

**TEXAS PUBLIC INFORMATION ACT
LAWS MADE EASY**



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Texas Public Information Act Made Easy

This “made easy” article provides answers in easy to understand language to the most frequently asked questions regarding the Public Information Act. In a question-and-answer format, this article provides guidance to public officials and member of public on the most frequently asked questions on the Public Information Act (Act). For example, the article addresses: the types of records and entities that fall under the Act; the time deadlines and mandatory notices that apply when a governmental body handles an open records request; and when a governmental body is required to ask for an Attorney General open records ruling.

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

TML is available to answer questions about this from city officials, who should nonetheless consult with their local legal counsel regarding the application of the law to the facts of each particular situation.

I. Application of the Public Information Act

1. What types of information are subject to the Public Information Act?

Public information includes:

Any information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- 1) By a governmental body;
- 2) For a governmental body and the governmental body:
 - a. Owns the information;
 - b. Has a right of access to the information; or
 - c. Spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- 3) By an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.¹

Also, information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.² Any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business is also included in the definition of public information.³ The Public Information Act (hereinafter the Act) applies to records regardless of their format. It includes information that is maintained in paper, tape, microfilm, video, electronic data held in a computer memory, as well as other mediums specified under law.⁴

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

The Act applies to information that is held by or for any "governmental body."⁵ The term "governmental body" has a broad definition that includes in applicable part:

¹ Tex. Gov't Code § 552.002(a).

² *Id.* § 552.002(a-1).

³ *Id.* § 552.002(a-2).

⁴ *Id.* § 552.002(b)-(c).

⁵ *Id.* § 552.003(1).

- 1) Boards, commissions, departments, committees, institutions, agencies, or offices that are within or are created by the executive or legislative branch of state government and that are directed by one or more elected or appointed members;
- 2) City governmental bodies;
- 3) County governmental bodies;
- 4) School district board of trustees;
- 5) Local workforce development board;
- 6) Governing board of a special district
- 7) Nonprofit corporations that are eligible to receive funds under the federal community services block grant program and that are authorized by this state to serve a geographic area of the state;
- 8) The part, section or portion of a public or private entity that spends or that is supported in whole or in part by public funds;
- 9) Certain property owners' associations.⁶

In other words, all governmental entities and certain non-governmental entities are subject to the Act. Additionally, entities that are considered departments, agencies, or political subdivisions of a city or county are also subject to the Act if the involved entity has rule-making or quasi-judicial powers.⁷ For example, zoning boards of adjustment have rule-making or quasi-judicial powers and are considered agencies or departments of a city. Therefore, the records of such entities would be subject to the Act.

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

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)(xii) of the Government Code. Public funds are “funds of the state or of a governmental subdivision of the state.”⁸ The Texas Supreme Court has defined “supported in whole or part by public funds’ to include only those private entities or their sub-parts sustained, at least in part, by public funds, meaning they could not perform the same or similar services without the public funds.”⁹ Thus, section 552.003(1)(A)(xii) encompasses only those private entities that are dependent on public funds to operate as a going concern, and only those entities acting as the functional equivalent of the government.

⁶ *Id.* § 552.0036.

⁷ *Id.* § 552.003(1)(A)(iv).

⁸ *Id.* § 552.003(5).

⁹ *Greater Houston Partnership v. Paxton*, 468 S.W.3d 51, 63 (Tex. 2015).

Finally, it should be noted that certain entities are specifically made subject to the Public Information Act under the state law that governs that entity. For example, economic development corporations are specifically made subject to the provisions of the Public Information Act under the Development Corporation Act found in Chapters 501 through 507 of the Local Government Code.¹⁰

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

The fact that a private entity may own or retain a record does not prevent the record from being subject to release under the Public Information Act. For example, if a consultant maintains or holds records for a governmental body, the documents are still considered public information if the governmental body owns the information or has a right of access to it.¹¹

It is important to note that a governmental body usually cannot contract away its right to access documents that are held by a consultant if the information would otherwise be considered public. For example, an open record decision has held that a city manager could not contract away the city's right to inspect a list of applicants for a city job even though the list was developed by a private consultant for the city.¹²

5. Are court records subject to the Public Information Act?

Judicial records are not subject to the Public Information Act.¹³ Courts must look to the rules adopted by the Texas Supreme Court to determine the court's duty to provide access to court records.¹⁴ Additionally, courts must consider court rulings, attorney general opinions and certain state statutes that give the public a right to obtain copies of court records. For example, higher courts have held that there is an "open courts" concept that must guide judges in giving public access to court documents. This legal concept provides that the public has a right to inspect and copy judicial records subject to the court's inherent power to control access to such records in order to preserve justice. In other words, the public's right of access to court documents is not an absolute right.¹⁵

It should be noted that the public's right to access court records is in addition to the right of parties to a lawsuit to obtain information through discovery or through other court

¹⁰ Tex. Loc. Gov't Code § 501.072.

¹¹ Tex. Gov't Code § 552.002(a)(2)(A)&(B). See also Tex. Att'y Gen. ORD-363 (1983).

¹² Tex. Att'y Gen. ORD-585 (1991).

¹³ Tex. Gov't Code § 552.003(1)(B).

¹⁴ *Id.* § 552.0035. See Tex. R. Jud. Admin. 12 reprinted in Tex. Gov't Code, tit. 2, subtit. F app.

¹⁵ *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Ashpole v. Millard*, 778 S.W.2d 169 (Tex.App. B Houston [1st Dist.] 1989, no writ); Op. Tex. Att'y Gen. No. DM-166 (1992), Tex. Att'y Gen. ORD-25 (1974).

procedures. Legislation has clarified that subpoenas and motions for discovery are not considered a request for information under the Public Information Act.¹⁶ Such requests should be handled as required by the applicable civil or criminal procedural statutes. Additionally, state law has been amended to indicate that probable cause affidavits for a search warrant are considered public records once the warrant has been executed.¹⁷ The magistrate who issued the warrant must make the affidavits available for public inspection in the court clerk's office.

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

These elected officials have an inherent right of access to a governmental body's records if the official is requesting the records in his/her official capacity. The transfer of information to officials of the governmental body is not considered a release to the public as long as the official is asking for the information in his/her official capacity.¹⁸ However, the ability to release such information to elected officials may be limited by the state or federal law that pertains to such documents.

II. What Constitutes a Public Information Request

7. To what governmental officer must a public information request be directed?

Except in the case of faxed and e-mailed requests, the Public Information Act does not require that the public direct its public information records requests to any specific public employee or officer.¹⁹ Generally, the deadlines involved in handling a public information records request are not put on hold merely because the wrong staff member received the request. For this reason, it is important that a governmental body clearly inform all of its employees what to do if they receive a request for records. The public official must be careful about what they do with these requests.

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

The governmental body has a duty to respond to any written requests for public information including those that are made through e-mail or by fax. However, state law provides that the governmental body can designate a person who is authorized to receive e-mail or faxed requests for public information. If the governmental body makes such a designation, the Act is only activated for emails and fax request if the request is

¹⁶ Tex. Gov't Code § 552.0055.

