "information in a student record at an educational institution funded wholly or partly by state revenue."[136] Section 552.114 states that a governmental body must make such information available to a person requesting it if the information is being requested by educational institution personnel; the student involved or the student's parent, legal guardian, or spouse; or a person conducting a child abuse investigation pursuant to chapter 261 of the Family Code.[137] Section 552.026 of the Government Code, which conforms the Public Information Act to the requirements of the federal Family Educational Rights and Privacy Act of 1974[138] ("FERPA"), also incorporates the rights of access established by that federal law.[139] To the extent that FERPA conflicts with state law, the federal statute prevails.[140] (For a discussion of sections 552.026 and 552.114, refer to the discussion beginning on page 122 of this handbook.)

b. Special Rights of Access Created by Other Statutes

Specific statutes other than the Public Information Act grant specific entities or individuals a special right of access to specific information. For example, section 25 of article 41a-1, V.T.C.S., makes information about a licensee held by the Texas State Board of Public Accountancy available for inspection by the licensee. Exceptions in the Public Information Act cannot authorize the board to withhold this information from the licensee.[141] Similarly, the exceptions in the Public Information Act do not apply to medical records when the consent

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[134] *See* Gov't Code § 552.023.

[135] Open Records Decision No. 152 at 3 (1977) (construing statutory predecessor).

[136] Gov't Code § 552.114(a).

[137] *Id*. § 552.114(b).

[138] 20 U.S.C. § 1232g.

[139] Open Records Decision No. 431 at 2-3 (1985).

[140] *Id*. at 3.

[141] Open Records Decision No. 451 at 4 (1986); *see also* Open Records Decision Nos. 500 at 4-5 (1988) (considering property owner's right of access to appraisal records under Tax Code), 478 at 3 (1987) (considering intoxilyzer test subject's right of access to test results under statutory predecessor to Transportation Code section 724.018).

requirements of the Medical Practice Act[142] are met.[143] Like the limited rights of access privilege provided by the Public Information Act in sections 552.102 and 552.023, these statutory rights of access do not affect the governmental body's authority to rely on applicable exceptions to disclosure when the information is requested by someone other than an individual with a special right of access.

2. Intra- or Intergovernmental Transfers

The transfer of information within a governmental body or between governmental bodies is not necessarily a release to the public for purposes of the Public Information Act. For example, a member of a governmental body, acting in his or her official capacity, is not a member of the public for purposes of access to information in the governmental body's possession. Thus, an authorized official may review records of the governmental body without implicating the Public Information Act's prohibition against selective disclosure.[144] Additionally, a state agency may ordinarily transfer information to another state agency or to another governmental body subject to the Public Information Act without violating the confidentiality of the information or waiving exceptions to disclosure.[145]

On the other hand, a federal agency is subject to an open records law that differs from the Texas Public Information Act. A state governmental body therefore should not transfer nondisclosable information to a federal agency unless some law requires or authorizes the state governmental body to do so.[146] This is because a federal agency may not maintain the state records with the "same eye towards confidentiality that state agencies would be bound to do under the laws of Texas."[147]

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[142] V.T.C.S. art. 4495b.

[143] *See* Open Records Decision Nos. 607 at 4 (1992), 598 at 4-5 (1991).

[144] *See* Attorney General Opinion JM-119 at 2 (1983); *see also* Open Records Decision Nos. 468 at 4 (1987) (when governmental body allows employee to see his or her job evaluations, governmental body does not release them to public under the Act), 464 at 5 (1987) (distribution of evaluations by university faculty members among faculty members does not waive exceptions to disclosure with respect to general public) (overruled on other grounds by Open Records Decision No. 615 (1993)).

[145] *See* Attorney General Opinions H-917 at 1 (1976), H-242 at 4 (1974); Open Records Decision No. 661 at 3 (1991). *But see* Attorney General Opinion JM-590 at 4-5 (1986).

[146] Open Records Decision No. 650 at 4 (1996).

[147] Attorney General Opinion H-242 at 4 (1974); *accord* Attorney General Opinion MW-565 at 4 (1982); Open Records Decision No. 561 at 6 (1990) (quoting with approval Attorney General Opinion H-242 (1974)).

Before transferring or releasing the information, the governmental body must examine the statutory provisions that govern the specific records at issue to determine whether such laws prohibit transferring the records to other governmental bodies.[148]

3. Other Limited Disclosures That Do Not Implicate Section 552.007

The attorney general has recognized other specific contexts in which a governmental body's limited release of information to certain persons does not constitute a release to "the public" under section 552.007:

> Open Records Decision No. 579 (1990) — exchanging information among litigants in informal discovery was not a voluntary release under statutory predecessor to section 552.007;
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> Open Records Decision No. 501 (1988) — article 9.39 of the Insurance Code authorizes the Commissioner of Insurance to designate as confidential escrow reports that a title company has furnished to the Board of Insurance; the statutory predecessor to section 552.101, in conjunction with article 9.39, prohibited the release of such information to the public, except that the Insurance Board could release the report to the title company to which the report related; and
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> Open Records Decision No. 400 (1983) — prohibition against selective disclosure does not apply when governmental body releases confidential information to the public.

[148] *See generally* Attorney General Opinions JM-966 (1988), JM-590 (1986) (addressing Tax Code confidentiality provision that authorized release of refund requests to expressly enumerated persons and entities to determine whether statute prohibited release to persons not listed), MW-202 (1980) (addressing provision that prohibited transfer of information about workers' compensation claims to state agencies that were not specifically identified); Open Records Decision Nos. 661 (1999) (Deep East Texas Council of Governments may transfer 9-1-1 information made confidential by Health and Safety Code section 771.061 to a county judge for tax and voter registration purposes), 655 (1997) (local public housing authorities authorized by federal statute to obtain criminal history information for applicant screening and certain other purposes; counties not authorized to obtain criminal history information on applicants for county employment), 516 (1989) (Human Resource Code section 76.002 authorizes attorney general to obtain information relating to absent parents from state and local agencies).

VI. Attorney General Determines Whether Information Is Subject to an Exception

A. Duty of the Governmental Body and of the Attorney General Under Subchapter G

Sections 552.301, 552.302 and 552.303 set out the duty of a governmental body to seek the attorney general's decision on whether information is excepted from disclosure to the public.

Section 552.301, subsections (a), (b), and (c) provide that when a governmental body receives a written request for information the governmental body wishes to withhold, it must seek an attorney general decision within ten business days of its receipt of the request and state the exceptions to disclosure which it believes are applicable. Subsections (a), (b), and (c) read:

> **(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.**
>
> **(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.**
>
> **(c) For purposes of this subchapter, a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission.**

Thus, a governmental body that denies a request for public information on the ground of an exception must seek the decision of the attorney general as to the applicability of that exception.[149] In addition, an entity contending that it is not subject to the Act must timely

[149] Open Records Decision Nos. 452 at 4 (1986), 435 (1986) (referring specifically to statutory predecessors to sections 552.103 and 552.111, respectively);*see also Conely v. Peck*, 929 S.W.2d 630, 632 (Tex. App.—Austin 1996, no writ) (requirement to request open records decision within ten days comes into play when governmental body denies access to requested information or asserts exception to public disclosure of information).

request a decision from the attorney general to avoid the consequences of noncompliance if the entity is determined to be subject to the Act.[150] Therefore, when requesting such a decision, the entity should not only present its arguments as to why it is not subject to the Act, but must also raise any exceptions to required disclosure it believes apply to the requested information.

A governmental body need not request an attorney general decision if there has been a previous determination that the requested material falls within one of the exceptions to disclosure.[151] What constitutes a "previous determination" is narrow in scope, and governmental bodies are cautioned against treating most published attorney general decisions as "previous determinations" to avoid the requirements of section 552.301(a). The governmental body need not request another decision from the attorney general under section 552.301(a) if the governmental body had previously requested and received a determination from the attorney general concerning the precise information at issue in the pending request. However, if the previous attorney general decision did not involve the same actual information, then in most cases the governmental body should not treat that decision as a previous determination regarding the information now being requested. This is because in the majority of cases, the attorney general must apply the legal standard of a particular exception to the specific information at issue in each case.[152] Consequently, the governmental body may not unilaterally decide to withhold information on the basis of a prior open records decision merely because it believes the legal standard for an exception, as established in the prior decision, applies to the recently requested information.[153] Examples of standards that must be applied by the attorney general to particular requests for information are the common-law privacy doctrine under sections 552.101 and 552.102 and the "advice, opinion, and recommendation" standard of section 552.111. (For a discussion of common-law privacy, refer to page 71 of this handbook; section 552.111 is discussed at page 113.)

On the other hand, a governmental body need not request an attorney general decision if there has been a previous determination regarding a specific, clearly delineated category

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[150] *See Kneeland v. National Collegiate Athletic Ass'n*, 650 F. Supp. 1064 at 1072-73 (W.D. Tex. 1986), *overruled on other grounds*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989) (whether Act applies to entity is necessary preliminary determination under subchapter G). For a discussion of the entities subject to the Act, see page 3 of this handbook.

[151] Gov't Code § 552.301(a).

[152] Open Records Decision No. 435 at 2-3 (1986) (discussing standard used for statutory predecessor to section 552.111); *see also Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (specifying that attorney general is authorized to determine what constitutes "previous determination"). *But see Hart v. Gossum*, 995 S.W.2d 958 (Tex. App.—Fort Worth 1999, no pet. h).

[153] Open Records Decision No. 511 (1988) (no unilateral withholding of information under litigation exception).

of information to which the requested information belongs.[154] An example of this type of category of information is the home address and home telephone number of a peace officer. The attorney general has determined that such information must be withheld pursuant to the predecessor to section 552.117(2) of the Government Code.[155] Therefore, a governmental body may rely on earlier decisions regarding section 552.117(2) as previous determinations for purposes of section 552.301(a), because section 552.117 categorically makes confidential the home address and telephone number of peace officers. (For a discussion of section 552.117, refer to page 130 of this handbook.) When in doubt, a governmental body should consult with the Open Records Division of the Office of the Attorney General to determine whether requested information is subject to a previous determination.[156]

A request for an open records decision pursuant to section 552.301 must come from the governmental body that has received a written request for information.[157] Otherwise, the attorney general does not have jurisdiction under the Act to determine whether the information is excepted from disclosure to the public.

It should be noted that Senate Bill 1851 of the Seventy-sixth Legislature added subsection (f) to section 552.301,[158] which expressly prohibits a governmental body from seeking an attorney general decision where the attorney general or a court has already determined that the same information must be released. Among other things, the amended provision prevents a governmental body from asking for reconsideration of an attorney general decision, which it has previously requested and received, ruling that it must release information. Subsection (f) provides:

> **(f) A governmental body must release the requested information and is prohibited from asking for a decision from the attorney general about whether information requested under this chapter is within an exception under Subchapter C if:**
>
> > **(1) the governmental body has previously requested and received a determination from the attorney general concerning the precise information at issue in a pending request; and**

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[154] Open Records Decision No. 435 (1986); *see Rainbow Group, Ltd. v. Texas Employment Comm'n*, 897 S.W.2d 946, 950 (Tex. App.—Austin 1995, writ denied); *Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d at 698.

[155] Open Records Decision Nos. 532 (1989), 530 at 1 (1989).

[156] *See* Open Records Decision No. 435 at 3 (1986) (concluding that attorney general has broad discretion to determine whether information is subject to previous determination).

[157] Open Records Decision Nos. 542 at 4 (1990), 449 (1986).

[158] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 20 (codified at Gov't Code § 552.301(f)).

> **(2) the attorney general or a court determined that the information is public information under this chapter that is not excepted by Subchapter C.**

Senate Bill 1851 also added subsection (d) to section 552.301.[159] Subsection (d) provides that if the governmental body seeks an attorney general decision as to whether it may withhold requested information, it must notify the requestor not later than the tenth business day after its receipt of the written request. The new subsection (d) of section 552.301 reads:

> **(d) A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:**
>
> > **(1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and**
> >
> > **(2) a copy of the governmental body's written communication to the attorney general asking for a decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.**

This office interprets section 552.301(d) to mean that a governmental body substantially complies with subsection (d) by sending the requestor a copy of the governmental body's written communication to the attorney general requesting a decision. Because governmental bodies may be required to submit evidence of their compliance with subsection (d), governmental bodies are encouraged to submit evidence of their compliance when seeking an attorney general decision. If a governmental body fails to comply with subsection (d), the requested information is presumed public pursuant to section 552.302.

[159] *Id.* (codified at Gov't Code § 552.301(d)).

B. Items that the Governmental Body Must Submit to the Attorney General

The provisions regarding the submissions to the attorney general a governmental body is required to make are now set out in subsection (e) of section 552.301.[160] A new provision requires a governmental body to submit a statement as to the date the governmental body received the written request for information or evidence sufficient to establish that date. Subsection (e) reads:

> **(e) A governmental body that requests an attorney general decision under Subsection (a) must within a reasonable time but not later than the 15th business day after the date of receiving the written request:**
>
> **(1) submit to the attorney general:**
>
> **(A) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld;**
>
> **(B) a copy of the written request for information;**
>
> **(C) a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and**
>
> **(D) a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested; and**
>
> **(2) label that copy of the specific information, or of the representative samples, to indicate which exceptions apply to which parts of the copy.**

[160] *Id.* (codified at Gov't Code § 552.301(e)).

Thus, subsection (e) of section 552.301 requires that a governmental body seeking an attorney general decision as to whether it may withhold requested information submit to the attorney general, no later than the fifteenth business day after receiving the written request: written comments stating why the claimed exceptions apply, a copy of the written request, a signed statement as to the date of its receipt of the request or sufficient evidence of that date, and a copy of the specific information it seeks to withhold, or representative samples thereof, labeled to indicate which exceptions are claimed to apply to which parts of the information.

1. Written Communication from the Person Requesting the Information

A written request includes a request sent by electronic mail or facsimile transmission to the public information officer or the officer's designee.[161] A copy of the written request from the member of the public seeking access to the records lets the attorney general know what information was requested, permits the attorney general to determine from the date of receipt whether the ten-day deadline was met, and enables the attorney general to inform the requestor of the ruling.[162] These written communications are generally public information.[163]

2. Information Requested from the Governmental Body

Section 552.303 provides that "[a] governmental body that requests an attorney general decision under this subchapter shall supply to the attorney general, in accordance with Section 552.301, the specific information requested. Unless the information requested is confidential by law, the governmental body may disclose the requested information to the public or to the requestor before the attorney general makes a final determination that the requested information is public or, if suit is filed under this chapter, before a final determination that the requested information is public has been made by the court with jurisdiction over the suit, except as otherwise provided by Section 552.322." If the requested records are voluminous and repetitive, a governmental body may submit representative samples.[164] If, however, each document contains substantially different information, a copy of all requested documents or information must be submitted to the attorney general.[165] The attorney general may not disclose the submitted information to the requestor or the public.[166]

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[161] Gov't Code § 552.301(a).

[162] Open Records Decision No. 150 (1977).

[163] *Cf.* Open Records Decision No. 459 (1987).

[164] Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

[165] *Id.*

[166] Gov't Code § 552.3035.

3. Labeling Requested Information to Indicate Which Exceptions Apply to Which Parts of the Requested Information

When a governmental body raises an exception applicable to only part of the information, it must mark the records to identify the information that it believes is subject to that exception. A general claim that an exception applies to an entire report or document, when the exception clearly does not apply to all information in that report or document, does not conform to the Act.[167]

4. Statement or Evidence as to Date Governmental Body Received Written Request

The governmental body, in its submission to the attorney general, must certify or provide sufficient evidence of the date it received the written request. This will enable the attorney general to determine whether the governmental body has timely requested the attorney general's decision within ten business days of receiving the written request, as required by section 552.301(b), and timely submitted the other materials required by section 552.301(e) to be submitted by the fifteenth business day after receipt of the request.

5. Letter from the Governmental Body Stating Which Exceptions Apply and Why

The letter from the governmental body stating which exceptions apply to the information and why they apply is necessary because the Public Information Act presumes that governmental records are open to the public unless the records are within one of the exceptions set out in subchapter C.[168] This presumption is based on the language of section 552.021, which makes virtually all information in the custody of a governmental body available to the public. This language places on the governmental body the burden of proving that an exception applies to the records requested from it.[169] Thus, if the governmental body wishes to withhold particular information, it must establish that a particular exception applies to the information[170] and must mark the records when necessary to identify the portion the governmental body believes is excepted from disclosure. Conclusory assertions that a particular exception applies to requested

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[167] *Id.* § 552.301(e); Open Records Decision Nos. 419 at 3 (1984), 252 at 3 (1980), 150 at 2 (1977).

[168] *See* Attorney General Opinion H-436 (1974); Open Records Decision Nos. 363 (1983), 339 (1982), 150 (1977), 91 (1975).

[169] *See, e.g.*, Open Records Decision Nos. 542 at 2-3 (1990) (concluding that burden is placed on governmental body when it requests ruling pursuant to statutory predecessor to section 552.301), 532 at 1 (1989), 363 (1983), 197 at 1 (1978).

[170] *See* discussion beginning on page 33 of this handbook.

information will not suffice. The burden for establishing the applicability of each exception in the Public Information Act is discussed in detail in part two of this handbook. If a governmental body does not establish how and why an exception applies to the requested information, the attorney general has no basis on which to pronounce it protected.[171]

The exceptions to disclosure listed in subchapter C can generally be considered to fall within two categories: "mandatory exceptions," which protect information deemed confidential by law (which a governmental body is prohibited from releasing subject to criminal penalties),[172] and "permissive exceptions," which grant to the governmental body the discretion to either release or withhold information. Because the permissive exceptions to disclosure do not make information "confidential," the governmental body may decide not to raise a permissive exception and may release to the public this nonconfidential information.[173] Furthermore, a waiver of an otherwise applicable permissive exception may result from the governmental body's failure to meet its burden in establishing that such an exception applies to the information.[174] However, mandatory exceptions, which protect from public disclosure information that a governmental body is prohibited from releasing, are not waivable. For example, section 552.101, which applies to "information considered to be confidential by law, either constitutional, statutory or by judicial decision," is not waivable; it refers to statutes, constitutional provisions, and judicial decisions that are not waived by a governmental body's failure to comply with the procedures set out in subchapter G of the Act. The following decisions address waiver of Public Information Act exceptions:

> Open Records Decision No. 630 (1994) — a governmental body may waive section 552.107(1) if it fails to timely request an open records decision;[175]
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> Open Records Decision No. 470 (1987) — a school district may waive the protection of section 552.111 as to the audit of high school funds but may not release information that is protected by sections 552.101 and 552.114;

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[171] Open Records Decision No. 363 (1983).

[172] *See* Gov't Code § 552.352.

[173] *See* Open Records Decision No. 522 at 4 (1989).

[174] *Compare Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ) *with City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App—Dallas 1998, pet. granted) *and Hart v. Gossum*, 995 S.W.2d 958 (Tex. App.—Fort Worth 1999, no pet. h).

[175] *But see Hart v. Gossum*, 995 S.W.2d 958 (Tex. App.—Fort Worth 1999, no pet. h).

Open Records Decision No. 400 (1983) — a city department that showed a report on employee misconduct to members of the public waived the statutory predecessor to section 552.111, but not section 552.101 or 552.102;

Open Records Decision No. 363 (1983) — if a governmental body fails to show how and why a particular exception applies to requested information and it is not apparent from the documents, the attorney general has no basis on which to conclude that the information is excepted from disclosure;

Open Records Decision No. 325 (1982) — when a governmental body has raised no exceptions to disclosure, the attorney general may raise only section 552.101;[176] and

Open Records Decision No. 321 (1982) — records were public where a governmental body raised the statutory predecessor to section 552.022(a)(1) with respect to records of an incomplete audit but raised no other exceptions to disclosure.

The governmental body's letter to the attorney general stating why information is excepted from public disclosure is ordinarily available to the public.[177] However, in order to explain how a particular exception applies to the information in dispute, the governmental body may find it necessary to reveal the content of the information in its letter to the attorney general. If the governmental body's letter reveals the content of the information that is in dispute, or if the letter contains information protected by privacy, the attorney general will not disclose those portions of the letter.[178] The best practice, therefore, is for the governmental body to discuss information which is the subject of its request or which raises a privacy interest in a separate document accompanying its letter requesting an open records ruling.[179]

[176] *See also* Open Records Decision No. 344 (1982) (attorney general will raise section 552.101).

[177] Open Records Decision No. 459 (1987).

[178] *Id*. at 1.

[179] *Id*. at 2.

C. Section 552.302: Information Presumed Public If Submissions and Notification Required by Section 552.301 Are Not Timely Made

Senate Bill 1851 also amended section 552.302 of the Act.[180] That section now provides:

> **If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Section 552.301(d), the information requested in writing is presumed subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.**

Section 552.301(b) establishes a deadline of ten business days for the governmental body to request an open records ruling from the attorney general.[181] Subsection (d) of the section now requires that the governmental body notify the requestor within ten business days if it is seeking an attorney general decision as to whether the information may be withheld. Section 552.301(e) establishes a deadline of fifteen business days for the governmental body to provide the other materials to the attorney general required under that subsection. Section 552.302, as amended by Senate Bill 1851, provides that if the governmental body does not timely request a decision, notify the requestor, and make the requisite submissions to the attorney general as required by section 552.301, the requested information will be presumed to be open to the public, and only the demonstration of a "compelling reason" for withholding the information can overcome that presumption.[182] In the great majority of cases, the governmental body will not be able to overcome that presumption and must promptly release the requested information. Whether failure to meet the respective ten- and fifteen-day deadlines has the effect of requiring disclosure may depend on whether the governmental body asserts a "mandatory" or "permissive" exception. (For a discussion of "mandatory" and "permissive" exceptions, refer to the discussion beginning on page 40 of this handbook.) The following decisions deal with whether there is a compelling reason which overcomes the presumption of openness arising on the governmental body's failure to meet the deadline for submissions:

> Open Records Decision No. 663 (1999) — concerning the effect of clarification of a request on the deadline;

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[180] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 21 (codified at Gov't Code § 552.302).

[181] *See also* Gov't Code § 522.308 (concerning timeliness of action by United States or interagency mail).

[182] *Id.* § 552.302; *see Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); Open Records Decision Nos. 515 at 6 (1988), 452 (1986), 319 (1982). *Compare City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App.—Dallas 1998, pet. granted)

Open Records Decision No. 630 (1994) — the mere fact that information may be protected by the attorney-client privilege is an insufficient basis to overcome the presumption of openness arising from the failure to meet the ten-day deadline;[183]

Open Records Decision No. 617 (1993) — if a request for information is made to the Records Management Division of the Texas State Library and Archives Commission for records it holds for a state agency, the ten-day deadline begins to run when the agency receives the request for information, not when the Records Management Division receives the request for information;

Open Records Decision No. 586 (1991) — when a governmental body has missed the ten-day deadline, the need of another governmental body to withhold the requested information may provide a compelling reason for nondisclosure;

Open Records Decision No. 552 (1990) — the presumption of openness may be overcome by a claim under section 552.110, because section 552.110 is designed to protect the interests of a third party;

Open Records Decision No. 473 (1987) — a city's failure to meet the ten-day deadline waived the protection of sections 552.103 and 552.111 but not the protection of sections 552.101, 552.102, and 552.109, which protect the privacy rights of third parties;

Open Records Decision No. 150 (1977) — the presumption of openness can be overcome only by a compelling demonstration that the information should not be released to the public, i.e., that the information is deemed confidential by some other source of law or that third-party interests are at stake;

Open Records Decision No. 71 (1975) — the protection of the privacy interests of a third party is a compelling reason that overcomes the presumption of openness; and

Open Records Decision No. 26 (1974) — the presumption of openness based on the failure to meet the ten-day deadline will not be overcome except by a "compelling demonstration" that the information should not be released to the public, such as that it is made confidential by another source of law.

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[183] *But see Hart v. Gossum*, 995 S.W.2d 958 (Tex. App.—Fort Worth 1999, no pet. h).

It should be noted that under sections 552.301 and 552.302 as amended by Senate Bill 1851, a governmental body's failure to timely make all of the requisite submissions and notifications required by section 552.301 triggers the presumption that the requested information must be released unless a compelling reason for withholding the information is demonstrated. Under prior law, if the attorney general determined that the governmental body had failed timely to submit required information other than the initial request for a decision, the attorney general was required to so notify the governmental body and the governmental body was allowed an additional seven calendar days to submit the required information before the presumption of openness was triggered. This is no longer the case. Now, the section 552.302 presumption of openness is automatically triggered as soon as the governmental body fails to meet any of the requisite deadlines for submissions or notification set out in section 552.301.

D. Section 552.303: Attorney General Determination That Information in Addition to That Required by Section 552.301 Is Necessary to Render a Decision

Senate Bill 1851 also amended subsections (b) through (e) of section 552.303.[184] The amended subsections provide for instances where the attorney general determines that information other than that required to be submitted by section 552.301 is necessary to render a decision, in which case the attorney general is to notify the governmental body. If the additional material is not provided by the governmental body within seven calendar days of its receipt of such notice, the information sought to be withheld is presumed public and must be disclosed unless a compelling reason for withholding the information is demonstrated. (*See* discussion of "compelling reason" for withholding information, beginning on page 42 of this handbook.)

E. Section 552.305: When the Requested Information Involves a Third Party's Privacy or Property Interests

Senate Bill 1851 also amended section 552.305[185] by adding new subsections (d) and (e). As amended, section 552.305 reads as follows:

> **(a) In a case in which information is requested under this chapter and a person's privacy or property interests may be involved, including a case under Section 552.101, 552.104, 552.110, or 552.114, a**

[184] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 22 (codified at Gov't Code § 552.303).

[185] *Id.* § 24 (codified at Gov't Code § 552.305).

governmental body may decline to release the information for the purpose of requesting an attorney general decision.

(b) A person whose interests may be involved under Subsection (a), or any other person, may submit in writing to the attorney general the person's reasons why the information should be withheld or released.

(c) The governmental body may, but is not required to, submit its reasons why the information should be withheld or released.

(d) If release of a person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision. Notice under this subsection must:

> **(1) be in writing and sent within a reasonable time not later than the 10th business day after the date the governmental body receives the request for the information; and**
>
> **(2) include:**
>
> > **(A) a copy of the written request for the information, if any, received by the governmental body; and**
> >
> > **(B) a statement, in the form prescribed by the attorney general, that the person is entitled to submit in writing to the attorney general within a reasonable time not later than the 10th business day after the date the person receives the notice:**
> >
> > > **(i) each reason the person has as to why the information should be withheld; and**
> > >
> > > **(ii) a letter, memorandum, or brief in support of that reason.**

(e) A person who submits a letter, memorandum, or brief to the attorney general under Subsection (d) shall send a copy of that letter, memorandum, or brief to the person who requested the information from the governmental body. If the letter, memorandum, or brief submitted

to the attorney general contains the substance of the information requested, the copy of the letter, memorandum, or brief may be a redacted copy.

Section 552.305 relieves the governmental body of its duty under section 552.301(b) to state which exceptions apply to the information and why they apply only in circumstances where (1) a third party's privacy or property interests may be implicated, (2) the governmental body has requested a ruling from the attorney general, and (3) the third party or any other party has submitted reasons for withholding or releasing the information.[186] However, "[w]here another party has not submitted . . . reasons [for withholding the information], the governmental body must assume the burden of raising exceptions it wishes this office to consider."[187] The language of section 552.305(b) is permissive and therefore does not require that a third party with privacy interests seek relief from the attorney general before claiming the privacy interests in court.[188]

Notice Required when Proprietary Information Requested. It should be noted, however, that new subsection (d) of section 552.305 requires the governmental body to make a good faith effort to notify a person whose proprietary interests may be implicated by a request for information where the information may be excepted from disclosure under sections 552.101, 552.110, 552.113, or 552.131. (*See* part two of this handbook for a discussion of these and other exceptions to disclosure). The governmental body is not required to notify a party whose privacy, as opposed to proprietary, interest is implicated by a release of information. The required notice must be in writing and sent within ten business days of the governmental body's receipt of the request. It must include a copy of the written request for information, and a statement in the form prescribed by the attorney general that the person may submit to the attorney general within ten days of his receiving the notice reasons why the information in question should be withheld and explanations in support thereof. The form of the statement required by section 552.305(d)(2)(B), as prescribed by the attorney general, may be found in Appendix C of this handbook. New subsection (e) of section 552.305 requires that a person who submits reasons under subsection (d) for withholding information, send a copy of such communication to the requestor of the information unless the communication reveals the substance of the information at issue, in which case the copy sent to the requestor may be redacted.

The following open records decisions have interpreted the statutory predecessor to section 552.305:

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[186] Open Records Decision No. 542 at 3 (1990).

[187] *Id*. at 3.

[188] *Morales v. Ellen*, 840 S.W.2d 519, 523 (Tex. App.—El Paso 1992, writ denied).

Open Records Decision No. 652 (1997) — if a governmental body takes no position pursuant to section 552.305 of the Government Code, or has determined that requested information is not protected under a specific confidentiality provision, this office will issue a decision based on a review of the information at issue and on any other information provided to the attorney general by the governmental body or third parties;

Open Records Decision No. 609 (1992) — the attorney general is unable to resolve a factual dispute where a governmental body and a third party disagree on whether information is excepted from disclosure based on the third party's property interests;

Open Records Decision No. 575 (1990) — the Public Information Act does not require a third party to substantiate its claims of confidentiality at the time it submits material to a governmental body;

Open Records Decision No. 552 (1990) — explanation of how the attorney general deals with a request when, pursuant to the statutory predecessor to section 552.305 of the Public Information Act, a governmental body takes no position on a third party's claim that information is excepted from public disclosure by the third party's property interests and when relevant facts are in dispute; and

Open Records Decision No. 542 (1990) — the statutory predecessor to section 552.305 did not permit a third party to request a ruling from the attorney general.

F. Section 552.3035: Attorney General Not to Disclose Information at Issue

Senate Bill 1851 added section 552.3035[189] which expressly prohibits the attorney general from disclosing information which is the subject of a request for an attorney general decision.

G. Section 552.304: Submission of Public Comments

Section 552.304 of the Act permits any person to submit written comments why information at issue in a request for an attorney general decision should or should not be released. In order to be considered, such comments must be received before the attorney general renders a decision under section 552.306.

[189] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 23 (codified at Gov't Code § 552.3035).

H. Rendition of Attorney General Decision

Pursuant to amendments by Senate Bill 1851 to section 552.306 of the Act,[190] the attorney general must render an open records decision "not later than the forty-fifth working day after the date the attorney general received the request for a decision."[191] If the attorney general cannot render a decision within the forty-five-day deadline, the attorney general may extend the deadline by ten working days by informing the governmental body and the requestor of the reason for the delay.[192] The attorney general must provide a copy of the decision to the requestor.[193]

VII. Cost of Copies and Access

A. General Cost Provisions

Subchapter F of the Public Information Act, sections 552.261 through 552.274, generally provides for charges for copies of and access to public information. Senate Bill 1851 added section 552.2615[194] which requires, under certain circumstances, that a governmental body provide a requestor an itemized statement detailing all charges that will be imposed. The statement must be provided if the cost of providing requested copies of or access to the requested public information will exceed $40.[195] If an alternative, less costly, method of viewing the records is available, the statement must advise the requestor that he may contact the governmental body regarding such alternative method.[196] If the governmental body anticipates that costs of complying with a request will be such that it will be required to send such a statement, it must inform the requestor that he must provide the governmental body a mailing address, facsimile transmission, or electronic mail address to which the statement may be sent.[197] The governmental body must also inform the requestor that the request will be considered withdrawn if he does not timely and properly respond to the statement or an updated statement by mail or in person, or by facsimile transmission or electronic mail if the governmental body can

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[190] *Id.* at § 25 (codified at Gov't Code § 552.306).

[191] Gov't Code § 552.306(a).

[192] *Id*.

[193] *Id*. § 552.306(b).

[194] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 15 (codified at Gov't Code § 552.2615).

[195] Gov't Code § 552.2615(a).

[196] *Id*.

[197] *Id*. § 552.2615(a)(1).

receive documents transmitted in such a manner.[198] The request will be considered withdrawn if the requestor does not, within ten days after the date a statement is sent to him, respond in writing that he accepts the charges or is modifying his request.[199]

If, before it has made the requested copy or paper record available, the governmental body determines that the estimated charges will exceed those detailed in the original statement by twenty percent or more, it must send the requestor an updated statement of all such estimated costs. If the requestor does not respond in writing within ten days after the date such updated statement is sent to him, the request is considered withdrawn.[200] Actual costs charged the requestor may not exceed the amount estimated in the updated statement, or, if no updated statement is sent, may not exceed the amount estimated in the original statement by twenty percent.[201] A statement, updated statement, or requestor's response is considered to have been sent on the date it is delivered in person, mailed, or sent by electronic mail or facsimile transmission.[202] The time taken to send a statement to the requestor and receive a response does not affect the running of the governmental body's ten- and fifteen-day deadlines under section 552.301.[203]

Under section 552.262(a), as amended by Senate Bill 1851 of the Seventy-sixth Legislature,[204] the General Services Commission is required to adopt reasonable cost rules that "shall be used by each governmental body in determining charges for providing copies of public information and in determining the charge, deposit, or bond required for making public information that exists in a paper record available for public inspection" unless another law provides a different charge for specific information.[205] The charges for public information may not be excessive and may not exceed the actual cost of producing the information.[206] A governmental body other than a state agency is allowed to determine its own charges for providing copies of public information and its own charge, deposit, or bond for making public information that exists in a paper record available for inspection, but those charges may not exceed by more than twenty-five percent the charge set under the General Services Commission rules.[207] A governmental body may request and receive an exemption from all or part of the General Services Commission rules if the commission finds that good cause exists.[208]

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[198] *Id*. § 552.2615(a)(2), (3).

[199] *Id*. § 552.2615(b).

[200] *Id*. § 552.2615(c).

[201] *Id*. § 552.2615(d).

[202] *Id*. § 552.2615(e), (f).

[203] *Id*. § 552.2615(g)

[204] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 16 (codified at Gov't Code § 552.262).

[205] Gov't Code § 552.262(a).

[206] *Id*.

[207] *Id*.

[208] *Id*. § 552.262(c).

A person who believes that they have been overcharged for a copy of public information may file a complaint with the General Services Commission.[209] The commission is required to investigate and issue a determination as to whether the charges are appropriate.[210] If the commission finds that the governmental body has overcharged for requested public information, the governmental body must adjust its charges in accordance with the commission's decision.[211] A person who overpays for copies of public information as a result of a governmental body's bad faith is entitled to recover three times the amount of the overcharge.[212] The commission's open records administrator may be reached by telephone at (512) 475-2497.

As amended by Senate Bill 1851,[213] section 552.263 of the Act provides that, if the requestor has been provided with the statement of estimated costs required under section 552.2615, an officer for public information may require a deposit or bond for payment of anticipated costs if the estimated charge for requested copies of public information exceeds 1) $100, if the governmental body has more than fifteen full-time employees, or 2) $50, if the governmental body has fewer than sixteen full-time employees.[214] If a requestor owes the governmental body unpaid charges in excess of $100 for previous requests, the existence and amounts of which unpaid charges have been fully documented by the governmental body, the officer for public information may require a deposit or bond for payment of the unpaid amounts before preparing copies of information in response to a new request from the requestor.[215] For purposes of the governmental body's obligations under subchapter E of the Act to make requested public information timely available to the requestor, a request for which a deposit or bond has been required under section 552.263 is considered to have been received by the governmental body on the date the governmental body receives the deposit or bond.[216] (It should be noted, however, that the requirement of a deposit or bond in connection with a request does not affect the date the request is considered to have been received for purposes of a governmental body's obligations to seek an attorney general decision under subchapter G.)

A governmental body shall waive or reduce the charge for a copy of public information if the governmental body determines that waiver or reduction of the fee is in the public

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[209] *Id.* § 552.269(a).

[210] *Id.*

[211] *Id.*

[212] *Id.* § 552.269(b).

[213] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 17 (codified at Gov't Code § 552.263).

[214] Gov't Code § 552.263(a). *But see* Gov't Code § 552.263(b) (governmental body may not require deposit or bond as down payment for copies of public information to be requested in future).

[215] Gov't Code § 552.263(c), (d).

[216] *Id.* § 552.263(e).

interest because furnishing the information primarily benefits the general public.[217] Additionally, a governmental body may waive a charge if the cost of processing the collection of the charge will exceed the amount of the charge.[218]

Government publications are excluded from the cost provisions of the Act.[219] The governmental body may establish the charges for its publications if the costs are not determined by other law.

B. Copies vs. Access

A requestor may choose to have *access* to public information or *copies* of the information, or both.[220] When a requestor seeks *copies* of public information contained in fifty or fewer pages of paper records, a governmental body may charge only for photocopying costs and may not charge for material, labor, or overhead, unless the pages to be copied are located in "two or more separate buildings that are not physically connected with each other" or in "a remote storage facility."[221] The cost of copies of public information contained in any other format "shall be an amount that reasonably includes all costs related to reproducing the public information, including costs of materials, labor, and overhead."[222] When a requestor seeks copies of records that contain both public information and information the attorney general has determined is confidential, the governmental body may charge, in addition to the photocopying costs, a reasonable cost for personnel time spent to "obliterate, blackout, or otherwise obscure" the confidential information.[223] A governmental body may not, however, charge personnel time for the redaction of information that the attorney general has determined may be withheld pursuant to one of the Act's permissive exceptions.[224]

If the charge for providing a copy of public information includes costs of labor, the requestor may require the governmental body's officer for public information or the officer's agent to provide the requestor with a written statement as to the amount of time that was required to produce and provide the copy.[225] The statement must be signed by the officer for public information or the officer's agent and the officer's or the agent's

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[217] *Id*. § 552.267(a).

[218] *Id*. § 552.267(b).

[219] *Id*. § 552.270.

[220] *Id*. § 552.221(a).

[221] *Id*. § 552.261(a).

[222] *Id.; see also* 1 T.A.C. § 111.63. (It should be noted that General Service Commission cost rules appearing in the Texas Administrative Code will be revised in order to take account of new legislation).

[223] 1 T.A.C. § 111.63(d)(4) (*But see* parenthetical note to the preceding footnote).

[224] Open Records Decision No. 633 at 6-8 (1995).

[225] Gov't Code § 552.261(b).

name must be typed or legibly printed below the signature.[226] A charge may not be imposed for providing the written statement to the requestor.[227]

Senate Bill 1851 added new provisions regarding charges that may be imposed for *access* to information that exists in a paper record.[228] If editing of confidential information is required in order to give access to a paper record, a governmental body may charge for the cost of making a copy of the page from which information must be edited.[229] Also, under subsection (c) of section 552.271, an officer for public information may require a requestor to pay, or make a deposit or bond for the payment of, anticipated personnel costs for making available for inspection requested information that exists in a paper record only if the specifically requested information is either older than five years or will fill six or more archival boxes and the officer for public information estimates that more than five hours will be required to make the information available for inspection.[230] If the governmental body has fewer than sixteen full-time employees, the payment, deposit, or bond may be required if the specifically requested information is older than three years or will fill three or more archival boxes and the officer for public information estimates that more than two hours will be required to make the information available for inspection.[231]

If a request is made to inspect information that exists in an electronic medium and that is not available directly on-line, "a charge may not be imposed for access to the information, unless complying with the request will require programming or manipulation of data."[232] Such charges must be assessed in accordance with the cost provisions of the Act.[233]

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[226] *Id*.

[227] *Id*.

[228] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 18 (codified at Gov't Code § 552.271).

[229] Gov't Code § 552.271.

[230] *Id*. § 552.271(c).

[231] *Id*. § 552.271(d).

[232] *Id*. § 552.272(a).

[233] *Id*.

C. Report by State Agency on Cost of Copies

Each state agency[234] shall file a report with the General Services Commission that describes the agency's procedures for charging and collecting fees for providing copies of public information.[235] The state agency must file the report no later than December 1 of each odd-numbered year.[236]

D. Cost Provisions Outside the Public Information Act

Other statutes may prevail over the cost provisions in the Act. Section 552.261 does not repeal a fee schedule for copies established by another statute.[237] For example, section 118.011 of the Local Government Code requires county clerks to charge one dollar for a noncertified copy of each page or part of a page of a document.[238] Also, section 550.065(c) of the Transportation Code provides specifically for the costs of copies of accident reports provided by the Department of Public Safety or law enforcement agencies.

VIII. Penalties and Remedies

A. Informal Resolution of Complaints

The Office of the Attorney General maintains an Open Government Hotline staffed by personnel trained to answer questions about the Public Information Act. In addition to answering substantive and procedural questions posed by governmental bodies and requestors, the Hotline staff handles written, informal complaints concerning requests for information. While not meant as a substitute for the statutory procedures and legal actions set out in section 552.3215, the Hotline provides an informal alternative for complainants. In most cases, the Hotline staff is able to resolve complaints and misunderstandings informally. The Hotline may be reached toll-free at (877) 673-6839 (877-OPEN TEX) or in the Austin area at (512) 478-6736 (478-OPEN). Questions concerning charges for providing public information may be directed to the General Services Commission at (512) 475-2497.

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[234] As defined by Gov't Code § 2151.002(2)(A).

[235] Gov't Code § 552.274(a).

[236] *Id.*

[237] *See* Attorney General Opinions MW-163 (1980) (applying provisions regarding charges for certified copies now found in Government Code section 603.004); *see also, e.g.*, Local Gov't Code §§ 118.141(a)(2), .144 (county treasurer may collect one dollar for certified or noncertified copy of each page or part of page of document); *cf.* Gov't Code § 552.266 (charge for copy made by municipal court clerk shall be as set by ordinance).

[238] Local Gov't Code §§ 118.011(a)(4), .0145, .052(3)(C), .0605.

B. Criminal Penalties

The Public Information Act establishes criminal penalties for both the release of information that must not be disclosed and the withholding of information that must be released. Section 552.352(a) of the Act provides: "A person commits an offense if the person distributes information considered confidential under the terms of this chapter." This section applies to information excepted from disclosure by section 552.101.[239] Section 552.353(a) provides:

> **An officer for public information, or the officer's agent, commits an offense if, with criminal negligence, the officer or the officer's agent fails or refuses to give access to, or to permit or provide copying of, public information to a requestor as provided by this chapter.**

Subsections (b) through (d) of section 552.353 set out various affirmative defenses to prosecution under subsection (a), including, for example, that a timely request for a decision from the attorney general is pending or that the officer for public information is pursuing judicial relief from compliance with a decision of the attorney general pursuant to section 552.353.[240] A violation of section 552.352 or section 552.353 constitutes official misconduct[241] and is a misdemeanor punishable by confinement in county jail not to exceed six months, or a fine not to exceed $1,000, or both confinement and the fine.[242]

The Act also criminalizes the destruction, alteration, or concealment of public records. Section 552.351 provides that the willful destruction, mutilation, removal without permission, or alteration of public records is a misdemeanor punishable by confinement in county jail for a minimum of three days and a maximum of three months, or a fine of a minimum of $25 and a maximum of $4,000, or both confinement and the fine.[243]

C. Civil Remedies

1. Writ of Mandamus

Section 552.321 of the Act provides for a suit for a writ of mandamus to compel the release of requested information. A requestor or the attorney general may file suit for a writ of mandamus to compel a governmental body to release information if the

[239] *See* Open Records Decision No. 490 (1988).

[240] Gov't Code § 552.353(b)(2), (3). *See generally Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 548-49 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

[241] Gov't Code §§ 552.352(c), .353(f).

[242] *Id.* §§ 552.352(b), .353(e).

[243] *See also* Penal Code § 37.10 (tampering with governmental record).

governmental body did not seek an attorney general decision as to whether the information could be withheld or if the attorney general determined that the information was not excepted from disclosure but the governmental body refused to release the information.[244] Senate Bill 1851 added subsection (b) to section 552.321[245] which provides that a mandamus action filed by a requestor under section 552.321 must be filed in a district court of the county in which the main offices of the governmental body are located. A mandamus suit filed by the attorney general under section 552.321 must be filed in a district court in Travis County except that if the suit is against a municipality with a population of 100,000 or less, the suit must be filed in a district court of the county where the main offices of the municipality are located.[246]

Section 552.321 authorizes a mandamus suit to compel the release of information even if the attorney general has ruled such information is not subject to required public disclosure. In *Texas Department of Public Safety v. Gilbreath*,[247] the court of appeals held that statutory mandamus relief is authorized whenever a "governmental body has not complied with the Act."[248] Therefore, such relief would be appropriate in an action seeking a judicial declaration that information is subject to disclosure under the Act even when the attorney general has determined to the contrary.[249]

The following are some other judicially recognized rules regarding mandamus under the Act:

Martin v. Victoria Independent School District[250] — Public Information Act does not automatically confer jurisdiction on a county court. A county court (constitutional or statutory) cannot hear an original injunction or mandamus proceeding unless the plaintiff alleges an amount in controversy within the county court's jurisdiction;

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[244] Gov't Code § 552.321(a).

[245] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 27 (codified at Gov't Code § 552.321(b)).

[246] Gov't Code § 552.321(b).

[247] 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ).

[248] *Id*. at 413.

[249] *Id*. at 411.

[250] 972 S.W.2d 815 (Tex. App.—Corpus Christi 1998, pet. denied).

A&T Consultants, Inc. v. Sharp[251] — the Texas Supreme Court is the proper forum for a mandamus action under the Act to compel disclosure of records held by executive officers named in the Texas Constitution, including the lieutenant governor, the secretary of state, the comptroller, the treasurer, the commissioner of the general land office, and the attorney general;

Johnson v. Lynaugh[252] — the district courts have original jurisdiction of mandamus proceedings under the Act; the courts of appeals have only appellate jurisdiction;

City of Houston v. Houston Chronicle Publishing Co.[253] — where one district court has determined certain information to be public information in a declaratory judgment action in which mandamus relief was not sought, that court does not have exclusive jurisdiction of a subsequent mandamus action relating to the same information and mandamus may be available in an independent proceeding filed in another district court;

Espinoza v. State[254] — because mandamus under the Public Information Act is, like mandamus generally, a civil action, mandamus relief cannot be obtained through a motion in a pending criminal case;

Hubert v. Harte-Hanks Texas Newspapers[255] — the attorney general's ruling on a request from the governmental body to determine whether information falls under an exception to disclosure is persuasive authority but is not binding on the court in a mandamus action under the Act; and *Industrial Foundation of the South v. Texas Industrial Accident Board*[256] — entitlement to mandamus is not barred by an unclean-hands defense based on the fact that the applicant for public information intends to use the information unlawfully or in violation of public policy.

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[251] 904 S.W.2d 668, 672 (Tex. 1995).

[252] 789 S.W.2d 704, 705-06 (Tex. App.—Houston [1st Dist.] 1990, no writ).

[253] 673 S.W.2d 316, 319 (Tex. App.—Houston [1st Dist.] 1984, no writ).

[254] 669 S.W.2d 736, 737-38 (Tex. Crim. App. 1984).

[255] 652 S.W.2d 546, 549 n.4 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

[256] 540 S.W.2d 668, 674-75 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

2. Declaratory Judgment or Injunctive Relief; Formal Complaints

Senate Bill 1851 added section 552.3215[257] providing for a suit for declaratory judgment or injunctive relief against a governmental body which violates the Public Information Act.

a. Suit by District or County Attorney or by Attorney General

The district or county attorney for the county in which a governmental body is located, or the attorney general, may bring the action in the name of the state only in a district court of that county. If the governmental body is located in more than one county, such suit must be brought in the county where the governmental body's administrative offices are located.[258] If the governmental body is a state agency, the Travis County District Attorney, or the attorney general, may bring such suit only in a district court of Travis County.[259]

b. Suit Pursuant to Formal Complaint

A complainant who claims to be a victim of a violation of the Act may seek to have a suit for declaratory judgment or injunctive relief brought on his behalf. The complainant must first file a complaint with the district or county attorney of the county where the governmental body is located. If the governmental body is located in more than one county, the complaint must be filed with the district or county attorney of the county where the governmental body's administrative offices are located. If the governmental body is a state agency, the complaint may be filed with the Travis County District Attorney. If the governmental body is the district or county attorney, the complaint must be filed with the attorney general.[260]

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[257] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 28 (codified at Gov't Code § 552.3215).

[258] Gov't Code § 552.3215(c).

[259] *Id.* § 552.3215(d).

[260] *Id.* § 552.3215(e).

c. Procedures for Formal Complaint

A complaint by a person who claims to be a victim of a violation of the Act must be in writing and signed by the complainant, name the governmental body complained of, state the time and place of the alleged violation, and describe the violation in general terms.[261] The district or county attorney receiving a complaint must note on its face the date it was filed and, before the thirty-first day after the complaint was filed, determine whether the alleged violation was committed, determine whether an action will be brought under the section, and notify the complainant of those determinations.[262] If the district or county attorney determines not to bring suit under the section, or determines that a conflict of interest exists which precludes his bringing suit, then he must include a statement of the basis for such determination and return the complaint to the complainant by the thirty-first day after his receipt of the complaint.[263]

If the county or district attorney determines, in response to a complaint filed with him, not to bring an action, the complainant may, before the thirty-first day after the complaint is returned to him, file the complaint with the attorney general. On receipt of the complaint, the attorney general must make the determinations and notification required of a district or county attorney receiving a complaint within the same time frame. If the attorney general determines to bring an action in response to a complaint against a governmental body located in only one county, the attorney general must file such action in a district court of that county.[264]

d. Governmental Body Must Be Given Opportunity to Cure Violation

Actions for declaratory judgment or injunctive relief under section 552.3215 may be brought only if the official proposing to bring the action notifies the governmental body in writing of his determination that the alleged violation was committed and the governmental body does not cure the violation before the fourth day after the date it receives the notice.[265]

3. Other Actions

Actions for declaratory judgment or injunctive relief authorized under section 552.3215 are in addition to any other civil, administrative, or criminal actions authorized by law.[266] Notably, prior to the adoption of section 552.3215, the court of appeals in *Morales v.*

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[261] *Id.*

[262] *Id.* § 552.3215(f), (g).

[263] *Id.* § 552.3215(h).

[264] *Id.* § 552.3215(i).

[265] *Id.* § 552.3215(j).

[266] *Id.* § 552.3215(k).

Ellen[267] affirmed that the district court had jurisdiction to decide a declaratory judgment action brought by a third party asserting privacy interests in documents the attorney general had ruled should be released. The court held that the statutory predecessor to Government Code section 552.305(b) — which permits a third party whose privacy or property interests may be involved in the requested information "or any other person" to "submit in writing to the attorney general the person's reasons why the information should be withheld or released" — is permissive and does not require that a third party exhaust this remedy before seeking relief in the courts.[268]

Sections 552.324 and 552.325 prohibit a governmental body, officer for public information, or other person or entity that wishes to withhold information from filing a lawsuit seeking to withhold the information against a person who has requested the information. The only suit section 552.324 allows a governmental body or officer for public information who seeks to withhold information to file is a suit challenging the attorney general's decision regarding the public availability of the information.[269] Senate Bill 1851 amended section 552.324[270] to require that a suit under the section be brought not later than the thirtieth calendar day after the governmental body receives the decision of the attorney general it seeks to challenge. If suit is not timely filed under the section, the governmental body must comply with the attorney general decision in question. The deadline for filing suit under section 552.324 does not affect the earlier ten-day deadline for a governmental body's filing suit, in order to establish an affirmative defense to prosecution under section 552.353(b)(3).[271]

Section 552.325 provides that a requestor may intervene in a suit filed to prevent disclosure and includes procedures for notice to the requestor of the right to intervene and of any proposed settlement between the attorney general and the governmental body. If sued for failure to release required information, an officer for public information may raise as an affirmative defense the fact that a person or entity has timely filed a suit seeking relief from compliance with an attorney general decision.[272]

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[267] 840 S.W.2d 519, 523 (Tex. App.—El Paso 1992, writ denied).

[268] *Id*.

[269] Gov't Code § 552.324(a).

[270] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 30 (codified at Gov't Code § 552.324).

[271] Gov't Code § 552.324(b); *see also* Act of May 30, 1999, 76th Leg., R.S., H.B. 211, § 6 (codified at Gov't Code § 552.131) (concerning procedures for school districts and open-enrollment charter schools to challenge attorney general decisions).

[272] Gov't Code § 552.353(c).

Overcharging for copies is actionable under section 552.269. If a governmental body does not act in good faith in calculating the cost of copying a public record and consequently requires a requestor to pay a charge for the copy that unlawfully exceeds its actual cost, the requestor "is entitled to recover three times the amount of the overcharge" actually paid.[273]

4. Exceptions to Disclosure Governmental Body May Raise in Civil Suit

Senate Bill 1851 added section 552.326[274] which limits the exceptions a governmental body may raise in a civil suit filed under section 552.321 (mandamus), section 552.3215 (declaratory judgment or injunctive relief), or section 552.324 (suit by governmental body). The only exceptions to disclosure a governmental body may raise in such suits are exceptions which it had properly raised in a request for an attorney general decision under section 552.301 unless the exception is one based on a requirement of federal law or one involving the property or privacy interests of another person.[275]

5. Discovery of Information Under Protective Order

Section 552.322 authorizes a court to order that information at issue in a suit for mandamus under section 552.321, or for declaratory judgment or injunctive relief under section 552.3215, may be discovered only under a protective order until a final determination is made.

D. Assessment of Costs of Litigation and Reasonable Attorney's Fees

Section 552.323 of the Act, as amended by Senate Bill 1851,[276] provides that in a suit for mandamus under section 552.321 or for declaratory judgment or injunctive relief under section 552.3215, the court shall assess costs of litigation and reasonable attorney's fees incurred by a plaintiff who substantially prevails. However, a court may not assess such costs and fees against a governmental body if the court finds that it acted in reasonable reliance on a judgment or order of a court applicable to that governmental body, the published opinion of an appellate court, or a written decision of the attorney general.[277]

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[273] *Id*. § 552.269(b).

[274] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 31 (codified at Gov't Code § 552.326).

[275] Gov't Code § 552.326.

[276] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 29 (codified at Gov't Code § 552.323).

[277] Gov't Code § 552.323(a).

In a suit brought under section 552.353(b)(3) — which provides for a governmental body's filing an action for a declaratory judgment or a writ of mandamus seeking relief from compliance with the decision of the attorney general — a court may assess costs and fees incurred by a plaintiff or defendant who substantially prevails. In exercising its discretion as to the assessment of such costs and fees, a court must consider whether the conduct of the officer for public information of the governmental body had a reasonable basis in law and whether the suit was brought in good faith.[278]

IX. Preservation and Destruction of Records

Subject to state laws governing the destruction of state and local government records, section 552.004 addresses the preservation period of noncurrent records. Sections 441.180 through 441.203 of the Government Code provide for the management, preservation, and destruction of state records under the guidance of the Texas State Library and Archives Commission.[279] Provisions for the preservation, retention, and destruction of local government records under the oversight of the Texas State Library and Archives Commission are set out in chapters 201 through 205 of the Local Government Code.

The Public Information Act in section 552.203 provides in part that the officer for public information, "subject to penalties provided in this chapter," has the duty to see that public records are protected from deterioration, alteration, mutilation, loss, or unlawful removal and that they are repaired as necessary.[280] Public records may be destroyed only as provided by statute.[281] A governmental body may not destroy records even pursuant to statutory authority while they are subject to an open records request.[282]

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[278] *Id.* § 552.323(b); *see also City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App.—Dallas 1998, pet. granted) (right to jury determination of attorney's fees).

[279] *See, e.g.*, Attorney General Opinions DM-181 at 3 (1992), JM-1013 at 2, 5-6 (1989), JM-229 at 5 (1984).

[280] *See also* Gov't Code § 552.351 (penalty for willful destruction, mutilation, removal without permission, or alteration of public records).

[281] *See generally* Attorney General Opinions DM-40 (1991) (deleting records), JM-830 (1987) (sealing records), MW-327 (1981) (expunging or altering public records).

[282] Local Gov't Code § 202.002(b); Open Records Decision No. 505 at 4 (1988).

X. Public Information Act Distinguished from Certain Other Statutes

A. Authority of the Attorney General to Issue Attorney General Opinions

The attorney general has authority pursuant to article IV, section 22 of the Texas Constitution and sections 402.041 through 402.045 of the Government Code to issue legal opinions to certain public officers, who are identified in sections 402.042 and 402.043 of the Government Code. The attorney general may not give legal advice or a written opinion to any other person.[283]

On the other hand, the Public Information Act requires a governmental body to request a ruling from the attorney general if it receives a written request for records that it believes to be within an exception set out in subchapter C of the Act, sections 552.101 through 552.132, and there has not been a previous determination about whether the information falls within the exception.[284] Thus, all governmental bodies have a duty to request a ruling from the attorney general under the circumstances set out in section 552.301. A much smaller group of public officers has discretionary authority to request attorney general opinions pursuant to chapter 402 of the Government Code. A school district, for example, is a governmental body that must request open records rulings as required by section 552.301 of the Public Information Act, but has no authority to seek legal advice on other matters from the attorney general.[285]

B. Texas Open Meetings Act

The Public Information Act, Government Code chapter 552, and the Open Meetings Act, Government Code chapter 551, both serve the purpose of opening government to the people. However, they operate differently and each has a different set of exceptions. The exceptions in the Public Information Act do not furnish a basis for holding executive session meetings to discuss confidential records.[286] Nor does the mere fact that a document was discussed in an executive session make it confidential under the Public Information Act.[287] Since the Open Meetings Act has no provision comparable to section 552.301 of the Public Information Act, the attorney general may address questions about the Open Meetings Act only when such questions are submitted by a public officer with

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[283] Gov't Code § 402.045.

[284] *Id.* § 552.301(a).

[285] *See generally* Attorney General Opinion DM-20 at 3-6 (1991).

[286] *See* Attorney General Opinion JM-595 at 4 (1986).

[287] Open Records Decision No. 485 (1987) at 9-10; *see also* Open Records Decision No. 605 at 2-3 (1992).

authority to request attorney general opinions pursuant to chapter 402 of the Government Code. (A companion volume to this handbook, the *Open Meetings Handbook*, is also available from the Office of the Attorney General.)

C. Discovery Proceedings

The Public Information Act differs in purpose from statutes and procedural rules providing for discovery of documents in administrative and judicial proceedings.[288] The Act's exceptions to required public disclosure do not create privileges from discovery of documents in administrative or judicial proceedings.[289] Furthermore, information that might be privileged from discovery is not necessarily protected from required public disclosure under the Act.[290] Whether such information is subject to disclosure under the Act will depend entirely upon whether one of the Act's exceptions to disclosure applies.[291]

[288] Attorney General Opinion JM-1048 at 2 (1989); Open Records Decision Nos. 551 at 4 (1990), 108 (1975).

[289] Gov't Code § 552.005.

[290] *See* Open Records Decision No. 647 (1996) (application of Public Information Act to attorney work product material which is privileged in context of civil discovery). For a discussion of the work product exceptions, see page 115 of this handbook.

[291] *See generally* Open Records Decision Nos. 575 at 2 (1990), 574 (1990).

PART TWO: Exceptions to Disclosure

I. Preliminary Matters

A. Information Generally Considered to Be Public

1. Section 552.022 Categories of Information

Section 552.022 of the Public Information Act sets out eighteen categories of public information. The introductory language in section 552.022 was amended by the Seventy-sixth Legislature to provide that "[w]ithout limiting the amount or kind of information 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 law. . . ."[292] Prior to amendment, this provision read "[w]ithout limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information . . . ." The attorney general interpreted the former language to mean that the legislature had not intended section 552.022 to diminish the force of the exceptions found in subchapter C of the Act.[293] Thus, under the attorney general's interpretation of the former language, information listed in section 552.022 could still be excepted from disclosure by an exception in subchapter C.[294] The new language reflects a legislative intent to change the status of the law with regard to the categories of information listed in section 552.022. Thus, under the current section 552.022, the Act's exceptions to disclosure generally do not apply to the categories of information contained in the provision.[295] Three exceptions to this general rule exist. First, any information in the section 552.022 list that is expressly made confidential under other law must be withheld. Second, under subsection (1) of section 552.022, "a complete report, audit, evaluation, or investigation made of, for, or by

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[292] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 5 (codified at Gov't Code § 552.022).

[293] Open Records Decision Nos. 460 at 3, 4 (1987), 407 at 3 (1984), 140 (1976); *see Cornyn v. City of Garland*, 994 S.W.2d 258 (Tex. App.—Austin 1999, no pet. h.); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 185 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

[294] *See* Open Records Decision No. 280 (1981); *see also* Open Records Decision No. 460 at 3 (1987).

[295] *But see A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 675 (Tex. 1995) (balancing test applied to conflict between subsections 552.022(1) and (3) and Tax Code section 111.006, which makes confidential information obtained or derived from examination of taxpayer).

a governmental body" may be excepted from disclosure under section 552.108, the law enforcement exception, assuming the governmental body establishes the applicability of that exception. Third, information in attorney fee bills that is within the attorney-client privilege may be excepted from disclosure under section 552.107(1).[296]

The recent amendment to section 552.022 also added subsection (b), which prohibits a court in this state from ordering a governmental body to withhold from public disclosure information in the section 552.022 categories unless the information is confidential by law. Thus, although section 552.107(2) of the Act excepts from disclosure information which a court by order has prohibited disclosure, the recent amendment to section 552.022 will effectively limit the applicability of that subsection and the authority of a court to order confidentiality. (For a discussion of section 552.107(2), refer to page 94 of this handbook).

2. Other Kinds of Information That May Not Be Withheld

Open records decisions of the attorney general have recognized that some records cannot be withheld from the public. In Open Records Decision No. 551 (1990), the attorney general declared that "[i]t is difficult to conceive of a more open record" than a city ordinance because the concept of due process requires that the people have notice of the law.[297] None of the exceptions to the Act may be used to bar public access to such information. In addition, as a general rule, a governmental body may not use one of the exceptions in the Act to withhold information that a statute other than the Act expressly makes public.[298] For example, a governmental body may not withhold from required public disclosure under Government Code section 552.108 an affidavit in support of an executed search warrant since the warrant is made public by statute.[299]

B. Application of New Exceptions to Pending Requests for Information

Absent a legislative mandate to the contrary, a newly adopted exception to the Public Information Act applies to records as of the effective date of the exception, even if there is a pending request for the records. In *Houston Independent School District v. Houston*

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[296] Gov't Code § 552.022(16); *see* Open Records Decision No. 574 (1990).

[297] Open Records Decision No. 551 at 2-3 (1990); *see also* Open Records Decision Nos. 221 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"), 146 at 2 (1976) (election returns are matter of greatest public interest).

[298] Open Records Decision No. 623 (1994); *see also* Open Records Decision No. 451 (1986) (specific statute that affirmatively requires release of information at issue prevails over litigation exception of Public Information Act); *cf. Houston Chronicle Publ'g Co. v. Woods*, 949 S.W.2d 492 (Tex. App.—Beaumont 1997, orig. proceeding) (concerning public disclosure of affidavits in support of executed search warrants).

[299] Act of May 10, 1999, 76th Leg., R.S., H.B. 234, § 1 (codified at Code Crim. Proc. art. 18.01(b)).

Chronicle Publishing Co.,[300] the court applied a newly enacted exception to the Public Information Act to the records sought in the mandamus action before it. The trial court had held that the Houston Chronicle Publishing Company was entitled to have access to college transcripts of school district administrators. However, the appellate court reversed, concluding that the school district could withhold the transcripts pursuant to an exception that was adopted after the attorney general's decision requiring release of the information and during the school district's suit challenging that decision, but before the district court issued its final order.[301] The attorney general's ruling was based on law that existed before the new exception was adopted. The appellate court concluded that the Houston Chronicle Publishing Company had not yet obtained a vested right in the transcripts and, consequently, that they were excepted from disclosure under the new amendment.[302] In Open Records Decision No. 600 (1992), the attorney general followed the rationale of the *Houston Independent School District* case and concluded that an amendment to the statutory predecessor to section 552.117 of the Government Code applied to records that already had been requested under the Act.

C. Confidentiality Agreements

A governmental body's promise to keep information confidential, including in a settlement agreement or any other contract, is not a basis for excepting information from required public disclosure under the Act unless the governmental body has express statutory authority to make such a promise. (For a discussion of the Act's limitations on governmental bodies' authority to enter into confidentiality agreements, refer to page 67 of this handbook.)

II. Exceptions

A. Section 552.101: Information Confidential by Law

Section 552.101 of the Government Code excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

This section makes clear that the Public Information Act does not mandate the disclosure of information that other law requires be kept confidential. Section 552.352(a) states: "A person commits an offense if the person distributes information considered confidential

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[300] *Houston Indep. Sch. Dist. v. Houston Chronicle Publ'g Co.*, 798 S.W.2d 580 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

[301] *Id.* at 583-84; *see* Gov't Code § 552.102.

[302] *Houston Indep. Sch. Dist.*, 798 S.W.2d at 589-90.

under the terms of this chapter." A violation under section 552.352 is a misdemeanor constituting official misconduct.[303] In its discretion, a governmental body may release to the public information protected under the Act's exceptions to disclosure but not deemed confidential by law.[304] On the other hand, a governmental body has no discretion to release information deemed confidential by law.[305] Because the Act prohibits the release of confidential information and because its improper release constitutes a misdemeanor, the attorney general may raise section 552.101 on behalf of a governmental body, although the attorney general ordinarily will not raise other exceptions that a governmental body has failed to claim.[306]

By providing that all information a governmental body collects, assembles, or maintains is public unless expressly excepted from disclosure, the Act prevents a governmental body from making an enforceable promise to keep information confidential unless the governmental body is authorized by law to do so.[307] Thus, a governmental body may rely on its promise of confidentiality to withhold information from disclosure only if the governmental body has specific statutory authority to make such a promise. Unless a governmental body is explicitly authorized to make an enforceable promise to keep information confidential, it may not make such a promise in a contract[308] or a settlement agreement.[309] In addition, a governmental body may not pass an ordinance or rule purporting to make certain information confidential unless the governmental body is statutorily authorized to do so.[310]

1. Information Confidential Under Specific Statutes

Section 552.101 incorporates specific statutes that protect information from public disclosure. The following points are important for the proper application of this aspect of section 552.101:

1) The language of the relevant confidentiality statute controls the scope of the protection.[311]

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[303] Gov't Code § 552.352(b), (c).

[304] *Id*. § 552.007.

[305] *See id. But see* discussion of informer's privilege beginning on page 76 of this handbook.

[306] *See* Open Records Decision Nos. 455 at 3 (1987), 325 at 1 (1982).

[307] Attorney General Opinion H-258 at 3 (1974); *see* Attorney General Opinions JM-672 at 1-2 (1987), JM-37 at 2 (1983); Open Records Decision Nos. 585 at 2 (1991), 514 at 1 (1988), 55A at 2 (1975).

[308] *See* Attorney General Opinion JM-672 at 2 (1987); Open Records Decision No. 514 at 1 (1988).

[309] *See* Open Records Decision No. 114 at 1 (1975).

[310] *See* Open Records Decision No. 594 at 3 (1991).

[311] *See* Open Records Decision No. 478 at 2 (1987).

2) To fall within section 552.101, a statute explicitly must require confidentiality; a confidentiality requirement will not be inferred from the statutory structure.[312]

The attorney general must interpret numerous confidentiality statutes. Examples of information made confidential by statute include the following noteworthy examples:

- social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to a licensing agency;[313]

- medical records a physician creates or maintains regarding the identity, diagnosis, evaluation, or treatment of a patient by a physician;[314]

- reports, records, and working papers used or developed in an investigation of alleged child abuse under Family Code chapter 261;[315]

- certain information relating to the provision of emergency medical services;[316]

- communications between a patient and a mental health professional and records of the identity, diagnosis, or treatment of a mental health patient created or maintained by a mental health professional;[317]

- certain personal information in government-operated utility customer's account records if the customer has requested that the utility keep the information confidential;[318] and

- retirement records of programs administered by the Employees Retirement System in the custody of the system or an administrator, carrier, or governmental agency acting in cooperation with the system, with certain exceptions.[319]

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[312] *See*, *e.g.*, Open Records Decision No. 465 at 4-5 (1987).

[313] Act of May 17, 1999, 76th Leg., R.S., H.B. 692, § 1 (codified at Occupation Code § 51.251).

[314] V.T.C.S. art. 4495b, § 5.08(b).

[315] Fam. Code § 261.201.

[316] Health & Safety Code § 773.091.

[317] *Id.* § 611.002.

[318] Util. Code § 182.052.

[319] Act of May 29, 1999, 76th Leg., R.S., S.B. 1130, § 27 (codified at Gov't Code § 815.503).

In the following examples, the attorney general has interpreted the scope of confidentiality provided by Texas statutes under section 552.101:

Open Records Decision No. 658 (1998) — section 154.073 of the Civil Practice and Remedies Code does not make confidential a governmental body's mediated final settlement agreement;[320]

Open Records Decision No. 655 (1997) — concerning confidentiality of criminal history record information and permissible interagency transfer of such information;

Open Records Decision No. 649 (1996) — originating telephone numbers and addresses furnished on a call-by-call basis by a service supplier to a 9-1-1 emergency communication district established under subchapter D of chapter 772 of the Health and Safety Code are confidential under section 772.318 of the Health and Safety Code. Section 772.318 does not except from disclosure any other information contained on a computer aided dispatch report that was obtained during a 9-1-1 call;

Open Records Decision No. 643 (1996) — section 21.355 of the Education Code makes confidential any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. The term "teacher" as used in section 21.355 means an individual who is required to hold and does hold a teaching certificate or school district teaching permit under subchapter B of chapter 21, and who is engaged in teaching at the time of the evaluation; an "administrator" is a person who is required to hold and does hold an administrator's certificate under subchapter B of chapter 21, and is performing the functions of an administrator at the time of the evaluation;

Open Records Decision No. 642 (1996) — section 143.1214(b) of the Local Government Code requires the City of Houston Police Department to withhold documents relating to an investigation of a City of Houston fire fighter conducted by the City of Houston Police Department's Public Integrity Review Group when the Public Integrity Review Group has concluded that the allegations were unfounded;

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[320] The Seventy-sixth Legislature amended section 154.073 of the Civil Practice and Remedies Code by adding subsection (d), which provides that a final written agreement to which a governmental body subject to the Act is a signatory and that was reached as a result of a dispute resolution procedure conducted under chapter 154 of that code is subject to or excepted from required disclosure in accordance with the Act. Act of May 30, 1999, 76th Leg., R.S., H.B. 826, § 6 (codified at Civ. Prac. & Rem. Code § 154.073).

> Open Records Decision No. 640 (1996) (replacing Open Records Decision No. 637 (1996)) — the Texas Department of Insurance must withhold any information obtained from audit "work papers" that are "pertinent to the accountant's examination of the financial statements of an insurer" under section 8 of article 1.15 of the Insurance Code; section 9 of article 1.15 makes confidential the examination reports and related work papers obtained during the course of an examination of a carrier; section 9 of article 1.15 does not apply to examination reports and work papers of carriers under liquidation or receivership; and
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> Open Records Decision No. 632 (1995) — the term "personal representative," as that term is used in section 773.093 of the Health and Safety Code pertaining to the release of confidential emergency medical services patient records, signifies "personal representative" as defined in section 3(aa) of the Probate Code.

Section 552.101 also incorporates the confidentiality provisions of federal statutes and regulations. For example, certain federal laws may govern whether a state or local agency may release a social security number.[321] In Open Records Decision No. 641 (1996), the attorney general ruled that information collected under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq*., from an applicant or employee concerning that individual's medical condition and medical history is confidential under section 552.101 of the Government Code, in conjunction with provisions of the Americans with Disabilities Act. This type of information must be collected and maintained separately from other information and may be released only as provided by the Americans with Disabilities Act.

As a general rule, the mere fact that a governmental body in Texas holds certain information that is confidential under the federal Freedom of Information Act or the federal Privacy Act will not bring the information within the section 552.101 exception,

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[321] *See* Open Records Decision No. 622 at 3-4 (1994) (concluding that certain social security numbers are confidential under federal law); *see also* Open Records Decision No. 226 at 2 (1979) (concluding that 26 U.S.C. §§ 6103(a), (b), 7213 require state governmental body to withhold certain requested federal income tax information). Additionally, state law makes confidential the social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency. Act of May 17, 1999, 76th Leg., R.S., H.B. 692 § 1 (codified at Occupation Code § 51.251).

as those acts govern disclosure only of information that federal agencies hold.[322] However, if an agency of the federal government shares its information with a Texas governmental entity, the Texas entity must withhold the information that the federal agency determined to be confidential under federal law.[323]

2. Information Confidential by Judicial Decision

a. Information Confidential Under Common-Law or Constitutional Privacy Doctrine

i. Common-Law Privacy

(a.) Generally

Section 552.101 also excepts from required public disclosure information held confidential under case law. Pursuant to the Texas Supreme Court decision in *Industrial Foundation of the South v. Texas Industrial Accident Board*,[324] section 552.101 applies to information when its disclosure would constitute the common-law tort of invasion of privacy through the disclosure of private facts. To be within this common-law tort, the information must (1) contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) be of no legitimate concern to the public.[325] Because much of the information that a governmental body holds is of legitimate concern to the public, the doctrine of common-law privacy frequently will not exempt information that might be considered "private." For example, generally, information about public employees' conduct on the job is not protected from disclosure.[326] The attorney general has found that the doctrine of common-law privacy does not protect the specific information at issue in the following decisions:

> Open Records Decision No. 625 (1994) — a company's address and telephone number;
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> Open Records Decision No. 620 (1993) — a corporation's financial information;

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[322] Attorney General Opinion MW-95 at 2 (1979); Open Records Decision No. 124 at 1 (1976).

[323] *See* Open Records Decision No. 561 at 6-7 (1990); *accord United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (finding that documents Federal Bureau of Investigation had lent to city police department remained property of Bureau and were subject to any restrictions on dissemination of Bureau-placed documents).

[324] 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

[325] *Id.* at 685; *see* Open Records Decision No. 569 (1999).

[326] *See* Open Records Decision No. 455 (1987).

Open Records Decision No. 616 (1993) — a "mug shot," unrelated to any active criminal investigation, taken in connection with an arrest for which an arrestee subsequently was convicted and is serving time;

Open Records Decision No. 611 (1992) — records held by law-enforcement agencies regarding violence between family members unless the information is highly intimate and embarrassing and of no legitimate public interest;

Open Records Decision No. 594 (1991) — certain information regarding a city's drug testing program for employees;

Open Records Decision No. 441 (1986) — job-related examination scores of public employees or applicants for public employment; and

Open Records Decision No. 169 (1977) — social security numbers.[327]

The attorney general has concluded that, with the exception of victims of sexual assault[328] and child victims of sexual abuse and serious sexual offenses,[329] section 552.101 does not except from required public disclosure, on common-law privacy grounds, the names of crime victims.[330]

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[327] *But see* Gov't Code § 552.117(1) (excepting social security number of current or former official or employee of governmental body, but only to extent that former officials and employees have elected to keep this information confidential in compliance with section 552.024), 552.117(2) (excepting social security number of peace officer as defined by article 2.12 of Code of Criminal Procedure, or security officer commissioned under section 51.212 of Education Code), 552.117(3) (excepting social security number of employee of Texas Department of Criminal Justice), Act of May 26, 1999, 76th Leg., R.S., S.B. 1846, § 1 (codified at Gov't Code § 552.117(4)) (excepting social security number of certain officers killed in the line of duty, regardless of whether the deceased complied with section 552.024), Act of May 17, 1999, 76th Leg., R.S., H.B. 692, § 1 (codified at Occupation Code § 51.251) (excepting social security number of applicant for or holder of license, certificate of registration or other legal authorization issued by licensing agency to practice in specific occupation or profession that is provided to a licensing agency). *See also* Attorney General Opinion DM-286 (1994) (concluding that certain federal statutes govern when governmental body may request individual's social security number); Open Records Decision No. 622 (1994) (concluding that certain social security numbers are confidential under federal law).

[328] *See* Open Records Decision No. 339 at 2 (1982).

[329] *See* Open Records Decision Nos. 628 at 3 (1994), 393 at 2 (1983).

[330] Open Records Decision No. 409 at 2 (1984); *see also* Open Records Decision Nos. 628 (1994) (concluding that identities of juvenile victims of crime are not per se protected from disclosure by common-law privacy), 611 (1992) (determining whether records held by law-enforcement agency regarding violence between family members are confidential under doctrine of common-law privacy must be done on case-by-case basis); *but see* Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 10 (codified at Gov't Code § 552.132) (excepting certain information held by attorney general about crime victims who apply for crime victim compensation and who elect to not allow public access to the information).

In addition to the seminal Public Information Act privacy case of *Industrial Foundation*, courts in other cases have considered the common-law right to privacy in the context of section 552.101 of the Act. In two cases involving the Fort Worth Star-Telegram newspaper, the Texas Supreme Court weighed an individual's right to privacy against the right of the press to publish certain embarrassing information concerning an individual. In *Star-Telegram, Inc. v. Doe*,[331] a rape victim sued the newspaper which had published articles disclosing the age of the victim, the relative location of her residence, the fact that she owned a home security system, that she took medication, that she owned a 1984 black Jaguar automobile, and that she owned a travel agency. The newspaper did not reveal her actual identity. The court held that the newspaper in this case could not be held liable for invasion of privacy for public disclosure of embarrassing private facts because, although the information disclosed by the articles made the victim identifiable by her acquaintances, it could not be said that the articles disclosed facts which were not of legitimate public concern.