¹⁷ Tex. Code Crim. Proc. Art 18.01(b). *See also Houston Chronicle Publishing Co. v. Woods*, 949 S.W.2d 492, 499 (Tex. App. — Beaumont 1997, no writ).

¹⁸ Op. Tex. Att'y Gen. No. JM-119 (1983), Tex. Att'y Gen. LO-93-69.

¹⁹ Tex. Att'y Gen. ORD-44 (1974), ORD-497 (1988).

directed to the assigned individual.²⁰ If the governmental body has not made such a designation, the e-mail or faxed request can be directed to any official or staff member.

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

State law allows a governmental body to require that all requests for copies of governmental records be made in writing. In fact, the Act is only activated by a written request for the documents.²¹ Governmental bodies often develop forms for the public to use to request public records, but the governmental body cannot require the requestor to use that form. The governmental body's duty to provide the record would apply to any written request for the information, regardless of the format of the document used by the requestor. For example, an open records request is often contained within a complaint letter or within other citizen correspondence sent to a governmental body.

If a governmental body provides copies of records upon a verbal request, the governmental body must be consistent in its treatment of all requestors.²² In other words, if the governmental body does not require a written request from certain individuals, it should not insist on a written request from others.

III. Administration of Public Information Requests

A. Timing Issues under the Public Information Act

10. How much time does a governmental body generally have to comply with a public information request when the governmental body is going to release the requested information?

There is often a misconception that the Public Information Act requires that copies of public information must be produced within ten business days of the written request to the governmental body for the record. However, the standard under the Act is actually that the governmental body must "promptly produce" the public information.²³ Further, the Act states that all public information requests must be accomplished within a reasonable time period.²⁴ What is considered reasonable and prompt will vary depending on the number of documents sought by the requestor. In certain circumstances, the records can be produced in less than ten business days. However, requests for a substantial number of documents may take several weeks to produce.

²⁰ Tex. Gov't Code § 552.301(c).

²¹ *Id.* § 552.301(a). See also Tex. Att'y Gen. ORD-304 (1982).

²² Tex. Gov't Code § 552.223.

²³ *Id.* § 552.221(a). See also Tex. Att'y Gen. ORD-664 (2000).

²⁴ Tex. Gov't Code § 552.221(a), Tex. Att'y Gen. ORD-467 (1987), ORD-664 (2000).

If it will take a governmental body longer than ten business days to provide the records, the governmental body must certify that fact in writing to the requestor.²⁵ In the notice to the requestor, the governmental body must indicate a set date and hour within a reasonable time that the information will be available for inspection or duplication.

11. Can the governmental body withdraw a public information request after informing the requestor that the requested information is available for inspection, to be picked up, or fails to pay the postage and other fees?

If the requestor fails to inspect or duplicate public information in the governmental body's office on or before the 60th day after the date the information is made available, or fails to pay postage and any other Act charges on or before the 60th day after the date the requestor is informed of the charges, then the request is considered withdrawn.²⁶

12. When is a governmental body under a timing deadline to take a particular action when handling a public information request?

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

- 1) **Notice to Requestor that the Governmental Body Needs Additional Time to Produce Records.**²⁷ If the governmental body is unable to produce a requested record within ten business days for inspection or for duplication, the governmental body must certify that fact in writing to the requestor and set a date and hour within a reasonable time that the information will be available for inspection or for duplication.
- 2) **Notice to Requestor that the Governmental Body Needs Additional Time to Produce Records That Are in Active Use or in Storage.**²⁸ If the governmental body needs additional time to produce a record because it is in active use or because it is in storage, the governmental body must notify the requestor of this fact in writing. This notice must be given within ten business days of the governmental body's receipt of the request for the documents.²⁹ The notice must set a date and hour within a reasonable

²⁵ Tex. Gov't Code § 552.221(d).

²⁶ *Id.* § 552.221(e).

²⁷ *Id.* § 552.221(d).

²⁸ *Id.* § 552.221(c).

²⁹ *Id.* § 552.221(d).

time that the information will be available for inspection or duplication. It should be noted that the fact that a document has not been formally approved by the governmental body usually would not justify a delay of the document's release under the "active use" provision.³⁰

3) **Notice to Requestor of Programming or Manipulation Costs.**³¹ If production of the requested information in a particular format would require additional computer programming or manipulation of data, the governmental body must provide a written notice of this fact to the requestor. The notice must indicate:

- a. that the information is not available in the requested form;
- b. a description of the forms in which the information is available;
- c. a description of any contract or services that would be required to provide the information in the requested form;
- d. as estimated cost providing the information in the requested form; and
- e. the time that it would take to provide the information in that form.³²

Generally, this notice must be provided to the requestor within 20 days of the governmental body's receipt of the request.³³

4) **Request by the Governmental Body for an Open Records Ruling from the Attorney General.**³⁴ If a governmental body plans to withhold certain documents or information, it usually must request an Attorney General's ruling on the ability to withhold such information. The written request for an Attorney General's ruling must be made within ten business days after the date the governmental body receives the written request for information. Also, certain notices must be sent:

- a. Notice to Requestor that the Governmental Body Sought an Attorney General's Open Records Ruling.³⁵ The governmental body must give written notice to a requestor if the governmental body seeks an Attorney General's ruling on the request. A copy of

³⁰ Tex. Att'y Gen. ORD-148 (1976) (faculty member's file not in active use the entire time the promotion is under consideration). *But see* Tex. Att'y Gen. ORD-225 (1979) (secretary's handwritten notes are in active use while the secretary is typing minutes of the meeting from them).

³¹ Tex. Gov't Code § 552.231(a).

³² *Id.* § 552.231(b).

³³ *Id.* § 552.231(c).

³⁴ *Id.* § 552.301(a).

³⁵ *Id.* § 552.301(d).

the governmental body's communication to the Attorney General must be provided to the requestor, though it may be redacted if the copy itself discloses the requested information. Both must be given within ten business days of the governmental body's receipt of the request for the documents.

- b. Notice to Person or Entity with Proprietary Interest in Information of Attorney General's Open Records Ruling Request.³⁶ If an open records request may result in the release of proprietary information, the governmental body must make a good faith attempt to notify the person or entity that has such an interest in the open records ruling request. The written notice must be sent by the governmental body within ten business days of the date the governmental body received the original request for the information.
 - i. This notice must include: (1) a copy of the written request for the information; and (2) a statement, in a form prescribed by the Attorney General, that the person is entitled to submit a letter, brief, or memorandum to the Attorney General in support of withholding the information.³⁷ The notice must inform the person that any briefing must include each reason why the person believes the information should be withheld. The person with a proprietary interest must submit his/her brief within ten business days of the date the person receives the written notice from the governmental body. Also, the person who submits a brief to withhold the information must provide a copy of his/her brief to the requestor.³⁸

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

If a governmental body in good faith has determined that the request for information is unclear or that the scope of the information being asked for is unduly broad, the governmental body should ask the requestor to clarify or narrow the scope of a request.³⁹ The ten business days to request an Attorney General's open records ruling is measured from the date the request is clarified or narrowed as long as the

³⁶ *Id.* § 552.305(d)(1).