In *Star-Telegram, Inc. v. Walker*,[332] the court addressed another case involving the identity of a rape victim. In this case, the victim's true identity could be gleaned from the criminal court records and testimony. The court found that because trial proceedings are public information, the order entered by the criminal court closing the files and expunging the victim's true identity from the criminal records (more than three months following the criminal trial) could not retroactively abrogate the press' right to publish public information properly obtained from open records. Once information is in the public domain, the court stated, the law cannot recall the information. Therefore, the court found that the newspaper could not be held liable for invasion of privacy for publication of information appearing in public court documents.

In *Morales v. Ellen*,[333] the court of appeals considered whether the statements and names of witnesses to and victims of sexual harassment were public information under the Act. In Open Records Decision No. 579 (1990), the attorney general had concluded that an investigative file concerning a sexual harassment complaint was not protected by common-law privacy. The decision in *Ellen* modified that interpretation. The *Ellen* court found that the names of witnesses and their detailed affidavits were "highly intimate or embarrassing." Furthermore, the court found that, because information pertinent to the sexual harassment charges and investigation already had been released to the public in summary form, the legitimate public interest in the matter had been satisfied. Therefore, the court determined that, in this instance, the public did not possess a legitimate interest in the names of witnesses to or victims of the sexual harassment, in their statements, or in any other information that would tend to identify them. The *Ellen* court did not protect from public disclosure the identity of the alleged perpetrator of the sexual harassment.

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[331] 915 S.W.2d 471 (Tex. 1995).

[332] 834 S.W.2d 54 (Tex. 1992).

[333] 840 S.W.2d 519, 524-25 (Tex. App.—El Paso 1992, writ denied).

(b.) Financial Information

Governmental bodies frequently claim that financial information pertaining to an individual is protected under the doctrine of common-law privacy as incorporated into section 552.101. Resolution of these claims hinges upon the role the information plays in the relationship between the individual and the governmental body.

Information regarding a financial transaction between an individual and a governmental body is a matter of legitimate public interest; thus, the doctrine of common-law privacy does not generally protect from required public disclosure information regarding such a transaction.[334] Examples of financial transactions between a person and a governmental body include a donation to a public institution,[335] a debt owed to a public hospital,[336] and a public employee's participation in an insurance program funded wholly or partially by his or her employer.[337] In contrast, a public employee's participation in a voluntary investment program or deferred compensation plan that his or her employer offers (but does not fund) is not considered a financial transaction between the individual and the governmental body; information regarding such participation is considered intimate and of no legitimate public interest.[338] Consequently, the doctrine of common-law privacy generally excepts such financial information from required public disclosure.

The doctrine of common-law privacy does not except from disclosure the basic facts concerning a financial transaction between an individual and a governmental body.[339] On the other hand, common-law privacy generally protects the "background" financial information of the individual, that is, information about the individual's overall financial status and past financial history.[340] However, certain circumstances may justify the public disclosure of background financial information; therefore, a determination of the availability of background financial information under the Act must be made on a case-by-case basis.[341]

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[334] *See* Open Records Decision Nos. 590 at 3 (1991), 523 at 3-4 (1989).

[335] *See* Open Records Decision No. 590 (1991).

[336] *See* Open Records Decision No. 385 at 2 (1983).

[337] *See* Open Records Decision No. 600 at 9 (1992).

[338] *See* Open Records Decision No. 545 at 3-5 (1990).

[339] *See, e.g.*, Open Records Decision Nos. 523 at 3-4 (1989), 385 at 2 (1983) (concluding that public hospital's accounts receivable showing patients' names and amounts they owed were subject to public disclosure).

[340] *See* Open Records Decision Nos. 523 at 3-4 (1989) (concluding that credit reports and financial statements of individual veterans participating in Veterans Land Program are protected from disclosure as "background" financial information), 373 at 3 (1983) (concluding that sources of income, salary, mortgage payments, assets, and credit history of applicant for housing rehabilitation grant are protected by common-law privacy). *But see* Open Records Decision No. 620 at 4 (1993) (concluding that background financial information regarding corporation is not protected by privacy).

[341] Open Records Decision No. 373 at 4 (1983).

ii. Constitutional Privacy

Section 552.101 incorporates constitutional privacy as well as common-law privacy.[342] The United States Constitution protects two kinds of individual privacy interests: (1) an individual's interest in independently making certain important personal decisions about matters that the United States Supreme Court has stated are within the "zones of privacy," as described in *Roe v. Wade*[343] and *Paul v. Davis*[344] and (2) an individual's interest in avoiding the disclosure of personal matters to the public or to the government.[345] The "zones of privacy" implicated in the individual's interest in independently making certain kinds of decisions include matters related to marriage, procreation, contraception, family relationships, and child rearing and education.

The second individual privacy interest that implicates constitutional privacy involves matters outside the zones of privacy. To determine whether the constitutional right of privacy protects particular information, the release of which implicates a person's interest in avoiding the disclosure of personal matters, the attorney general applies a balancing test, weighing the individual's interest in privacy against the public's right to know the information. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs."[346]

iii. Privacy Rights Lapse on Death of the Subject

Common-law and constitutional privacy rights lapse upon the death of the subject.[347] Whether confidentiality imposed by statutes outside the Public Information Act lapses depends upon the particular statute concerned.[348]

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[342] *Industrial Found.*, 540 S.W.2d at 678.

[343] 410 U.S. 113, 152 (1973).

[344] 424 U.S. 693, 712-13 (1976).

[345] Open Records Decision No. 600 at 4-5 (1992); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

[346] *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985)).

[347] Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981).

[348] *See* Attorney General Opinions DM-61 at 3 (1991), JM-851 at 2 (1988).

iv. False-Light Privacy

The Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas.[349] In addition, in Open Records Decision No. 579 (1990), the attorney general determined that the statutory predecessor to section 552.101 did not incorporate the common-law tort of false-light privacy, overruling prior decisions to the contrary.[350] Thus, the truth or falsity of information is not relevant under the Public Information Act.

b. Information Within the Informer's Privilege

As interpreted by the attorney general, section 552.101 of the Government Code incorporates the "informer's privilege." In *Roviaro v. United States*,[351] the United States Supreme Court explained the rationale underlying the informer's privilege:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish *information of violations of law to officers charged with enforcement of that law.* The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. [Emphasis added; citations omitted.]

In accordance with this policy, the attorney general has construed the informer's privilege aspect of section 552.101 as protecting the identity only of a person who (1) reports a violation or possible violation of the law (2) to officials charged with the duty of enforcing the particular law. The informer's privilege facet of section 552.101 does not protect information about lawful conduct.[352] Moreover, the informer's privilege does not protect the identity of a person who has reported conduct that may be illegal when the person does not consider the conduct to be illegal.[353] The privilege protects information reported to administrative-agency officials having a duty to enforce statutes with civil or criminal penalties, as well as to law enforcement officers.[354]

The informer's privilege protects not only the informer's identity, but also any portion of the informer's statement that might tend to reveal the informer's identity.[355] Of course,

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[349] *Cain v. Hearst Corp*., 878 S.W.2d 577, 579 (Tex. 1994).

[350] Open Records Decision No. 579 at 3-8 (1990).

[351] 353 U.S. 53, 59 (1957).

[352] *See* Open Records Decision Nos. 515 at 4-5 (1988), 191 at 1 (1978).

[353] *Roviaro v. United States*, 353 U.S. 53 (1957).

[354] *See* Open Records Decision No. 515 at 2 (1988).

[355] *Id.*

protecting an informer's identity and any identifying information under the informer's privilege serves no purpose if the subject of the information already knows the informer's identity. The attorney general has held that the informer's privilege does not apply in such a situation.[356]

The informer's privilege facet of section 552.101 of the Government Code serves to protect the flow of information to a governmental body; it does not serve to protect a third person.[357] Thus, since it exists to protect the governmental body's interest, this privilege, unlike other section 552.101 claims, may be waived by the governmental body.[358]

Occasionally, a law enforcement agency may seek to withhold from required public disclosure under the informer's privilege aspect of section 552.101 information that identifies the complainant in a criminal investigative file. Information that identifies a complainant is front page offense report information that is generally considered public.[359] Front page offense report information may be withheld from disclosure only in special situations.[360] Consequently, in order to withhold complainant-identifying information under the informer's privilege, a governmental body must show the existence of special circumstances in a particular case.

School districts may rely on another exception in the Act to withhold information about certain informers. Newly added section 552.131[361] excepts from public disclosure, with several exceptions, information held by a school district that would identify a student or former student or an employee or former employee who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority. (For a discussion of this new exception, see page 141 in this handbook.)

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[356] Open Records Decision No. 208 at 1-2 (1978).

[357] Open Records Decision No. 549 at 5 (1990).

[358] *Id*. at 6.

[359] *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976);*see* Open Records Decision No. 127 at 10 (1976).

[360] *See* Open Records Letter No. 97-2336 at 3-4 (1997) (citing Open Records Decision Nos. 393 (1983), 366 (1983), 333 (1982), 169 at 6-7 (1977), 123 (1976)).

[361] Act of May 30, 1999, 76th Leg., R.S., H.B. 211, § 6 (codified at Gov't Code § 552.131)

B. Section 552.102: Certain Personnel Information

Section 552.102 provides as follows:

> **(a) Information is excepted from [required public disclosure] if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter. The exception to public disclosure created by this subsection is in addition to any exception created by Section 552.024. Public access to personnel information covered by Section 552.024 is denied to the extent provided by that section.**
>
> **(b) Information is excepted from [required public disclosure] if it is a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.**

1. Unwarranted Invasion of Privacy

The court in *Hubert v. Harte-Hanks Texas Newspapers*[362] ruled that the test to be applied under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for applying the doctrine of common-law privacy as incorporated by section 552.101. (For a discussion of common-law privacy, refer to page 71 of this handbook.) Consequently, in claiming that information is excepted from public disclosure under section 552.102, a governmental body should not rely upon decisions interpreting this provision that predate the *Hubert* decision.

Because there is a legitimate public interest in the activities of public employees in the workplace, information about public employees is commonly held not to be excepted from required public disclosure under this test. Therefore, although this exception is commonly referred to as the "personnel file" exception, in reality this provision excepts very little of the information commonly found in the personnel files of public employees. For example, information about public employees' job performance or the reasons for their dismissal, demotion, promotion, or resignation is not excepted from public disclosure.[363] On the other hand, information commonly found in public employee personnel files that reveals personal financial information generally is excepted from

[362] 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

[363] Open Records Decision Nos. 444 at 5-6 (1986), 405 at 2-3 (1983).

public disclosure under the common-law privacy test, except to the extent the information reflects a transaction between the employee and the public employer.[364] (For a discussion of the application of the common-law privacy doctrine to financial information, refer to page 74 of this handbook.)

Open Records Decision No. 284 (1981) determined that letters of recommendation supplied under an express promise of confidentiality prior to the enactment date of the Public Information Act may be withheld from required public disclosure. Other recommendations, whether or not given under a promise of confidentiality, are not protected under section 552.102. (For a discussion of the limits imposed by the Public Information Act on a governmental body's authority to enter into confidentiality agreements, see page 66 of this handbook.) In addition, in light of Open Records Decision No. 615 (1993), opinions and recommendations concerning routine personnel matters are no longer protected under section 552.111; governmental bodies should not rely on attorney general decisions issued prior to Open Records Decision No. 615 (1993) that apply section 552.111 (or its statutory predecessor) to personnel information.[365] (For a discussion of the inapplicability of section 552.111 to advice, opinions, and recommendations found in personnel records, refer to page 113 of this handbook.)[366]

Section 552.102 applies to former as well as current public employees.[367] However, section 552.102 does not apply to applicants for employment.[368] (For a discussion of the right of access set forth in subsection (a) of section 552.102, refer to page 29 of this handbook.)

2. Transcripts of Professional Public School Employees

Section 552.102 also protects from required public disclosure most information on a transcript from an institution of higher education maintained in the personnel files of professional public school employees. Section 552.102 does not except from disclosure information on a transcript detailing the degree obtained and the curriculum pursued.[369]

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[364] *See* Open Records Decision Nos. 600 at 9-11 (1992) (information about public employee's participation in group insurance program, retirement benefits beneficiaries, tax-exempt reimbursement accounts, and direct deposit), 545 (1990) (information about public employee's participation in deferred compensation plan), 523 at 5 (1989) (federal income tax returns and W-2 and W-2P forms submitted by individual to governmental body are excepted from disclosure under common-law privacy);*see also* Open Records Decision No. 600 at 8 (1992) (employee W-4 forms are excepted from disclosure by 26 U.S.C. § 6103(a)).

[365] *See generally Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 456-457 (Tex. App.—Houston [14th Dist] 1996, writ denied).

[366] *See* Open Records Decision No. 615 (1993).

[367] Attorney General Opinion JM-229 at 2 (1984).

[368] Open Records Decision No. 455 at 8 (1987).

[369] *See* Open Records Decision No. 526 (1989).

3. Evaluations of Public School Teachers and Administrators

Although the disclosure of the evaluations of public school teachers and administrators does not constitute an invasion of privacy,[370] such evaluations are confidential by statute and therefore excepted from public disclosure pursuant to section 552.101 of the Government Code.[371] Section 21.355 of the Education Code makes confidential a "document evaluating the performance of a teacher or administrator."[372]

C. Section 552.103: Information Relating to Litigation

Senate Bill 1851 of the Seventy-sixth Legislature amended section 552.103(a)[373] of the Government Code, commonly referred to as the "litigation exception." Subsection (a) excepts from required public disclosure information

> **relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.**

Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery used in litigation.[374] This exception enables a governmental body to protect its position in litigation "by forcing parties seeking information relating to that litigation to obtain it through discovery" procedures.[375]

1. Governmental Body's Burden

For information to be excepted from public disclosure by section 552.103(a), (1) litigation involving the governmental body must be pending or reasonably anticipated and (2) the information must relate to that litigation.[376] Therefore, a governmental body that seeks an attorney general decision under section 552.301 has the burden of clearly establishing both prongs of this test.[377] For purposes of section 552.103(a), a contested case under the

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[370] Open Records Decision No. 455 (1987).

[371] *See* Open Records Decision No. 643 (1996) (discussing scope of section 21.355 of Education Code).

[372] Educ. Code § 21.355.

[373] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 6 (codified at Gov't Code § 552.103).

[374] Attorney General Opinion JM-1048 at 4 (1989).

[375] Open Records Decision No. 551 at 3 (1990).

[376] *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co*., 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

[377] A new law provides that state governmental entities may withhold from disclosure under section 552.103 time and expense records under contract for legal services provided the state governmental entity if, in

Administrative Procedure Act ("APA"), Government Code chapter 2001, constitutes "litigation."[378] Questions remain regarding whether administrative proceedings not subject to the APA may be considered litigation within the meaning of section 552.103(a).[379] Former section 552.103(a)(2) required the attorney for a governmental body that claimed section 552.103 to determine initially whether section 552.103(a) should be claimed, a determination that was subject to review by the attorney general under section 552.301 of the Act.[380] The Seventy-sixth Legislature eliminated this requirement.[381]

Whether litigation is reasonably anticipated must be determined on a case-by-case basis.[382] Section 552.103(a) requires concrete evidence that litigation is realistically contemplated; it must be more than conjecture.[383] The mere chance of litigation is not sufficient to trigger section 552.103(a).[384] The fact that a governmental body received a claim letter that it represents to the attorney general to be in compliance with the notice requirements of the Texas Tort Claims Act, Civil Practice and Remedies Code chapter 101, or applicable municipal ordinance, shows that litigation is reasonably anticipated.[385] If a governmental body does not make this representation, the claim letter is a factor the attorney general will consider in determining from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated.

In previous open records decisions, the attorney general had concluded that a governmental body could claim the litigation exception only if it established that withholding the information was necessary to protect the governmental body's strategy or position in litigation.[386] However, Open Records Decision No. 551 (1990) significantly revised this test and concluded that the governmental body need only establish the relatedness of the information to the subject matter of the pending or

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addition to meeting the section 552.103 burden, the chief legal officer or employee of the state governmental entity determines that withholding the information is necessary to protect the entity's strategy or position in pending or reasonably anticipated litigation. Act of May 30, 1999, 76th Leg., R.S., S.B. 178, § 3.03 (codified at Gov't Code 2254.104). A state governmental entity means a board, commission, department, office, or other agency in the executive branch of the state government created under the constitution or a statute of the state, including an institution of higher education as defined in section 61.003 of the Education Code. *Id.*

[378] Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to APA).

[379] *Id.* at 6-7.

[380] Open Records Decision Nos. 551 at 5 (1990), 511 at 3 (1988).

[381] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 6 (codified at Gov't Code § 552.103).

[382] Open Records Decision No. 452 at 4 (1986).

[383] Attorney General Opinion JM-266 at 4 (1984); Open Records Decision Nos. 518 at 5 (1989), 328 at 2 (1982).

[384] Open Records Decision Nos. 518 at 5 (1989), 397 at 2 (1983), 361 at 2 (1983), 359 (1983).

[385] Open Records Decision No. 638 at 4 (1996).

[386] *See* Open Records Decision Nos. 518 at 5 (1989), 474 at 5 (1987).

anticipated litigation.[387] Therefore, to meet its burden under section 552.103(a) in requesting an attorney general decision under the Act, the governmental body must identify the issues in the litigation and explain how the information relates to those issues.[388] When the litigation is actually pending, the governmental body, in its request for a ruling, must explain or describe how the information relates to the subject of the litigation to which the governmental body is a party.[389] The governmental body should also provide the attorney general a copy of the relevant pleadings.[390]

2. Only Evidence Existing at the Time of the Request

Under the attorney general's interpretation of former section 552.103, the attorney general accepted as evidence of the applicability of section 552.103 information about a change in the circumstances of the litigation underlying a section 552.103(a) claim that occurred after the requestor requested the information and after the governmental body requested a decision from the attorney general.[391] The attorney general can no longer follow this interpretation due to the Seventy-sixth Legislature's amendment to section 552.103.[392] That amendment added a new subsection (c) which provides as follows:

> **Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.**

Consequently, in determining whether a governmental body has met its burden under section 552.103, the attorney general or a court cannot consider information about occurrences after the date of the request for information.[393]

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[387] Open Records Decision No. 551 at 5 (1990).

[388] *Id.*

[389] Open Records Decision No. 638 at 4 (1996).

[390] *Id*.

[391] *Id*.

[392] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 6 (codified at Gov't Code § 552.103).

[393] In concluding that the prior language of the Act did not limit the evidence a court may receive on a claim under former section 552.103, the court in *Cornyn v. City of Garland*, 994 S.W.2d 258 (Tex. App.—Austin 1999, no pet. h.), held that evidence of pending litigation which had not been considered by the attorney general established the applicability of the exception. *But see* Gov't Code § 552.326 (in suit filed under Act, governmental body may only raise exceptions raised before the attorney general).

3. Temporal Nature of Section 552.103

Generally, when parties to litigation have inspected the records pursuant to court order, discovery, or through any other means, section 552.103(a) may no longer be invoked.[394] In addition, when litigation has concluded, section 552.103(a) is no longer applicable.[395] Once a governmental body has disclosed information relating to litigation, the governmental body is ordinarily precluded from invoking section 552.103(a) to withhold the same information; this is not the case, however, when a governmental body has disclosed information to a co-defendant in litigation where the governmental body believes in good faith that it has a constitutional obligation to disclose it.[396]

4. Scope of Section 552.103

Section 552.103 applies to information that relates to pending or reasonably anticipated litigation, a very broad category of information.[397] The exception no longer expressly includes information relating to settlement negotiations as it did before its recent amendment.[398] The protection of section 552.103 may overlap with that of discovery privileges and other exceptions that encompass discovery privileges.

The work product of counsel in a civil proceeding is just one category of information excepted by section 552.103(a); like any other information, attorney work product is protected from disclosure under this section only if it relates to pending or anticipated litigation.[399] During the pendency of civil litigation, a governmental body may withhold attorney work product under section 552.103 or 552.111 of the Government Code.[400] Once civil litigation has concluded, attorney work product may be withheld under section 552.111. (For a discussion of section 552.111, refer to page 113 of this handbook.)

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[394] Open Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in offense report that was previously disclosed to defendant in criminal litigation); *see* Open Records Decision Nos. 551 at 4 (1990), 511 at 5 (1988), 493 at 2 (1988), 349 (1982), 320 (1982).

[395] Open Records Decision Nos. 551 at 4 (1990), 350 (1982).

[396] Open Records Decision No. 454 at 3 (1986); *see Cornyn v. City of Garland,* 994 S.W.2d 258 (Tex. App.–Austin 1999, no pet. h.); Open Records Decision No. 579 at 9-10 (1990) (exchange of information in informal discovery is not voluntary release of information under section 552.021).

[397] *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.).

[398] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 6 (codified at Gov't Code § 552.103).

[399] Open Records Decision Nos. 575 at 2 (1990), 574 at 6 (1990), 429 at 3 (1985).

[400] Open Records Decision No. 647 at 1-3 (1996).

In an earlier decision, the attorney general had determined that attorney work product was excepted from disclosure under the statutory predecessor to section 552.101.[401] However, the attorney general has since concluded that section 552.101 does not except information merely because it might be privileged from discovery.[402] Information protected by the attorney-client privilege is given express protection under section 552.107(1).[403] (For a discussion of section 552.107(1), refer to page 90 of this handbook.)

5. Duration of Section 552.103 for Criminal Litigation

Section 552.103(b) provides:

> **For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.**

The attorney general has determined that the statutory predecessor to section 552.103(b), former V.T.C.S. article 6252-17a, section 3(e), is not a separate exception to disclosure; it merely provides a time frame within which the litigation exception excepts information from disclosure.[404] Former section 3(e) was not included among the specific exceptions to disclosure set forth in the Act. Although former section 3(e) has since been codified as section 552.103(b) of the Government Code, this is not significant to its construction as the codification of the Act in the Government Code is a nonsubstantive revision.[405]

D. Section 552.104: Information Relating to Competition or Bidding

Section 552.104 of the Government Code provides as follows:

> **Information is excepted from [required public disclosure] if it is information that, if released, would give advantage to a competitor or bidder.**

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[401] *See* Open Records Decision No. 304 (1982).

[402] Open Records Decision No. 575 at 2 (1990); *compare* Open Records Decision No. 647 (1996) (determining that section 552.111 encompassed attorney work product privilege).

[403] *See* Open Records Decision No. 574 (1990).

[404] Open Records Decision No. 518 at 5 (1989).

[405] *See* Act of May 4, 1993, 73rd Leg., R.S., ch. 268, § 47, 1993 Tex. Gen. Laws 583, 986.

The purpose of section 552.104 is to protect the interests of a governmental body in situations such as competitive bidding and requests for proposals in which the governmental body may wish to withhold information to obtain more favorable offers.[406] Significantly, it is not designed to protect the interests of private parties that submit information, such as bids and proposals, to governmental bodies.[407] Because section 552.104 protects only the interests of governmental bodies, it is an exception that a governmental body may waive by, for example, disclosing the information to the public or failing to raise the exception within the ten-day deadline.[408] (For a discussion of the ten-day deadline, refer to page 33 of this handbook.)

Generally, section 552.104 protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104.[409]

Section 552.104 frequently is raised to protect information submitted to a governmental body in response to a competitive bidding notice or request for proposals. In this context, the protection of section 552.104 is temporal in nature. Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded.[410] However, bids may continue to be withheld from public disclosure during the period in which the governmental body seeks to clarify bids and bidders remain at liberty to furnish additional information.[411] Section 552.104 does not apply when there is only a single individual or entity seeking a contract, since there are no "competitors" for that contract.[412] Note that, even when section 552.104 does not protect bids from required public disclosure, section 552.110 will require the governmental body to withhold any portions of those bids that contain trade secrets or other commercial or financial information that is made confidential by law.[413] (For a discussion of the section

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[406] *See* Open Records Decision No. 592 at 8 (1991).

[407] *Id*. at 8-9.

[408] *Id*. at 8.

[409] Open Records Decision Nos. 593 at 2 (1991), 541 at 4 (1990), 463 (1987).

[410] Open Records Decision Nos. 541 at 5 (1990), 514 at 2 (1988), 319 at 3 (1982).

[411] Open Records Decision No. 170 (1977); *see also* Open Records Decision No. 541 at 5 (1990) (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids).

[412] Open Records Decision No. 331 (1982).

[413] *See, e.g.*, Open Records Decision Nos. 319 (1982), 309 (1982).

552.110 exception, refer to page 110 of this handbook.) In addition to the actual bid proposals, section 552.104 may protect information related to the bidding process that is not part of a bid.[414]

Although early decisions of the attorney general concluded that section 552.104 does not protect the interests of governmental bodies when they engage in competition with private entities in the marketplace,[415] this line of opinions has been reexamined. In Open Records Decision No. 593 (1991), the attorney general concluded that a governmental body may claim section 552.104 to withhold information to maintain its competitive advantage in the marketplace if the governmental body is specifically authorized by law to engage in such competition.[416] In Open Records Decision No. 593 (1991), the governmental body at issue, the Teacher Retirement System of Texas, demonstrated that it had such authority.[417] A governmental body that can demonstrate 1) that it has specific marketplace interests and 2) the possibility of specific harm to these marketplace interests from the release of the requested information may withhold information from disclosure based on section 552.104.[418]

E. Section 552.105: Information Relating to Location or Price of Property

Section 552.105 of the Government Code excepts from required public disclosure information relating to:

> **(1) the location of real or personal property for a public purpose prior to public announcement of the project; or**
>
> **(2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.**

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[414] *Compare* Attorney General Opinion MW-591 (1982) (identity of probable bidders is protected from public disclosure because disclosure could interfere with governmental body's ability to obtain best bids possible) *with* Open Records Decision No. 453 (1986) (identity of individuals who receive bid packets are not protected when governmental body fails to show substantial likelihood that these individuals would bid).

[415] *See* Open Records Decision Nos. 463 (1987), 231 (1979), 153 (1977), 99 (1975).

[416] Open Records Decision No. 593 at 4 (1991).

[417] *See id*. at 3-4.

[418] *See, e.g.*, Open Records Letter Nos. 97-2516 (1997) (City of San Antonio records of costs various performers pay for use of Alamodome), 96-2186 (1996) (City of Alvin information regarding proposal to provide another city solid waste disposal services).

This exception protects a governmental body's planning and negotiating position with respect to particular real or personal property transactions,[419] and its protection is therefore limited in duration. The protection of section 552.105 generally expires upon the governmental body's acquisition of the property in question.[420] Because this exception extends to "information relating to" the location, appraisals, and purchase price of property, it may protect more than a specific appraisal report prepared for a specific piece of property.[421] For example, the attorney general has held that appraisal information about parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels.[422] The attorney general has interpreted section 552.105 as applying to an appraisal report concerning city property a city was negotiating to sell to the requestor.[423]

When a governmental body has made a good faith determination that the release of information would damage its negotiating position with respect to the acquisition of property, the attorney general in issuing a ruling under section 552.306 will accept that determination, unless the records or other information show the contrary as a matter of law.[424]

The exception for information pertaining to "purchase price" in section 552.105(2) also applies to information pertaining to a lease price.[425]

F. Section 552.106: Certain Legislative Documents

Section 552.106 of the Government Code provides as follows:

> **(a) A draft or working paper involved in the preparation of proposed legislation is excepted from [required public disclosure].**
>
> **(b) An internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation is excepted from [required public disclosure].**

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[419] Open Records Decision No. 357 at 3 (1982).

[420] Open Records Decision No. 222 at 1-2 (1979).

[421] Open Records Decision No. 564 (1990) (construing statutory predecessor to section 552.105).

[422] *Id*.

[423] Open Records Letter No. 99-2103 (1999).

[424] Open Records Decision No. 564 (1990).

[425] Open Records Decision No. 348 (1982).

Section 552.106(a) protects documents concerning the deliberative processes of a governmental body relevant to the enactment of legislation.[426] The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body.[427] However, section 552.106(a) does not protect purely factual material.[428] If a draft or working paper contains some purely factual material that can be disclosed without revealing protected judgments or recommendations, such factual material must be disclosed unless another exception to disclosure applies.[429] Section 552.106(a) protects drafts of legislation that reflect policy judgments, recommendations, and proposals prepared by persons with some official responsibility to prepare them for the legislative body.[430] In addition to documents actually created by the legislature, the attorney general has construed the term "legislation" to include certain documents created by a city or a state agency.[431]

The attorney general has decided only a few cases under section 552.106(a) or its predecessor. The following open records decisions have held certain information to be excepted from required public disclosure under the statutory predecessor to section 552.106(a):

> Open Records Decision No. 460 (1987) — a city manager's proposed budget prior to its presentation to the city council, where the city charter directed the city manager to prepare such a proposal and the proposal was comprised of recommendations rather than facts;
>
> Open Records Decision No. 367 (1983) — recommendations of the executive committee of the Texas State Board of Public Accountancy for amendments to the Public Accountancy Act; and
>
> Open Records Decision No. 248 (1980) — drafts of a municipal ordinance and a resolution prepared by a city staff study group for discussion purposes that reflected policy judgments, recommendations, and proposals.

The following open records decisions have held information not to be excepted from required public disclosure under the statutory predecessor to section 552.106(a):

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[426] *See* Open Records Decision No. 429 at 5-6 (1985).

[427] Open Records Decision No. 460 at 2 (1987).

[428] Open Records Decision Nos. 460 at 2 (1987), 344 at 3-4 (1982), 197 at 3 (1978), 140 at 4 (1976).

[429] Open Records Decision No. 460 at 2 (1987).

[430] Open Records Decision No. 429 at 5 (1985).

[431] *See* Open Records Decision Nos. 460 at 2-3 (1987), 367 (1983), 248 (1980).

> Open Records Decision No. 482 (1987) — drafts and working papers incorporated into materials that are disclosed to the public;
>
> Open Records Decision No. 429 (1985) — documents relating to the Texas Turnpike Authority's efforts to persuade various cities to enact ordinances, for the reason that the agency had no official authority to do so and acted merely as an interested third party to the legislative process; and
>
> Open Records Decision No. 344 (1982) — certain information relating to the State Property Tax Board's biennial study of taxable property in each school district, for the reason that the nature of the requested information compiled by the board was factual.

Sections 552.106 and 552.111 were designed to achieve the same goals in different contexts. The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes."[432] Because the policies and objectives of each exception are the same, some decisions applying section 552.111 may be helpful in determining how section 552.106 should be construed.[433] Although the provisions protect the same type of information, section 552.106 is narrower in scope because it applies specifically to the legislative process.[434] (For a discussion of section 552.111, refer to page 113 of this handbook.)

G. Section 552.107: Certain Legal Matters

Section 552.107 of the Government Code states that information is excepted from required public disclosure if:

> **(1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct; or**

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[432] *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

[433] Open Records Decision No. 482 at 9 (1987). *But see* Open Records Decision No. 615 at 5 (1993) (holding that agency's policymaking functions protected by section 552.111 do not encompass routine internal administrative and personnel matters).

[434] *See* Open Records Decision Nos. 460 at 3 (1987), 429 at 5 (1985).

(2) a court by order has prohibited disclosure of the information.[435]

This section has two distinct aspects: subsection (1) protects information within the attorney-client privilege and subsection (2) protects information that a court has ordered to be kept confidential. (For a discussion of attorney work product, refer to pages 84 and 115 of this handbook.)

1. Subsection (1)

a. Information Within the Attorney-Client Privilege

In Open Records Decision No. 574 (1990), the attorney general determined that the statutory predecessor to section 552.107(1) was the appropriate section for a governmental body to cite when seeking to except from required public disclosure communications between the governmental body and its legal counsel.[436] Prior to the issuance of this decision, the attorney general often analyzed information of this type under the statutory predecessor to section 552.101.

Although section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, the attorney general determined in Open Records Decision No. 574 (1990) that rule 1.05 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body.[437] Rule 1.05(a) prohibits an attorney from divulging "confidential information." For purposes of the rule, "confidential information" includes not only material within the attorney-client privilege of rule 503 of the Texas Rules of Evidence[438] ("privileged information"), but also "all information relating to a client or furnished by the client . . . acquired by the lawyer during the course of or by reason of the representation of the client" ("unprivileged information").[439] Since to conclude otherwise would allow a governmental body to circumvent the Public Information Act by transferring information to its attorney, the attorney general determined that section 552.107(1) applies only to material within the attorney-client privilege aspect of rule 1.05 ("privileged information") and does not apply to "unprivileged information."

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[435] The Texas Rules of Civil Evidence and Texas Rules of Criminal Evidence were merged, effective March 1, 1998, and are now known as the "Texas Rules of Evidence." Tex. R. Evid. 101.

[436] *But see Hart v. Gossum*, 995 S.W.2d 958, 963, n.2 (Tex. App.—Fort Worth 1999, no pet. h.).

[437] Open Records Decision No. 574 at 5 (1990).

[438] In 1998, the Texas Supreme Court and the Court of Criminal Appeals merged the civil and criminal rules and renamed them the "Texas Rules of Evidence." Order in Misc. Docket No. 97-9184 (October 20, 1997) (effective March 1, 1998).

[439] Tex. Disciplinary R. Prof'l Conduct 1.05(a) (definition of "[c]onfidential information"), *reprinted in* Gov't Code tit. 2, subtit. G app. A (Vernon Supp. 1999).

Under rule 503(b) of the Texas Rules of Evidence, "a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." A "confidential communication" is a communication "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."[440]

Thus, section 552.107(1) does not apply to every communication between a governmental body and its attorney. Rather, the communication must have been made in confidence in furtherance of the attorney rendering professional legal services to the government body. Consequently, a governmental body generally may withhold under section 552.107(1) only information revealing client confidences or containing legal advice or opinion.[441]

While section 552.107(1) protects the attorney's communication of legal advice or opinion to the client, it does not protect basically factual communications from the attorney to the client or among attorneys for the same client when those factual communications do not reveal client confidences. Therefore, the attorney general determined in Open Records Decision No. 574 (1990) that the statutory predecessor to section 552.107(1) did not protect the following communications: a summary of a meeting, containing no legal advice or opinion or client confidence, sent from one attorney to an associate; an account of factual events in a lawsuit sent from one agency attorney to another; documentation of meetings attended or memoranda sent; and communications between an attorney and a third party.

In applying this exception, several attorney general decisions have also distinguished between information acquired by an attorney in his or her capacity as a legal adviser and information he or she acquired while performing some other role. For instance, section 552.107(1) does not protect factual information compiled by a governmental attorney acting strictly in the capacity of an investigator.[442] On the other hand, information communicated by the client to or compiled by a governmental attorney acting as a legal adviser may be protected under section 552.107(1) as a client confidence.[443]

When invoking this exception in its request to the attorney general for a ruling under section 552.301, the governmental body bears the burden of explaining how the particular information requested constitutes either a client confidence or a communication of legal advice or opinion

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[440] Tex. R. Evid. 503(a)(5).

[441] Open Records Decision No. 574 at 5 (1990); *see id.* at 2-5 (explaining scope of attorney-client privilege); Open Records Decision No. 462 at 9-11, 12-14 (1987) (same).

[442] *See, e.g.*, Open Records Decision Nos. 462 at 11, 13-14 (1987) (construing statutory predecessor to section 552.107(1)), 429 at 4-6 (1985) (same), 230 (1979) (same).

[443] *See* Open Records Decision No. 462 at 10-11 (1987).

protected under section 552.107(1).[444] In addition, the governmental body should appropriately mark the copy of the requested information submitted to the attorney general to identify which portions constitute client confidences and which contain legal advice.[445] When it is not apparent on the face of the document, the governmental body should indicate whether the communication is to or from an attorney, a client, or a representative of either.

In appropriate circumstances, a governmental body may withhold under section 552.103(a) of the Government Code information it may not withhold under section 552.107(1). In addition, the scope of the attorney-client privilege and the work product privilege, which is encompassed by section 552.111 of the Government Code, are often confused. The attorney-client privilege covers communications with the client while the work product privilege generally covers work prepared for the client's lawsuit.[446] For materials to be covered by the attorney-client privilege, they need not be prepared for litigation. (For a discussion of attorney work product and discovery privileges, refer to pages 80 and 115 of this handbook.)

b. Attorney Fee Bills

In Open Records Decision No. 589 (1991), the attorney general explicitly found that a governmental body may withhold information in an attorney fee bill under the statutory predecessor to section 552.107(1) only to the extent that the information reveals client confidences or the attorney's legal advice.[447] Thus, only the portions of a fee bill that disclose the details of the substance of a privileged attorney-client communication may be protected from required public disclosure under this exception of the Act. Prior opinions had suggested that the Public Information Act protected attorney fee bills categorically.[448] Because Open Records Decision No. 574 (1990) implicitly overruled this suggestion, a governmental body seeking to withhold requested attorney fee bills under section 552.107(1) must review the particular bill at issue and identify the portions that contain client confidences or legal advice. In Open Records Decision No. 589 (1991), the attorney general determined that the "attorney-client privilege" exception did not protect a requested list of "phone calls and conferences regarding a particular matter" or indications that an attorney had reviewed documents relevant to the attorney's representation of the governmental body.[449] Under a

[444] *See, e.g.*, Open Records Decision No. 589 (1991).

[445] *Id.*

[446] *See National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993); *Owens-Corning Fiberglass v. Caldwell,* 818 S.W.2d 749, 750 (Tex. 1991).

[447] Open Records Decision No. 589 at 1 (1991).

[448] *See* Open Records Decision Nos. 499 at 7 (1988), 399 at 2 (1983), 304 at 2 (1982).

[449] *See also* Gov't Code § 552.022(16).

new law,[450] state governmental entities subject to chapter 2161 of the Government Code (providing provisions relating to state agency contingency fee contracts for legal services) may not withhold from public disclosure under section 552.107 a contracting attorney's or firm's complete written statements of legal services provided or time and expense records.

c. Information that a Private Attorney Holds for the Governmental Body

If a governmental body engages a private attorney to perform legal services, information in the attorney's possession relating to the legal services is subject to the Public Information Act.[451]

d. Waiver of the Attorney-Client Privilege

When a governmental body voluntarily discloses privileged material to a third party, the attorney-client privilege is waived.[452] The mere fact that information falls within the attorney-client privilege under section 552.107(1) is not a compelling reason to withhold it from public disclosure when a governmental body does not request an attorney general decision within the ten business day time period mandated by section 552.301.[453] Thus, a governmental body may waive the protection afforded by section 552.107(1) if the governmental body fails to timely request an attorney general decision. (For a discussion of the ten-day deadline, refer to page 33 of this handbook.)

2. Subsection (2)

Section 552.107(2) excepts from disclosure information that a court has ordered a governmental body to keep confidential. Prior to the recent amendment to section 552.022, governmental bodies often relied on section 552.107(2) to withhold from disclosure the terms of a settlement agreement if a court had issued an order expressly prohibiting the parties to the settlement agreement or their attorneys from disclosing the terms of the agreement.[454] The amendment states that a state court may not order a governmental body or an officer for public information to withhold from public disclosure any category of information listed in section 552.022 unless the information is expressly made confidential under other law.[455] A settlement agreement to which a governmental body is a party is one category of information

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[450] Act of May 30, 1999, 76th Leg., R.S., S.B. 178, § 3.03, sec. 2254.104 (codified at Gov't Code § 2254.104(c)).