³⁷ *Id.* § 552.305(d)(2).

³⁸ *Id.* § 552.305(e).

³⁹ *Id.* § 552.222(b)

governmental body is acting in good faith.⁴⁰ In other words from the day that the requestor clarifies or narrows his/her request to the governmental body, the governmental body has ten business days to ask for a ruling from the Attorney General's office.

The written request for clarification to the requestor must contain a statement as to the consequence of failing to timely respond to the request for clarification, discussion or additional information.⁴¹ If the governmental body sends a written request for clarification, discussion or additional information to the requestor and the requestor does not send a written response by the 61st day, the requestor's open records request is considered withdrawn.⁴² For the request to be considered withdrawn, the governmental body must send the request for clarification, discussion or additional information to the requestor by certified mail if the governmental body has a physical or mailing address for the requestor.⁴³ If the public information request is received by e-mail, the governmental body can send the written request for clarification, discussion or additional information by e-mail.⁴⁴ Also, if the requestor does not send an e-mail written response by the 61st day to the e-mail requesting clarification or narrowing, the request is considered withdrawn.⁴⁵

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

A governmental body is required to ask the Attorney General for an open records ruling in almost all cases if the governmental body wants to withhold requested documents or information.⁴⁶ The fact that a particular document request may arguably fall within one of the statutory exceptions to disclosure does not in itself eliminate the need to ask for an open records ruling. Unless the governmental body can point to a previous determination that addresses the exact information that the governmental body now wants to withhold⁴⁷ or to a section of the PIA that allows a governmental body to withhold information without asking for a ruling⁴⁸, the governmental body must request a ruling to withhold the information. In addition, if determining whether a particular record

⁴⁰ *City of Dallas v. Abbott*, 304 S.W.3d 390, 384 (Tex. 2010).

⁴¹ Tex. Gov't Code § 552.222(e).

⁴² *Id.* § 552.222(d).

⁴³ *Id.* § 552.222(f).

⁴⁴ *Id.* § 552.222(g)(1).

⁴⁵ *Id.* § 552.222(g)(2).

⁴⁶ *Id.* § 552.301(a).

⁴⁷ See Tex. Att'y Gen. ORD-673 (2001) (what constitutes a "previous determination"); Tex. Att'y Gen. ORD-435 (1986) (school district cannot unilaterally decide that material fits within exception unless the school district has previously requested a determination involving the exact same material); *Houston Chronicle Publishing Co., v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (specifying that Attorney General is authorized to determine what constitutes "previous determination.").

⁴⁸ See, e.g. Tex. Gov't Code §§ 552.130(c); .136(c), .147(b).

may be withheld under a statutory exception requires a review and consideration of the applicable facts, the governmental body should request an Attorney General ruling before it withholds the record.

A request for an Attorney General's ruling must be made within ten business days of the date the governmental body received the written request.⁴⁹ Such a request can only be made by the governmental body.⁵⁰ If the governmental body does not make such a request within the deadline, the information is presumed to be open to the public as a matter of law and the information must be released.⁵¹ The presumption of openness and the duty to release the information can only be overcome by a compelling reason that the information should not be released. A compelling reason may in certain cases involve a showing that the information is deemed confidential by some other source of law or that third-party interests are at stake.⁵² It should be noted that if the governmental body is going to release all of the requested information, there is no need to ask for a ruling. The governmental body can seek advice on any of these issues from the Attorney General's Open Government Hotline at (877) 673-6839 or (512) 478-6736.

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

The Attorney General has concluded a governmental body may not request an open records ruling from the Attorney General if the governmental body reasonably believes the requested information is not excepted from required disclosure. Instead, the governmental body must promptly produce the requested public information to the requestor.⁵³

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

The Public Information Act provides that a governmental body must request an Attorney General open records ruling if the governmental body wishes to withhold requested information unless there has been a previous determination about that particular information.⁵⁴ The Act does not define previous determination. However, the Attorney General has concluded there are two types of "previous determinations".⁵⁵

⁴⁹ Tex. Gov't Code §552.301(b).

⁵⁰ Tex. Att'y Gen. ORD-542 (1990).

⁵¹ Tex. Gov't Code § 552.302. See Tex. Att'y Gen. ORD-319 (1982).

⁵² Tex. Att'y Gen. ORD-150 (1977).

⁵³ Tex. Att'y Gen. ORD-665 (2000).

⁵⁴ Tex. Gov't Code §552.301(a).

⁵⁵ Tex. Att'y Gen. ORD-673 (2001).

The first type of previous determination exists so long as the law, facts, and circumstances on which the ruling was based have not changed and where the requested information is precisely the same information which was addressed in a prior attorney general ruling; the ruling is addressed to the same governmental body; and the ruling concludes that the information is or is not excepted from disclosure.

The second type of previous determination is an attorney general decision which may be relied upon so long as the elements of law, facts, and circumstances are met to support the previous decision's conclusion, the decision concludes that a specific, clearly delineated category of information is or is not excepted from disclosure, and the decision explicitly provides that the governmental body or type of governmental body from which the information is requested, in response to future requests, is not required to seek a decision from the attorney general in order to withhold the information. For example, all governmental bodies may withhold direct deposit authorizations; Form I-9s and attachments; W-2 and W-4 forms; certified agendas and tapes (recordings) of a closed meetings; and fingerprints without the necessity of requesting an attorney general ruling as to whether the applicable exception applies.⁵⁶

17. Can a governmental body withhold information from requested information without asking for an Attorney General open record ruling?

There are certain sections within the Public Information Act that allow a governmental body to withhold information without asking for an open records ruling from the Attorney General's office. These sections include:

- 1) Information related to driver's license, motor vehicle title or registration, or personal identification documents⁵⁷
- 2) Credit cards, debit cards and access device numbers;⁵⁸
- 3) Certain information maintained by a family violence shelter center, victim of trafficking shelter center, and sexual assault program;⁵⁹
- 4) Personal information of certain public employees;⁶⁰ and
- 5) Social security numbers.⁶¹

All of these sections, except for social security numbers, require the governmental body to send a specific letter to the requestor that explains that certain information has been

⁵⁶ Tex. Att'y Gen. ORD-684 (2009).

⁵⁷ Tex. Gov't Code § 552.130.

⁵⁸ *Id.* § 552.136(c).

⁵⁹ *Id.* § 552.138(c).

⁶⁰ *Id.* §§ 552.024(c)(2); .1175(f).