[451] Open Records Decision Nos. 663 at 7-8 (1999), 499 at 5 (1988), 462 at 7 (1987).

[452] *See* Open Records Decision No. 630 at 4 (1994); *but see Hart v. Gossum,* 995 S.W.2d 958 (Tex. App.—Fort Worth 1999, no. pet. h.).

[453] Open Records Decision No. 630 at 6-7 (1994); *but see Hart v. Gossum,* 995 S.W.2d 958 (Tex. App.—Fort Worth 1999, no. pet. h.).

[454] *See* Open Records Decision No. 415 at 2 (1984).

[455] *See* Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 5 (codified at Gov't Code § 552.022).

listed in section 552.022.[456] The amendment also makes public such categories of information and states that these categories are not excepted under the Act unless they are expressly confidential under other law.[457]

For information other than the section 552.022 categories of information, section 552.107(2) excepts from disclosure information that is subject to a protective order during the pendency of the litigation.[458] Thus, a governmental body may not use a protective order as grounds for the exception once the court has dismissed the suit from which it arose.[459]

H. Section 552.108: Certain Law Enforcement Records

Section 552.108 of the Government Code, sometimes referred to as the "law enforcement" exception, provides as follows:

> **(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:**
>
> > **(1) release of the information would interfere with the detection, investigation, or prosecution of crime;**
> > **(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or**
> >
> > **(3) it is information that:**
> >
> > > **(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or**
> > >
> > > **(B) reflects the mental impressions or legal reasoning of an attorney representing the state.**

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[456] Gov't Code § 552.022(18).

[457] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 5 (codified at Gov't Code § 552.022); *see also* Act of May 30, 1999, 76th Leg., R.S., H.B. 826, § 6 (codified at Civ. Prac. & Rem. Code § 154.073) (concerning final settlement agreements of governmental body reached during a dispute resolution procedure under chapter 154 of Civil Practice and Remedies Code); Open Records Decision No. 658 (1998) (same).

[458] Open Records Decision No. 143 at 1 (1976).

[459] Open Records Decision No. 309 at 5 (1982).

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

This section generally promotes a governmental interest and may be waived by the governmental body.[460]

1. The Meaning of "Law Enforcement Agency" and the Applicability of Section 552.108 to Other Units of Government

Section 552.108 applies only to records that can be characterized as the records of law enforcement agencies or prosecutors. Thus, section 552.108 applies to the records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce the criminal laws.[461] It generally does not apply to the records created by an agency whose chief function is essentially regulatory in nature.[462] For example, an agency that employs peace officers to investigate crime and enforce the criminal laws may claim that

[460] Open Records Decision No. 177 (1977); *see also* Open Records Decision No. 586 (1991).

[461] *See* Open Records Decision Nos. 493 at 2 (1988), 287 at 2 (1981).

[462] Open Records Decision No. 199 (1978).

section 552.108 excepts portions of its records from required public disclosure. On the other hand, an agency involved primarily in licensing certain professionals or regulating a particular industry usually may not use section 552.108 to except its records from disclosure.[463] An agency that investigates both civil and criminal violations of law but lacks criminal enforcement authority is not a law enforcement agency for purposes of section 552.108.[464]

For example, entities that have been found to be law enforcement agencies for purposes of section 552.108 include: The Texas Department of Corrections (now the Texas Department of Criminal Justice);[465] the Texas National Guard;[466] the Attorney General's Organized Crime Task Force;[467] an arson investigation unit of a fire department;[468] the El Paso Special Commission on Crime;[469] the Texas Lottery Commission;[470] and the State Comptroller's Office.[471]

The following entities are not law enforcement agencies for purposes of section 552.108: the Texas Department of Agriculture;[472] the Texas Board of Private Investigators and Private Security Agencies;[473] a municipal fire department;[474] the Texas Board of Pharmacy;[475] and the Texas Real Estate Commission.[476]

An agency that does not qualify as a law enforcement agency may, under limited circumstances, claim that section 552.108 excepts records in its possession from required

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[463] *See id*. *But see* Attorney General Opinion MW-575 at 1-2 (1982) (indicating that former section 552.108 may apply to information gathered by administrative agency when its release would unduly interfere with law enforcement); Open Records Decision No. 493 at 2 (1988).

[464] Open Records Letter No. 99-1907 (1999) (Medicaid Program Integrity Division of Health and Human Services Commission investigates both civil and criminal violations of medicaid fraud laws and refers criminal violations to attorney general for criminal enforcement).

[465] Attorney General Opinion MW-381 at 3 (1981); Open Records Decision No. 413 (1984).

[466] Open Records Decision No. 320 (1982).

[467] Open Records Decision No. 211 at 3 (1978).

[468] Open Records Decision No. 127 (1976).

[469] Open Records Decision No. 129 (1976).

[470] *See* Gov't Code § 466.020 (Lottery Commission is authorized to maintain department of security staffed by commissioned peace officers or investigators); *id.* at § 466.019 (Lottery Commission is authorized to enforce violations of lottery laws).

[471] *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 677-78 (Tex. 1995) (comptroller's office is charged with law enforcement and prosecutory powers).

[472] Attorney General Opinion MW-575 (1982).

[473] Open Records Decision No. 199 (1978).

[474] Open Records Decision No. 85 (1975).

[475] Open Records Decision No. 493 (1988).

[476] Open Records Decision No. 80 (1975).

public disclosure. For example, records that otherwise qualify for the section 552.108 exception, such as documentary evidence in a police file on a pending case, do not necessarily lose that status while in the custody of an agency not directly involved with law enforcement.[477] Similarly, in construing the statutory predecessor to section 552.108, the attorney general concluded that if an investigation by an administrative agency reveals possible criminal conduct that the agency intends to report or already has reported to the appropriate law enforcement agency, then section 552.108 will apply to the information gathered by the administrative agency if the information relates to an open investigation or if the release would interfere with law enforcement.[478]

2. Application of Section 552.108

Section 552.108 excepts from required public disclosure three categories of information:

> 1) information, the release of which would interfere with law enforcement or prosecution,
>
> 2) information that relates to an investigation that did not result in a conviction or deferred adjudication, and
>
> 3) information that is prepared by a prosecutor or that reflects the prosecutor's mental impressions or legal reasoning.

a. Interference with Detection, Investigation, or Prosecution of Crime

In order to establish the applicability of either subsection (1) or (2) of both section 552.108(a) and 552.108(b) to a requested criminal file, a law enforcement agency should inform this office of the status of the case the information concerns.[479] Information relating to a pending criminal investigation or prosecution is one example of information that is excepted under subsections (a)(1) and (b)(1) because release of such information presumptively would interfere with the detection, investigation, or prosecution of crime.[480]

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[477] Open Records Decision No. 272 at 1-2 (1981).

[478] *See* Attorney General Opinion MW-575 at 1-2 (1982) (construing statutory predecessor); Open Records Decision No. 493 at 2 (1988) (same); Open Records Letter No. 99-1907 (1999) (section 552.108 applicable to information Health and Human Services Commission's Medicaid Program Integrity Division ("MPI") intends to refer to Attorney General's Medicaid Fraud Control Unit for criminal prosecution and not to cases MPI does not so refer).

[479] Open Records Letter No. 98-0709 (1998).

[480] *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 184-185 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

All of the formal open records decisions interpreting the law enforcement exception considered the provision's predecessor statute rather than the provision as it now reads. In these decisions, this office permitted law enforcement agencies to withhold information in a closed criminal case only if its release would "unduly interfere" with law enforcement or crime prevention.[481] The following is a discussion of the "undue interference" standard under the predecessor statute as applied before the case of *Holmes v. Morales*,[482] as the reader may find this information useful in determining the types of information to provide to the attorney general's office when seeking to withhold information under the new provision's "interference" standard found in subsections (a)(1) and (b)(1).

i. Information Relating to the Detection, Investigation, or Prosecution of Crime

To withhold information under former section 552.108, a governmental body had to demonstrate how release of the information would unduly interfere with law enforcement or prosecution, unless the records supply this explanation on their face.[483] For example, the names and statements of witnesses could be withheld if the law-enforcement agency demonstrated that disclosure might either (1) subject the witnesses to possible intimidation or harassment or (2) harm the prospects of future cooperation by the witnesses.[484] However, to prevail on its claim that section 552.108 excepts the information from disclosure, a law-enforcement agency had to do more than merely make a conclusory assertion that releasing the information would unduly interfere with law enforcement. Whether the release of particular records would unduly interfere with law enforcement was determined on a case-by-case basis.[485]

(a.) Records Regarding Family Violence

Former section 552.108 did not as a matter of law except from required public disclosure records held by law-enforcement agencies regarding violence between adult members of a family. As with any other case, except for information ordinarily appearing on the first page of an offense report, former section 552.108 permitted a law-enforcement agency to withhold all information related to a case of family violence when its release would unduly interfere with law enforcement. However, the fact that a case involved an assault by one adult family

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[481] *See* Open Records Decision No. 628 at 6-8 (1994).

[482] 924 S.W.2d 920, 923-24 (Tex. 1996) (holding that statutory predecessor to section 552.108 made no distinction between open and closed case files and did not require governmental body to establish that release of requested criminal files would cause undue interference with law enforcement).

[483] Open Records Decision Nos. 616 at 1 (1993), 434 at 2-3 (1986); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

[484] *See* Open Records Decision No. 297 at 2 (1981).

[485] Open Records Decision No. 409 at 2 (1984).

member on another did not, by itself, demonstrate that releasing information about that case would unduly interfere with law enforcement.[486]

(b.) Mug Shots

A mug shot taken in connection with an arrest when the arrestee was subsequently convicted of the offense for which he or she was arrested and is currently serving time was not protected by former section 552.108 unless the law-enforcement agency demonstrated that its release would unduly interfere with law enforcement.[487]

ii. Internal Records of a Law Enforcement Agency

To withhold internal records and notations of law enforcement agencies and prosecutors under former section 552.108, a governmental body had to demonstrate how release of the information would unduly interfere with law enforcement and crime prevention unless the records supplied this explanation on their face.[488] For example, the Department of Public Safety was permitted to withhold a list of stations that issue drivers' licenses and the corresponding code that designates each station on the drivers' licenses issued by that station. Although the information did not on its face suggest that its release would unduly interfere with law enforcement, the Department of Public Safety explained that the codes are used by officers to determine whether a license is forged and argued that releasing the list of stations and codes would reduce the value of the codes for detecting forged drivers' licenses.[489] This office previously held that release of routine investigative procedures, techniques that are commonly known, and routine personnel information would not unduly interfere with law enforcement and crime prevention.[490]

The supreme court has addressed the applicability of former section 552.108 to the internal records and notations of the comptroller's office. In *A & T Consultants, Inc. v. Sharp*,[491] the supreme court stated that former section 552.108 has the same scope as section 552(b)(7) of the federal Freedom of Information Act,[492] which prevents the disclosure of investigatory records that would reveal law enforcement methods, techniques, and strategies, including those the Internal Revenue Service uses to collect federal taxes. Some information,

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[486] Open Records Decision No. 611 at 1-2 (1992).

[487] Open Records Decision No. 616 (1993).

[488] *See* Open Records Decision No. 508 at 2 (1988).

[489] Open Records Decision No. 341 (1982).

[490] *See* Open Records Decision Nos. 216 at 4 (1978), 133 at 3 (1976).

[491] *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995).

[492] 5 U.S.C. § 552.

such as the date a taxpayer's name appeared on a generation list and the assignment date and codes in audits, are confidential and excepted from disclosure by former section 552.108 because they reflect the internal deliberations within the comptroller's office, an agency charged with law enforcement and prosecutory powers.[493] For audits that have been concluded, there is little harm in releasing some of this information.[494] The audit method and audit group remain confidential before, during, and after the comptroller undertakes a taxpayer audit under former section 552.108.[495]

The attorney general also addressed whether internal records and notations could be withheld under the statutory predecessor to section 552.108 in the following decisions:

> Open Records Decision No. 531 (1989) — detailed guidelines regarding a police department's use of force policy may be withheld but not those portions of the procedures that restate generally known common-law rules, constitutional limitations, or penal code provisions; the release of the detailed guidelines would impair an officer's ability to arrest a suspect and would place individuals at an advantage in confrontations with police;
>
> Open Records Decision No. 508 (1988) — the dates on which specific prisoners are to be transferred from a county jail to the Texas Department of Corrections may be withheld prior to the transfer because release of this information could impair security, but these dates may not be withheld after the prisoner is transferred because the public has a legitimate interest in the information;
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> Open Records Decision No. 506 (1988) — the cellular mobile telephone numbers assigned to county officials and employees with specific law enforcement duties may be withheld but not the numbers of officials and employees who are assigned no such duties;
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> Open Records Decision No. 413 (1984) — a sketch showing the security measures that the Texas Department of Corrections plans to use for its next scheduled execution may be withheld because its release may make crowd control unreasonable or difficult;
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> Open Records Decision No. 394 (1983) — except for information regarding juveniles, a jail roster may not be withheld; a jail roster is an internal record that

[493] *A & T Consultants, Inc.*, 904 S.W.2d at 677-78 (such information also excepted from disclosure by former section 552.116 of Government Code).

[494] *Id.* at 678.

[495] *Id.* at 679 (such information also confidential under former section 552.116 of Government Code).

reveals information specifically made public in other forms, such as the names of persons arrested;

Open Records Decision No. 369 (1983) — notes recording a prosecutor's subjective comments about former jurors may be withheld; releasing these comments would tend to reveal future prosecutorial strategy;

Open Records Decision No. 287 (1981) — a notation kept by the Community Services Division of the police department consisting of the name and address of a person referred, a comment about her, the name of the social worker assigned to the matter, and the date the notation was entered may not be withheld; the notation concerns social service activity, not the detection and investigation of crime, and the department offered no explanation of how its release would unduly interfere with law enforcement; and

Open Records Decision Nos. 211 (1978), 143 (1976) — information that would reveal the identities of undercover agents or where employees travel on sensitive assignments may be withheld.

b. Concluded Cases

With regard to the second category of information, information relating to a criminal investigation or prosecution that concluded in a result other than a conviction or deferred adjudication may be withheld under subsections (a)(2) and (b)(2) of section 552.108. Subsections (a)(2) and (b)(2) cannot apply to an open criminal file because the investigation or prosecution for such files has not concluded. To establish the applicability of subsections (a)(2) and (b)(2), a governmental body must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication.

c. Prosecutor Information

As for the third category of information, subsections (a)(3) and (b)(3) of section 552.108 protect information, including an internal record or notation, prepared by a prosecutor in anticipation of or in the course of preparing for criminal litigation *or* information that reflects the prosecutor's mental impressions or legal reasoning. When a governmental body asserts that the information reflects the prosecutor's mental impressions or legal reasoning, the OAG strongly encourages the governmental body, in its request for a ruling, to explain how the information does so. Subsections 552.108(a)(3) and (b)(3) contain a different standard from the standard used in establishing civil work product, which requires that the information be prepared in anticipation of litigation *and* the work

product consists of or tends to reveal the thought processes of an attorney.[496] (For a discussion of civil work product under section 552.111, refer to page 115 of this handbook.)

3. Limitations on Scope of Section 552.108

Section 552.108(c) provides that basic information about an arrested person, an arrest, or a crime is not excepted from required public disclosure. The kinds of basic information not excepted from disclosure by section 552.108 are those that were deemed public in *Houston Chronicle Publishing Co. v. City of Houston*[497] (*"Houston Chronicle I"*) and catalogued in Open Records Decision No. 127 (1976). Basic information is information that ordinarily appears on the first page of an offense report and in other records of law enforcement agencies relating to arrests such as:

(a) the name, age, address, race, sex, occupation, alias, and physical condition of the arrested person;

(b) the date and time of the arrest;

(c) the offense charged and the court in which it is filed;

(d) the details of the arrest;

(e) booking information;

(f) the notation of any release or transfer;

(g) bonding information;
(h) the location of the crime;

(i) the identification and description of the complainant;

(j) the premises involved;

(k) the time of occurrence of the crime;

(l) the property involved, if any;

(m) the vehicles involved, if any;

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[496] Open Records Decision No. 647 (1996).

[497] *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 184-85 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

(n) a description of the weather;

(o) a detailed description of the offense; and

(p) the names of the arresting and investigating officers.[498]

Generally, the identity of the victim or complainant may not be withheld from disclosure under section 552.108. However, information tending to identify victims of serious sexual offenses must be withheld from public disclosure pursuant to section 552.101 because such information is protected by common-law privacy.[499] In rare circumstances, a governmental body may demonstrate the existence of special circumstances that overcome the presumption of public access to the complainant's identity. See Open Records Letter No. 97-2332 (1997). (For a discussion of common-law privacy and information about victims of sexual offenses, refer to page 71 of this handbook.) Other specific information ordinarily found on the first page of an offense report may also be withheld under section 552.108 when the governmental body demonstrates that the release of that specific information would interfere with law enforcement.[500] Section 552.130 protects from disclosure certain information on offense reports that concerns motor vehicle records. (For a discussion of section 552.130, refer to page 140 of this handbook.)

Although basic information not excepted from disclosure by section 552.108 often is described by its location ("first-page offense report information"), the location of the information or the label placed on it is not determinative of its status under section 552.108. For example, radio dispatch logs or radio cards maintained by a police department that contain the type of information deemed public may not be withheld.[501] Likewise, basic information appearing in other records of law-enforcement agencies, such as blotters, arrest sheets, "show-up sheets," and fire casualty reports, is not excepted from disclosure by section 552.108.[502] Conversely, a videotape of a booking that conveys information excepted from disclosure is not subject to disclosure when editing the tape is practically impossible and the public information on the tape is available in written form.[503]

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[498] Open Records Decision No. 127 at 4-5 (1976).

[499] *See* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

[500] Open Records Decision No. 508 at 2 (1988) (construing statutory predecessor).

[501] Open Records Decision No. 394 at 3 (1983); *see City of Lubbock v. Cornyn*, 993 S.W.2d 461 (Tex. App.—Austin 1999, no pet.).

[502] *See* Open Records Decision Nos. 371 (1983), 127 at 2 (1976).

[503] Open Records Decision No. 364 (1983).

Section 552.108 generally does not apply to information made public by statute[504] or to information to which a statute grants certain individuals a right of access.[505] Records filed with a court are also public records not excepted from disclosure under section 552.108.[506]

4. Application of Section 552.108 to Specific Kinds of Law-Enforcement Information

a. Information Relating to Police Officers and Complaints Against Police Officers

Because of their role in protecting the safety of the general public, law-enforcement officers generally can expect a lesser degree of personal privacy than other public employees.[507] General information about a police officer usually is not excepted from required public disclosure by section 552.108. For example, a police officer's age, law-enforcement background, and previous experience and employment usually are not excepted from disclosure by section 552.108.[508] However, the disclosure of information from the personnel files of police officers serving in cities that have adopted chapter 143 of the Local Government Code (the fire fighters' and police officers' civil service law) is restricted by section 143.089 of the Local Government Code.[509] Absent federal authority, a city police department must not release to a federal law enforcement agency information made confidential under section 143.089(g).[510] A city police department should refer a request for information in a fire

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[504] *See, e.g.*, Code Crim. Proc. art. 18.01(a) (making public executed search warrant affidavit).

[505] For example, article 6701d, section 47, requires a law enforcement agency to release a copy of a requested accident report to an individual who provides the law enforcement agency with two or more pieces of information specified in the statute. In *Texas Daily Newspaper Ass'n v. Morales*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., Aug. 29, 1997) (Oct. 24, 1997) (second amended agreed temporary injunction) the court enjoined the enforcement of Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 13, 1997 Tex. Gen. Laws 4575, 4582-83, which amended section 550.065 of the Transportation Code concerning accident reports. *See City of Lubbock v. Cornyn*, 993 S.W.2d 461, 464, 465 n.1 (Tex. App.—Austin 1999, no pet.) (although Travis County district court entered temporary injunction enjoining application of section of 550.065 as unconstitutional and reinstated former article 6701d, section 47, V.T.C.S., plain meaning of section 47 did not give city discretion to withhold accident reports from requestors who satisfied the statute's requirements).

[506] *See Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994); Gov't Code § 552.022(17).

[507] *See Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 206 (Tex. 1987); Open Records Decision No. 562 at 8-9 n.2 (1990).

[508] Open Records Decision Nos. 562 at 10 (1990), 329 at 1 (1982).

[509] *See City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 952 (Tex. App.—Austin 1993, writ denied); *see also* Gov't Code § 552.117(2), (3) (excepting from disclosure home addresses and home telephone numbers of peace officers and additional information of employees of Texas Department of Criminal Justice and their family members). (For a discussion of section 552.117, refer to page 130 of this handbook.)

[510] Open Records Decision No. 650 (1996).

fighter's or police officer's personnel file to the civil-service director or the director's designee.[511]

Similarly, information about complaints against police officers generally may not be withheld under section 552.108. For example, the names of complainants, the names of the officers who are the subjects of complaints, an officer's written response to a complaint, and the final disposition of a complaint generally are not excepted from disclosure by section 552.108.[512] As previously discussed, however, the identities of witnesses, informants, and persons interviewed in the course of a police internal investigation may be withheld under section 552.108 if the police department determines that disclosure either might subject these individuals to possible intimidation or harassment or might harm the prospects of future cooperation.[513] However, section 552.108 is inapplicable where a complaint against a law enforcement officer does not result in a criminal investigation or prosecution.[514] Furthermore, in cities that have adopted chapter 143 of the Local Government Code, section 143.089 of the Local Government Code makes information about complaints against police officers confidential under section 552.101 if the department took no disciplinary action or the disciplinary action was taken without just cause.[515]

b. Criminal History Information

Where an individual's criminal history information has been compiled or summarized by a governmental entity, the information takes on a character that implicates the individual's right of privacy in a manner that the same individual records in an uncompiled state do not.[516] Thus, when a requestor asks for all information concerning a certain named individual and that individual is a possible suspect, a law enforcement agency must withhold this information under section 552.101 of the Government Code as that individual's privacy right has been implicated.[517]

Federal law also imposes limitations on the dissemination of criminal history information obtained from the federal National Crime Information Center ("NCIC") and its Texas

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[511] Local Gov't Code § 143.089(g).

[512] Open Records Decision Nos. 350 at 3 (1982), 342 at 2 (1982), 329 at 2 (1982).

[513] Open Records Decision Nos. 329 at 2 (1982), 313 at 2-3 (1982), 297 at 2 (1981), 252 at 4 (1980).

[514] *Morales v. Ellen*, 840 S.W.2d 519, 525-526 (Tex. App.—El Paso 1992, writ denied) (construing statutory predecessor).

[515] *See* Local Gov't Code § 143.089(a); *City of San Antonio*, 851 S.W.2d at 949; Open Records Decision No. 642 (1996) (where allegations are determined to be unfounded, Local Government Code section 143.1214(b) requires withholding of documents relating to investigation of City of Houston firefighters).

[516] *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

[517] *See id*.; *see also* Gov't Code § 411.106(b).

counterpart, the Texas Crime Information Center ("TCIC").[518] In essence, federal law requires each state to observe its own laws regarding dissemination of criminal history information it generates, but requires a state to maintain as confidential any information from other states or the federal government that the state obtains by access to the Interstate Identification Index, a component of the NCIC.[519]

Chapter 411, subchapter F of the Government Code contains the Texas state statutes that restrict the release of TCIC information obtained from the Texas Department of Public Safety. However, subchapter F "does not prohibit a criminal justice agency from disclosing to the public criminal history record information that is related to the offense for which a person is involved in the criminal justice system."[520] Additionally, any person is entitled to obtain from the Department of Public Safety information regarding convictions and deferred adjudications that was obtained from judicial records.[521]

5. Other Related Law Enforcement Records

a. Juvenile Law Enforcement Records

The Seventy-fifth Legislature's amendment to the Family Code[522] in part supercedes Open Records Decision No. 644 (1996). Open Records Decision No. 644 (1996) held that section 58.007 of the Family Code does not make confidential juvenile law enforcement records concerning juvenile conduct occurring on or after January 1, 1996, that are maintained by law enforcement agencies. Juvenile offender records held by law enforcement agencies are now expressly confidential under section 58.007(c) of the Family Code. However, section 58.007(c) only applies to juvenile law enforcement records concerning conduct that occurred on or after September 1, 1997. The relevant language of amended Family Code section 58.007(c)[523] reads as follows:

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[518] *See* Open Records Decision No. 655 (1997).

[519] *See* Open Records Decision No. 565 at 10-12 (1990).

[520] Gov't Code § 411.081(b); *see* Open Records Decision No. 655 (1997) (concerning statutory authority of county and housing authority to obtain criminal history record information). Open Records Decision No. 655 was superceded in part by enactment of H.B. 2200, which authorizes counties ro receive criminal history record information from the Department of Public Safety concerning applicants for county employment. *See* Act of May 17, 1999, 76th Leg., R.S., H.B. 2200, § 1 (codified at Gov't Code § 411.1295).

[521] Gov't Code § 411.135.

[522] Fam. Code § 58.007.

[523] The Seventy-sixth Legislature also amended section 58.007(c) by addressing the electronic storage of juvenile law enforcement records. Act of May 26, 1999, 76th Leg., R.S., H.B. 1583, § 1 (codified at Fam. Code § 58.007).

> **(c) Except as provide by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:**
>
> > **(1) if maintained on paper or microfilm, kept separate from adult files and records; and**
> >
> > . . . .
> >
> > **(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.**

Open Records Decision No. 644 (1996) still applies to records concerning juvenile conduct that occurred from January 1, 1996, to August 31, 1997. Section 58.007(c) of the Family Code only applies to juvenile law enforcement records concerning juvenile conduct occurring on or after September 1, 1997, that are maintained by law enforcement agencies.[524] Juvenile law enforcement records concerning conduct that occurred before January 1, 1996, are governed by former section 51.14(d) of the Family Code, which is continued in effect for that purpose.[525]

b. Sex Offender Registration Information

Under article 62.08 of the Code of Criminal Procedure all information contained in either an adult's or juvenile's sex offender registration form and subsequently entered into the Department of Public Safety database is public information and must be released upon written request except for the registrant's social security number, driver's license number, telephone number, and any information that on its face would directly reveal the identity of the victim.[526]

Local law enforcement authorities are required under article 62.03 to provide school officials with "any information the authority determines is necessary to protect the public" regarding adult sex offenders except the person's social security number, driver's license number,

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[524] Section 58.007 applies only to the records of a child who is ten years of age or older and under 17 years of age or 17 years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age. Fam. Code § 51.02(1).

[525] Fam. Code § 58.007.

[526] Act of May 29, 1999, 76th Leg., R.S., H.B. 2145, § 17 (codified at Code Crim. Proc. art. 62.08); *see* Open Records Decision No. 645 at 3 (1996) (construing statutory predecessor).

telephone number, and any information that would identify the victim of the offense.[527] Upon receiving a written request for such information, the school district must release or withhold the requested information it receives in accordance with article 62.03 or other law, including the Public Information Act.[528]

Neither a school district official nor the general public is authorized to receive from local law enforcement authorities sex offender registration information pertaining to individuals whose reportable convictions or adjudication occurred prior to September 1, 1995.[529]

c. Records of 9-1-1 Calls

Originating telephone numbers and addresses furnished on a call-by-call basis by a service supplier to a 9-1-1 emergency communication district established under subchapter B, C, or D of chapter 772 of the Health and Safety Code are confidential under chapter 772 of the Health and Safety Code.[530] Chapter 772 does not except from disclosure any other information contained on a computer aided dispatch report that was obtained during a 9-1-1 call.[531] Subchapter E, which applies to counties with populations over 1.5 million, does not contain a similar confidentiality provision. Other exceptions to disclosure in the Public Information Act may apply to information not otherwise confidential under section 772.318 of the Health and Safety Code.[532]

I. Section 552.109: Certain Private Communications of an Elected Office-Holder

Section 552.109 of the Government Code excepts from required public disclosure:

> **Private correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy . . . .**

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[527] Code Crim Proc. art. 62.03(g).

[528] *Id*.

[529] The Seventy-sixth Legislature amended the sex offender registration statute, chapter 62 of the Code of Criminal Procedure, in several respects. *See* Act of May 29, 1999, 76th Leg., R.S., H.B. 2145, §§ 7-18, 25-31 (codified at Code Crim. Proc. ch. 62); Act of May 26, 1999, 76th Leg., R.S., S.B. 399, §§ 4-10 (codified at Code Crim. Proc. ch. 62).

[530] Open Records Decision No. 649 at 2-3 (1996).

[531] *Id.* at 4.

[532] *Id*. *See* Act of May 28, 1997, 75th Leg., R.S., ch. 1377, 1997 Tex. Gen. Laws 5166, 5167 (amending Health and Safety Code by adding sections 771.061 and 771.062).

This section protects the same privacy interests as section 552.101, and decisions under section 552.109 and its statutory predecessor rely on the same tests applicable under section 552.101.[533] (For a discussion of section 552.101, refer to page 66 of this handbook.) Section 552.109 protects the privacy interests only of elected office holders.[534] It does not protect the privacy interests of their correspondents.[535] Certain records of communications between citizens and members of the legislature or the lieutenant governor may be confidential by statute.[536]

In the following open records decisions, the attorney general determined that certain information was not excepted from required public disclosure under the statutory predecessor to section 552.109:

> Open Records Decision No. 506 (1988) — cellular mobile telephone numbers of county officials where county paid for installation of service and for telephone bills, and which service was intended to be used by officials in conducting official public business, because public has a legitimate interest in the performance of official public duties;
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> Open Records Decision No. 473 (1987) — performance evaluations of city council appointees because this section was intended to protect the privacy only of elected office-holders; although city council members prepared the evaluations, the evaluations did not implicate their privacy interests;
>
> Open Records Decision No. 332 (1982) — letters concerning a teacher's performance written by parents to school trustees, because nothing in the letters constituted an invasion of privacy of the trustees;
>
> Open Records Decision No. 241 (1980) — correspondence of the governor regarding potential nominees for public office because material was not protected by a constitutional right of privacy; furthermore, material was not protected by common-law right of privacy because it did not contain any highly embarrassing or intimate facts and there was a legitimate public interest in the appointment process;[537] and
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> Open Records Decision No. 40 (1974) — itemized list of long distance calls made by legislators and charged to their contingent expense accounts, because such a list is not a "communication."

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[533] *See, e.g.*, Open Records Decision Nos. 506 at 3 (1988), 241 (1980), 212 (1978).

[534] Open Records Decision No. 473 at 3 (1987).

[535] *See* Open Records Decision No. 332 at 2 (1982).

[536] *See* Gov't Code §§ 306.003, .004; Open Records Decision No. 648 (1996).

[537] *See* Open Records Decision No. 212 at 4 (1978).

J. Section 552.110: Certain Commercial Information

The Seventy-sixth Legislature amended section 552.110 of the Government Code to read as follows:

> **(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from [required public disclosure].**
>
> **(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from [required public disclosure].**

The new section 552.110 refers to the same two types of information as did the former section 552.110: (1) trade secrets and (2) confidential commercial or financial information obtained from a person. The amendment changes the standard for excepting from disclosure commercial and financial information. The standard for excepting from disclosure trade secrets is unchanged. The Act now requires a governmental body to make a good faith attempt to notify in writing a person whose proprietary information may be subject to section 552.110 within ten business days of receiving the request for the information.[538] That person so notified bears the burden of establishing the applicability of section 552.110.[539] A copy of the form the Act requires the governmental body to send a person whose information may be subject to section 552.110, as well as sections 552.101, 552.113, or 552.131, can be found in Appendix C of this handbook. For a discussion of a governmental body's or a third party's procedural duties, refer to pages 33 and 44 of this handbook.

1. Trade Secrets

The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939).[540] The determination of whether any particular information is a trade secret is a determination of fact.[541] Noting that an exact definition of a trade secret is not possible, the Restatement lists six factors to be considered in determining whether particular information constitutes a trade secret:

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[538] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 24 (codified at Gov't Code § 552.305).

[539] *Id*.

[540] *Hyde v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

[541] Open Records Decision No. 552 at 2 (1990).

> (1) the extent to which the information is known outside of [the company's] business;
>
> (2) the extent to which it is known by employees and others involved in [the company's business];
>
> (3) the extent of measures taken by [the company] 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 expended by [the company] in developing the information; [and]
>
> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[542]

Open Records Decision No. 552 (1990) noted that the attorney general is unable to resolve disputes of fact regarding the status of information as "trade secrets" and must rely upon the facts alleged or upon those facts that are discernible from the documents submitted for inspection. For this reason, the attorney general will accept a claim for exception as a trade secret when a prima facie case is made that the information in question constitutes a trade secret and no argument is made that rebuts that assertion as a matter of law.[543]

In Open Records Decision No. 609 (1992), there was a factual dispute between the governmental body and the proponent of the trade secret protection as to certain elements of a prima facie case. Because the attorney general cannot resolve such factual disputes, the matter was referred back to the governmental body for fact-finding.

2. Commercial or Financial Information Privileged or Confidential by Law

The amended section 552.110 now expressly includes the standard for excepting from disclosure commercial and financial information.[544] The governmental body must demonstrate

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[542] RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.–Austin 1999, pet. filed).

[543] Open Records Decision No. 552 at 5 (1990).

[544] The former section 552.110 excepted "commercial and financial information . . . privileged or confidential by statute or judicial decision." It did not set out the standard for excepting commercial or financial information. In 1996, this office announced that it would follow the test for applying section 552(b)(4) of the

"based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom it was obtained." This standard resembles part of the test for applying the correlative exemption in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(4), as set out in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). That part of the *National Parks* test states that commercial or financial information is confidential if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.[545] The new commercial and financial information branch of section 552.110 does not incorporate the part of the *National Parks* test for information that is likely to impair the government's ability to obtain necessary information in the future. Like the federal standard, the new section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure.[546] The attorney general has issued no formal opinions applying this new standard.

K. Section 552.111: Agency Memoranda

1. Certain Advice, Opinions, and Recommendations in Agency Memoranda

Section 552.111 of the Government Code excepts from required public disclosure:

> **An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency . . . .**

The purpose of withholding advice, opinion, or recommendation under section 552.111 is "to encourage frank and open discussion within the agency in connection with its decision-making processes" pertaining to policy matters.[547]

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federal Freedom of Information Act as set forth in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See* Open Records Decision No. 639 at 2-3 (1996). However, the Third Court of Appeals held that *National Parks* was not a judicial decision within the meaning of the former section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.–Austin 1999, pet. filed). Consequently, after the *Birnbaum* decision, this office no longer used the *National Parks* standard for excepting commercial or financial information under former section 552.110.

[545] *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

[546] *See* Open Records Decision No. 661 (1999).

[547] *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); *see also City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 553-556 (Tex. App.—Dallas 1998, pet. granted); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.—Austin 1992, no writ).

The attorney general reexamined the language of section 552.111 in Open Records Decision No. 615 (1993). Before Open Records Decision 615, the attorney general had held that the statutory predecessor to section 552.111 was applicable to advice, opinions, and recommendations in a wide range of circumstances.[548] In Open Records Decision No. 615 (1993), however, the attorney general reexamined the proper scope of this exception and held that it applies only to internal communications consisting of advice, recommendations, or opinions reflecting the policymaking processes of the governmental body at issue.[549] "An agency's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel."[550] Moreover, documents relating to problems with a specific employee do not relate to the making of new policy but merely implement existing policy.[551] An agency's policymaking functions do include, however, administrative and personnel matters of broad scope that affect the governmental body's policy mission.[552] Thus, because the information at issue in Open Records Decision No. 615 (1993) concerned the evaluation of a university professor's job performance, the statutory predecessor to section 552.111 did not except this information from required public disclosure. On the other hand, the information at issue in Open Records Decision No. 631 (1995) was a report addressing allegations of systematic discrimination against African-American and Hispanic faculty members in the retention, tenure, and promotion process at a university. Rather than pertaining solely to the internal administration of the university, the scope of the report was much broader and involved the university's educational mission. Accordingly, section 552.111 excepted from required public disclosure the portions of the report that constituted advice, recommendations, or opinions.[553]

Even when an internal memorandum relates to a governmental body's policy functions, section 552.111 excepts from disclosure only the advice, recommendations, and opinions found in

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[548] *See, e.g.*, Open Records Decision Nos. 565 (1990) (considering evaluation of employment application), 549 (1990) (considering evaluation of grant applications), 538 (1990) (considering teacher performance evaluations).

[549] Open Records Decision No. 615 at 5 (1993).

[550] *Id.*; *see City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 557 (Tex. App.—Dallas 1998, pet. granted); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

[551] *City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 557 (Tex. App.—Dallas 1998, pet. granted); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

[552] Open Records Decision No. 631 at 3 (1995); *City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 557 (Tex. App.—Dallas 1998, pet. granted).

[553] Open Records Decision No. 631 at 3 (1995).

that memorandum. Section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of the memorandum.[554]

To be protected under section 552.111, material must consist of interagency or intra-agency communications. Section 552.111 applies to interagency or intra-agency communications even in cases where the identity of the author is not ascertainable.[555] Although information protected by section 552.111 is most commonly generated by agency personnel, information created for an agency by outside consultants acting on the behalf of the agency in an official capacity may be within section 552.111.[556] Communications between agencies and other third parties, however, are not protected. For example, correspondence between a licensing agency and its licensees is not excepted under section 552.111.[557]

Given the attorney general's current interpretation of the scope of section 552.111, a governmental body that receives a request for information should exercise caution in relying on prior attorney general decisions regarding the applicability of this exception. For example, in Open Records Decision No. 559 (1990), the attorney general held that the predecessor statute to section 552.111 also protects drafts of a document that has been or will be released in final form to the public and any comments or other notations on the drafts because they necessarily represent advice, opinion, and recommendation of the drafter as to the form and content of the final document. However, the rationale and scope of this open records decision have been modified implicitly by Open Records Decision No. 615 (1993) to apply only to those records involving an agency's policy matters.

2. Attorney Work Product

As noted above, section 552.111 excepts from required public disclosure information "that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 647 (1996), the attorney general concluded that a governmental body may withhold information as "attorney work product" under section 552.111 of the Government Code if the governmental body can show that (1) the information was created for trial or in anticipation of litigation under the test articulated in *National Tank Co. v. Brotherton*,[558] or

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[554] *See* Open Records Decision No. 615 at 4-5 (1993); *City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App.—Dallas 1998, pet. granted)

[555] *See* Open Records Decision No. 538 at 3-4 (1990).

[556] Open Records Decision No. 462 (1987) (construing statutory predecessor).

[557] Open Records Decision No. 474 at 2-3 (1987) (construing statutory predecessor); *see also* Open Records Decision No. 561 at 9 (1990) (correspondence from Federal Bureau of Investigation officer to city was not protected by statutory predecessor to section 552.111, where no privity of interest or common deliberative process existed between federal agency and city).