⁶¹ *Id.* § 552.147.

redacted without asking for a ruling, but that the requestor has the right to appeal to the attorney general's office for a ruling on the withheld information.⁶² The attorney general's office has form letters for those sections that require these letters that can be found on its website at <https://texasattorneygeneral.gov/og/redacting-public-information-rules-and-forms>. If the requestor chooses to appeal to the attorney general's office, then the governmental body will receive a notice from the attorney general's office and will have to submit the required information for a review of the redacted information.⁶³

18. What must a governmental body do if it wants to request an Attorney General open records ruling?

If a governmental body wants to withhold information, it has ten business days from the date it receives the request to ask for an open records ruling from the Attorney General. By the tenth business day, the governmental body must do the following:

- 1. Write the Attorney General requesting an open records ruling and state which exceptions apply to the requested information.**⁶⁴ The original request for a ruling must indicate the specific exception that the governmental body is relying on to withhold the information. If the governmental body fails to cite the applicable exceptions in this request, the governmental body generally will be barred from raising them in any additional briefing that it may provide.
- 2. Provide the requestor with a written statement that the governmental body wishes to withhold the information and that it has asked the Attorney General for a ruling.**⁶⁵
- 3. Provide the requestor with a copy of the governmental body's correspondence to the Attorney General.**⁶⁶
- 4. Make a good faith attempt to notify any affected third parties of the request.**⁶⁷

The governmental body has an additional five business days (a total of fifteen business days from the date the governmental body received the original request for the record) to provide the Attorney General with additional written documentation that supports

⁶² *Id.* §§ 552.024(c-1)-(c-2); .1175(g)-(h); .130(d)-(e); .136(d)-(e); .138(d)-(e).

⁶³ 1 Tex. Admin. Code §§ 63.11-63.16.

⁶⁴ Tex. Gov't Code § 552.301(b).

⁶⁵ *Id.* § 552.301(d)(1).

⁶⁶ *Id.* § 552.301(d)(2).

⁶⁷ *Id.* § 552.305(d).

withholding the requested information.⁶⁸ By the 15th business day, the governmental body must:

1. **Submit written comments explaining how the claimed exceptions apply.**⁶⁹
2. **Submit a copy of the written request for information.**⁷⁰
3. **Submit a signed statement or evidence sufficient to establish the date the request for information was received.**⁷¹ It is important to note that the ten business day deadline for requesting an Attorney General open records ruling is measured from the date the request is clarified or narrowed as long as the governmental body is acting in good faith in requesting a clarification or narrowing of an unclear or unduly broad request.⁷² If the governmental body contends that the ten business day deadline started the date the request was clarified or narrowed, the governmental body must explain this fact in its request for an open records ruling. Also, the governmental body must explain if there were holidays, natural disasters, and any other days the governmental body was officially closed. In its explanation, the governmental body should include all dates relevant to the calculation of the ten business day deadline.
4. **Submit copies of documents requested or a representative sample of the documents.**⁷³ The documents must be labeled to show which exceptions apply to which parts of the documents.⁷⁴ Representative samples are not appropriate when each document sought to be withheld contains substantially different information or when third-party proprietary information is at issue.
5. **Provide the requestor with a copy of the written comments submitted to the Attorney General.**⁷⁵ The governmental body must provide a copy of its comments to the requestor not later than the 15th business day after the date the request for information was received. This does not mean that the governmental body has to send the requestor a copy of the information that they are trying to withhold. If the written comments disclose or contain the substance of the information requested, the copy

⁶⁸ *Id.* § 552.301(e).

⁶⁹ *Id.* § 552.301(e)(1)(A).

⁷⁰ *Id.* § 552.301(e)(1)(B).

⁷¹ *Id.* § 552.301(e)(1)(C).

⁷² *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010).

⁷³ Tex. Gov't Code Ann. § 552.301(e)(1)(D).

⁷⁴ *Id.* § 552.301(e)(2).

⁷⁵ *Id.* § 552.301(e-1).

provided to the requestor should be redacted. Governmental bodies are cautioned against redacting more than that which would reveal the requested information to the requestor.

The Attorney General may ask the governmental body for additional information.⁷⁶ The governmental body must respond to an Attorney General's request of additional information within seven calendar days.⁷⁷ If the governmental body fails to respond, the information is presumed to be open and must be released unless there is a compelling reason to withhold the information.⁷⁸

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

The Attorney General has 45 business days from the date the request for ruling was received from the governmental body.⁷⁹ However, if the Attorney General is unable to issue the decision within the 45 business-day period, the Attorney General may extend the time to respond for an additional ten business days. Such an extension may be taken if the Attorney General notifies the governmental body and the requestor of the reason for the delay. This notification must take place within the original 45 business-day time period.

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

There is no statutory provision that provides the governmental body with an extension of time to seek an open records ruling from the Attorney General's office. Even if the request is for an excessive amount of information, the governmental body must still meet the fifteen business-day deadline for making an open record ruling request to the Attorney General. As noted earlier, this request must include the legal arguments that support withholding the information, a marked-up representative sample of the requested information (marked to show which exceptions apply to what portion of the sample documents), a copy of the open records request, and a signed statement or other evidence of when the governmental body received the request.⁸⁰

⁷⁶ *Id.* § 552.303(c).

⁷⁷ *Id.* § 552.303(d).

⁷⁸ *Id.* § 552.303(e).

⁷⁹ *Id.* § 552.306(a).

⁸⁰ *Id.* § 552.301(e).

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

If the Attorney General or a court has already ruled that the exact information that is at issue in a particular request is open to the public, the governmental body must release the information and is prohibited from seeking a reconsideration of that issue from the Attorney General.⁸¹ If the governmental body wants to challenge the ruling, the governmental body must file suit in Travis County district court within 30 calendar days of receiving the ruling.⁸²

B. Rights and Duties of the Governmental Body and of the Public Information Requestor

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

A governmental body's public information officer is responsible for posting a sign which informs the public about its right to access public information.⁸³ The sign must be displayed in the governmental body's administrative offices. The Attorney General's Office is responsible for determining what specific information must be displayed on the sign. For more information, a governmental body may contact the Open Government Hotline at (512) 478-6736 or (877) 673-6839 or our website: <https://texasattorneygeneral.gov/og/open-government>.

23. What inquiries can a governmental body make of a public information requestor?

Generally, there are only two permissible lines of inquiry that can be made of a requestor. First, the governmental body can ask a requestor for proper identification.⁸⁴ This inquiry for proper identification should be done if needed, but if the information can be given without any identification, then the inquiry is not necessary. State law does not indicate how such identification could be accomplished if the request is completely handled through the mail, e-mail, or by fax.

This identification requirement is generally imposed by a governmental body when a state statute limits who may gain access to certain information. For example, certain statutes regulate who can gain access to information within motor vehicle records, such as copies of drivers' licenses.⁸⁵ These statutes contain specific rules on what inquiries can be made to determine if the requestor is eligible to receive the information. If an

⁸¹ *Id.* § 552.301(f).

⁸² *Id.* § 552.324(b).

⁸³ *Id.* § 552.205.

⁸⁴ *Id.* § 552.222(a).

⁸⁵ *Id.* § 552.222(c).

open records request involves such information, the governmental body should visit with its legal counsel regarding the applicable law.