[558] 851 S.W.2d 193 (Tex. 1993).

after a lawsuit is filed, and (2) the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories."[559]

The first requirement that must be met to consider information "attorney work product" is that the information must have been created for trial or in anticipation of litigation. In order for the attorney general to conclude that information was created in anticipation of litigation, the governmental body must demonstrate that

> a) a reasonable person would have concluded from the totality of the circumstances . . . that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.[560] [Footnote added.]

A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear."[561] The attorney general will determine whether the governmental body has met its burden under this requirement on a case-by-case basis.

The second requirement that must be met is that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation context."[562] Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney.[563] Generally, records that were neither created by an attorney nor created at the direction of an attorney may not be withheld as attorney work product, regardless of the fact that they were forwarded to an attorney in connection with the litigation, because they do not reveal the "mental processes, conclusions, and legal theories of the attorney."[564] On the

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[559] Open Records Decision No. 647 at 5-6 (1996) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)).

[560] *National Tank Co.*, 851 S.W.2d at 207.

[561] *Id.* at 204.

[562] Open Records Decision No. 647 at 4 (1996).

[563] *Id.* and authorities cited therein; *see also Leede Oil & Gas, Inc. v. McCorkle,* 789 S.W.2d 686, 687 (Tex. App.—Houston [1st Dist.] 1990, no writ) ("neutral recital of facts" may not be withheld as attorney work product).

[564] *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993); *see* Tex. R. Civ. Proc. 192.5 (newly promulgated work product privilege).

other hand, the attorney general concluded in Open Records Decision No. 647 (1996) that, pursuant to the rationale set forth in *National Union Fire Insurance Co.*, a request encompassing an attorney's *entire* litigation file may be denied under either section 552.103 or section 552.111 of the Government Code if the litigation is reasonably anticipated or pending, or under section 552.111 if the litigation has concluded.[565]

L. Section 552.112: Certain Information Relating to Regulation of Financial Institutions or Securities

Section 552.112(a) of the Government Code excepts from required public disclosure

> **information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.**

Subsection (b) provides:

> **In this section, "securities" has the meaning assigned by The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes).**

This section protects specific examination, operating, or condition reports obtained by agencies in regulating or supervising financial institutions or securities or information that indirectly reveals the contents of such reports.[566] Such reports typically disclose the financial status and dealings of the institutions that file them. Section 552.112 does not protect general information about the overall condition of an industry if the information does not identify particular institutions under investigation or supervision.[567] An entity must be a "financial institution" for its examination, operating, or condition reports to be excepted by section 552.112; it is not sufficient that the entity is regulated by an agency that regulates or supervises financial institutions.[568] The attorney general has stated that the term "financial institution" means "any banking corporation or trust company, building and loan association, governmental agency, insurance company, or related corporation, partnership, foundation, or the other institutions engaged primarily in lending or investing funds."[569] Notably, a recent

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[565] Open Records Decision No. 647 at 5 (1996); *see also Curry v. Walker*, 873 S.W.2d 379, 380-81 (Tex. 1994) (discovery request for district attorney's "entire file" was "too broad" and "the decision as to what to include in [the file], necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case"); *accord National Union Fire Ins. Co.*, 863 S.W.2d at 460.

[566] *See generally* Open Records Decision Nos. 261 (1980), 29 (1974).

[567] Open Records Decision No. 483 at 9 (1987).

[568] Open Records Decision No. 158 at 4-5 (1977).

[569] *Id.* at 5; *see also* Open Records Decision No. 392 at 3 (1983).

Texas appeals court decision, *Birnbaum v. Alliance of American Insurers*,[570] held that insurance companies are not "financial institutions" under section 552.112, overruling the determination in Open Record Decision No.158 (1977) that insurance companies were "financial institutions" under the statutory predecessor to the section. Section 552.112 is a permissive exception that a governmental body may waive at its discretion.[571]

The following open records decisions have considered whether information is excepted from required public disclosure under section 552.112:

> Open Records Decision No. 483 (1987) — Texas Savings and Loan Department report containing a general discussion of the condition of the industry that does not identify particular institutions under investigation or supervision is not excepted from disclosure;
>
> Open Records Decision No. 392 (1983) — material collected by the Consumer Credit Commissioner in an investigation of loan transactions was not protected by the statutory predecessor to section 552.112 when the requested information did not consist of a detailed description of the complete financial status of the company being investigated but rather consisted of the records of the company's particular transactions with persons filing consumer complaints;
>
> Open Records Decision No. 261 (1980) — form acknowledgment by bank board of directors that Department of Banking examination report had been received is excepted from disclosure where acknowledgment would reveal the conclusions reached by the department;
>
> Open Records Decision No. 194 (1978) — pawn shop license application that includes information about applicant's net assets to assess compliance with Texas Pawnshop Act is not excepted from disclosure because such information does not qualify as an examination, operating, or condition report;
>
> Open Records Decision No. 187 (1978) — property development plans submitted by a credit union to the Credit Union Department were excepted from disclosure by the statutory predecessor to section 552.112 because submission included detailed presentation of credit union's conditions and operations and particular proposed investment; and
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> Open Records Decision No. 130 (1976) — investigative file of the enforcement division of the State Securities Board is excepted from disclosure.

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[570] 994 S.W.2d 766 (Tex. App.—Austin, 1999, pet. filed).

[571] *Birnbaum*, 994 S.W.2d at 776.

M. Section 552.113: Geological or Geophysical Information

Section 552.113 underwent significant revision during the 1995 legislative session.[572] The amended version of section 552.113 preserved the confidentiality provided under the former version of the statute for electric logs under Subchapter M, Chapter 91 of the Natural Resources Code, and for geological or geophysical information or data, including maps concerning wells, except when filed in connection with an application or proceeding before an agency. The amended version of this exception added sections pertaining to geological or geophysical information, including electric logs, filed with the General Land Office, and includes provisions for the expiration of confidentiality of "confidential material," as that term is defined, and the use of such material in administrative proceedings before the General Land Office.

Section 552.113 provides as follows:

> (a) Information is excepted from the requirements of Section 552.021 if it is:
>
> > (1) an electric log confidential under Subchapter M, Chapter 91, Natural Resources Code;
> > (2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency; or
> >
> > (3) confidential under Subsections (c) through (f).
>
> (b) Information that is shown to or examined by an employee of the General Land Office, but not retained in the land office, is not considered to be filed with the land office.
>
> (c) In this section:
>
> > (1) "Confidential material" includes all well logs, geological, geophysical, geochemical, and other similar data, including maps and other interpretations of the material filed in the General Land Office:
> >
> > > (A) in connection with any administrative application or proceeding before the land commissioner, the school land board, any board for lease, or the commissioner's or board's staff; or

[572] Act of May 25, 1995, 74th Leg., R.S., ch. 1035, § 8, sec. 552.113, 1995 Tex. Gen. Laws 5127, 5131.

(B) in compliance with the requirements of any law, rule, lease, or agreement.

(2) "Basic electric logs" has the same meaning as it has in Chapter 91, Natural Resources Code.

(3) "Administrative applications" and "administrative proceedings" include applications for pooling or unitization, review of shut-in royalty payments, review of leases or other agreements to determine their validity, review of any plan of operations, review of the obligation to drill offset wells, or an application to pay compensatory royalty.

(d) Confidential material, except basic electric logs, filed in the General Land Office on or after September 1, 1985, is public information and is available to the public under Section 552.021 on and after the later of:

(1) five years from the filing date of the confidential material; or

(2) one year from the expiration, termination, or forfeiture of the lease in connection with which the confidential material was filed.

(e) Basic electric logs filed in the General Land Office on or after September 1, 1985, are either public information or confidential material to the same extent and for the same periods provided for the same logs by Chapter 91, Natural Resources Code. A person may request that a basic electric log that has been filed in the General Land Office be made confidential by filing with the land office a copy of the written request for confidentiality made to the Railroad Commission of Texas for the same log.

(f) The following are public information:

(1) basic electric logs filed in the General Land Office before September 1, 1985; and

(2) confidential material, except basic electric logs, filed in the General Land Office before September 1, 1985, provided, that Subsection (d) governs the disclosure of that confidential material filed in connection with a lease that is a valid and subsisting lease on September 1, 1995.

(g) Confidential material may be disclosed at any time if the person filing the material, or the person's successor in interest in the lease in connection with

> which the confidential material was filed, consents in writing to its release. A party consenting to the disclosure of confidential material may restrict the manner of disclosure and the person or persons to whom the disclosure may be made.
>
> (h) Notwithstanding the confidential nature of the material described in this section, the material may be used by the General Land Office in the enforcement, by administrative proceeding or litigation, of the laws governing the sale and lease of public lands and minerals, the regulations of the land office, the school land board, or of any board for lease, or the terms of any lease, pooling or unitization agreement, or any other agreement or grant.
>
> (i) An administrative hearings officer may order that confidential material introduced in an administrative proceeding remain confidential until the proceeding is finally concluded, or for the period provided in Subsection (d), whichever is later.
>
> (j) Confidential material examined by an administrative hearings officer during the course of an administrative proceeding for the purpose of determining its admissibility as evidence shall not be considered to have been filed in the General Land Office to the extent that the confidential material is not introduced into evidence at the proceeding.
>
> (k) This section does not prevent a person from asserting that any confidential material is exempt from disclosure as a trade secret or commercial information under Section 552.110 or under any other basis permitted by law.

Open Records Decision No. 627 (1994) interpreted the predecessor to the current version of section 552.113 as follows:

> [S]ection 552.113 excepts from required public disclosure all "geological or geophysical information or data including maps concerning wells," unless the information is filed in connection with an application or proceeding before an agency. . . . We interpret "geological or geophysical information" as section 552.113(2) uses the term to refer only to geological and geophysical information regarding the exploration or development of natural resources. [Footnote omitted.] Furthermore, we reaffirm our prior determination that section 552.113 protects only geological and geophysical information that is commercially valuable. *See* Open Records Decision Nos. 504 (1988) at 2; 479 (1987) at 2. Thus, we conclude that section 552.113(2) protects from public disclosure only (i) geological and geophysical information regarding the

> exploration or development of natural resources that is (ii) commercially valuable.[573]

The decision explained that the phrase "information regarding the exploration or development of natural resources" signifies "information indicating the presence or absence of natural resources in a particular location, as well as information indicating the extent of a particular deposit or accumulation."[574]

Open Records Decision No. 627 (1994) overruled Open Records Decision No. 504 (1988) to the extent the two decisions are inconsistent. In Open Records Decision No. 504 (1988), the attorney general had interpreted the statutory predecessor to section 552.113 of the Government Code to require the application of a test similar to the test used at that time to determine whether the statutory predecessor to section 552.110 protected commercial information (including trade secrets) from required public disclosure. Under the test for the statutory predecessor to section 552.110, commercial information was 'confidential' for purposes of the exemption if disclosure of the information [was] likely to have either of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[575]

Following the issuance of Open Records Decision No. 504 (1988), the attorney general articulated new tests for determining whether section 552.110 of the Government Code protects trade secret information and commercial and financial information from required public disclosure.[576] Thus, Open Records Decision No. 627 (1994) reexamined the attorney general's reliance upon the former tests for section 552.110 to determine the applicability of section 552.113. That decision noted that section 552.113 of the Government Code, as the legislature originally enacted it, differed from its federal counterpart[577] in that the statutory predecessor to section 552.113 of the Government Code excepted from its scope "information filed in connection with an application or proceeding before any agency."[578] Thus, the state exception to required public disclosure exempted a more limited class of information than did the federal exemption.[579] Consequently, the decision determined that grafting the balancing test used to limit the

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[573] Open Records Decision No. 627 at 3-4 (1994).

[574] *Id.* at 4 n.4 (1994).

[575] Open Records Decision No. 504 at 4 (1988) (quoting Open Records Decision No. 494 (1988)).

[576] *See* Open Records Decision Nos. 592 at 4-8 (1991), 552 at 2-5 (1990).

[577] 5 U.S.C. § 552(b)(9).

[578] Open Records Decision No. 627 at 2-3 (1994).

[579] *Id.* at 3.

scope of the federal exemption to the plain language of section 552.113 of the Government Code was unnecessary.[580]

Since the current version of section 552.113 took effect on September 1, 1995, there have been no published court decisions or formal opinions interpreting the amended statute or the validity of Open Records Decision No. 627 (1994) in light of the amendments to the statute. When a governmental body believes requested information of a third party may be excepted under this exception, the governmental body must notify the third party in accordance with section 552.305. The notice the governmental body must send the third party is found at Appendix C of this handbook.

N. Section 552.026 and Section 552.114: Student Records

The Public Information Act includes two exceptions for student records, sections 552.026 and 552.114 of the Government Code.

1. Family Educational Rights and Privacy Act of 1974

Section 552.026 of the Government Code incorporates into the Texas Public Information Act the federal Family Educational Rights and Privacy Act of 1974,[581] known as "FERPA" or the "Buckley Amendment."[582] FERPA governs the availability of student records held by educational agencies or institutions that receive federal funds under programs administered by the federal government. It prohibits, in most circumstances, the release of student records without a parent's written consent. It also gives parents a right to inspect the education records of their children. If a student has reached age eighteen or is attending an institution of post-secondary education, the rights established by FERPA attach to the student rather than to the student's parents. "Education records" for purposes of FERPA are records that contain information directly related to a student and that are maintained by an educational institution or agency.[583]

An educational institution or agency may, however, release "directory information" to the public if the educational institution or agency complies with certain procedures.[584] The statute gives the following examples of directory information: "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance,

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[580] *Id.*

[581] 20 U.S.C. § 1232g.

[582] *See* Open Records Decision No. 72 (1975) (concluding that compliance with federal law was required before enactment of statutory predecessor to section 552.026).

[583] 20 U.S.C. § 1232g(a)(4)(A).

[584] *See id.* § 1232g(a)(5)(B).

degrees and awards received, and the most recent previous educational agency or institution attended by the student."[585] The attorney general has determined that marital status and expected date of graduation also constitute directory information.[586]

University police department records concerning students previously were held to be education records for the purposes of FERPA.[587] However, FERPA was amended, effective July 23, 1992, to provide that the term "education records" does not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement."[588] On the basis of this provision, records created by a state university campus police department are not excepted from required public disclosure by section 552.026 of the Government Code.[589]

FERPA applies only to records at educational institutions or agencies receiving federal funds and does not govern access to records in the custody of governmental bodies that are not educational institutions or agencies.[590] An "educational agency or institution" is "any public or private agency or institution" that receives federal funds under an applicable program.[591] Thus, an agency or institution need not instruct students in order to qualify as an educational agency or institution under FERPA. If student records are transferred by a school district or state institution of higher education to a state administrative agency concerned with education, federal regulations provide that the student records in the administrative agency's possession are subject to FERPA.[592]

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[585] *Id.* § 1232g(a)(5)(A).

[586] Open Records Decision No. 96 (1975); *see also* Open Records Decision Nos. 244 (1980) (student rosters public), 242 (1980) (student parking permit information public), 193 (1978) (report of accident insurance claims paid to identifiable students not public).

[587] *See* Open Records Decision Nos. 342 at 2-3 (1982), 205 at 2 (1978).

[588] 20 U.S.C. § 1232g(a)(4)(B)(ii).

[589] Open Records Decision No. 612 at 2 (1992) (concluding that campus police department records were not excepted by statutory predecessor to section 552.101, incorporating FERPA, or statutory predecessor to section 552.114).

[590] *See* Open Records Decision No. 390 at 3 (1983) (City of Fort Worth is not "educational agency" within FERPA).

[591] 20 U.S.C. § 1232g(a)(3).

[592] *Id.* § 1232g(b)(1)(E), (b)(4)(B); 34 C.F.R. §§ 99.31, .33, .35.

If there is a conflict between the provisions of the state Public Information Act and FERPA, the federal statute prevails. Open Records Decision No. 634 (1995) concluded that an educational agency or institution may withhold from public disclosure personally identifiable nondirectory information in "education records" as defined in FERPA, which information is excepted from required public disclosure by section 552.026, without the necessity of requesting an attorney general decision as to that exception.[593] As a general rule, exceptions

[593] Open Records Decision No. 634 also stated that an educational agency or institution that seeks a ruling under the Public Information

to disclosure under the Public Information Act do not apply to a student's or a parent's request for the student's own educational records pursuant to FERPA.[594]

FERPA is a detailed federal statute, and custodians of records covered by it should be familiar with its specific provisions. Questions about this law can be directed to the following agency:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, D.C. 20202-0498
(202) 260-3887

2. State Law

Section 552.114 of the Government Code, the other exception for student records, provides as follows:

> **(a) Information is excepted from [required public disclosure] if it is information in a student record at an educational institution funded wholly or partly by state revenue.**
>
> **(b) A record under Subsection (a) shall be made available on the request of:**
>
> > **(1) educational institution personnel;**
> >
> > **(2) the student involved or the student's parent, legal guardian, or spouse; or**
> >
> > **(3) a person conducting a child abuse investigation required by Subchapter D, Chapter 261, Family Code.**

Act should, before submitting "education records" to the attorney general, either obtain parental consent to the disclosure of personally identifiable nondirectory information in the records or edit the records to make sure that they contain no personally identifiable nondirectory information. However, subsequent correspondence from the United States Department of Education has advised that educational agencies and institutions may submit personally identifiable information subject to FERPA to the attorney general for purposes of obtaining rulings as to whether information contained therein must be withheld under FERPA or state law. *See* Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, United States Department of Education to David Anderson, Chief Counsel, Texas Education Agency (April 29, 1998) (on file with Open Records Division, Office of the Attorney General). Thus, should Texas educational institutions or agencies seek attorney general decisions under the Public Information Act regarding information subject to FERPA, information submitted in connection therewith under section 552.301(e)(1)(D) of the Act should be submitted in unredacted form, and parental consent need not be obtained.

[594] Open Records Decision No. 431 at 3 (1985).

The term "student record" in section 552.114 generally has been considered to be the equivalent of "education records" in FERPA. An educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.[595] Although FERPA and section 552.114 are similar, they are not coextensive.[596] For example, under section 552.114, unlike FERPA, a student's spouse has a right of access to the student's records. Thus, an educational institution that receives state funds but not federal funds would have to make student records available to a student's spouse. If an institution received both state and federal funds, the spouse would have no right of access because the federal law is paramount.[597]

The following decisions provide examples of the type of records that have been found to be "education records" for purposes of FERPA or "student records" for purposes of the statutory predecessor to section 552.114:

> Open Records Decision No. 539 (1990) — portions of a tape recording of an interview with a former university student athlete consisting of information about events that occurred while he was a student or while he was being recruited by the university;
>
> Open Records Decision No. 477 (1987) — names of former students whose degrees were rescinded because of events that took place while those persons were students;
>
> Open Records Decision No. 462 (1987) — information about student athletes prepared by a law firm acting as an agent for the university;
>
> Open Records Decision No. 332 (1982) — letters written by parents to school trustees regarding teacher's performance to the extent that they contain information "directly related to a student";
>
> Open Records Decision No. 224 (1979) — students' handwritten evaluations of a university faculty member in a case in which the handwriting, style of expression, and nature of comments would make identities easily traceable;

[595] Open Records Decision No. 634 (1995).

[596] Open Records Decision No. 524 at 3 (1989).

[597] *See* Open Records Decision No. 431 (1985).

Open Records Decision No. 214 (1978) — class paper prepared by a group of university students; and

Open Records Decision No. 120 (1976) — examination materials and evaluations of a Ph.D. candidate.

The following decisions address information found not to be subject to the confidentiality provisions of FERPA or section 552.114:

Open Records Decision No. 612 (1992) — records created by university campus police departments;

Open Records Decision No. 524 (1989) — records regarding a deceased student; and

Open Records Decision No. 132 (1976) — achievement test scores by grade and school that do not identify individual students.

Finally, it should be noted that under section 12.105(b) of the Education Code, as amended by House Bill 211,[598] open-enrollment charter schools are "governmental bodies" for purposes of the Public Information Act and subject to the Act's requirements relating to a school district, school board, or students.

O. Section 552.115: Birth and Death Records

House Bill 836 substantially amended the provisions of section 552.115[599] regarding birth and death records. The section as amended now reads:

(a) A birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from [required public disclosure], except that:

(1) a birth record is public information and available to the public on and after the 50th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official;

(2) a death record is public information and available to the public on and after the 25th anniversary of the date of death as shown on the record filed with the bureau of vital statistics or local registration official;

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[598] Act of May 30, 1999, 76th Leg., R.S., H.B. 211, § 1 (amending Educ. Code § 12.105(b)).

[599] Act of May 26, 1999, 76th Leg., R.S., H.B. 836, § 1 (codified at Gov't Code § 552.115).

> (3) a general birth index or a general death index established or maintained by the bureau of vital statistics or a local registration official is public information and available to the public to the extent the index relates to a birth record or death record that is public information and available to the public under Subdivision (1) or (2); and
>
> (4) a summary birth index or a summary death index prepared or maintained by the bureau of vital statistics or a local registration official is public information and available to the public.
>
> (b) Notwithstanding Subsection (a), a general birth index or a summary birth index is not public information and is not available to the public if:
>
> (1) the fact of an adoption or paternity determination can be revealed by the index; or
>
> (2) the index contains specific identifying information relating to the parents of a child who is the subject of an adoption placement.

Section 552.115 now specifically applies to birth and death records of a local registration official as well as to those of the Department of Health.[600] Until the time limits set out above have passed, a birth or death record may be obtained from the Bureau of Vital Statistics only in accordance with chapter 192 of the Health and Safety Code.[601] While birth records over 50 years old and death records over 25 years old are not excepted from disclosure under the Act, a local registrar of the Bureau of Vital Statistics[602] is required by title 3 of the Health and Safety Code and rules promulgated thereunder to **deny physical access** to these records and to provide copies of them for a certain fee.[603] These specific provisions prevail over the more general provisions in the Act regarding inspection and copying of public records.[604]

Provisions added by House Bill 836 to section 552.115 now specifically make public a summary birth index and summary death index, and also make public a general birth index or general death index to the extent that it relates to birth or death records which themselves would be public information under the section.[605] However, a general or summary birth index is not public information if it reveals the fact of an adoption or paternity determination or

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[600] Gov't Code § 552.115(a).

[601] *See generally* Open Records Decision No. 596 (1991) (regarding availability of adoption records).

[602] *See* Health & Safety Code § 191.022; *see also* Attorney General Opinion MW-163 (1980).

[603] *See* Attorney General Opinion DM-146 at 2 (1992).

[604] *Id.* at 5.

[605] Gov't Code § 552.115(a)(3), (4).

contains identifying information relating to the parents of a child who is the subject of an adoption placement.[606] There are no cases or opinions interpreting section 552.115 as amended.

P. Section 552.116: Audit Working Papers

Senate Bill 1851 substantially amended section 552.116.[607] Section 552.116 now reads:

> **(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.**
>
> **(b) In this section:**
>
> > **(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.**
> >
> > **(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:**
> >
> > > **(A) intra-agency and interagency communications; and**
> > >
> > > **(B) drafts of the audit report or portions of those drafts.**

To the extent that information in an audit working paper is also maintained in another record, such other record is not excepted by amended section 552.116, although such other record may be withheld from public disclosure under the Act's other exceptions.[608] A new subsection defines the term "audit" for purposes of the section as one authorized or required by a state or federal statute, and "audit working paper" as including all information prepared or maintained in conducting an audit or preparing an audit report including intra-agency or interagency communications and drafts of audit reports. There are no cases or opinions interpreting the section as amended.

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[606] *Id.* § 552.115(b).

[607] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 8 (codified at Gov't Code § 552.116).

[608] Gov't Code § 552.116(a).

Q. Section 552.117: Certain Addresses, Telephone Numbers, Social Security Numbers, and Personal Family Information

Section 552.117 of the Government Code excepts from required public disclosure

> **information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:**
>
> > **(1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;**
> >
> > **(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024;**
> >
> > **(3) an employee of the Texas Department of Criminal Justice, regardless of whether the employee complies with Section 552.024; or**
> >
> > **(4) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or other law, a reserve law enforcement officer, a commissioned deputy game warden, or a corrections officer in a municipal, county, or state penal institution in this state who was killed in the line of duty, regardless of whether the deceased complied with Section 552.024.**

Generally, a governmental body may not invoke section 552.117 as a basis for withholding an official's or an employee's home address and telephone number if another law, such as a state statute expressly authorizing child support enforcement officials to obtain information to locate absent parents, requires the release of such information.[609] Because the subsections of section 552.117 deal with different categories of officials and employees and differ in their application, they are discussed separately below.

[609] *See* Open Records Decision No. 516 at 3 (1989).

1. Subsection (1): Public Officials and Employees

Section 552.117, subsection (1), must be read together with section 552.024, which provides:

> **(a) Each employee or official of a governmental body and each former employee or official of a governmental body shall choose whether to allow public access to the information in the custody of the governmental body that relates to the person's home address, home telephone number, or social security number, or that reveals whether the person has family members.**
>
> **(b) Each employee and official and each former employee and official shall state that person's choice under Subsection (a) to the main personnel officer of the governmental body in a signed writing not later than the 14th day after the date on which:**
>
> > **(1) the employee begins employment with the governmental body;**
> >
> > **(2) the official is elected or appointed; or**
> >
> > **(3) the former employee or official ends service with the governmental body.**
>
> **(c) If the employee or official or former employee or official chooses not to allow public access to the information, the information is protected under Subchapter C.**
>
> **(d) If an employee or official or a former employee or official fails to state the person's choice within the period established by this section, the information is subject to public access.**
>
> **(e) An employee or official or former employee or official of a governmental body who wishes to close or open public access to the information may request in writing that the main personnel officer of the governmental body close or open access.**

The legislature enacted the statutory predecessors to these provisions in 1985 in response to open records decisions holding that public employees' home addresses and telephone numbers ordinarily are not protected under the privacy exceptions.[610]

Significant decisions of the attorney general in regard to these provisions include the following:

> Open Records Decision No. 622 (1994) — statutory predecessor to section 552.117(1) excepts employees' former home addresses and telephone numbers from required public disclosure;
>
> Open Records Decision No. 530 (1989) — addressing the time at which an employee may exercise the options under the statutory predecessor to section 552.024;
>
> Open Records Decision No. 506 (1988) — these provisions do not apply to telephone numbers of mobile telephones that are provided to employees by a governmental body for work purposes; and
>
> Open Records Decision No. 455 (1987) — statutory predecessor to section 552.117(1) continued to except an employee's home address and telephone number from required public disclosure after the employment relationship ends; it did not except, as a general rule, applicants' or other private citizens' home addresses and telephone numbers.

2. Subsections (2), (3), and (4): Peace Officers, Texas Department of Criminal Justice Employees, and Certain Other Law Enforcement Personnel

Senate Bill 1846 added subsection (4) to section 552.117.[611] Subsections (2) and (4), protect information pertaining to "peace officers" as defined by article 2.12 of the Code of Criminal Procedure. Subsection (2) also protects information relating to "campus security personnel" employed and commissioned by the governing bodies of private institutions of higher education pursuant to section 51.212 of the Education Code. Subsection (3) protects information relating to employees of the Texas Department of Criminal Justice. The new subsection (4) protects such information pertaining to peace officers and other enumerated law enforcement personnel, if they were killed in the line of duty.

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[610] *See* Open Records Decision Nos. 169 at 6 (1977), 123 at 2 (1976); *see also Calvert v. Employees Retirement Sys.*, 648 S.W.2d 418, 420-21 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (judicial retirees' names and addresses are not protected by right of privacy).

[611] Act of May 26, 1999, 76th Leg., R.S., S.B. 1846, § 1 (codified at Gov't Code § 552.117).

As noted above, to obtain the protection of section 552.117, subsection (1), public employees and officials must comply with the provisions of section 552.024. (A sample 552.024 election form can be found at Appendix D of this handbook.) No action is necessary, however, on the part of the personnel listed in subsections (2), (3), and (4).[612] Furthermore, while subsection (1) does not protect the home addresses, telephone numbers, social security numbers, and family information of applicants for public employment,[613] subsection (2) and the new subsection (4) protect this information about peace officers who apply for peace officer positions.[614]

R. Section 552.118: Triplicate Prescription Form

Section 552.118 of the Government Code excepts from required public disclosure

> **information on or derived from an official prescription form filed with the director of the Department of Public Safety under Section 481.075, Health and Safety Code.**

Under the Triplicate Prescription Program, health practitioners who prescribe certain controlled substances must provide forms containing information about the prescription, including the name, address, and age of the person for whom the controlled substance is prescribed.[615] The dispensing pharmacist is required to complete the form and provide a copy to the Department of Public Safety.[616] Section 481.076 of the Health and Safety Code provides that the department may release this information only to certain state investigators charged with investigating health professionals. Under section 552.118 of the Public Information Act, the copies of the forms filed with the department and any information derived from them are not subject to public disclosure.

S. Section 552.119: Photograph of Peace Officers or Certain Security Guards

Section 552.119(a) of the Government Code excepts from required public disclosure:

> **(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under**

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[612] Gov't Code § 552.117(2), (3), (4); *See* Open Records Decision No. 532 at 3 (1989).

[613] Open Records Decision No. 455 at 2 (1987).

[614] *See* Open Records Decision No. 532 at 6 (1989).

[615] Health & Safety Code § 481.075(e).

[616] *Id*. § 481.075(i)(3).

> **Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer . . . unless:**
>
> > **(1) the officer is under indictment or charged with an offense by information;**
> >
> > **(2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or**
> > **(3) the photograph is introduced as evidence in a judicial proceeding.**

Section 552.119(a) must be read in conjunction with section 552.119(b), which provides that a photograph protected by section 552.119(a) may be released "only if the peace officer or security officer gives written consent to the disclosure."

The attorney general has issued only two decisions construing section 552.119(a). The first, Open Records Decision No. 502 (1988), held that there need not be a threshold determination that release of a photograph would endanger an officer before the statutory predecessor to section 552.119(a) could be invoked. Furthermore, the exception would apply to all photographs of peace officers unless the circumstances in the subsections occur or the officer provides a written waiver. The second, Open Records Decision No. 536 (1989), concluded that the exception provided by the statutory predecessor to section 552.119 did not apply to photographs of officers who are no longer living. This opinion reasoned that the section was inapplicable because its purpose was to protect peace officers from life-threatening harassment and to insure that this protection would be effective by granting the discretionary authority to release the photograph only to the subject of the photograph. Protecting the photographs of deceased officers would not serve this purpose.

T. Section 552.120: Rare Books and Original Manuscripts

Section 552.120 of the Government Code excepts from required public disclosure:

> **A rare book or original manuscript that was not created or maintained in the conduct of official business of a governmental body and that is held by a private or public archival and manuscript repository for the purpose of historical research . . . .**

The attorney general has not yet issued an open records decision on this provision. A similar provision applicable to state institutions of higher education is found in the Education Code:

> **Rare books, original manuscripts, personal papers, unpublished letters, and audio and video tapes held by an institution of higher education for the purposes of historical research are confidential, and the institution may restrict access by the public to those materials to protect the actual or potential value of the materials and the privacy of the donors**.[617]

U. Section 552.121: Certain Documents Held for Historical Research

Section 552.121 of the Government Code excepts from required public disclosure:

> **An oral history interview, personal paper, unpublished letter, or organizational record of a nongovernmental entity that was not created or maintained in the conduct of official business of a governmental body and that is held by a private or public archival and manuscript repository for the purpose of historical research . . . to the extent that the archival and manuscript repository and the donor of the interview, paper, letter, or record agree to limit disclosure of the item.**

The attorney general has not yet issued an open records decision on this provision. The Education Code sets out a similar provision applicable to institutions of higher education. It states as follows:

> **An oral interview that is obtained for historical purposes by an agreement of confidentiality between an interviewee and a state institution of higher education is not public information. The interview becomes public information when the conditions of the agreement of confidentiality have been met.[618]**

An attorney general opinion requested by a committee of the legislature which enacted section 51.910(a) states that the Public Information Act prevents an institution of higher education from agreeing to keep oral history information confidential unless the institution has specific authority under law to make such agreements.[619]

V. Section 552.122: Test Items

Section 552.122 of the Government Code excepts the following from required public disclosure:

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[617] Educ. Code § 51.910(b).

[618] *Id.* § 51.910(a).

[619] Attorney General Opinion JM-37 at 2 (1983).

> **(a) A test item developed by an educational institution that is funded wholly or in part by state revenue . . . [; and]**
>
> **(b) A test item developed by a licensing agency or governmental body . . . .**

The attorney general considered the scope of the phrase "test items" in Open Records Decision No. 626 (1994). That decision considered whether employee evaluations and records used for determining promotions were "test items" under section 552.122(b). "Test item" was defined as "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated."[620] The opinion held that in this instance the evaluations of the applicant for promotion and the answers to questions asked of the applicant by the promotion board in evaluating the applicant were not "test items" and that such a determination under section 552.122 had to be made on a case-by-case basis.[621]

W. Section 552.123: Names of Applicants for Chief Executive Officer of Institutions of Higher Education

Section 552.123 of the Government Code excepts from required public disclosure:

> **The name of an applicant for the position of chief executive officer of an institution of higher education . . . , except that the governing body of the institution must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the person.**

Section 552.123 permits the withholding of any identifying information about candidates, not just their names.[622] Before the addition of the statutory predecessor to section 552.123, the names of all persons being considered for public positions were available under the Public Information Act.[623] The addition of this section changed the law only in respect to applicants for the position of university president.[624] The exception protects the identity of all applicants for the position of university president, whether they apply on their own initiative or they are nominated.[625]

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[620] Open Records Decision No. 626 at 6 (1994).

[621] *Id*. at 6-8.

[622] Open Records Decision No. 540 (1990) (construing statutory predecessor to section 552.123).

[623] *See Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 557 (Tex. App.—Austin 1983, writ ref'd n.r.e.); Open Records Decision No. 439 at 2 (1986).

[624] *See* Open Records Decision No. 585 (1991) (availability of names of applicants for position of city manager).

[625] *See* Open Records Decision No. 540 at 5 (1990).

X. Section 552.124: Records of Library or Library System

Section 552.124 excepts from required public disclosure:

> **(a) A record of a library or library system, supported in whole or in part by public funds, that identifies or serves to identify a person who requested, obtained, or used a library material or service . . . unless the record is disclosed:**
>
> > **(1) because the library or library system determines that disclosure is reasonably necessary for the operation of the library or library system, and the record is not confidential under other state or federal law;**
> >
> > **(2) under Section 552.023; or**
> >
> > **(3) to a law enforcement agency or a prosecutor under a court order or subpoena obtained after a showing to a district court that:**
> >
> > > **(A) disclosure of the record is necessary to protect the public safety; or**
> > >
> > > **(B) the record is evidence of an offense or constitutes evidence that a particular person committed an offense.**
>
> **(b) A record of a library or library system that is excepted from required public disclosure under this section is confidential.**

There are no cases or opinions interpreting this exception. The legislative history suggests that the purpose of this section is to codify, clarify, and extend a prior decision of the attorney general.[626] This section protects the identity of the individual library user while allowing law-enforcement officials access to such information by court order or subpoena. An individual has a special right of access under section 552.023 to library records that relate to that individual.

[626] *See* Senate Comm. on State Affairs, Bill Analysis, S.B. 360, 73rd Leg. (1993); Open Records Decision No. 100 (1975) (concluding that identity of library user in connection with library materials he or she has reviewed was protected from public disclosure under statutory predecessor to section 552.101).

Y. Section 552.125: Certain Audits

Section 552.125 provides:

> **[a]ny documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act are excepted from the requirements of Section 552.021.**

There are no cases or formal opinions interpreting this exception. An informal ruling, Open Records Letter No. 98-3149 (1998), applied section 552.125 in conjunction with the Texas Environmental, Health, and Safety Audit Privilege Act, article 4447cc of Vernon's Texas Civil Statutes.

Z. Section 552.126: Name of Applicant for Superintendent of Public School District

Section 552.126 provides that:

> **The name of an applicant for the position of superintendent of a public school district is excepted from the requirements of Section 552.021, except that the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which a final action or vote is to be taken on the employment of the person.**

There are no cases or formal opinions interpreting this exception.

AA. Section 552.127: Personal Information Relating to Participants in Neighborhood Crime Watch Organization

Section 552.127 provides as follows:

> **(a) Information is excepted from [required public disclosure] if the information identifies a person as a participant in a neighborhood crime watch organization and relates to the name, home address, business address, home telephone number, or business telephone number of the person.**
>
> **(b) In this section, "neighborhood crime watch organization" means a group of residents of a neighborhood or part of a neighborhood that is formed in affiliation or association with a law enforcement agency**

in this state to observe activities within the neighborhood or part of a neighborhood and to take other actions intended to reduce crime in that area.

This section was added to the Public Information Act by the Seventy-fifth Legislature.[627] There are no cases or formal opinions interpreting this exception.

BB. Section 552.128: Certain Information Submitted by Potential Vendor or Contractor

Section 552.128 provides as follows:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from [required public disclosure], except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that

[627] Act of May 26, 1997, 75th Leg., R.S., ch. 719, § 1, 1997 Tex. Gen. Laws 2376.

> **may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.**

This section was renumbered as section 552.128 by Senate Bill 1368.[628] There are no cases or formal opinions interpreting this exception. However, the attorney general has determined that the exception does not apply to documents created by the governmental body rather than submitted by the potential vendor or contractor.[629] Additionally, the exception may cover orally submitted information of an applicant.[630] Subsection (c) of the exception does not make confidential a potential contractor's bid proposals, but states that bidding information is subject to public disclosure unless made confidential by the law.[631]

CC. Section 552.129: Motor Vehicle Inspection Information

Section 552.129 provides as follows:

> **A record created during a motor vehicle emissions inspection under Subchapter F, Chapter 548, Transportation Code, that relates to an individual vehicle or owner of an individual vehicle is excepted from [required public disclosure].**

This section was renumbered by Senate Bill 1368.[632] There are no cases or formal opinions interpreting this exception.

DD. Section 552.130: Motor Vehicle Records

Section 552.130 provides as follows:

> **(a) Information is excepted from [required public disclosure] if the information relates to:**
>
> > **(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;**
> > **(2) a motor vehicle title or registration issued by an agency of this state; or**

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[628] Act of April 23, 1999, 76th Leg., R.S., S.B. 1368, § 19.01 (codified at Gov't Code § 552.128).

[629] Open Records Letter Nos. 99-0565 (1999), 98-0782 (1998).

[630] Open Records Letter Nos. 99-0979 (1999), 99-0922 (1999).

[631] Open Records Letter No. 99-1511 (1999).

[632] *Id*. (codified at Gov't Code § 552.129).