Second, as discussed earlier in this article, a governmental body may ask the requestor for a clarification if the request is unclear or ask the requestor to narrow the scope of the request if the request is unduly broad.⁸⁶ It should be noted that the governmental body cannot ask the requestor the purpose for which the information will be used.⁸⁷

24. Does the name and address of a public information requestor become public information?

In certain cases, a public information requestor can be required to provide identification, which may include his or her name or address.⁸⁸ If the governmental body receives this information and it becomes part of a governmental record, there is no statutory provision that would except it from disclosure.

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

If the governmental body has the technological ability to produce the information in the requested format, it is usually required to do so.⁸⁹ For example, if a requestor wants a copy of information on a computer disk, he can ask that it be provided in that format. The governmental body cannot insist on providing the information in only a paper format if the governmental body has the ability to provide it in the requested format. However, the governmental body is not required to buy additional hardware or software to accommodate a public information request. If the governmental body is unable to provide the requested information in the requested medium because it does not have the technological ability, it would require it to buy additional software or hardware or it would violate copyright agreements between the governmental body and a third party, then the governmental body can provide the information on another medium that is acceptable to the requestor.

⁸⁶ *Id.* § 552.222(b).

⁸⁷ *Id.* § 552.222(a).

⁸⁸ *Id.* § 552.222(a).

⁸⁹ *Id.* § 552.228.

26. Can a public information request require a governmental body to create a record if none exists?

A public information request generally does not require the governmental body to produce information which is not in existence.⁹⁰ The Act does not require a governmental body to prepare new information in response to a request.

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

A governmental body has no duty to comply with standing requests for copies of records.⁹¹ If a requestor seeks documents that are not in existence at the time of the request, the governmental body may notify the requestor of this fact and ask the requestor to resubmit the request at a later time when such a record may be available. Also, the governmental body has no duty to notify the requestor in the future that the information has come into existence.⁹² However, some governmental bodies have chosen to accommodate standing requests for certain records. Whether to enter into such agreements is at the governmental body's discretion. Nonetheless, if such an arrangement is made, it should be available to any requestor on an equal basis.⁹³

28. Can a public information request require the governmental body to compile statistics, perform research, or provide answers to questions?

A public information request only requires a governmental body to provide copies of documents that relate to the information sought by the requestor. The Public Information Act does not require a governmental body to calculate statistics, to perform legal research, or to prepare answers to questions.⁹⁴

29. Does a public information request require a governmental body to locate information that is not organized or retrievable by the type of information that is requested?

Sometimes a public information request will ask for certain documents or information that is not organized or retrievable by the type of information that is requested. If the governmental body could provide this information by making a simple computer search

⁹⁰ *Id.* §552.002(a). See also Tex. Att'y Gen. ORD- 87 (1975), ORD-342 (1982), ORD-452 (1986); *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed).

⁹¹ Tex. Att'y Gen. ORD-465 (1987), ORD-476 (1987).

⁹² Op. Tex. Att'y Gen. No. JM-48 (1983).

⁹³ See Tex. Gov't Code § 552.223.

⁹⁴ Tex. Att'y Gen. ORD-342 (1982), ORD-555 at 1 (1990), ORD-563 at 8 (1990).

or by some other basic task, it should make such an effort.⁹⁵ The governmental body may notify the requestor of the format in which the information is currently available.⁹⁶ However, if providing the information would require extensive research, the governmental body has no duty to take such action.⁹⁷

If providing the requested information would require programming or manipulation of data, the governmental body shall send the requestor a written notice explaining that the requested information is not in the format requested and to provide the information would require programming and manipulation of data at a cost to the requestor.⁹⁸ The notice must include a cost estimate for providing the information in the format that meets the requestor's preferences. Also, the notice must be sent to the requestor within 20 days after the date the governmental body received the public information request. If the requestor does not respond to the written notice within 30 days, the request is considered withdrawn.

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

A governmental body has no duty to purchase new software or hardware to accommodate a public information request.⁹⁹ If the governmental body is unable with existing resources to provide the information in the requested format, the record should be provided in a paper format or in another medium that is acceptable to the requestor.¹⁰⁰ In certain cases, a governmental body can provide the information in the requested format by manipulating the data within a computer system or by making a programming change that allows access to the information. If a public information request would require such manipulation of data or programming, the governmental body can notify the requestor of the applicable cost of putting the information together in that format and require the requestor to agree to pay the cost of production of the material.¹⁰¹

⁹⁵ Tex. Gov't Code § 552.002(a). See also Tex. Att'y Gen. ORD-87 (1975), ORD-342 (1982), ORD-452 (1986); *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismiss'd).

⁹⁶ Tex. Gov't Code § 552.228(c).

⁹⁷ Tex. Gov't Code § 552.002(a). See also Tex. Att'y Gen. ORD-87 (1975), ORD-342 (1982), ORD-452 (1986); *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismiss'd).

⁹⁸ Tex. Gov't Code § 552.231.

⁹⁹ *Id.* § 552.228(b)(2).

¹⁰⁰ *Id.* § 552.228(c).

¹⁰¹ *Id.* § 552.231.

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

The Attorney General has concluded that a member of the public does not have the right to personally use a government computer terminal to search for public information.¹⁰² Instead, the governmental body may require that searches of public information be conducted by government personnel who then provide the requestor with access to or copies of the requested items. Of course, a governmental body may adopt a policy to allow the public to use his/her computer terminals to access information, but the public cannot demand that such a policy be implemented.

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

A requestor is allowed to bring his or her own copier to make copies of public records. However, a governmental body may refuse to allow the use of a requestor's portable copier if such activity would: (1) be unreasonably disruptive, (2) cause a safety hazard, (3) interfere with others' right to inspect and copy records, or (4) if the requested records contain confidential information that needs to be redacted.¹⁰³

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

The Public Information Act specifically provides that a governmental body is not required to copy information onto material provided by a public information requestor. For example, a governmental body does not have to copy information onto paper or onto a computer disk that is provided by the requestor. Instead, the governmental body may choose to use its own materials.¹⁰⁴

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

Generally, a governmental body is not required to allow access to or to make a copy of information from a commercial book or publication that is in the governmental body's possession. If the publication was purchased by the governmental body and it is still available commercially, the governmental body can alert requestors of this fact. However, a governmental body is under a duty to allow inspection of the commercial

¹⁰² Tex. Att'y Gen. ORD-571 (1990).

¹⁰³ Op. Tex. Att'y Gen. No. JM-757 (1987). See also Op. Tex. Att'y Gen. No. GA-400 (2006).

¹⁰⁴ Tex. Gov't Code § 552.228(c). See also Tex. Gov't Code § 552.230 (governmental body may promulgate rules for efficient, safe, and speedy inspection and copying if not inconsistent with Public Information Act).

book or publication if portions of the publication are specifically made a part of, incorporated into, or referred to in a governmental body rule or policy.¹⁰⁵

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

If a request is made for documents that are copyrighted, the governmental body will have to provide access to those records, unless there is an applicable exception that would allow those records to be withheld. However, the governmental body is not required to make copies of copyrighted material for a requestor.¹⁰⁶ Instead, the governmental body should provide the requestor access to the information. The requestor bears the duty of compliance with federal copyright law.