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

This section was added to the Public Information Act by the Seventy-fifth Legislature.[633] The Seventy-fifth Legislature also amended section 552.222 of the Government Code by adding subsection (c).[634] Subsection (c) permits the officer for public information or the officer's agent to require the requestor to provide additional identifying information sufficient for the officer or the officer's agent to determine whether the requestor is eligible to receive the information under chapter 730 of the Transportation Code. There are no cases or formal opinions interpreting this exception.

EE. Section 552.131: School District Informers

The Seventy-sixth Legislature added four new exceptions to the Act as section 552.131. Section 552.131 as added by House Bill 211 provides as follows**:**

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from the requirements of Section 552.021.

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

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[633] Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 4, 1997 Tex. Gen. Laws 4575, 4580.

[634] *Id*., § 5, 1997 Tex. Gen. Laws 4575, 4580.

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.[635]

Unlike the informer's privilege aspect of section 552.101, this new exception for school district informers may apply in situations in which noncriminal activity is reported. (See page 76 for a discussion of the informer's privilege under section 552.101.) There are no cases or opinions interpreting this exception.

FF. Section 552.131: Certain Information Relating to Inmate of Department of Criminal Justice

Section 552.131 as added by House Bill 1379[636] should be read with two other new provisions concerning the required public disclosure of Department of Criminal Justice information, sections 552.029 and 508.313 of the Government Code. Sections 552.131 and 508.313 make certain information confidential. On the other hand, section 552.029 provides for required public access to certain specified information, notwithstanding sections 552.131 and 508.313. Section 552.029, which specifies information about inmates the Department of Criminal Justice must release, reads as follows:

Notwithstanding Section 508.313 or 552.131, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

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[635] Act of May 30, 1999, 76th Leg., R.S., H.B. 211, § 6 (codified at Gov't Code § 552.131).

[636] Act of May 26, 1999, 76th Leg., R.S., H.B. 1379, § 1 (to be codified at Gov't Code § 552.131).

(1) the inmate's name, identification number, age, birthplace, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate;

(2) the inmate's assigned unit or the date on which the unit received the inmate, unless disclosure of the information would violate federal law relating to the confidentiality of substance abuse treatment;

(3) the offense for which the inmate was convicted or the judgment and sentence for that offense;

(4) the county and court in which the inmate was convicted;

(5) the inmate's earliest or latest possible release dates;

(6) the inmate's parole date or earliest possible parole date;

(7) any prior confinement of the inmate by the Texas Department of Criminal Justice or its predecessor; or

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.[637]

Section 552.131 as added by House Bill 1379[638] reads as follows:

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

(b) Subsection (a) does not apply to:

(1) statistical or other aggregated information relating to inmates confined in one or more facilities operated by or under a contract with the department; or

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[637] Act of May 26, 1999, 76th Leg., R.S., H.B. 1379, § 2 (codified at Gov't Code § 552.029).

[638] *Id.*, § 1 (to be codified at Gov't Code § 552.131).

(2) information about an inmate sentenced to death.

(c) This section does not affect whether information is considered confidential or privileged under Section 508.313.

(d) A release of information described by Subsection (a) to an eligible entity, as defined by Section 508.313(d), for a purpose related to law enforcement, prosecution, corrections, clemency, or treatment is not considered a release of information to the public for purposes of Section 552.007 and does not waive the right to assert in the future that the information is excepted from required disclosure under this section or other law.

Section 508.313 of the Government Code generally makes confidential all information the Texas Department of Criminal Justice obtains and maintains about certain classes of inmates, including an inmate of the institutional division subject to release on parole, release to mandatory supervision, or executive clemency. Section 508.313 also applies to information about a releasee and a person directly identified in any proposed plan of release for an inmate. Section 508.313 permits the release of the information it covers to the Governor, a member of the Board of Pardons and Paroles, the Criminal Justice Policy Council or an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.[639] Section 508.313 does not apply to information that is subject to required public disclosure under section 552.029.[640] There are no cases or opinions interpreting section 552.131 or 552.029.

GG. Section 552.131: Public Power Utility Information Related to Competitive Matters

Section 552.131 as added by Senate Bill 7[641] reads as follows:

(a) In this section:

(1) "Public power utility" means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

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[639] Gov't Code § 508.313(c).

[640] *Id*. § 508.313(f). Act of May 26, 1999, 76th Leg., R.S., H.B. 1379, § 3 (codified at Gov't Code § 508.313).

[641] Act of May 27, 1999, 76th Leg., R.S., S.B. 7, § 46 (codified at Gov't Code § 552.131).

(2) "Public power utility governing body" means the board of trustees or other applicable governing body, including a city council, of a public power utility.

(3) "Competitive matter" means a utility-related matter that the public power utility governing body in good faith determines by a vote under this section is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors but may not be deemed to include the following categories of information:

> **(A) information relating to the provision of distribution access service, including the terms and conditions of the service and the rates charged for the service but not including information concerning utility-related services or products that are competitive;**
>
> **(B) information relating to the provision of transmission service that is required to be filed with the Public Utility Commission of Texas, subject to any confidentiality provided for under the rules of the commission;**
>
> **(C) information for the distribution system pertaining to reliability and continuity of service, to the extent not security-sensitive, that relates to emergency management, identification of critical loads such as hospitals and police, records of interruption, and distribution feeder standards;**
>
> **(D) any substantive rule of general applicability regarding service offerings, service regulation, customer protections, or customer service adopted by the public power utility as authorized by law;**
>
> **(E) aggregate information reflecting receipts or expenditures of funds of the public power utility, of the type that would be included in audited financial statements;**

(F) information relating to equal employment opportunities for minority groups, as filed with local, state, or federal agencies;

(G) information relating to the public power utility's performance in contracting with minority business entities;

(H) information relating to nuclear decommissioning trust agreements, of the type required to be included in audited financial statements;

(I) information relating to the amount and timing of any transfer to an owning city's general fund;

(J) information relating to environmental compliance as required to be filed with any local, state, or national environmental authority, subject to any confidentiality provided under the rules of those authorities;

(K) names of public officers of the public power utility and the voting records of those officers for all matters other than those within the scope of a competitive resolution provided for by this section;

(L) a description of the public power utility's central and field organization, including the established places at which the public may obtain information, submit information and requests, or obtain decisions and the identification of employees from whom the public may obtain information, submit information or requests, or obtain decisions; or

(M) information identifying the general course and method by which the public power utility's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures.

(b) Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility

governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally ownedutility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

(c) In connection with any request for an opinion of the attorney general under Section 552.301 with respect to information alleged to fall under this exception, in rendering a written opinion under Section 552.306 the attorney general shall find the requested information to be outside the scope of this exception only if the attorney general determines, based on the information provided in connection with the request:

(1) that the public power utility governing body has failed to act in good faith in making the determination that the issue, matter, or activity in question is a competitive matter; or

(2) that the information or records sought to be withheld are not reasonably related to a competitive matter.

Section 552.131 excepts from disclosure a public power utility's information related to a competitive matter. The exception defines "competitive matter" as a matter the public power utility governing body in good faith determines by vote to be related to the public power utility's competitive activity. The governing body must also, in like manner, determine that the release of the information would give an advantage to competitors or prospective competitors. Similarly, section 552.104 of the Government Code protects from public disclosure information that if released would possibly cause harm to a governmental body's marketplace interests. (For a discussion of section 552.104, refer to page 85 of this handbook.) Section 552.131 lists thirteen categories of information that may not be deemed competitive matters. The attorney general must find section 552.131 is inapplicable to requested information only if, based on the information provided, the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or if the attorney general determines that the information requested is not reasonably related to a competitive matter. There are no cases or opinions interpreting this provision.

HH. Section 552.131: Information Relating to Economic Development Negotiations

Section 552.131 as added by Senate Bill 1851[642] reads as follows:

> **(a) Information is excepted from the requirements of Section 552.021 if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:**
>
> > **(1) a trade secret of the business prospect; or**
> >
> > **(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.**
>
> **(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from the requirements of Section 552.021.**
>
> **(c) After an agreement is made with the business prospect, this section does not except from the requirements of Section 552.021 information about a financial or other incentive being offered to the business prospect:**
>
> > **(1) by the governmental body; or**
> >
> > **(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.**

While section 552.131 applies to the same two kinds of information excepted from disclosure under section 552.110, trade secrets or commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained, unlike section 552.110, section 552.131 only applies to information that relates to economic

[642] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 9 (codified at Gov't Code § 552.131).

development negotiations between a governmental body and a business prospect. In addition, unlike section 552.110, the duration of section 552.131 is, in part, temporal. After the governmental body reaches an agreement with the business prospect, information about a financial or other incentive offered the business prospect is no longer excepted under section 552.131. There are no cases or opinions interpreting this exception.

II. Section 552.132: Crime Victim Compensation Information

Section 552.132 provides as follows:

(a) In this section, "crime victim" means a victim under Subchapter B, Chapter 56, Code of Criminal Procedure, who has filed an application for compensation under that subchapter.

(b) A crime victim may elect whether to allow public access to information held by the crime victim's compensation division of the attorney general's office that relates to:

(1) the name, social security number, address, or telephone number of the crime victim; or

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

(c) An election under Subsection (b) must be:

(1) made in writing on a form developed by the attorney general for that purpose and signed by the crime victim; and

(2) filed with the crime victims' compensation division before the third anniversary of the date that the crime victim filed the application for compensation.

(d) If the crime victim elects not to allow public access to the information, the information is excepted from the requirements of Section 552.021. If the crime victim does not make an election under Subsection (b) or elects to allow public access to the information, the information is not excepted from the requirements of Section 552.021 unless the information is made confidential or excepted from those requirements by another law.

(e) If the crime victim is awarded compensation under Section 56.34, Code of Criminal Procedure, as of the date of the award of compensation, the name of the crime victim and the amount of compensation awarded to that victim are public information and are not excepted from the requirements of Section 552.021.

This section was added to the Act by the Seventy-sixth Legislature.[643] There are no cases or opinions interpreting this exception. If you are or have been a crime victims' compensation applicant and wish to make the election provided by this section, you should contact:

Office of the Attorney General
Crime Victims' Compensation Division
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1200

[643] Act of May 25, 1999, 76th Leg., R.S., S.B. 1851, § 10 (codified at Gov't Code § 552.132).

PART THREE: Text of the Texas Public Information Act

Government Code Chapter 552. Public Information

SUBCHAPTER A. GENERAL PROVISIONS

§ 552.001. Policy; Construction

(a) Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.

(b) This chapter shall be liberally construed in favor of granting a request for information.

§ 552.002. Definition of Public Information; Media Containing Public Information

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

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

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

(1) paper;

(2) film;

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

(4) tape;

(5) Mylar;

(6) linen;

(7) silk; and

(8) vellum.

(c) The general forms in which the media containing public information exist include a book, paper, letter, document, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map and drawing and a voice, data, or video representation held in computer memory.

§ 552.003. Definitions

In this chapter:

(1) "Governmental body":

(A) means:

(i) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;

(ii) a county commissioners court in the state;

(iii) a municipal governing body in the state;

(iv) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;

(v) a school district board of trustees;

(vi) a county board of school trustees;

(vii) a county board of education;

(viii) the governing board of a special district;

(ix) the governing body of a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code; and

(x) the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds; and

(B) does not include the judiciary.

(2) "Manipulation" means the process of modifying, reordering, or decoding of information with human intervention.

(3) "Processing" means the execution of a sequence of coded instructions by a computer producing a result.

(4) "Programming" means the process of producing a sequence of coded instructions that can be executed by a computer.

(5) "Public funds" means funds of the state or of a governmental subdivision of the state.

(6) "Requestor" means a person who submits a request to a governmental body for inspection or copies of public information.

§ 552.0035. Certain Property Owners' Associations Subject to Law

A property owners' association is subject to this chapter in the same manner as a governmental body if:

(1) membership in the property owners' association is mandatory for owners or for a defined class of owners of private real property in a defined geographic area in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more;

(2) the property owners' association has the power to make mandatory special assessments for capital improvements or mandatory regular assessments; and

(3) the amount of the mandatory special or regular assessments is or has ever been based in whole or in part on the value at which the state or a local governmental body assesses the property for purposes of ad valorem taxation under Section 20, Article VIII, Texas Constitution.

§ 552.0035. Access to Information of Judiciary

(a) Access to information collected, assembled, or maintained by or for the judiciary is governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules.

(b) This section does not address whether information is considered to be information collected, assembled, or maintained by or for the judiciary.

§ 552.004. Preservation of Information

A governmental body or, for information of an elective county office, the elected county officer, may determine a time for which information that is not currently in use will be preserved, subject to any applicable rule or law governing the destruction and other disposition of state and local government records or public information.

§ 552.005. Effect of Chapter on Scope of Civil Discovery

(a) This chapter does not affect the scope of civil discovery under the Texas Rules of Civil Procedure.

(b) Exceptions from disclosure under this chapter do not create new privileges from discovery.

§ 552.0055. Subpoena Duces Tecum or Discovery Request

A subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter.

§ 552.006. Effect of Chapter on Withholding Public Information

This chapter does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided by this chapter.

§ 552.007. Voluntary Disclosure of Certain Information When Disclosure Not Required

(a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

(b) Public information made available under Subsection (a) must be made available to any person.

§ 552.008. Information for Legislative Purposes

(a) This chapter does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

(1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;

(2) the information be labeled as confidential;

(3) the information be kept securely; or

(4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

(c) This section does not affect:

(1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;

(2) the procedures under which the information is obtained under other law; or

(3) the use that may be made of the information obtained under other law.

§ 552.009. Open Records Steering Committee: Advice to Commission; Electronic Availability of Public Information

(a) The open records steering committee is composed of:

(1) a representative of each of the following, appointed by its governing entity:

(A) the attorney general's office;

(B) the comptroller's office;

(C) the Department of Public Safety;

(D) the Department of Information Resources;

(E) the Texas State Library and Archives Commission; and

(F) the General Services Commission;

(2) five public members, appointed by the General Services Commission; and

(3) a representative of each of the following types of local governments, appointed by the General Services Commission:

(A) a municipality;

(B) a county; and

(C) a school district.

(b) The representative of the General Services Commission is the presiding officer of the committee. The committee shall meet as prescribed by committee procedures or at the call

of the presiding officer.
(c) The committee shall advise the General Services Commission regarding the commission's performance of its duties under this chapter.

(d) The members of the committee who represent state governmental bodies and the public members of the committee shall periodically study and determine the types of public information for which it would be useful to the public or cost-effective for the government if the type of information were made available by state governmental bodies by means of the Internet or another electronic format. The committee shall report its findings and recommendations to the governor, the presiding officer of each house of the legislature, and the budget committee and state affairs committee of each house of the legislature.

(e) Chapter 2110 does not apply to the size, composition, or duration of the committee. Chapter 2110 applies to the reimbursement of a public member's expenses related to service on the committee. Any reimbursement of the expenses of a member who represents a state or local governmental body may be paid only from funds available to the state or local governmental body the member represents.

§ 552.010. State Governmental Bodies: Fiscal and Other Information Relating to Making Information Accessible

(a) Each state governmental body shall report to the Legislative Budget Board the information the board requires regarding:

(1) the number and nature of requests for information the state governmental body processes under this chapter in the period covered by the report; and

(2) the cost to the state governmental body in that period in terms of capital expenditures and personnel time of:

(A) responding to requests for information under this chapter; and

(B) making information available to the public by means of the Internet or another electronic format.

(b) The Legislative Budget Board shall design and phase in the reporting requirements in a way that:

(1) minimizes the reporting burden on state governmental bodies; and

(2) allows the legislature and state governmental bodies to estimate the extent to which it is cost-effective for state government, and if possible the extent to which it is

cost-effective or useful for members of the public, to make information available to the public by means of the Internet or another electronic format as a supplement or alternative to publicizing the information only in other ways or making the information available only in response to requests made under this chapter.

(c) The open records steering committee and the state auditor, at the request of the Legislative Budget Board, shall assist the board in designing its reporting requirements under this section. The board shall share the information reported under this section with the open records steering committee.

§ 552.011. Uniformity

The attorney general shall maintain uniformity in the application, operation, and interpretation of this chapter. To perform this duty, the attorney general may prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on this chapter.

SUBCHAPTER B. RIGHT OF ACCESS TO PUBLIC INFORMATION

§ 552.021. Availability of Public Information

Public information is available to the public at a minimum during the normal business hours of the governmental body.

§ 552.022. Categories of Public Information; Examples

(a) Without limiting the amount or kind of information 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 law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

(4) the name of each official and the final record of voting on all proceedings in a governmental body;

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

(6) the name, place of business, and the name of the municipality to which local sales and use taxes are credited, if any, for the named person, of a person reporting or paying sales and use taxes under Chapter 151, Tax Code;

(7) a description of an agency's central and field organizations, including:

(A) the established places at which the public may obtain information, submit information or requests, or obtain decisions;

(B) the employees from whom the public may obtain information, submit information or requests, or obtain decisions;

(C) in the case of a uniformed service, the members from whom the public may obtain information, submit information or requests, or obtain decisions; and

(D) the methods by which the public may obtain information, submit information or requests, or obtain decisions;

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;

(9) a rule of procedure, a description of forms available or the places at which forms may be obtained, and instructions relating to the scope and content of all papers, reports, or examinations;

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

(11) each amendment, revision, or repeal of information described by Subdivisions (7)-(10);

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases;

(13) a policy statement or interpretation that has been adopted or issued by an agency;

(14) administrative staff manuals and instructions to staff that affect a member of the public;

(15) information regarded as open to the public under an agency's policies;

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege;

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

(b) A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of public information for inspection or duplication, unless the category of information is expressly made confidential under other law.

§ 552.023. Special Right of Access to Confidential Information

(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests.

(b) A governmental body may not deny access to information to the person, or the person's representative, to whom the information relates on the grounds that the information is considered confidential by privacy principles under this chapter but may assert as grounds for denial of access other provisions of this chapter or other law that are not intended to protect the person's privacy interests.

(c) A release of information under Subsections (a) and (b) is not an offense under Section 552.352.

(d) A person who receives information under this section may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

(e) Access to information under this section shall be provided in the manner prescribed by Sections 552.229 and 552.307.

§ 552.024. Electing to Disclose Address and Telephone Number

(a) Each employee or official of a governmental body and each former employee or official of a governmental body shall choose whether to allow public access to the information in the custody of the governmental body that relates to the person's home address, home telephone number, or social security number, or that reveals whether the person has family members.

(b) Each employee and official and each former employee and official shall state that person's choice under Subsection (a) to the main personnel officer of the governmental body in a signed writing not later than the 14th day after the date on which:

(1) the employee begins employment with the governmental body;

(2) the official is elected or appointed; or

(3) the former employee or official ends service with the governmental body.

(c) If the employee or official or former employee or official chooses not to allow public access to the information, the information is protected under Subchapter C.

(d) If an employee or official or a former employee or official fails to state the person's choice within the period established by this section, the information is subject to public access.

(e) An employee or official or former employee or official of a governmental body who wishes to close or open public access to the information may request in writing that the main personnel officer of the governmental body close or open access.

§ 552.025. Tax Rulings and Opinions

(a) A governmental body with taxing authority that issues a written determination letter, technical advice memorandum, or ruling that concerns a tax matter shall index the letter, memorandum, or ruling by subject matter.

(b) On request, the governmental body shall make the index prepared under Subsection (a) and the document itself available to the public, subject to the provisions of this chapter.

(c) Subchapter C does not authorize withholding from the public or limiting the availability to the public of a written determination letter, technical advice memorandum, or ruling that concerns a tax matter and that is issued by a governmental body with taxing authority.

§ 552.026. Education Records

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

§ 552.027. Exception: Information Available Commercially; Resource Material

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

§552.028. Request for Information From Incarcerated Individual

(a) A governmental body is not required to accept or comply with a request for information from:

(1) an individual who is imprisoned or confined in a correctional facility; or

(2) an agent of that individual, other than that individual's attorney when the attorney is requesting information that is subject to disclosure under this chapter.

(b) This section does not prohibit a governmental body from disclosing to an individual described by Subsection (a)(1), or that individual's agent, information held by the governmental body pertaining to that individual.

(c) In this section, "correctional facility" has the meaning assigned by Section 1.07(a), Penal Code.

§ 552.029. Right of Access to Certain Information Relating to Inmate of Department of Criminal Justice

Notwithstanding Section 508.313 or 552.131, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

(1) the inmate's name, identification number, age, birthplace, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate;

(2) the inmate's assigned unit or the date on which the unit received the inmate, unless disclosure of the information would violate federal law relating to the confidentiality of substance abuse treatment;

(3) the offense for which the inmate was convicted or the judgment and sentence for that offense;

(4) the county and court in which the inmate was convicted;

(5) the inmate's earliest or latest possible release dates;

(6) the inmate's parole date or earliest possible parole date;

(7) any prior confinement of the inmate by the Texas Department of Criminal Justice or its predecessor; or

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

SUBCHAPTER C. INFORMATION EXCEPTED FROM REQUIRED DISCLOSURE

§ 552.101. Exception: Confidential Information

Information is excepted from the requirements of Section 552.021 if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

§ 552.102. Exception: Personnel Information

(a) Information is excepted from the requirements of Section 552.021 if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter. The exception to public disclosure created by this subsection is in addition to any exception created by Section 552.024. Public access to personnel information covered by Section 552.024 is denied to the extent provided by that section.

(b) Information is excepted from the requirements of Section 552.021 if it is a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

§ 552.103. Exception: Litigation or Settlement Negotiations Involving the State or a Political Subdivision

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

§ 552.104. Exception: Information Related to Competition or Bidding

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

§ 552.105. Exception: Information Related to Location or Price of Property

Information is excepted from the requirements of Section 552.021 if it is information relating to:

(1) the location of real or personal property for a public purpose prior to public announcement of the project; or

(2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

§ 552.106. Exception: Certain Legislative Documents

(a) A draft or working paper involved in the preparation of proposed legislation is excepted from the requirements of Section 552.021.

(b) An internal bill analysis or working paper prepared by the governor's office for the purpose of evaluating proposed legislation is excepted from the requirements of Section 552.021.

§ 552.107. Exception: Certain Legal Matters

Information is excepted from the requirements of Section 552.021 if:

(1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct; or

(2) a court by order has prohibited disclosure of the information.

§ 552.108. Exception: Certain Law Enforcement and Prosecutorial Information

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(c) This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime.

§ 552.109. Exception: Certain Private Communications of an Elected Office Holder

Private correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy are excepted from the requirements of Section 552.021.

§ 552.110. Exception: Trade Secrets; Certain Commercial or Financial Information

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

§ 552.111. Exception: Agency Memoranda

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from the requirements of Section 552.021.

§ 552.112. Exception: Certain Information Relating to Regulation of Financial Institutions or Securities

(a) Information is excepted from the requirements of Section 552.021 if it is information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.

(b) In this section, "securities" has the meaning assigned by The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes).

§ 552.113. Exception: Geological or Geophysical Information

(a) Information is excepted from the requirements of Section 552.021 if it is:

(1) an electric log confidential under Subchapter M, Chapter 91, Natural Resources Code;

(2) geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency; or

(3) confidential under Subsections (c) through (f).

(b) Information that is shown to or examined by an employee of the General Land Office, but not retained in the land office, is not considered to be filed with the land office.

(c) In this section:

(1) "Confidential material" includes all well logs, geological, geophysical, geochemical, and other similar data, including maps and other interpretations of the material filed in the General Land Office:

(A) in connection with any administrative application or proceeding before the land commissioner, the school land board, any board for lease, or the commissioner's or board's staff; or

(B) in compliance with the requirements of any law, rule, lease, or agreement.

(2) "Basic electric logs" has the same meaning as it has in Chapter 91, Natural Resources Code.

(3) "Administrative applications" and "administrative proceedings" include applications for pooling or unitization, review of shut-in royalty payments, review of leases or other agreements to determine their validity, review of any plan of operations, review of the obligation to drill offset wells, or an application to pay compensatory royalty.

(d) Confidential material, except basic electric logs, filed in the General Land Office on or after September 1, 1985, is public information and is available to the public under Section 552.021 on and after the later of:

(1) five years from the filing date of the confidential material; or

(2) one year from the expiration, termination, or forfeiture of the lease in connection with which the confidential material was filed.

(e) Basic electric logs filed in the General Land Office on or after September 1, 1985, are either public information or confidential material to the same extent and for the same periods provided for the same logs by Chapter 91, Natural Resources Code. A person may request that a basic electric log that has been filed in the General Land Office be made confidential by filing with the land office a copy of the written request for confidentiality made to the Railroad Commission of Texas for the same log.

(f) The following are public information:

(1) basic electric logs filed in the General Land Office before September 1, 1985; and

(2) confidential material, except basic electric logs, filed in the General Land Office before September 1, 1985, provided, that Subsection (d) governs the disclosure of that confidential material filed in connection with a lease that is a valid and subsisting lease on September 1, 1995.

(g) Confidential material may be disclosed at any time if the person filing the material, or the person's successor in interest in the lease in connection with which the confidential material was filed, consents in writing to its release. A party consenting to the disclosure of confidential material may restrict the manner of disclosure and the person or persons to whom the disclosure may be made.

(h) Notwithstanding the confidential nature of the material described in this section, the material may be used by the General Land Office in the enforcement, by administrative proceeding or litigation, of the laws governing the sale and lease of public lands and minerals, the regulations of the land office, the school land board, or of any board for lease, or the terms of any lease, pooling or unitization agreement, or any other agreement or grant.

(i) An administrative hearings officer may order that confidential material introduced in an administrative proceeding remain confidential until the proceeding is finally concluded, or for the period provided in Subsection (d), whichever is later.

(j) Confidential material examined by an administrative hearings officer during the course of an administrative proceeding for the purpose of determining its admissibility as evidence shall not be considered to have been filed in the General Land Office to the extent that the confidential material is not introduced into evidence at the proceeding.

(k) This section does not prevent a person from asserting that any confidential material is exempt from disclosure as a trade secret or commercial information under Section 552.110 or under any other basis permitted by law.

§ 552.114. Exception: Student Records

(a) Information is excepted from the requirements of Section 552.021 if it is information in a student record at an educational institution funded wholly or partly by state revenue.

(b) A record under Subsection (a) shall be made available on the request of:

(1) educational institution personnel;

(2) the student involved or the student's parent, legal guardian, or spouse; or

(3) a person conducting a child abuse investigation required by Subchapter D, Chapter 261, Family Code.

§ 552.115. Exception: Birth and Death Records

(a) A birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021, except that:

(1) a birth record is public information and available to the public on and after the 50th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official;

(2) a death record is public information and available to the public on and after the 25th anniversary of the date of death as shown on the record filed with the bureau of vital statistics or local registration official;

(3) a general birth index or a general death index established or maintained by the bureau of vital statistics or a local registration official is public information and available to the public to the extent the index relates to a birth record or death record that is public information and available to the public under Subdivision (1) or (2); and

(4) a summary birth index or a summary death index prepared or maintained by the bureau of vital statistics or a local registration official is public information and available to the public.

(b) Notwithstanding Subsection (a), a general birth index or a summary birth index is not public information and is not available to the public if:

(1) the fact of an adoption or paternity determination can be revealed by the index; or

(2) the index contains specific identifying information relating to the parents of a child who is the subject of an adoption placement.

§ 552.116. Exception: Audit Working Papers

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

§ 552.117. Exception: Certain Addresses, Telephone Numbers, Social Security Numbers, and Personal Family Information

Information is excepted from the requirements of Section 552.021 if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

(1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024;

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024;

(3) an employee of the Texas Department of Criminal Justice, regardless of whether the employee complies with Section 552.024; or

(4) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or other law, a reserve law enforcement officer, a commissioned deputy game warden, or a corrections officer in a municipal, county, or state penal institution in this state who was killed in the line of duty, regardless of whether the deceased complied with Section 552.024.

§ 552.118. Exception: Triplicate Prescription Form

Information is excepted from the requirements of Section 552.021 if it is information on or derived from an official prescription form filed with the director of the Department of Public Safety under Section 481.075, Health and Safety Code.

§ 552.119. Exception: Photograph of Peace Officer or Certain Security Guards

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from the requirements of Section 552.021 unless:

(1) the officer is under indictment or charged with an offense by information;

(2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

§ 552.120. Exception: Certain Rare Books and Original Manuscripts

A rare book or original manuscript that was not created or maintained in the conduct of official business of a governmental body and that is held by a private or public archival and manuscript repository for the purpose of historical research is excepted from the requirements of Section 552.021.

§ 552.121. Exception: Certain Documents Held for Historical Research

An oral history interview, personal paper, unpublished letter, or organizational record of a nongovernmental entity that was not created or maintained in the conduct of official business of a governmental body and that is held by a private or public archival and manuscript repository for the purpose of historical research is excepted from the requirements of Section 552.021 to the extent that the archival and manuscript repository and the donor of the interview, paper, letter, or record agree to limit disclosure of the item.

§ 552.122. Exception: Test Items

(a) A test item developed by an educational institution that is funded wholly or in part by state revenue is excepted from the requirements of Section 552.021.

(b) A test item developed by a licensing agency or governmental body is excepted from the requirements of Section 552.021.

§ 552.123. Exception: Name of Applicant for Chief Executive Officer of Institution of Higher Education

The name of an applicant for the position of chief executive officer of an institution of higher education is excepted from the requirements of Section 552.021, except that the governing body of the institution must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which final action or vote is to be taken on the employment of the person.

§ 552.124 Exception: Records of Library or Library System

(a) A record of a library or library system, supported in whole or in part by public funds, that identifies or serves to identify a person who requested, obtained, or used a library material or service is excepted from the requirements of Section 552.021 unless the record is disclosed:

(1) because the library or library system determines that disclosure is reasonably necessary for the operation of the library or library system and the record is not confidential under other state or federal law;

(2) under Section 552.023; or

(3) to a law enforcement agency or a prosecutor under a court order or subpoena obtained after a showing to a district court that:

(A) disclosure of the record is necessary to protect the public safety; or

(B) the record is evidence of an offense or constitutes evidence that a particular person committed an offense.

(b) A record of a library or library system that is excepted from required disclosure under this section is confidential.

§ 552.125 Exception: Certain Audits

Any documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act are excepted from the requirements of Section 552.021.

§ 552.126. Exception: Name of Applicant for Superintendent of Public School District

The name of an applicant for the position of superintendent of a public school district is excepted from the requirements of Section 552.021, except that the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which a final action or vote is to be taken on the employment of the person.

§ 552.127. Exception: Personal Information Relating to Participants in Neighborhood Crime Watch Organization

(a) Information is excepted from the requirements of Section 552.021 if the information identifies a person as a participant in a neighborhood crime watch organization and relates to the name, home address, business address, home telephone number, or business telephone number of the person.

(b) In this section, "neighborhood crime watch organization" means a group of residents of a neighborhood or part of a neighborhood that is formed in affiliation or association with a law enforcement agency in this state to observe activities within the neighborhood or part of a neighborhood and to take other actions intended to reduce crime in that area.

§ 552.128. Exception: Certain Information Submitted by Potential Vendor or Contractor

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from the requirements of Section 552.021, except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

§ 552.129. Motor Vehicle Inspection Information

A record created during a motor vehicle emissions inspection under Subchapter F, Chapter 548, Transportation Code, that relates to an individual vehicle or owner of an individual vehicle is excepted from the requirements of Section 552.021.

§ 552.130. Exception: Motor Vehicle Records

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

§ 552.131. Exception: Certain Information Held by School District

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from the requirements of Section 552.021.

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

§ 552.131. Exception: Certain Information Relating to Inmate of Department of Criminal Justice

(a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

(b) Subsection (a) does not apply to:

(1) statistical or other aggregated information relating to inmates confined in one or more facilities operated by or under a contract with the department; or

(2) information about an inmate sentenced to death.

(c) This section does not affect whether information is considered confidential or privileged under Section 508.313.

(d) A release of information described by Subsection (a) to an eligible entity, as defined by Section 508.313(d), for a purpose related to law enforcement, prosecution, corrections,

clemency, or treatment is not considered a release of information to the public for purposes of Section 552.007 and does not waive the right to assert in the future that the information is excepted from required disclosure under this section or other law.

§ 552.131. Exception: Public Power Utility Competitive Matters

(a) In this section:

(1) "Public power utility" means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(2) "Public power utility governing body" means the board of trustees or other applicable governing body, including a city council, of a public power utility.

(3) "Competitive matter" means a utility-related matter that the public power utility governing body in good faith determines by a vote under this section is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors but may not be deemed to include the following categories of information:

(A) information relating to the provision of distribution access service, including the terms and conditions of the service and the rates charged for the service but not including information concerning utility-related services or products that are competitive;

(B) information relating to the provision of transmission service that is required to be filed with the Public Utility Commission of Texas, subject to any confidentiality provided for under the rules of the commission;

(C) information for the distribution system pertaining to reliability and continuity of service, to the extent not security-sensitive, that relates to emergency management, identification of critical loads such as hospitals and police, records of interruption, and distribution feeder standards;

(D) any substantive rule of general applicability regarding service offerings, service regulation, customer protections, or customer service adopted by the public power utility as authorized by law;

(E) aggregate information reflecting receipts or expenditures of funds of the public power utility, of the type that would be included in audited financial statements;

(F) information relating to equal employment opportunities for minority groups, as filed with local, state, or federal agencies;

(G) information relating to the public power utility's performance in contracting with minority business entities;

(H) information relating to nuclear decommissioning trust agreements, of the type required to be included in audited financial statements;

(I) information relating to the amount and timing of any transfer to an owning city's general fund;

(J) information relating to environmental compliance as required to be filed with any local, state, or national environmental authority, subject to any confidentiality provided under the rules of those authorities;

(K) names of public officers of the public power utility and the voting records of those officers for all matters other than those within the scope of a competitive resolution provided for by this section;

(L) a description of the public power utility's central and field organization, including the established places at which the public may obtain information, submit information and requests, or obtain decisions and the identification of employees from whom the public may obtain information, submit information or requests, or obtain decisions; or

(M) information identifying the general course and method by which the public power utility's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures.

(b) Information or records are excepted from the requirements of Section 552.021 if the information or records are reasonably related to a competitive matter, as defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the Utilities Code, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

(c) In connection with any request for an opinion of the attorney general under Section 552.301 with respect to information alleged to fall under this exception, in rendering a written opinion under Section 552.306 the attorney general shall find the requested information to be outside the scope of this exception only if the attorney general determines, based on the information provided in connection with the request:

(1) that the public power utility governing body has failed to act in good faith in making the determination that the issue, matter, or activity in question is a competitive matter; or

(2) that the information or records sought to be withheld are not reasonably related to a competitive matter.

§ 552.131. Exception: Economic Development Information

(a) Information is excepted from the requirements of Section 552.021 if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from the requirements of Section 552.021.

(c) After an agreement is made with the business prospect, this section does not except from the requirements of Section 552.021 information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

§ 552.132. Exception: Crime Victim Information

(a) In this section, "crime victim" means a victim under Subchapter B, Chapter 56, Code of Criminal Procedure, who has filed an application for compensation under that subchapter.

(b) A crime victim may elect whether to allow public access to information held by the crime victim's compensation division of the attorney general's office that relates to:

(1) the name, social security number, address, or telephone number of the crime victim; or

(2) any other information the disclosure of which would identify or tend to identify the crime victim.

(c) An election under Subsection (b) must be:

(1) made in writing on a form developed by the attorney general for that purpose and signed by the crime victim; and

(2) filed with the crime victims' compensation division before the third anniversary of the date that the crime victim filed the application for compensation.

(d) If the crime victim elects not to allow public access to the information, the information is excepted from the requirements of Section 552.021. If the crime victim does not make an election under Subsection (b) or elects to allow public access to the information, the information is not excepted from the requirements of Section 552.021 unless the information is made confidential or excepted from those requirements by another law.

(e) If the crime victim is awarded compensation under Section 56.34, Code of Criminal Procedure, as of the date of the award of compensation, the name of the crime victim and the amount of compensation awarded to that victim are public information and are not excepted from the requirements of Section 552.021.

SUBCHAPTER D. OFFICER FOR PUBLIC INFORMATION

§ 552.201. Identity of Officer for Public Information

(a) The chief administrative officer of a governmental body is the officer for public information, except as provided by Subsection (b).
(b) Each elected county officer is the officer for public information and the custodian, as defined by Section 201.003, Local Government Code, of the information created or received by that county officer's office.

§ 552.202. Department Heads

Each department head is an agent of the officer for public information for the purposes of complying with this chapter.

§ 552.203. General Duties of Officer for Public Information

Each officer for public information, subject to penalties provided in this chapter, shall:

(1) make public information available for public inspection and copying;

(2) carefully protect public information from deterioration, alteration, mutilation, loss, or unlawful removal; and

(3) repair, renovate, or rebind public information as necessary to maintain it properly.

§ 552.204. Scope of Responsibility of Officer for Public Information

An officer for public information is responsible for the release of public information as required by this chapter. The officer is not responsible for:

(1) the use made of the information by the requestor; or

(2) the release of information after it is removed from a record as a result of an update, a correction, or a change of status of the person to whom the information pertains.

§ 552.205. Informing Public of Basic Rights and Responsibilities Under this Chapter

(a) An officer for public information shall prominently display a sign in the form prescribed by the General Services Commission that contains basic information about the rights of a requestor, the responsibilities of a governmental body, and the procedures for inspecting or obtaining a copy of public information under this chapter. The officer shall display the sign at one or more places in the administrative offices of the governmental body where it is plainly visible to:

(1) members of the public who request public information in person under this chapter; and

(2) employees of the governmental body whose duties include receiving or responding to requests under this chapter.

(b) The General Services Commission by rule shall prescribe the content of the sign and the size, shape, and other physical characteristics of the sign. In prescribing the content of the sign, the commission shall include plainly written basic information about the rights of a requestor, the responsibilities of a governmental body, and the procedures for inspecting or obtaining a copy of public information under this chapter that, in the opinion of the commission, is most useful for requestors to know and for employees of governmental bodies who receive or respond to requests for public information to know.

SUBCHAPTER E. PROCEDURES RELATED TO ACCESS

§ 552.221. Application for Public Information; Production of Public Information

(a) An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer.

(b) An officer for public information complies with Subsection (a) by:

(1) providing the public information for inspection or duplication in the offices of the governmental body; or

(2) sending copies of the public information by first class United States mail if the person requesting the information requests that copies be provided and pays the postage and any other applicable charges that the requestor has accrued under Subchapter F.

(c) If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

(d) If an officer for public information cannot produce public information for inspection or duplication within 10 business days after the date the information is requested under Subsection (a), the officer shall certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

§ 552.222. Permissible Inquiry by Governmental Body to Requestor

(a) The officer for public information and the officer's agent may not make an inquiry of a requestor except to establish proper identification or except as provided by Subsection (b) or (c).

(b) If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request. If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but the governmental body may not inquire into the purpose for which information will be used.