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

If a governmental body has previously provided copies of certain information, the governmental body has no duty to provide the same information to the requestor again.¹⁰⁷ Similarly, if a governmental body has previously made the information available and the requestor has not paid the costs associated with the prior request, the governmental body may respond to a second request for such documents by providing a special notice to the requestor.¹⁰⁸ The governmental body's public information officer or his or her agent must provide the requestor a letter which certifies that all or part of requested information was previously furnished to the requestor or was made available upon payment of costs.¹⁰⁹ The certification must include:

1. a description of the information that was previously furnished or made available;
2. the date the governmental body received the previous request;
3. the date the governmental body previously furnished or made available the information to the requestor;
4. a statement that no further additions, deletions, or corrections have been made to that information; and
5. the name, title, and signature of the public information officer or his or her agent who is making the certification.¹¹⁰

¹⁰⁵ Tex. Gov't Code § 552.027.

¹⁰⁶ Op. Tex. Att'y Gen. No. JM-672 (1987), Tex. Att'y Gen. ORD-550 (1990).

¹⁰⁷ Tex. Gov't Code § 552.232(a).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* § 552.232(b).

¹¹⁰ *Id.*

A governmental body may not charge the requestor for the preparation of the certification.¹¹¹

Of course, a governmental body may choose to provide the requested information.¹¹² It is important to note that a governmental body must furnish or make available upon payment of applicable charges any information that has not been previously supplied or made available to the requestor.¹¹³

IV. Statutory Exceptions That Allow Information to Be Withheld

A. Information that Is Presumed Public

37. Is there a list of items that are presumed to be public information?

The Public Information Act lists items that are presumed to be public information. Section 552.022(a) of the Government Code states “(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 unless made confidential under this chapter or other law.” For example, completed reports,¹¹⁴ public court record information,¹¹⁵ and settlement agreements to which a governmental body is a party¹¹⁶ are just a few of the items that are considered public information.

38. Is a discretionary exception considered “other law” for the purpose of withholding public information?

Discretionary exceptions are designed to protect the interests of the governmental body and are not considered “other law” for purposes of section 552.022 of the Government Code. Public information can only be withheld if it is “made confidential under [the Public Information Act] or other law.”¹¹⁷ However, sections 552.104 (Information Related to Competition or Bidding) and 552.133 (Public Power Utility Competitive Matters) are two exceptions to this general rule.¹¹⁸

¹¹¹ *Id.* § 552.232(c).

¹¹² *Id.* § 552.232(a)(1)-(2).

¹¹³ *Id.* § 552.232(d).

¹¹⁴ *Id.* § 552.022(a)(1).

¹¹⁵ *Id.* § 552.022(a)(17).

¹¹⁶ *Id.* § 552.022(a)(18).

¹¹⁷ *Id.* § 552.022(a).

¹¹⁸ *Id.* §§ 552.104(b); .133(c).

39. Is there “other law” which may be relied upon to withhold information under section 552.022 of the Government Code?

The Texas Supreme Court has concluded the term “other law” as it is used in section 552.022 of the Government Code does include the Texas Rules of Civil Procedure and Texas Rules of Evidence.¹¹⁹ Accordingly, the attorney-client privilege and work-product doctrine could be considered “other law” for the purpose of withholding public information.¹²⁰

B. General Issues Regarding Confidential Records

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

At this time, there does not appear to be an entity that publishes a single, comprehensive list of all the types of information that are confidential under state law. A governmental body should consult closely with its attorney and/or public information coordinator regarding records that state or federal law specifically require or allow to be withheld from the public.

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

A promise of confidentiality from staff or a related promise within a governmental contract generally does not give the governmental body the right to withhold certain information from public disclosure. Such promises are only enforceable if a state statute specifically allows the governmental body to guarantee the confidentiality of the information.¹²¹

42. Can a governmental body substitute a new document or produce a redacted copy of a record in response to a public information request?

The governmental body is required to make copies of the actual records that exist. If authorized by law, the city can cross through or otherwise redact the confidential information. However, a governmental body may not substitute a new document in which only the non-confidential information is presented, unless the requestor consents to the substitution.¹²²

¹¹⁹ *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001).

¹²⁰ *Id.*

¹²¹ Op. Tex. Atty Gen. Nos. H-258 (1974), JM-672 (1987); Tex. Atty Gen. ORD-455 (1987).

¹²² Tex. Atty Gen. ORD-633 (1995), ORD-606 (1992).

C. Information about Public Officials/Employees

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

Public officials and public employees may request in writing that the governmental body not reveal his/her home address, home phone number, emergency contact information, social security number, or information about family members. In fact, governmental bodies are required to ask each employee whether they want such information to be treated as confidential. This inquiry to each employee must be made within fourteen days of the employee being hired, appointed, elected or ending service with the governmental body.¹²³ If the employee indicates in writing a preference for such confidentiality, the governmental body must refuse to release the personal information.¹²⁴

Although the governmental body is required to make this inquiry to employees at the time of his starting or leaving employment with the governmental body, the ultimate duty to make a written request for confidentiality rests with the employee. If the governmental body receives a request for this information and no confidentiality request has been filed by the employee, it is too late for the governmental body to ask the employee whether such confidentiality is preferred. In such a case, the governmental body would have to release the personal information to the requestor.¹²⁵

It is important to note that a peace officer is not required to file a written request to keep his/her personal information confidential. A peace officer's home address, home phone number, emergency contact information, social security number, and any information about family members are automatically confidential.¹²⁶ Additionally, the home address, home phone number, emergency contact information, social security number, and any information about family members relating to a peace officer killed in the line of duty will remain confidential after his death. The section also covers certain other state employees whose duties involve law enforcement.¹²⁷

¹²³ Tex. Gov't Code § 552.024(a)-(b).

¹²⁴ *Id.* §§ 552.024(c), .117.

¹²⁵ *Id.* § 552.024(d).

¹²⁶ *Id.* §§ 552.117(a), .1175. See *id.* § 552.1175(b)(also protects date of birth).

¹²⁷ *Id.* § 552.117(a)(4).

44. Can a governmental body withhold a public official or public employee’s home address, home phone number, emergency contact information, social security number, or family information without requesting an Attorney General ruling?

A governmental body can withhold a public official or public employee’s home address, home phone number, emergency contact information, social security number, or family information without requesting an Attorney General’s ruling.¹²⁸ If a governmental body does withhold the public employee’s information, the governmental body must provide the requestor, on a form prescribed by the Attorney General, with:

- 1) a description of the information redacted or withheld,
- 2) the citation to section 552.024 of the Government Code, and
- 3) instructions regarding how the requestor may seek an Attorney General’s ruling regarding whether the withheld information is excepted from disclosure.¹²⁹

The requestor has the ability to ask for an Attorney General’s ruling regarding whether the withheld information is excepted from disclosure.¹³⁰ The Attorney General’s office has established procedures and deadlines for receiving information necessary to decide the ruling and briefs from the requestor, the governmental body, and any other interested party.¹³¹ Like any other request for an Attorney General’s ruling, the Attorney General has 45 business days to render a ruling.