(c) If the information requested relates to a motor vehicle record, the officer for public information or the officer's agent may require the requestor to provide additional identifying information sufficient for the officer or the officer's agent to determine whether the requestor is eligible to receive the information under Chapter 730, Transportation Code. In this subsection "motor vehicle record" has the meaning assigned that term by Section 730.003, Transportation Code.

§ 552.223. Uniform Treatment of Requests for Information

The officer for public information or the officer's agent shall treat all requests for information uniformly without regard to the position or occupation of the requestor, the person on whose behalf the request is made, or the status of the individual as a member of the media.

§ 552.224. Comfort and Facility

The officer for public information or the officer's agent shall give to a requestor all reasonable comfort and facility for the full exercise of the right granted by this chapter.

§ 552.225. Time for Examination

(a) A requestor must complete the examination of the information not later than the 10th day after the date the custodian of the information makes it available to the person.

(b) The officer for public information shall extend the initial examination period by an additional 10 days if, within the initial period, the requestor files with the officer for public information a written request for additional time. The officer for public information shall extend an additional examination period by another 10 days if, within the additional period, the requestor files with the officer for public information a written request for more additional time.

(c) The time during which a person may examine information may be interrupted by the officer for public information if the information is needed for use by the governmental body. The period of interruption is not considered to be a part of the time during which the person may examine the information.

§ 552.226. Removal of Original Record

This chapter does not authorize a requestor to remove an original copy of a public record from the office of a governmental body.

§ 552.227. Research of State Library Holdings Not Required

An officer for public information or the officer's agent is not required to perform general research within the reference and research archives and holdings of state libraries.

§ 552.228. Providing Suitable Copy of Public Information Within Reasonable Time

(a) It shall be a policy of a governmental body to provide a suitable copy of public information within a reasonable time after the date on which the copy is requested.

(b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as on diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

(1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;

(2) the governmental body is not required to purchase any software or hardware to accommodate the request; and

(3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

(c) If a governmental body is unable to comply with a request to produce a copy of information in a requested medium for any of the reasons described by this section, the governmental body shall provide a paper copy of the requested information or a copy in another medium that is acceptable to the requestor. A governmental body is not required to copy information onto a diskette or other material provided by the requestor but may use its own supplies.

§ 552.229. Consent to Release Information Under Special Right of Access

(a) Consent for the release of information excepted from disclosure to the general public but available to a specific person under Sections 552.023 and 552.307 must be in writing and signed by the specific person or the person's authorized representative.

(b) An individual under 18 years of age may consent to the release of information under this section only with the additional written authorization of the individual's parent or guardian.

(c) An individual who has been adjudicated incompetent to manage the individual's personal affairs or for whom an attorney ad litem has been appointed may consent to the release of information under this section only by the written authorization of the designated legal guardian or attorney ad litem.

§ 552.230. Rules of Procedure for Inspection and Copying of Public Information

(a) A governmental body may promulgate reasonable rules of procedure under which public information may be inspected and copied efficiently, safely, and without delay.

(b) A rule promulgated under Subsection (a) may not be inconsistent with any provision of this chapter.

§ 552.231. Responding to Requests for Information That Require Programming or Manipulation of Data

(a) A governmental body shall provide to a requestor the written statement described by Subsection (b) if the governmental body determines:

(1) that responding to a request for public information will require programming or manipulation of data; and

(2) that:

(A) compliance with the request is not feasible or will result in substantial interference with its ongoing operations; or

(B) the information could be made available in the requested form only at a cost that covers the programming and manipulation of data.

(b) The written statement must include:

(1) a statement that the information is not available in the requested form;

(2) a description of the form 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) a statement of the estimated cost of providing the information in the requested form as determined in accordance with the rules established by the General Services Commission under Section 552.262; and

(5) a statement of the anticipated time required to provide the information in the requested form.

(c) The governmental body shall provide the written statement to the requestor within 20 days after the date of the governmental body's receipt of the request. The governmental body has an additional 10 days to provide the statement if the governmental body gives written notice to the requestor, within 20 days after the date of receipt of the request, that the additional time is needed.

(d) On providing the written statement to the requestor as required by this section, the governmental body does not have any further obligation to provide the information in the requested form or in the form in which it is available until the requestor states in writing to the governmental body that the requestor:

(1) wants the governmental body to provide the information in the requested form according to the cost and time parameters set out in the statement or according to other terms to which the requestor and the governmental body agree; or

(2) wants the information in the form in which it is available.

(e) The officer for public information of a governmental body shall establish policies that assure the expeditious and accurate processing of requests for information that require programming or manipulation of data. A governmental body shall maintain a file containing all written statements issued under this section in a readily accessible location.

§ 552.232. Responding to Repetitious or Redundant Requests

(a) A governmental body that determines that a requestor has made a request for information for which the governmental body has previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F, shall respond to the request, in relation to the information for which copies have been already furnished or made available, in accordance with this section, except that:

(1) this section does not prohibit the governmental body from furnishing the information or making the information available to the requestor again in accordance with the request; and

(2) the governmental body is not required to comply with this section in relation to information that the governmental body simply furnishes or makes available to the requestor again in accordance with the request.

(b) The governmental body shall certify to the requestor that copies of all or part of the requested information, as applicable, were previously furnished to the requestor or made available to the requestor on payment of applicable charges under Subchapter F. The certification must include:

(1) a description of the information for which copies have been previously furnished or made available to the requestor;

(2) the date that the governmental body received the requestor's original request for that information;

(3) the date that the governmental body previously furnished copies of or made available copies of the information to the requestor;

(4) a certification that no subsequent additions, deletions, or corrections have been made to that information; and

(5) the name, title, and signature of the officer for public information or the officer's agent making the certification.

(c) A charge may not be imposed for making and furnishing a certification required under Subsection (b).

(d) This section does not apply to information for which the governmental body has not previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F. A request by the requestor for information for which copies have not previously been furnished or made available to the requestor, including information for which copies were not furnished or made available because the information was redacted from other information that was furnished or made available or because the information did not yet exist at the time of an earlier request, shall be treated in the same manner as any other request for information under this chapter.

SUBCHAPTER F. CHARGES FOR PROVIDING COPIES OF PUBLIC INFORMATION

§ 552.261. Charges for Providing Copies of Public Information

(a) The charge for providing a copy of public information shall be an amount that reasonably includes all costs related to reproducing the public information, including costs of materials, labor, and overhead. If a request is for 50 or fewer pages of paper records, the charge for providing the copy of the public information may not include costs of materials, labor, or overhead, but shall be limited to the photocopying costs, unless the pages to be photocopied are located in:

(1) two or more separate buildings that are not physically connected with each other; or

(2) a remote storage facility.

(b) If the charge for providing a copy of public information includes costs of labor, the requestor may require the governmental body's officer for public information or the officer's agent to provide the requestor with a written statement as to the amount of time that was required to produce and provide the copy. The statement must be signed by the officer for public information or the officer's agent and the officer's or the agent's name must be typed or legibly printed below the signature. A charge may not be imposed for providing the written statement to the requestor.

(c) For purposes of Subsection (a), a connection of two buildings by a covered or open sidewalk, an elevated or underground passageway, or a similar facility is insufficient to cause the buildings to be considered separate buildings.

(d) Charges for providing a copy of public information are considered to accrue at the time the governmental body advises the requestor that the copy is available on payment of the applicable charges.

§ 552.2615. Required Itemized Estimate of Charges

(a) If a request for a copy of public information will result in the imposition of a charge under this subchapter that exceeds $40, or a request to inspect a paper record will result in the imposition of a charge under Section 552.271 that exceeds $40, the governmental body shall provide the requestor with a written itemized statement that details all estimated charges that will be imposed, including any allowable charges for labor or personnel costs. If an alternative less costly method of viewing the records is available, the statement must include a notice that the requestor may contact the governmental body regarding the alternative method. The governmental body must inform the requestor of the duties imposed on the requestor by this section and give the requestor the information needed to respond, including:

(1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;

(2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and

(3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

(b) A request described by Subsection (a) is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 days after the date the statement is sent to the requestor that:

(1) the requestor will accept the estimated charges; or

(2) the requestor is modifying the request in response to the itemized statement.

(c) If the governmental body later determines, but before it makes the copy or the paper record available, that the estimated charges will exceed the charges detailed in the written itemized statement by 20 percent or more, the governmental body shall send to the requestor a written updated itemized statement that details all estimated charges that will be imposed, including any allowable charges for labor or personnel costs. If the requestor does not respond in writing to the updated estimate in the time and manner described by Subsection (b), the request is considered to have been withdrawn by the requestor.

(d) If the actual charges that a governmental body imposes for a copy of public information, or for inspecting a paper record under Section 552.271, exceeds $40, the charges may not exceed:

(1) the amount estimated in the updated itemized statement; or

(2) if an updated itemized statement is not sent to the requestor, an amount that exceeds by 20 percent or more the amount estimated in the itemized statement.

(e) An itemized statement or updated itemized statement is considered to have been sent by the governmental body to the requestor on the date that:

(1) the statement is delivered to the requestor in person;

(2) the governmental body deposits the properly addressed statement in the United States mail; or

(3) the governmental body transmits the properly addressed statement by electronic mail or facsimile transmission, if the requestor agrees to receive the statement by electronic mail or facsimile transmission, as applicable.

(f) A requestor is considered to have responded to the itemized statement or the updated itemized statement on the date that:

(1) the response is delivered to the governmental body in person;

(2) the requestor deposits the properly addressed response in the United States mail; or

(3) the requestor transmits the properly addressed response to the governmental body by electronic mail or facsimile transmission.

(g) The time deadlines imposed by this section do not affect the application of a time deadline imposed on a governmental body under Subchapter G.

§ 552.262. Rules of the General Services Commission

(a) The General Services Commission shall adopt rules for use by each governmental body in determining charges for providing copies of public information under this subchapter and in determining the charge, deposit, or bond required for making public information that exists in a paper record available for inspection as authorized by Sections 552.271(c) and (d). The rules adopted by the General Services Commission shall be used by each governmental body in determining charges for providing copies of public information and in determining the charge, deposit, or bond required for making public information that exists in a paper record available for inspection, except to the extent that other law provides for charges for specific kinds of public information. The charges for providing copies of public information may not be excessive and may not exceed the actual cost of producing the information or for making public information that exists in a paper record available. A governmental body, other than an agency of state government, may determine its own charges for providing copies of public information and its own charge, deposit, or bond for making public information that exists in a paper record available for inspection but may not charge an amount that is greater than 25 percent more than the amount established by the General Services Commission unless the governmental body requests an exemption under Subsection (c).

(b) The rules of the General Services Commission shall prescribe the methods for computing the charges for providing copies of public information in paper, electronic, and other kinds of media and the charge, deposit, or bond required for making public information that exists in a paper record available for inspection. The rules shall establish costs for various components of charges for providing copies of public information that shall be used by each governmental body in providing copies of public information or making public information that exists in a paper record available for inspection.

(c) A governmental body may request that it be exempt from part or all of the rules adopted by the General Services Commission for determining charges for providing copies of public information or the charge, deposit, or bond required for making public information that exists in a paper record available for inspection. The request must be made in writing to the General Services Commission and must state the reason for the exemption. If the General Services Commission determines that good cause exists for exempting a governmental body from a part or all of the rules, the commission shall give written notice of the determination to the governmental body within 90 days of the request. On receipt of the determination, the governmental body may amend its charges for providing copies of public information or its charge, deposit, or bond required for making public information that exists in a paper record available for inspection according to the determination of the General Services Commission.

(d) The General Services Commission shall publish annually in the Texas Register a list of the governmental bodies that have authorization from the General Services Commission to adopt

any modified rules for determining the cost of providing copies of public information or making public information that exists in a paper record available for inspection.

(e) The rules of the General Services Commission do not apply to a state governmental body that is not a state agency for purposes of Subtitle D, Title 10.

§ 552.263. Bond for Payment of Costs or Cash Prepayment for Preparation of Copy of Public Information

(a) An officer for public information or the officer's agent may require a deposit or bond for payment of anticipated costs for the preparation of a copy of public information if the officer for public information or the officer's agent has provided the requestor with the required written itemized statement detailing the estimated charge for providing the copy and if the charge for providing the copy of the public information specifically requested by the requestor is estimated by the governmental body to exceed:

(1) $100, if the governmental body has more than 15 full-time employees; or

(2) $50, if the governmental body has fewer than 16 full-time employees.

(b) The officer for public information or the officer's agent may not require a deposit or bond be paid under Subsection (a) as a down payment for copies of public information that the requestor may request in the future.

(c) An officer for public information or the officer's agent may require a deposit or bond for payment of unpaid amounts owing to the governmental body in relation to previous requests that the requestor has made under this chapter before preparing a copy of public information in response to a new request if those unpaid amounts exceed $100. The officer for public information or the officer's agent may not seek payment of those unpaid amounts through any other means.

(d) The governmental body must fully document the existence and amount of those unpaid amounts or the amount of any anticipated costs, as applicable, before requiring a deposit or bond under this section. The documentation is subject to required public disclosure under this chapter.

(e) For purposes of Subchapter E, a request for a copy of public information is considered to have been received by a governmental body on the date the governmental body receives the deposit or bond for payment of anticipated costs or unpaid amounts if the governmental body's officer for public information or the officer's agent requires a deposit or bond in accordance with this section.

§ 552.264. Copy of Public Information Requested by Member of Legislature

One copy of public information that is requested from a state agency by a member, agency, or committee of the legislature under Section 552.008 shall be provided without charge.

§ 552.265. Charge for Certified Record Provided by District or County Clerk

The charge for providing a copy made by a district or county clerk's office shall be the charge provided by law.

§ 552.266. Charge for Copy of Public Information Provided by Municipal Court Clerk

The charge for providing a copy made by a municipal court clerk shall be the charge provided by municipal ordinance.

§ 552.267. Waiver or Reduction of Charge for Providing Copy of Public Information

(a) A governmental body shall provide a copy of public information without charge or at a reduced charge if the governmental body determines that waiver or reduction of the charge is in the public interest because providing the copy of the information primarily benefits the general public.

(b) If the cost to a governmental body of processing the collection of a charge for providing a copy of public information will exceed the amount of the charge, the governmental body may waive the charge.

§ 552.268. Efficient Use of Public Resources

A governmental body shall make reasonably efficient use of supplies and other resources to avoid excessive reproduction costs.

§ 552.269. Overcharge or Overpayment for Copy of Public Information

(a) A person who believes the person has been overcharged for being provided with a copy of public information may complain to the General Services Commission in writing of the alleged overcharge, setting forth the reasons why the person believes the charges are excessive. The General Services Commission shall review the complaint and make a determination in writing as to the appropriate charge for providing the copy of the

requested information. The governmental body shall respond to the General Services Commission to any written questions asked of the governmental body by the commission regarding the charges for providing the copy of the public information. The response must be made to the General Services Commission within 10 days after the date the questions are received by the governmental body. If the General Services Commission determines that a governmental body has overcharged for providing the copy of requested public information, the governmental body shall promptly adjust its charges in accordance with the determination of the General Services Commission.

(b) A person who overpays for a copy of public information because a governmental body refuses or fails to follow the rules for charges adopted by the General Services Commission is entitled to recover three times the amount of the overcharge if the governmental body did not act in good faith in computing the costs.

§ 552.270 Charge for Government Publication

(a) This subchapter does not apply to a publication that is compiled and printed by or for a governmental body for public dissemination. If the cost of the publication is not determined by state law, a governmental body may determine the charge for providing the publication.

(b) This section does not prohibit a governmental body from providing a publication free of charge if state law does not require that a certain charge be made.

§ 552.271. Inspection of Public Information in Paper Record if Copy Not Requested

(a) If the requestor does not request a copy of public information, a charge may not be imposed for making available for inspection any public information that exists in a paper record, except as provided by this section.

(b) If a requested page contains confidential information that must be edited from the record before the information can be made available for inspection, the governmental body may charge for the cost of making a photocopy of the page from which confidential information must be edited. No charge other than the cost of the photocopy may be imposed under this subsection.

(c) Except as provided by Subsection (d), an officer for public information or the officer's agent may require a requestor to pay, or to make a deposit or post a bond for the payment of, anticipated personnel costs for making available for inspection public information that exists in paper records only if:

(1) the public information specifically requested by the requestor:

(A) is older than five years; or

(B) completely fills, or when assembled will completely fill, six or more archival boxes; and

(2) the officer for public information or the officer's agent estimates that more than five hours will be required to make the public information available for inspection.

(d) If the governmental body has fewer than 16 full-time employees, the payment, the deposit, or the bond authorized by Subsection (c) may be required only if:

(1) the public information specifically requested by the requestor:

(A) is older than three years; or

(B) completely fills, or when assembled will completely fill, three or more archival boxes; and

(2) the officer for public information or the officer's agent estimates that more than two hours will be required to make the public information available for inspection.

§ 552.272. Inspection of Electronic Record If Copy Not Requested

(a) In response to a request to inspect information that exists in an electronic medium and that is not available directly on-line to the requestor, a charge may not be imposed for access to the information, unless complying with the request will require programming or manipulation of data. If programming or manipulation of data is required, the governmental body shall notify the requestor before assembling the information and provide the requestor with an estimate of charges that will be imposed to make the information available. A charge under this section must be assessed in accordance with this subchapter.

(b) If public information exists in an electronic form on a computer owned or leased by a governmental body and if the public has direct access to that computer through a computer network or other means, the electronic form of the information may be electronically copied from that computer without charge if accessing the information does not require processing, programming, or manipulation on the government-owned or government-leased computer before the information is copied.

(c) If public information exists in an electronic form on a computer owned or leased by a governmental body and if the public has direct access to that computer through a computer network or other means and the information requires processing, programming,

or manipulation before it can be electronically copied, a governmental body may impose charges in accordance with this subchapter.

(d) If information is created or kept in an electronic form, a governmental body is encouraged to explore options to separate out confidential information and to make public information available to the public through electronic access through a computer network or by other means.

(e) The provisions of this section that prohibit a governmental entity from imposing a charge for access to information that exists in an electronic medium do not apply to the collection of a fee set by the supreme court after consultation with the Judicial Committee on Information Technology as authorized by Section 77.031 for the use of a computerized electronic judicial information system.

§ 552.274. Report by State Agency on Cost of Copies

(a) Not later than December 1 of each odd-numbered year, each state agency shall provide the General Services Commission detailed information, for use by the commission in preparing the report required by Sections 2(c) and (d), Chapter 428, Acts of the 73rd Legislature, Regular Session, 1993, describing the agency's procedures for charging and collecting fees for providing copies of public information.

(b) In this section, "state agency" has the meaning assigned by Sections 2151.002(2)(A) and (C).

SUBCHAPTER G. ATTORNEY GENERAL DECISIONS

§ 552.301. Request for Attorney General Decision

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

(c) For purposes of this subchapter, a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission.

(d) A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

(e) A governmental body that requests an attorney general decision under Subsection (a) must within a reasonable time but not later than the 15th business day after the date of receiving the written request:

(1) submit to the attorney general:

(A) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld;

(B) a copy of the written request for information;

(C) a signed statement as to the date on which the written request for information was received by the governmental body or evidence sufficient to establish that date; and

(D) a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested; and

(2) label that copy of the specific information, or of the representative samples, to indicate which exceptions apply to which parts of the copy.

(f) A governmental body must release the requested information and is prohibited from asking for a decision from the attorney general about whether information requested under this chapter is within an exception under Subchapter C if:

(1) the governmental body has previously requested and received a determination from the attorney general concerning the precise information at issue in a pending request; and

(2) the attorney general or a court determined that the information is public information under this chapter that is not excepted by Subchapter C.

§ 552.302. Failure to Make Timely Request for Attorney General Decision; Presumption That Information Is Public

If a governmental body does not request an attorney general decision as provided by Section 552.301 and provide the requestor with the information required by Section 552.301(d), the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.

§ 552.303. Delivery of Requested Information to Attorney General; Disclosure of Requested Information; Attorney General Request for Submission of Additional Information

(a) A governmental body that requests an attorney general decision under this subchapter shall supply to the attorney general, in accordance with Section 552.301, the specific information requested. Unless the information requested is confidential by law, the governmental body may disclose the requested information to the public or to the requestor before the attorney general makes a final determination that the requested information is public or, if suit is filed under this chapter, before a final determination that the requested information is public has been made by the court with jurisdiction over the suit, except as otherwise provided by Section 552.322.

(b) The attorney general may determine whether a governmental body's submission of information to the attorney general under Section 552.301 is sufficient to render a decision.

(c) If the attorney general determines that information in addition to that required by Section 552.301 is necessary to render a decision, the attorney general shall give written notice of that fact to the governmental body and the requestor.

(d) A governmental body notified under Subsection (c) shall submit the necessary additional information to the attorney general not later than the seventh calendar day after the date the notice is received.

(e) If a governmental body does not comply with Subsection (d), the information that is the subject of a person's request to the governmental body and regarding which the governmental

body fails to comply with Subsection (d) is presumed to be subject to required public disclosure and must be released unless there exists a compelling reason to withhold the information.

§ 552.3035. Disclosure of Requested Information by Attorney General

The attorney general may not disclose to the requestor or the public any information submitted to the attorney general under Section 552.301(e)(1)(D).

§ 552.304. Submission of Public Comments

A person may submit written comments stating reasons why the information at issue in a request for an attorney general decision should or should not be released.

§ 552.305. Information Involving Privacy or Property Interests of Third Party

(a) In a case in which information is requested under this chapter and a person's privacy or property interests may be involved, including a case under Section 552.101, 552.104, 552.110, or 552.114, a governmental body may decline to release the information for the purpose of requesting an attorney general decision.

(b) A person whose interests may be involved under Subsection (a), or any other person, may submit in writing to the attorney general the person's reasons why the information should be withheld or released.

(c) The governmental body may, but is not required to, submit its reasons why the information should be withheld or released.

(d) If release of a person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision. Notice under this subsection must:

(1) be in writing and sent within a reasonable time not later than the 10th business day after the date the governmental body receives the request for the information; and

(2) include:

(A) a copy of the written request for the information, if any, received by the governmental body; and

(B) a statement, in the form prescribed by the attorney general, that the person is entitled to submit in writing to the attorney general within a reasonable time not later than the 10th business day after the date the person receives the notice:

(i) each reason the person has as to why the information should be withheld; and

(ii) a letter, memorandum, or brief in support of that reason.

(e) A person who submits a letter, memorandum, or brief to the attorney general under Subsection (d) shall send a copy of that letter, memorandum, or brief to the person who requested the information from the governmental body. If the letter, memorandum, or brief submitted to the attorney general contains the substance of the information requested, the copy of the letter, memorandum, or brief may be a redacted copy.

§ 552.306. Rendition of Attorney General Decision; Issuance of Written Opinion

(a) Except as provided by Section 552.011, the attorney general shall promptly render a decision requested under this subchapter, consistent with the standards of due process, determining whether the requested information is within one of the exceptions of Subchapter C. The attorney general shall render the decision not later than the 45th working day after the date the attorney general received the request for a decision. If the attorney general is unable to issue the decision within the 45-day period, the attorney general may extend the period for issuing the decision by an additional 10 working days by informing the governmental body and the requestor, during the original 45-day period, of the reason for the delay.

(b) The attorney general shall issue a written opinion of the determination and shall provide a copy of the opinion to the requestor.

§ 552.307. Special Right of Access; Attorney General Decisions

(a) If a governmental body determines that information subject to a special right of access under Section 552.023 is exempt from disclosure under an exception of Subsection C, other than an exception intended to protect the privacy interest of the requestor or the person whom the requestor is authorized to represent, the governmental body shall, before disclosing the information, submit a written request for a decision to the attorney general under the procedures of this subchapter.

(b) If a decision is not requested under Subsection (a), the governmental body shall release the information to the person with a special right of access under Section 552.023 not later than the 10th day after the date of receiving the request for information.

§ 552.308. Timeliness of Action by United States or Interagency mail

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the requirement is met in a timely fashion if the document is sent to the person by first class United States mail properly addressed with postage prepaid and:

(1) it bears a post office cancellation mark indicating a time within that period; or

(2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail within that period.

(b) When this subchapter requires an agency of this state to submit or otherwise give to the attorney general within a specified period a request, notice, or other writing, the requirement is met in a timely fashion if:

(1) the request, notice, or other writing is sent to the attorney general by interagency mail; and

(2) the agency provides evidence sufficient to establish that the request, notice, or other writing was deposited in the interagency mail within that period.

SUBCHAPTER H. CIVIL ENFORCEMENT

§ 552.321. Suit for Writ of Mandamus

(a) A requestor or the attorney general may file suit for a writ of mandamus compelling a governmental body to make information available for public inspection if the governmental body refuses to request an attorney general's decision as provided by Subchapter G or refuses to supply public information or information that the attorney general has determined is public information that is not excepted from disclosure under Subchapter C.

(b) A suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located. A suit filed by the attorney general under this section must be filed in a district court of Travis County, except that a suit against a municipality with a population of 100,000 or less must be filed in a district court for the county in which the main offices of the municipality are located.

§ 552.3215. Declaratory Judgment or Injunctive Relief

(a) In this section:

(1) "Complainant" means a person who claims to be the victim of a violation of this chapter.

(2) "State agency" means a board, commission, department, office, or other agency that:

(A) is in the executive branch of state government;

(B) was created by the constitution or a statute of this state; and

(C) has statewide jurisdiction.

(b) An action for a declaratory judgment or injunctive relief may be brought in accordance with this section against a governmental body that violates this chapter.

(c) The district or county attorney for the county in which a governmental body other than a state agency is located or the attorney general may bring the action in the name of the state only in a district court for that county. If the governmental body extends into more than one county, the action may be brought only in the county in which the administrative offices of the governmental body are located.

(d) If the governmental body is a state agency, the Travis County district attorney or the attorney general may bring the action in the name of the state only in a district court of Travis County.

(e) A complainant may file a complaint alleging a violation of this chapter. The complaint must be filed with the district or county attorney of the county in which the governmental body is located unless the governmental body is the district or county attorney. If the governmental body extends into more than one county, the complaint must be filed with the district or county attorney of the county in which the administrative offices of the governmental body are located. If the governmental body is a state agency, the complaint may be filed with the Travis County district attorney. If the governmental body is the district or county attorney, the complaint must be filed with the attorney general. To be valid, a complaint must:

(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) in general terms, describe the violation.

(f) A district or county attorney with whom the complaint is filed shall indicate on the face of the written complaint the date the complaint is filed.

(g) Before the 31st day after the date a complaint is filed under Subsection (e), the district or county attorney shall:

(1) determine whether:

(A) the violation alleged in the complaint was committed; and

(B) an action will be brought against the governmental body under this section; and

(2) notify the complainant in writing of those determinations.

(h) Notwithstanding Subsection (g)(1), if the district or county attorney believes that that official has a conflict of interest that would preclude that official from bringing an action under this section against the governmental body complained of, before the 31st day after the date the complaint was filed the county or district attorney shall inform the complainant of that

official's belief and of the complainant's right to file the complaint with the attorney general. If the district or county attorney determines not to bring an action under this section, the district or county attorney shall:

(1) include a statement of the basis for that determination; and

(2) return the complaint to the complainant.

(i) If the district or county attorney determines not to bring an action under this section, the complainant is entitled to file the complaint with the attorney general before the 31st day after the date the complaint is returned to the complainant. On receipt of the written complaint, the attorney general shall comply with each requirement in Subsections (g) and (h) in the time required by those subsections. If the attorney general decides to bring an action under this section against a governmental body located only in one county in response to the complaint, the attorney general must comply with Subsection (c).

(j) An action may be brought under this section only if the official proposing to bring the action notifies the governmental body in writing of the official's determination that the alleged violation was committed and the governmental body does not cure the violation before the fourth day after the date the governmental body receives the notice.

(k) An action authorized by this section is in addition to any other civil, administrative, or criminal action provided by this chapter or another law.

§ 552.322. Discovery of Information Under Protective Order Pending Final Determination

In a suit filed under this chapter, the court may order that the information at issue may be discovered only under a protective order until a final determination is made.

§ 552.323. Assessment of Costs of Litigation and Reasonable Attorney Fees

(a) In an action brought under Section 552.321 or 552.3215, the court shall assess costs of litigation and reasonable attorney fees incurred by a plaintiff who substantially prevails, except that the court may not assess those costs and fees against a governmental body if the court finds that the governmental body acted in reasonable reliance on:

(1) a judgment or an order of a court applicable to the governmental body;

(2) the published opinion of an appellate court; or

(3) a written decision of the attorney general, including a decision issued under Subchapter G or an opinion issued under Section 402.042.

(b) In an action brought under Section 552.353(b)(3), the court may assess costs of litigation and reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails. In exercising its discretion under this subsection, the court shall consider whether the conduct of the officer for public information of the governmental body had a reasonable basis in law and whether the litigation was brought in good faith.

§ 552.324. Suit by Governmental Body

(a) The only suit a governmental body or officer for public information may file seeking to withhold information from a requestor is a suit that is filed in accordance with Sections 552.325 and 552.353 and that challenges a decision by the attorney general issued under Subchapter G.

(b) The governmental body must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the attorney general being challenged. If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general. This subsection does not affect the earlier deadline for purposes of Section 552.353(b)(3) for a suit brought by an officer for public information.

§ 552.325. Parties to Suit Seeking to Withhold Information

(a) A governmental body, officer for public information, or other person or entity that files a suit seeking to withhold information from a requestor may not file suit against the person requesting the information. The requestor is entitled to intervene in the suit.

(b) The governmental body, officer for public information, or other person or entity that files the suit shall demonstrate to the court that the governmental body, officer for public information, or other person or entity made a timely good faith effort to inform the requestor, by certified mail or by another written method of notice that requires the return of a receipt, of:

(1) the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;

(2) the requestor's right to intervene in the suit or to choose to not participate in the suit;

(3) the fact that the suit is against the attorney general; and

(4) the address and phone number of the office of the attorney general.

(c) If the attorney general enters into a proposed settlement that all or part of the information that is the subject of the suit should be withheld, the attorney general shall notify the requestor of that decision and, if the requestor has not intervened in the suit, of the requestor's right to intervene to contest the withholding. The attorney general shall notify the requestor:

(1) in the manner required by the Texas Rules of Civil Procedure, if the requestor has intervened in the suit; or

(2) by certified mail or by another written method of notice that requires the return of a receipt, if the requestor has not intervened in the suit.

(d) The court shall allow the requestor a reasonable period to intervene after the attorney general attempts to give notice under Subsection (c)(2).

§ 552.326. Failure to Raise Exceptions Before Attorney General

(a) Except as provided by Subsection (b), the only exceptions to required disclosure within Subchapter C that a governmental body may raise in a suit filed under this chapter are exceptions that the governmental body properly raised before the attorney general in connection with its request for a decision regarding the matter under Subchapter G.

(b) Subsection (a) does not prohibit a governmental body from raising an exception:

(1) based on a requirement of federal law; or

(2) involving the property or privacy interests of another person.

SUBCHAPTER I. CRIMINAL VIOLATIONS

§ 552.351. Destruction, Removal, or Alteration of Public Information

(a) A person commits an offense if the person willfully destroys, mutilates, removes without permission as provided by this chapter, or alters public information.

(b) An offense under this section is a misdemeanor punishable by:

(1) a fine of not less than $25 or more than $4,000;

(2) confinement in the county jail for not less than three days or more than three months; or

(3) both the fine and confinement.

§ 552.352. Distribution of Confidential Information

(a) A person commits an offense if the person distributes information considered confidential under the terms of this chapter.
(b) An offense under this section is a misdemeanor punishable by:

(1) a fine of not more than $1,000;

(2) confinement in the county jail for not more than six months; or

(3) both the fine and confinement.

(c) A violation under this section constitutes official misconduct.

§ 552.353. Failure or Refusal of Officer for Public Information to Provide Access to or Copying of Public Information

(a) An officer for public information, or the officer's agent, commits an offense if, with criminal negligence, the officer or the officer's agent fails or refuses to give access to, or to permit or provide copying of, public information to a requestor as provided by this chapter.

(b) It is an affirmative defense to prosecution under Subsection (a) that the officer for public information reasonably believed that public access to the requested information was not required and that the officer:

(1) acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record or of the attorney general issued under Subchapter G;

(2) requested a decision from the attorney general in accordance with Subchapter G, and the decision is pending; or

(3) not later than the 10th calendar day after the date of receipt of a decision by the attorney general that the information is public, filed a petition for a declaratory judgment, a writ of mandamus, or both, against the attorney general in a Travis County district court seeking relief from compliance with the decision of the attorney general, and a petition is pending.

(c) It is an affirmative defense to prosecution under Subsection (a) that a person or entity has, not later than the 10th calendar day after the date of receipt by a governmental body

of a decision by the attorney general that the information is public, filed a cause of action seeking relief from compliance with the decision of the attorney general, and the cause is pending.

(d) It is an affirmative defense to prosecution under Subsection (a) that the defendant is the agent of an officer for public information and that the agent reasonably relied on the written instruction of the officer for public information not to disclose the public information requested.

(e) An offense under this section is a misdemeanor punishable by:

(1) a fine of not more than $1,000;

(2) confinement in the county jail for not more than six months; or

(3) both the fine and confinement.

(f) A violation under this section constitutes official misconduct.

PART FOUR: Text of Cost Regulations Promulgated by General Services Commission

[NOTE: The General Service Commission cost rules will be revised to reflect Acts passed by the Seventy-sixth Legislature. The new rules were not available when this handbook went to press.]

1 Texas Administrative Code §§ 111.61 - .70

§ 111.61. General

(a) The General Services Commission (the "Commission") must:

(1) adopt rules for use by each governmental body in determining charges under Government Code, Chapter 552, Subchapter F (the Public Information Act);

(2) prescribe the methods for computing the charges for copies of public information in paper, electronic, and other kinds of media; and

(3) establish costs for various components of charges for public information that shall be used by each governmental body in providing copies of public information.

(b) The cost of providing public information is not necessarily synonymous with the charges made for providing public information. Governmental bodies must use the charges established by these rules, unless:

(1) Other law provides for charges for specific kinds of public information;

(2) They are a governmental body other than a state agency, and their charges are within a 25% variance above the charges established by the Commission;

(3) They request and receive an exemption because their actual costs are higher; or

(4) They abide by § 552.267 of the Public Information Act, which reads:

(A) A governmental body shall furnish a copy of public information without charge or at a reduced charge if the governmental body determines that

waiver or reduction of the fee is in the public interest because furnishing the information primarily benefits the general public; or

(B) If the cost to the governmental body of processing the collection of a charge for a copy of public information will exceed the amount of the charge, the governmental body may waive the charge.

§ 111.62. Definitions

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

Actual cost — The sum of all direct costs plus a proportional share of overhead or indirect costs. Actual cost should be determined in accordance with generally accepted methodologies. To determine actual costs, governmental bodies may utilize the cost methodology adopted by the Council on Competitive Government.

Client/Server System — A combination of two or more computers that serve a particular application through sharing processing, data storage, and end-user interface presentation. Pcs located in a LAN environment containing file servers fall into this category as do applications running in an X-window environment where the server is a UNIX based system.

Commission — The General Services Commission.

Governmental Body — As defined by § 552.003 of the Public Information Act, means:

(A) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;

(B) a county commissioners court in the state;

(C) a municipal governing body in the state;

(D) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;

(E) a school district board of trustees;

(F) a county board of school trustees;

(G) a county board of education;

(H) the governing board of a special district;

(I) the governing body of a nonprofit corporation organized under Chapter 76, Acts of the 43rd Legislature, First Called Session, 1933 (Article 1434a, Texas Civil Statutes), that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under the Tax Code, § 11.30; and

(J) the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds; and

(K) does not include the judiciary.

Mainframe Computer — A computer located in a controlled environment and serving large applications and/or large numbers of users. These machines usually serve an entire organization or some group of organizations. These machines usually require an operating staff. IBM and UNISYS mainframes, and large Digital VAX 9000 and VAX Clusters fall into this category.

Midsize Computer — A computer smaller than a Mainframe Computer that is not necessarily located in a controlled environment. It usually serves a smaller organization or a sub-unit of an organization. IBM AS/400 and Digital VAX/VMS multi-user single-processor systems fall into this category.

Nonstandard copy — A copy of public information that is made available to a requestor in any format other than a standard paper copy. Microfiche, microfilm, diskettes, magnetic tapes, CD-ROM are examples of nonstandard copies. Paper copies larger than 8 1/2 by 14 inches (legal size) are also considered nonstandard copies.

Standalone PC — an IBM compatible PC, Macintosh or Power PC based computer system operated without a connection to a network.

Standard paper copy — A printed impression on one side of a piece of paper that measures up to 8 1/2 by 14 inches. Each side of a piece of paper on which an impression is made is counted as a single copy. A piece of paper that is printed on both sides is counted as two copies.

§ 111.63. Charges for Providing Copies of Public Information

(a) The charges in this section to recover costs associated with providing copies of public information are based on estimated average costs to governmental bodies across the state.

When actual costs are 25% higher than those used in these rules, governmental bodies other than agencies of the state, may request an exemption in accordance with § 111.64 of this title (relating to Requesting an Exemption).

(b) Copy charge.

(1) Standard paper copy. The charge for standard paper copies reproduced by means of an office machine copier or a computer printer is $.10 per page or part of a page. Each side that has a printed image is considered a page.

(2) Nonstandard copy. The charges for nonstandard copies are:

(A) diskette — $1.00;

(B) magnetic tape — $11.00-$13.50 (depending on width — see § 111.70 of this title (relating to the General Services Commission Charge Schedule));

(C) data cartridge — $17.50-$35 (depending on series — see § 111.70);

(D) tape cartridge — $35-$45 (depending on memory — see § 111.70);

(E) VHS video cassette — $2.50;

(F) audio cassette — $1.00;

(G) oversize paper copy (i.e.: 11 inches by 17 inches, greenbar, bluebar) — $.50;

(H) Mylar — $.85-$1.35/linear foot (depending on thickness — see § 111.70);

(I) Blueprint/Blueline paper — $.20/linear foot (all widths).

(3) The charges in this subsection are to cover the cost of materials onto which information is copied and do not reflect any additional charges that may be associated with a particular request.

(c) Programming personnel. If a particular request requires the services of a programmer in order to execute an existing program or to create a new program so that requested information may be accessed and copied, the governmental body may charge for the programmer's time.

(1) The hourly charge for a programmer is $26 an hour, including fringe benefits. Only programming services shall be charged at this hourly rate.
(2) Governmental bodies that do not have in-house programming capabilities shall comply with requests in accordance with § 552.231 of the Public Information Act.

(d) Other Personnel charge.

(1) The charge for other personnel costs, incurred in processing a request for public information, is $15 an hour, including fringe benefits. Where applicable, the other personnel charge may include the actual time to locate, compile, and reproduce the requested information.

(2) An other personnel charge shall not be billed in connection with complying with requests that are for 50 or fewer pages of paper records, unless the documents to be copies are located in:

(A) more than one building; or

(B) a remote storage facility.

(3) Other personnel time shall not be recovered for any time spent by an attorney, legal assistant, or any other person who reviews the requested information:

(A) to determine whether the governmental body will raise any exceptions to disclosure of the requested information under Subchapter C of the Public Information Act; or

(B) to research or prepare a request for a ruling by the attorney general's office pursuant to § 552.301 of the Public Information Act.

(4) When confidential information is mixed with public information in the same page, personnel time may be recovered for time spent to obliterate, blackout, or otherwise obscure confidential information in order to release the public information.

(e) Overhead charge.

(1) Whenever any personnel charge is applicable to a request, a governmental body may include in the charges direct and indirect costs, in addition to the specific personnel charge. This overhead charge would cover such costs as depreciation of capital assets, rent, maintenance and repair, utilities, and administrative overhead. If a governmental body chooses to recover such costs, a charge shall be made in

accordance with the methodology described in paragraph (3) of this subsection. Although an exact calculation of costs will vary, the use of a standard charge will avoid complication in calculating such costs and will provide uniformity for charges made statewide.

(2) An overhead charge shall be computed at 20% of the charge made to cover any personnel costs associated with a particular request. Example: if one hour of personnel (programming, other personnel or a combination of both) is used for a particular request, the formula would be as follows: $15.00 x .20 = $3.00; or $26.00 x .20 = $5.20; or $41.00 x .20 = $8.20.

(f) Microfiche and microfilm charge.

(1) If a governmental body already has information that exists on microfiche or microfilm and has copies available for sale or distribution, the charge for a copy must not exceed the cost of its reproduction. If no copies of the requested microfiche or microfilm are available and the information on the microfiche or microfilm can be released in its entirety, the governmental body should make a copy of the microfiche or microfilm. The charge for a copy shall not exceed the cost of its reproduction. The Texas State Library and Archives Commission has the capacity to reproduce microfiche and microfilm for state agencies. Governmental bodies that do not have in-house capability to reproduce microfiche or microfilm may charge the actual costs of having the reproduction made commercially.

(2) If only a master copy of information in microform is maintained, the charge is $.10 per page for standard size paper copies, plus any applicable personnel and overhead charge for more than 50 copies.

(g) Remote document retrieval charge.

(1) Due to limited on-site capacity of storage of documents, it is frequently necessary to store information that is not in current use in remote storage locations. Every effort should be made by governmental bodies to store current records on-site. State agencies are encouraged to store inactive or non-current records with the Texas State Library and Archives Commission, which is equipped to provide such a service to state agencies free of charge. To the extent that the retrieval of documents results in a charge to comply with a request, it is permissible to recover costs of such services.

(2) If a governmental body has a contract with a commercial records storage company, whereby the private company charges a fee to locate, retrieve, deliver, and return to storage the needed record(s), no additional personnel charge shall be factored in for time spent locating documents at the storage location by the private

company's personnel. If after delivery to the governmental body, the boxes must still be searched for records that are responsive to the request, a personnel charge is allowed in accordance with § 111.61(d)(1) of this title (relating to General).

(h) Computer resource charge.

(1) The computer resource charge is a utilization charge for computers based on the amortized cost of acquisition, lease, operation, and maintenance of computer resources, which might include, but is not limited to, some or all of the following: central processing units (CPUs), servers, disk drives, local area networks (LANs), printers, tape drives, other peripheral devices, communications devices, software, and system utilities.

(2) These computer resource charges are not intended to substitute for cost recovery methodologies or charges made for purposes other than responding to public information requests.

(3) The charges in this subsection are averages based on a survey of governmental bodies with a broad range of computer capabilities. Each governmental body using this cost recovery charge shall determine which category (ies) of computer system(s) used to fulfill the public information request most closely fits its existing system(s), and set its charge accordingly. Type of System — Rate: Mainframe — $10 per minute; Midsize — $1.50 per minute; Client/Server — $2.20 per hour; PC or LAN — $1.00 per hour.

(4) The charge made to recover the computer utilization cost is the actual time the computer takes to execute a particular program times the applicable rate. The CPU charge is not meant to apply to programming or printing time; rather, it is solely to recover costs associated with the actual time required by the computer to execute a program. This time, called CPU time, can be read directly from the CPU clock, and most frequently will be a matter of seconds. If programming is required to comply with a particular request, the appropriate charge that may be recovered for programming time is set forth in subsection (d) of this section. No charge should be made for computer print-out time. Example: If a mainframe computer is used, and the processing time is 20 seconds, the charges would be as follows: $10 / 3 = $3.33; or $10 / 60 x 20 = $3.33.

(5) A governmental body that does not have in-house computer capabilities shall comply with requests in accordance with the Public Information Act, Government Code, Chapter 552, § 552.231.

(i) Miscellaneous supplies. The actual cost of miscellaneous supplies, such as labels, boxes, and other supplies used to produce the requested information, may be added to the total charge for public information.

(j) Postal and shipping charges. Governmental bodies may add any related postal or shipping expenses which are necessary to transmit the reproduced information to the requesting party.

(k) Sales tax. Sales tax shall not be added on charges for public information.

(l) The commission shall reevaluate and update these charges as necessary.

§ 111.64. Requesting an Exemption

(a) Pursuant to § 552.262(c) of the Public Information Act, a governmental body may request that it be exempt from part or all of these rules.

(b) State agencies must request an exemption if their charges to recover costs are higher than those established by these rules.

(c) Governmental bodies, other than agencies of the state, must request an exemption before seeking to recover costs that are more than 25% higher than the charges established by these rules.

(d) An exemption request must be made in writing, and must contain the following elements:

(1) A statement identifying the subsection(s) of these rules for which an exemption is sought;

(2) The reason(s) the exemption is requested;

(3) A copy of the proposed charges;

(4) The methodology and figures used to calculate/compute the proposed charges;

(5) Any supporting documentation, such as invoices, contracts, etc.; and

(6) The name, title, work address, and phone number of a contact person at the governmental body.

(e) The contact person shall provide sufficient information and answer in writing any questions necessary to process the request for exemption.

(f) If there is good cause to grant the exemption, because the request is duly documented,

reasonable, and in accordance with generally accepted accounting principles, the exemption shall be granted. The name of the governmental body shall be added to a list to be published annually in the Texas Register.

(g) If the request is not duly documented and/or the charges are beyond cost recovery, the request for exemption shall be denied. The letter of denial shall:

(1) Explain the reason(s) the exemption cannot be granted; and

(2) Whenever possible, propose alternative charges.

(h) All determinations to grant or deny a request for exemption shall be completed promptly, but shall not exceed 90 days from receipt of the request by the Commission.

§ 111.65. Access to Information Where Copies Are Not Requested

(a) Access to information in standard paper form. A governmental body shall not charge for making available for inspection information maintained in standard paper form. Charges are permitted only where the governmental body is asked to provide, for inspection, information that contains confidential information and public information. When such is the case, the governmental body may charge to make a copy of the page from which information must be edited. No other charges are allowed.

(b) Access to information in other than standard form. In response to requests for access, for purposes of inspection only, to information that is maintained in other than standard form, a governmental body may not charge the requesting party the cost of preparing and making available such information, unless complying with the request will require programming or manipulation of data. If programming or manipulation of data is needed to access the information, the governmental body shall inform the requestor before assembling the information, and shall provide the requestor with an estimate of charges.

(c) A governmental body is not required to purchase any hardware, software or programming capabilities that it does not already possess to accommodate a particular kind of request.

(d) Provision of a copy of public information in the requested medium shall not violate the terms of any copyright agreement between the governmental body and a third party.

(e) If the governmental body does not have the required technological capabilities to comply with the request in the format preferred by the requestor, the governmental body shall proceed in accordance with § 552.228(c) of the Public Information Act.

(f) If a governmental body receives a request requiring programming or manipulation of data, the governmental body should proceed in accordance with § 552.231 of the Public Information Act. Manipulation of data under § 552.231 applies only to information stored in electronic format.

§ 111.66. Format for Copies of Public Information

(a) If a requesting party asks that information be provided on a diskette or other computer-compatible media, and the requested information is electronically stored, the governmental body shall provide the information on computer-compatible media.

(b) The extent to which a requestor can be accommodated will depend largely on the technological capability of the governmental body to which the request is made.

(c) A governmental body is not required to purchase any hardware, software or programming capabilities that it does not already possess to accommodate a particular kind of request.

(d) Provision of a copy of public information in the requested medium shall not violate the terms of any copyright agreement between the governmental body and a third party.

(e) If the governmental body does not have the required technological capabilities to comply with the request in the format preferred by the requestor, the governmental body shall proceed in accordance with § 552.228(c) of the Public Information Act.

(f) If a governmental body receives a request requiring programming or manipulation of data, the governmental body should proceed in accordance with § 552.231 of the Public Information Act. Manipulation of data under § 552.231 applies only to information stored in electronic format.

§ 111.67. Estimates and Waivers of Public Information Charges

(a) A party requesting copies of public information will not always be aware of the amount of time and cost that may be involved in complying with a particular request. Where a particular request will involve considerable time and resources to process, it is advisable that governmental bodies inform requestors of the anticipated completion date and potential resulting charges. When a governmental body charges for public information, a detailed statement of the charges should be made available to the requestor.

(b) A governmental body that cannot produce the public information for inspection and/or duplication within 10 calendar days after the date the information is requested, shall certify to that fact in writing, and set a date and hour within a reasonable time when the information will be available.

(c) A deposit or a bond may be required in the amount of the estimated charges if such charges exceed $100.

§ 111.68. Processing Complaints of Overcharges

(a) Pursuant to the § 552.269(a) of the Public Information Act, a requestor who believes he/she has been overcharged for a copy of public information may complain to the Commission.

(b) The complaint must be in writing, and must:

(1) set forth the reason(s) the person believes the charges are excessive; and

(2) be received by the General Services Commission within 10 working days after the person knows of the occurrence of the alleged overcharge.

(c) The General Services Commission shall address written questions to the governmental body, regarding the methodology and figures used in the calculation of the charges which are the subject of the complaint.

(d) The governmental body shall respond in writing to the questions within 10 days from receipt of the questions.

(e) If the General Services Commission determines that the governmental body overcharged for requested public information, the governmental body shall adjust its charges in accordance with the determination, and shall refund the difference between what was charged and what was determined to be appropriate charges.

(f) The General Services Commission shall send a copy of the determination to the complainant and to the governmental body.

(g) Pursuant to § 552.269(b) of the Public Information Act, a requestor who overpays because a governmental body refuses or fails to follow the charges established by the Commission, is entitled to recover three times the amount of the overcharge if the governmental body did not act in good faith in computing the charges.

(h) The General Services Commission does not have the authority to determine whether or not a governmental body acted in good faith in computing charges.

§ 111.69. Examples of Charges for Copies of Public Information

The following tables present a few examples of the calculations of charges for information:

(1) TABLE 1 (Fewer than 50 pages of paper records): $.10 per copy x number of copies (standard-size paper copies); + Personnel charge (if applicable); + Overhead charge (if applicable); + Document retrieval charge (if applicable); + Postage and shipping (if applicable) = $ TOTAL CHARGE.

(2) TABLE 2 (More than 50 pages of paper records or nonstandard copies): $.10 per copy x number of copies (standard-size paper copies), or cost of nonstandard copy (e.g., diskette, oversized paper, etc.); + Personnel charge (if applicable); + Overhead charge (if applicable); + Document retrieval charge (if applicable); + Actual cost of miscellaneous supplies (if applicable); + Postage and shipping (if applicable) = $ TOTAL CHARGE.

(3) TABLE 3 (Information that Requires Programming or Manipulation of Data): Cost of copy (standard or nonstandard, whichever applies); + Personnel charge; + Overhead charge; + Computer resource charge; + Programming time (if applicable); + Document retrieval charge (if applicable); + Actual cost of miscellaneous supplies (if applicable); + Postage and shipping (if applicable) = $ TOTAL CHARGE.

§ 111.70. The General Services Commission Charge Schedule

The following is a summary of the charges for copies of public information that have been adopted by the Commission. Service Rendered — Charge:

(1) Standard paper copy — $.10 per page.

(2) Nonstandard-size copy:

(A) Diskette — $1.00 each;

(B) Magnetic tape:

(i) 4 mm. — $13.50 each;

(ii) 8 mm. — $12 each;

(iii) 9-track — $11 each;

(C) Data Cartridge:

(i) 2000 Series — $17.50 each;

(ii) 3000 Series — $20 each;

(iii) 6000 Series — $25 each;

(iv) 9000 Series — $35 each;

(v) 600A — $20 each;

(D) Tape Cartridge:

(i) 250 MB — $38 each;

(ii) 525 MB — $45 each;

(E) VHS video cassette — $2.50 each;

(F) Audio cassette — $1.00 each;

(G) Oversized Paper copy — $.50 each;

(H) Mylar (36-inch, 42-inch, and 48-inch):

(i) 3 mil. — $.85/linear foot;

(ii) 4 mil. — $1.10/linear foot;

(iii) 5 mil. — $1.35/linear foot;

(I) Blueline/blueprint paper (all widths) — $.20/linear foot;

(J) Other — Actual cost.

(3) Personnel charge:

(A) Programming personnel — $26 per hour;

(B) Other personnel — $15 per hour.

(4) Overhead charge — 20% of personnel charge.

(5) Microfiche or microfilm charge:

(A) Paper copy — $.10 per page;

(B) Fiche or film copy — Actual cost.

(6) Remote document retrieval charge — Actual cost.

(7) Computer resource charge:

(A) Mainframe — $10 per minute;

(B) Midsize — $1.50 per minute;

(C) Client/Server — $2.20 per hour;

(D) PC or LAN — $1.00 per hour.

(8) Miscellaneous supplies — Actual cost.

(9) Postage and shipping charge — Actual cost.

(10) Photographs — Actual cost.

(11) Other costs — Actual cost.

(12) Outsourced/Contracted Services — Actual cost.

(13) No Sales Tax — No Sales Tax shall be applied to copies of public information.

PART FIVE: Table of Cases

RULES OF JUDICIAL ADMINISTRATION

RULE 12. PUBLIC ACCESS TO JUDICIAL RECORDS

12.1 Policy. The purpose of this rule is to provide public access to information in the judiciary consistent with the mandates of the Texas Constitution that the public interests are best served by open courts and by an independent judiciary. The rule should be liberally construed to achieve its purpose.

12.2 Definitions. In this rule:

(a) *Judge* means a regularly appointed or elected judge or justice.

(b) *Judicial agency* means an office, board, commission, or other similar entity that is in the Judicial Department and that serves an administrative function for a court. A task force or committee created by a court or judge is a "judicial agency".

(c) *Judicial officer* means a judge, former or retired visiting judge, referee, commissioner, special master, court-appointed arbitrator, or other person exercising adjudicatory powers in the judiciary. A mediator or other provider of non-binding dispute resolution services is not a "judicial officer".

(d) *Judicial record* means a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record. A record is a document, paper, letter, map, book, tape, photograph, film, recording, or other material, regardless of electronic or physical form, characteristics, or means of transmission.

(e) *Records custodian* means the person with custody of a judicial record determined as follows:

(1) The judicial records of a court with only one judge, such as any trial court, are in the custody of that judge. Judicial records pertaining to the joint administration of a number of those courts, such as the district courts in a particular county or region, are in the custody of the judge who presides over the joint administration, such as the local or regional administrative judge.

(2) The judicial records of a court with more than one judge, such as any appellate court, are in the custody of the chief justice or presiding

judge, who must act under this rule in accordance with the vote of a majority of the judges of the court. But the judicial records relating specifically to the service of one such judge or that judge's own staff are in the custody of that judge.

(3) The judicial records of a judicial officer not covered by subparagraphs (1) and (2) are in the custody of that officer.

(4) The judicial records of a judicial agency are in the custody of its presiding officer, who must act under this rule in accordance with agency policy or the vote of a majority of the members of the agency.

12.3 Applicability. This rule does not apply to:

(a) records or information to which access is controlled by:

(1) a state or federal court rule, including:

(A) a rule of civil or criminal procedure, including Rule 76a, Texas Rules of Civil Procedure;

(B) a rule of appellate procedure;

(C) a rule of evidence;

(D) a rule of administration;

(2) a state or federal court order not issued merely to thwart the purpose of this rule;

(3) the Code of Judicial Conduct;

(4) Chapter 552, Government Code, or another statute or provision of law;

(b) records or information to which Chapter 552, Government Code, is made inapplicable by statute, rule, or other provision of law, other than Section 552.003(1)(B);

(c) records or information relating to an arrest or search warrant or a supporting affidavit, access to which is controlled by:

(1) a state or federal court rule, including a rule of civil or criminal procedure, appellate procedure, or evidence; or

(2) common law, court order, judicial decision, or another provision of law

(d) elected officials other than judges.

12.4 Access to Judicial Records.

(a) ***Generally.*** Judicial records other than those covered by Rules 12.3 and 12.5 are open to the general public for inspection and copying during regular business hours. But this rule does not require a court, judicial agency, or records custodian to:

(1) create a record, other than to print information stored in a computer;

(2) retain a judicial record for a specific period of time;

(3) allow the inspection of or provide a copy of information in a book or publication commercially available to the public; or

(4) respond to or comply with a request for a judicial record from or on behalf of an individual who is imprisoned or confined in a correctional facility as defined in Section 1.07(a), Penal Code, or in any other such facility in any state, federal, or foreign jurisdiction.

(b) ***Voluntary disclosure.*** A records custodian may voluntarily make part or all of the information in a judicial record available to the public, subject to Rules 12.2(e)(2) and 12.2(e)(4), unless the disclosure is expressly prohibited by law or exempt under this rule, or the information is confidential under law. Information voluntarily disclosed must be made available to any person who requests it.

12.5 Exemptions from Disclosure. The following records are exempt from disclosure under this rule:

(a) ***Judicial work product and drafts.*** Any record that relates to a judicial officer's adjudicative decision-making process prepared by that judicial officer, by another judicial officer, or by court staff, an intern, or any other person acting on behalf of or at the direction of the judicial officer.

(b) ***Security plans.*** Any record, including a security plan or code, the release of which would jeopardize the security of an individual against physical injury or jeopardize information or property against theft, tampering, improper use, illegal disclosure, trespass, unauthorized access, or physical injury.

(c) ***Personnel information.*** Any personnel record that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

(d) ***Home address and family information.*** Any record reflecting any person's home address, home or personal telephone number, social security number, or family members.

(e) ***Applicants for employment or volunteer services.*** Any records relating to an applicant for employment or volunteer services.

(f) ***Internal deliberations on court or judicial administration matters.*** Any record relating to internal deliberations of a court or judicial agency, or among judicial officers or members of a judicial agency, on matters of court or judicial administration.

(g) ***Court law library information.*** Any record in a law library that links a patron's name with the materials requested or borrowed by that patron.

(h) ***Judicial calendar information.*** Any record that reflects a judicial officer's appointments or engagements that are in the future or that constitute an invasion of personal privacy.

(i) ***Information confidential under other law.*** Any record that is confidential or exempt from disclosure under a state or federal constitutional provision, statute or common law, including information that relates to:

> (1) a complaint alleging misconduct against a judicial officer, if the complaint is exempt from disclosure under Chapter 33, Government Code, or other law;
>
> (2) a complaint alleging misconduct against a person who is licensed or regulated by the courts, if the information is confidential under applicable law; or
>
> (3) a trade secret or commercial or financial information made privileged or confidential by statute or judicial decision.

(j) ***Litigation or settlement negotiations.*** Any judicial record relating to civil or criminal litigation or settlement negotiations:

(1) in which a court or judicial agency is or may be a party; or

(2) in which a judicial officer or member of a judicial agency is or may be a party as a consequence of the person's office or employment.

(k) ***Investigations of character or conduct.*** Any record relating to an investigation of any person's character or conduct, unless:

(1) the record is requested by the person being investigated; and

(2) release of the record, in the judgment of the records custodian, would not impair the investigation.

(l) ***Examinations.*** Any record relating to an examination administered to any person, unless requested by the person after the examination is concluded.

12.6 Procedures for Obtaining Access to Judicial Records.

(a) ***Request.*** A request to inspect or copy a judicial record must be in writing and must include sufficient information to reasonably identify the record requested. The request must be sent to the records custodian and not to a court clerk or other agent for the records custodian. A requestor need not have detailed knowledge of the records custodian's filing system or procedures in order to obtain the information.

(b) ***Time for inspection and delivery of copies.*** As soon as practicable — and not more than 14 days — after actual receipt of a request to inspect or copy a judicial record, if the record is available, the records custodian must either:

(1) allow the requestor to inspect the record and provide a copy if one is requested; or

(2) send written notice to the requestor stating that the record cannot within the prescribed period be produced or a copy provided, as applicable, and setting a reasonable date and time when the document will be produced or a copy provided, as applicable.

(c) ***Place for inspection.*** A records custodian must produce a requested judicial record at a convenient, public area.

(d) ***Part of record subject to disclosure.*** If part of a requested record is subject to disclosure under this rule and part is not, the records custodian must redact the portion of the record that is not subject to disclosure, permit the remainder of the record to be inspected, and provide a copy if requested.

(e) ***Copying; mailing.*** The records custodian may deliver the record to a court clerk for copying. The records custodian may mail the copy to a requestor who has prepaid the postage.

(f) ***Recipient of request not custodian of record.*** A judicial officer or a presiding officer of a judicial agency who receives a request for a judicial record not in his or her custody as defined by this rule must promptly attempt to ascertain who the custodian of the record is. If the recipient of the request can ascertain who the custodian of the requested record is, the recipient must promptly refer the request to that person and notify the requestor in writing of the referral. The time for response prescribed in Rule 12.6(b) does not begin to run until the referral is actually received by the records custodian. If the recipient cannot ascertain who the custodian of the requested record is, the recipient must promptly notify the requestor in writing that the recipient is not the custodian of the record and cannot ascertain who the custodian of the record is.

(g) ***Inquiry to requestor.*** A person requesting a judicial record may not be asked to disclose the purpose of the request as a condition of obtaining the judicial record. But a records custodian may make inquiry to establish the proper identification of the requestor or to clarify the nature or scope of a request.

(h) ***Uniform treatment of requests.*** A records custodian must treat all requests for information uniformly without regard to the position or occupation of the requestor or the person on whose behalf a request is made, including whether the requestor or such person is a member of the media.

12.7 Costs for Copies of Judicial Records; Appeal of Assessment.

(a) ***Cost.*** The cost for a copy of a judicial record is either:

(1) the cost prescribed by statute, or

(2) if no statute prescribes the cost, the actual cost, as defined in Section 111.62, Title 1, Texas Administrative Code, not to exceed 125 percent of the amount prescribed by the General Services Commission for providing public information under Title 1, Texas Administrative Code, Sections 111.63, 111.69, and 111.70.

(b) ***Waiver or reduction of cost assessment by records custodian.*** A records custodian may reduce or waive the charge for a copy of a judicial record if:

(1) doing so is in the public interest because providing the copy of the record primarily benefits the general public, or

(2) the cost of processing collection of a charge will exceed the amount of the charge.

(c) ***Appeal of cost assessment.*** A person who believes that a charge for a copy of a judicial record is excessive may appeal the overcharge in the manner prescribed by Rule 12.9 for the appeal of the denial of access to a judicial record.

(d) ***Records custodian not personally responsible for cost.*** A records custodian is not required to incur personal expense in furnishing a copy of a judicial record.

12.8 Denial of Access to a Judicial Record.

(a) ***When request may be denied.*** A records custodian may deny a request for a judicial record under this rule only if the records custodian:

(1) reasonably determines that the requested judicial record is exempt from required disclosure under this rule; or

(2) makes specific, non-conclusory findings that compliance with the request would substantially and unreasonably impede the routine operation of the court or judicial agency.

(b) ***Time to deny.*** A records custodian who denies access to a judicial record must notify the person requesting the record of the denial within a reasonable time — not to exceed 14 days — after receipt of the request, or before the deadline for responding to the request extended under Rule 12.6(b)(2).

(c) ***Contents of notice of denial.*** A notice of denial must be in writing and must:

(1) state the reason for the denial;

(2) inform the person of the right of appeal provided by Rule 12.9; and

(3) include the name and address of the Administrative Director of the Office of Court Administration.

12.9 Relief from Denial of Access to Judicial Records.

(a) ***Appeal.*** A person who is denied access to a judicial record may appeal the denial by filing a petition for review with the Administrative Director of the Office of Court Administration.

(b) ***Contents of petition for review.*** The petition for review:

(1) must include a copy of the request to the record custodian and the records custodian's notice of denial;

(2) may include any supporting facts, arguments, and authorities that the petitioner believes to be relevant; and

(3) may contain a request for expedited review, the grounds for which must be stated.

(c) ***Time for filing.*** The petition must be filed not later than 30 days after the date that the petitioner receives notice of a denial of access to the judicial record.

(d) ***Notification of records custodian and presiding judges.*** Upon receipt of the petition for review, the Administrative Director must promptly notify the records custodian who denied access to the judicial record and the presiding judge of each administrative judicial region of the filing of the petition.

(e) ***Response.*** A records custodian who denies access to a judicial record and against whom relief is sought under this section may — within 14 days of receipt of notice from the Administrative Director — submit a written response to the petition for review and include supporting facts and authorities in the response. The records custodian must mail a copy of the response to the petitioner. The records custodian may also submit for in camera inspection any record, or a sample of records, to which access has been denied.

(f) ***Formation of special committee.*** Upon receiving notice under Rule 12.9(d), the presiding judges must refer the petition to a special committee of not less than five of the presiding judges for review. The presiding judges must notify the Administrative Director, the petitioner, and the records custodian of the names of the judges selected to serve on the committee.

(g) ***Procedure for review.*** The special committee must review the petition and the records custodian's response and determine whether the requested judicial record should be made available under this rule to the petitioner. The special

committee may request the records custodian to submit for in camera inspection a record, or a sample of records, to which access has been denied. The records custodian may respond to the request in whole or in part but it not required to do so.

(h) ***Considerations.*** When determining whether the requested judicial record should be made available under this rule to petition, the special committee must consider:

(1) the text and policy of this Rule;

(2) any supporting and controverting facts, arguments, and authorities in the petition and the response; and

(3) prior applications of this Rule by other special committees or by courts.

(i) ***Expedited review.*** On request of the petitioner, and for good cause shown, the special committee may schedule an expedited review of the petition.

(j) ***Decision.*** The special committee's determination must be supported by a written decision that must:

(1) issue within 60 days of the date that the Administrative Director received the petition for review;

(2) either grant the petition in whole or in part or sustain the denial of access to the requested judicial record;

(3) state the reasons for the decision, including appropriate citations to this rule; and

(4) identify the record or portions of the record to which access is ordered or denied, but only if the description does not disclose confidential information.

(k) ***Notice of decision.*** The special committee must send the decision to the Administrative Director. On receipt of the decision from the special committee, the Administrative Director must:

(1) immediately notify the petitioner and the records custodian of the decision and include a copy of the decision with the notice; and

(2) maintain a copy of the special committee's decision in the Administrative Director's office for public inspection.

(l) ***Publication of decisions.*** The Administrative Director must publish periodically to the judiciary and the general public the special committees' decisions.

(m) ***Final decision.*** A decision of a special committee under this rule is not appealable but is subject to review by mandamus.

(n) ***Appeal to special committee not exclusive remedy.*** The right of review provided under this subdivision is not exclusive and does not preclude relief by mandamus.

12.10 Sanctions. A records custodian who fails to comply with this rule, knowing that the failure to comply is in violation of the rule, is subject to sanctions under the Code of Judicial Conduct.

Comments

1. Although the definition of "judicial agency" in Rule 12.2(b) is comprehensive, applicability of the rule is restricted by Rule 12.3. The rule does not apply to judicial agencies whose records are expressly made subject to disclosure by statute, rule, or law. An example is the State Bar ("an administrative agency of the judicial department", Tex. Gov't Code § 81.011(a)), which is subject to the Public Information Act. Tex. Gov't Code § 81.033. Thus, no judicial agency must comply with both the Act and this rule; at most one can apply. Nor does the rule apply to judicial agencies expressly excepted from the Act by statute (other than by the general judiciary exception in section 552.003(b) of the Act), rule, or law. Examples are the Board of Legal Specialization, Tex. Gov't Code § 81.033, and the Board of Disciplinary Appeals, Tex. R. Disciplinary App. 7.12. Because these boards are expressly excepted from the Act, their records are not subject to disclosure under this rule, even though no law affirmatively makes their records confidential. The Board of Law Examiners is partly subject to the Act and partly exempt, Tex. Gov't Code § 82.003, and therefore this rule is inapplicable to it. An example of a judicial agency subject to the rule is the Supreme Court Advisory Committee, which is neither subject to nor expressly excepted from the Act, and whose records are not made confidential by any law.

2. As stated in Rule 12.4, this rule does not require the creation or retention of records, but neither does it permit the destruction of records that are required to be maintained by statute or other law, such as Tex. Gov't Code §§ 441.158-.167, .180-.203; Tex. Local Gov't Code ch. 203; and 13 Tex. Admin. Code § 7.122.

3. Rule 12.8 allows a records custodian to deny a record request that would substantially and unreasonably impede the routine operation of the court or judicial agency. As an illustration, and not by way of limitation, a request for "all judicial records" that is submitted every day or even every few days by the same person or persons acting in concert could substantially and unreasonably impede the operations of a court or judicial agency that lacked the staff to respond to such repeated requests.

Public Information Act Deadlines for Governmental Bodies

Step	Action	Section	Deadline	Due	Done
1	Governmental body must either release requested public information promptly, or if not within ten days of receipt of request, its Public Information Officer ("PIO") must certify fact that governmental body cannot produce the information within 10 days and state date and hour within reasonable time when the information will be available.	552.221(a) 552.221(d)	Within 10 business days of receipt of request for information make public information available, **or**		
			certify to requestor date and hour when public information will be available		
2	Governmental body seeking to withhold information based on one or more of the exceptions under Subchapter C must request an attorney general decision stating all exceptions that apply, if there has not been a previous determination.	552.301(b)	Within a reasonable time, but not later than the 10th business day after receipt of the request for information.		
3	Governmental body must give notice to the requestor of the request for attorney general decision and a copy of the governmental body's request for an attorney general decision.	552.301(d)	Within a reasonable time, but not later than the 10th business day after receipt of the request for information.		
4	Governmental body must submit to the attorney general comments explaining why the exceptions raised in step 2 apply.	552.301(e)	Within a reasonable time, but not later than the 15th business day after receipt of the request for information.		
5	Governmental body must submit to attorney general copy of written request for information.	552.301(e)	Within a reasonable time, but not later than the 15th business day after receipt of the request for information.		
6	Governmental body must submit to attorney general signed statement as to date on which written request for information was received.	552.301(e)	Within a reasonable time, but not later than the 15th business day after receipt of the request for information.		
7	Governmental body must submit to attorney general copy of information requested, or representative sample if voluminous amount of information is requested.	552.301(e)	Within a reasonable time, but not later than the 15th business day after receipt of the request for information.		
8	a) Governmental body makes a good faith attempt to notify person whose proprietary information may be protected from disclosure under sections 552.101, 552.110, 552.113, or 552.131. Notification includes: 1) copy of written request; 2) letter, in the form prescribed by the attorney general, stating that the third party may submit to the attorney general reasons requested information should be withheld.	552.305(d)	Within a reasonable time, but not later than the 10th business day after date governmental body receives request for information.		

Step	Action	Section	Deadline	Due	Done
	b) Third party may submit brief to attorney general.	552.305(d)	Within a reasonable time, but not later than the 10th business day of receiving notice from governmental body.		
9	Governmental body must submit to attorney general additional information if requested by attorney general.	552.303(d)	Not later than the 7th calendar day after date governmental body received written notice of attorney general's need for additional information.		
10	Governmental body desires attorney general reconsideration of attorney general decision.	552.301(f)	Public Information Act prohibits a governmental body from seeking the attorney general's reconsideration of an open records ruling.		
11	Governmental body files suit challenging the attorney general decision.	552.324	Within 30 calendar days after the date governmental body receives attorney general decision.		
12	Governmental body files suit against the attorney general challenging the attorney general decision to preserve an affirmative defense to prosecution for failing to produce requested information.	552.353(b)	Within 10 calendar days after governmental body receives attorney general's decision that information is public.		

Public Information Act Deadlines for Requestor

Step	Action	Section	Deadline	Due	Done
1	Requestor may submit to attorney general reasons requested information should be released when request for attorney general decision is pending.	552.304	Public Information Act has no deadline. Requestors wishing to submit information should contact attorney general to obtain deadline.		
2	Requestor may file writ of mandamus if governmental body refuses to request an attorney general decision or refuses to release information that the attorney general determined is public information.	552.321	No deadline specified in chapter 552, Government Code.		
3	**Complaints: Requestor files with district or county attorney.** Requestor may file complaint with district or county attorney alleging violation of Public Information Act.	552.3215(e)	No deadline specified in chapter 552, Government Code		
4	**Complaints: District or county attorney.** If a complaint is filed with the district or county attorney, the district or county attorney shall determine whether to bring declaratory or injunctive action based on allegations of violations of the Public Information Act.	552.3215(g)	Before the 31st day after the complaint is filed with the district or county attorney.		
5	**Complaints: Notice of determination.** The district or county attorney shall notify the complainant of the determination on whether to bring declaratory or injunctive action based on the requestor's complaint.	552.3215(g)	Before the 31st day after the complaint is filed with the district or county attorney.		
6	**Complaints: Conflict of interest.** If the district or county attorney believes there is a conflict of interest, the district or county attorney shall inform the complainant of that decision and of the complainant's right to file with the attorney general's office.	552.3215(h)	Before the 31st day after the complaint is filed with the district or county attorney.		
7	**Complaints: No action filed.** If the district or county attorney decides not to bring an action, it shall return the complaint to the complainant with a statement explaining the basis for that determination.	552.3215(h)	Before the 31st day after the complaint is filed with the district or county attorney.		
8	**Complaints: Complainants' rights.** If the district or county attorney decides not to bring an action, the complainant is entitled to file the complaint with the attorney general.	552.3215(i)	Before the 31st day after the date the complaint is returned to the complainant.		
9	**Complaints: Attorney General.** On receipt of the complaint, the attorney general shall comply with the requirements in subsections 552.3215(g) and (h).	552.3215(j)	Before the 31st day after the complaint is filed with the attorney general.		

Notice Statement to persons whose proprietary information is requested

(A governmental body must provide this notice to a person whose proprietary interests may be affected by release of information within ten business days after receipt of the written request for information. *NOTE:* This notice is periodically updated. Please check the OAG Web site (www.oag.state.tx.us) for the latest version.)

date

Third Party
address

Dear M:

This notice is to advise you that (Name of Governmental Body) has received a request under the Texas Public Information Act (the "Act"), chapter 552 of the Government Code, for information received from or related to your company. The requested information may be excepted from disclosure by sections 552.101, 552.110, 552.113, or 552.131 of the Act. A copy of the request for information is enclosed for your inspection. Pursuant to section 552.301 of the Government Code, we are seeking an attorney general decision to determine whether we must release the requested information. We are providing the attorney general with a copy of the request for information and a copy of the requested information, along with other material required by the Act.

Under the Act, all information held by governmental bodies is open to public disclosure unless it falls within one of the Act's specific exceptions to disclosure. The Act places on the custodian of records the burden of demonstrating that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). However, in cases such as this one, where a third party's property interest is implicated, the governmental body may rely on the third party to establish that the information should be withheld under applicable exceptions intended to protect those interests. Gov't Code § 552.305; Open Records Decision No. 542 (1990).

If you wish to claim that the requested information is protected proprietary information, you have the right to submit additional information or legal briefing to the attorney general. You are not required to submit briefing to the attorney general, but if you decide not to submit briefing, the Office of the Attorney General will presume that you have no property interest in the requested information. In other words, your failure to take timely action will result in the requested information being released to the public. If you decide to submit briefing, **you must do so not**

later than the tenth business day after the date you receive this notice.
If you submit briefing to the attorney general, you must:

a) identify the legal exceptions that apply,

b) identify the specific parts of each document that are covered by each exception, and

c) explain why each exception applies. Gov't Code § 552.305(d).

A claim that an exception applies without further explanation will not suffice. Attorney General Opinion H-436. Please contact this office to review the information at issue in order to make your arguments. The Act does not require the attorney general to raise and consider exceptions that have not been raised. The attorney general is generally required to issue a decision within 45 working days. You must send your written comments to the Office of the Attorney General at the following address:

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

In addition, you are required to provide the requestor with a copy of your communication to the Office of the Attorney General. Gov't Code § 552.305(e). You may redact the requestor's copy of your communication to the extent it contains the substance of the requested information. Gov't Code § 552.305(e).

Commonly Raised Exceptions
In order for a governmental body to withhold requested information, specific tests or factors for the applicability of a claimed exception must be met. Failure to meet these tests may result in the release of requested information. We have listed the most commonly-claimed exceptions in the Government Code concerning proprietary information and the leading cases or decisions discussing them. This listing is not intended to limit any exceptions or statutes you may raise.

Section 552.101: Information Made Confidential by Law
Open Records Decision No. 652 (1997).

Section 552.110: Trade Secrets and Commercial or Financial Information

Trade Secrets:
Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

Open Records Decision No. 552 (1990).

Commercial or Financial Information:
The commercial or financial information prong of section 552.110 was amended by the Seventy-sixth Legislature. The amendment became effective September 1, 1999. At the time of publication of this form, there were no cases or opinions construing the amended provision.

Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. filed) (construing previous version of section 552.110).
National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).
Open Records Decision No. 639 (1996).

Section 552.113: Geological or Geophysical Information
Open Records Decision No. 627 (1994).

Section 552.131: Economic Development Negotiation Information

If you have questions about this notice or release of information under the Act, please refer to the Public Information Handbook published by the Office of the Attorney General, or contact the attorney general's Open Government Hotline at 512-478-OPEN (6736) or toll-free at (877)-673-6839 (877-OPEN TEX). To obtain copies of the Public Information Handbook or Attorney General Opinions, please go to the attorney general's Web site at www.oag.state.tx.us or call the attorney general's Opinions Library at 512- 936-1730.

Sincerely,

Officer for Public Information or Designee
Name of Governmental Body

Enclosure: Copy of request for information

cc: Requestor
address
(w/o enclosures)

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)

Public Access Option Form

[Note: This form should be completed and signed by the employee no later than the 14th day after the date the employee begins employment, the public official is elected or appointed, or a former employee or official ends employment or service.]

_____

(Name)

The Public Information Act allows employees, public officials and former employees and officials to elect whether to keep certain information about them confidential. Unless you choose to keep it confidential, the following information about you may be subject to public release if requested under the Texas Public Information Act. Therefore, please indicate whether you wish to allow public release of the following information.

	Public Access?
Home Address	No____ Yes____
Home Telephone Number	No____ Yes____
Social Security Number	No____ Yes____
Information that reveals whether you have family members	No____ Yes____

_____ _____

(Signature) (Date)

Subject Index