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

Personal notes pertaining to official business that are made by an official are generally subject to the Act. A governmental body should consider the following factors if it receives a request for such information: (1) who prepared the notes; (2) who possesses or controls the document; (3) who has access to it; (4) the nature of its contents; (4) whether the document is used in conducting the business of the governmental body; and (5) whether public funds were expended in creating or maintaining the document.¹³²

¹²⁸ *Id.* § 552.024(c)(2).

¹²⁹ *Id.* § 552.024(c-2). For a § 552.024 form letter, go to Attorney General’s website: <https://texasattorneygeneral.gov/og/redacting-public-information-rules-and-forms>.

¹³⁰ *Id.* § 552.024(c-1).

¹³¹ See 1 Tex. Admin. Code §§ 63.11 – 63.16.

¹³² See, e.g., Tex. Att’y Gen. ORD-626 (1994) (handwritten notes taken during D.P.S. promotion board oral interviews are subject to Act), ORD-635 (1995) (public official’s or employee’s appointment calendar may be subject to Act).

D. Personnel Information

46. What information within a public employee's personnel file is considered public information?

The vast majority of information within a public employee's personnel file is considered public information and accessible to the public. For example, information about a public employee's job performance, dismissal, demotion, promotion, resignation, and salary information is generally considered open.¹³³ Similarly, job-related test scores of public employees or applicants for public employment are generally treated as public information,¹³⁴ as are letters of recommendation, and opinions and recommendations concerning other routine personnel matters.¹³⁵ However, Attorney General rulings have required information about an employee's withholding on a federal tax form to be withheld, as well as information about an employee's beneficiary under governmental body life insurance programs.¹³⁶ A governmental body may refuse to reveal certain information under common law privacy through Section 552.101 of the Government Code. To make such a determination, the governmental body should consider:

- 1) whether the information contains highly intimate or embarrassing facts about the person; and
- 2) whether there is any legitimate public interest in the release of or access to this information.¹³⁷

Under the above two part-test, a court has held that a governmental body did not have to release the names and statements of victims and witnesses alleging sexual harassment.¹³⁸ The court found that the information at issue was intimate or embarrassing and that the public had no legitimate interest in the release of that information.

47. Can a governmental body disclose the dates of birth of public employees?

The dates of birth of public employees are excepted from disclosure under section 552.102(a).¹³⁹ Only those public employee's birth dates that are contained in records maintained by the governmental body in a personnel context are protected. Also, it

¹³³ Tex. Gov't Code § 552.022(a)(2). See also Tex. Att'y Gen. ORD-405 (1983), ORD-444 (1986).

¹³⁴ Tex. Att'y Gen. ORD-441 (1986).

¹³⁵ Tex. Att'y Gen. ORD-615 (1993).

¹³⁶ Tex. Att'y Gen. ORD-600 (1992).

¹³⁷ See *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex.App.—Austin 1983, writ ref'd n.r.e.).

¹³⁸ See *Morales v. Ellen*, 840 S.W.2d 519 (Tex.App.—El Paso 1992, no writ).

¹³⁹ See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010).

applies to former as well as current public employees.¹⁴⁰ However, it does not apply to applicants for employment,¹⁴¹ nor to private employees or private individuals.

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

Most information within an employee's personnel file can be accessed by the involved employee or the employee's designated representative.¹⁴² However, it is possible for the governmental body to withhold the employee's personnel information from the employee under some other exception. For example, the governmental body may be able to refuse to release information to an employee from his personnel file if the information relates to issues that are currently under civil or criminal litigation.¹⁴³

49. Are the records within a city that has adopted civil service for its police and fire departments treated differently under the Public Information Act?

Section 143.089 of the Local Government Code prohibits a city's civil service fire or police department from releasing information from the department's personnel file. Instead, the department is required to refer someone who requests information from a civil service personnel file to the city's director of civil service.¹⁴⁴ Under Texas law, the civil service director maintains a separate set of personnel files. The files of the civil service director do not contain information about complaints against civil service police officers or firefighters if no departmental disciplinary action was taken or if the disciplinary action was determined to have been taken without just cause.¹⁴⁵ However, if there is disciplinary action taken against a police officer or firefighter, then all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity are required to be placed in the civil service personnel file.¹⁴⁶

¹⁴⁰ Op. Tex. Att'y Gen. No. JM-229 at 2 (1984).

¹⁴¹ Tex. Att'y Gen. ORD-455 at 8 (1987).

¹⁴² Tex. Gov't Code § 552.023(a). See Tex. Att'y Gen. ORD-288 (1981).

¹⁴³ Tex. Att'y Gen. ORD-288 (1981). (The Attorney General generally does not allow a governmental body to withhold information pursuant to the litigation exception if the opposing party has had previous access to the information. Thus, if a governmental body is engaged in litigation with its own employee, the litigation exception generally would not protect any information in the employee's personnel file to which the employee had previously had access.)

¹⁴⁴ Tex. Loc. Gov't Code § 143.089(g).

¹⁴⁵ *Id.* § 143.089(c). See also *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Tex. Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied); Tex. Att'y Gen. ORD-642 (1996).

¹⁴⁶ Tex. Loc. Gov't Code § 143.089(a)(2). See also *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.).

E. General Exception to Withhold Information

50. Can a governmental body withhold social security numbers without requesting an Attorney General's ruling?

A governmental body can withhold the social security number of a living person from any information without requesting an Attorney General's ruling.¹⁴⁷ Governmental bodies must release the requestor's social security number to the requestor or an authorized representative of the requestor.¹⁴⁸

51. Can a governmental body withhold the dates of birth of members of the public?

A governmental body can withhold the dates of birth of members of the public.¹⁴⁹ Dates of birth of members of the public are protected by common-law privacy pursuant to section 552.101 of the Government Code.

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

A governmental body cannot release the e-mail address of a member of the public that is provided for the purpose of communicating electronically with the governmental body.¹⁵⁰ The member of the public can allow his/her e-mail address to be disclosed if the member of the public affirmatively consents to its release. Under certain circumstances, some e-mail addresses are not excepted by section 552.137 of the Government Code. These circumstances are when the governmental body is provided with the e-mail address:

- 1) by a person who has a contractual relationship with the governmental body;
- 2) by a vendor who seeks a contract with the governmental body;
- 3) during the bidding process;
- 4) on a letterhead, coversheet, printed document or other document made available to the public; or
- 5) for the purpose of providing public comment on or receiving notices related to an application for a license as defined by section 2001.003(2) of

¹⁴⁷ Tex. Gov't Code § 552.147(b).

¹⁴⁸ See *id.* § 552.023.

¹⁴⁹ *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin, May22, 2015, pet. denied)(memo op.)

¹⁵⁰ Tex. Gov't Code § 552.137.

the Government Code or receiving orders or decisions from a governmental body.¹⁵¹

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

The Public Information Act allows a governmental body, in limited circumstances, to withhold certain information that is contained in an inter-agency or intra-agency memoranda or letter.¹⁵² This exception has been held to only apply to internal staff communications consisting of advice, recommendations, or opinions that reflect the policymaking process.¹⁵³ This exception does not apply to purely factual information that could be severed from the opinion portions of the document. Additionally, this exception does not protect routine memoranda or letters on administrative and personnel matters, unless those matters involve policy issues of a broad scope.¹⁵⁴ For example, the evaluation of an individual employee would probably not be protected from disclosure under this exception.¹⁵⁵ On the other hand, a university report addressing systematic discrimination against minorities has been found to be protected by this exception.¹⁵⁶ It should be noted that information created by outside consultants acting on the governmental body's behalf may in certain cases be covered by this exception.¹⁵⁷

54. Can a governmental body release copies of certified agendas or recording of closed meetings (executive sessions)?

A certified agenda is a written document that summarizes each of the issues that were discussed at a closed meeting or the minutes of the closed meeting. The Open Meeting Act requires a governmental body have a certified agenda or recording of its closed meetings.¹⁵⁸ The certified agenda or recording of the closed meeting are considered confidential¹⁵⁹ and may not be released except under order of a court.¹⁶⁰ Therefore, a certified agenda or recording of a closed meeting can not be obtained through a public

¹⁵¹ *Id.* § 552.137(c).

¹⁵² *Id.* § 552.111.

¹⁵³ *City of Garland V. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 456 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412-13 (Tex. App.—Austin 1992, no writ); Tex. Att'y Gen. ORD-615 (1993). See also Tex. Att'y Gen. ORD-631 (1995) (report addressing systematic discrimination against minorities and the educational mission of the university in question was not open to public).

¹⁵⁴ Tex. Att'y Gen. ORD-631 at 3 (1995); *City of Garland V. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000).

¹⁵⁵ Tex. Att'y Gen. ORD-615 (1993).

¹⁵⁶ Tex. Att'y Gen. ORD-631 (1995).

¹⁵⁷ *Id.*

¹⁵⁸ Tex. Gov't Code § 551.103

¹⁵⁹ Tex. Att'y Gen. ORD-495 (1988).

¹⁶⁰ Tex. Gov't Code § 551.104.

information request. Actually, the release of a certified agenda or recording of a closed meeting is a class B misdemeanor.¹⁶¹

Governmental bodies can withhold the certified agenda or recording of a closed meeting without asking for an attorney general's ruling.¹⁶² However, the certified agenda or recording of a closed meeting can be reviewed by members of the governmental body who attended the closed meeting.¹⁶³ Also, elected members that were absent from the closed meeting can review the certified agenda or recording.¹⁶⁴ But, a member of governmental body cannot have a copy or make a copy of the certified agenda or recording whether they were present for or absent from the closed meeting.¹⁶⁵ Additionally, a governmental body may not allow a member to review the certified agenda or recording of a closed meeting once the member has left the office.¹⁶⁶ The governmental body would want to adopt procedures for reviewing the certified agenda or recording, but it cannot absolutely prohibit the review by a member of the governmental body.

F. Law Enforcement Information

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

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

- 1) **Information That, If Released, Would Affect Investigation or Prosecution:** Information that is held by a law enforcement agency or prosecutor that, if disclosed, would interfere with the law enforcement agency or prosecutor's ability to detect, investigate or prosecute a crime;
- 2) **Information About Certain Prosecutions:** Information that deals with the prosecution of crimes that did not result in a conviction or a deferred adjudication;
- 3) **Threats Against Peace Officers:** Information that deals with threats against peace officers collected or disseminated under section 411.048 of the Government Code; or

¹⁶¹ *Id.* § 551.146.

¹⁶² Tex. Att'y Gen. ORD-684 (2009).

¹⁶³ Op. Tex. Att'y Gen. No. JC-120 (1999), DM-227 (1993).

¹⁶⁴ Op. Tex. Att'y Gen. No. JC-120 (1999).

¹⁶⁵ *Id.*; Tex. Att'y Gen. LO-98-033 (1998).

¹⁶⁶ Op. Tex. Att'y Gen. No. JC-120 (1999).

- 4) **Attorney Work-Product:** Information that the attorney of the governmental body prepared for use in criminal litigation or information reflecting the mental impressions or legal reasoning of the attorney regarding such litigation.¹⁶⁷

It is important to note that the law enforcement exception does not except from disclosure basic information about an arrested person or basic information within a criminal citation or police offense report.¹⁶⁸ Information that has been held to be open includes:

- 1) The name, age, address, race, sex, occupation, alias, Social Security number, police department identification number, and physical condition of an arrested person
- 2) The date and time of the arrest
- 3) The place of the arrest
- 4) The offense charged and the court in which it is filed
- 5) The details of the arrest
- 6) Booking information
- 7) The notation of any release or transfer
- 8) The location of the crime
- 9) The identification and description of the complainant
- 10) The premises involved
- 11) The time of occurrence of the crime
- 12) The property involved, if any
- 13) The vehicle involved, if any
- 14) A description of the weather
- 15) A detailed description of the offense, and
- 16) The names of the arresting and investigating officers.¹⁶⁹

Section 552.108 only applies to criminal investigations and prosecutions. Where no criminal investigation or prosecution results from an investigation of a police officer for alleged misconduct, section 552.108 is inapplicable.¹⁷⁰

¹⁶⁷ Tex. Gov't Code § 552.108(a).

¹⁶⁸ *Id.* § 552.108(c). See also Tex. Att'y Gen. ORD-127 (1976).

¹⁶⁹ Tex. Att'y Gen. ORD-127 at 3-5 (1976).

It is also important to note that the law enforcement exception may apply to departments other than the police department if those departments are, by law, charged with the detection, investigation, or prosecution of crime. For example, the Attorney General has determined that the arson investigation unit of a fire department may cite the law enforcement exception to protect some of its records.¹⁷¹

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

The disclosure of motor vehicle accident reports, also known as ST-3, CRB-3 or CR-3 forms, is governed by the Transportation Code.¹⁷² In general, motor vehicle accident reports are privileged and for the confidential use of the Department of Public Safety (DPS), an agency the United States, state of Texas, or a local government of Texas that has use for the information for accident prevention purposes.¹⁷³ However, certain people and entities can obtain an un-redacted copy of a motor vehicle accident report. With a written request and payment of any required fee, the following requestors can obtain the un-redacted report:

- 1) DPS;
- 2) An agency the United States, state of Texas, or a local government of Texas that has use for the information for accident prevention purposes;
- 3) Law enforcement agency that employs the peace officer who investigated the accident and sent to DPS, including an agent of the law enforcement agency authorized by contract to obtain the information;
- 4) The court in which a case involving a person involved in the accident is pending if the report is subpoenaed; or
- 5) any person directly concerned in the accident or having a proper interest therein, including:
 - a) any person involved in the accident;
 - b) the authorized representative of any person involved in the accident;
 - c) a driver involved in the accident;

¹⁷⁰ *Morales v. Ellen*, 840 S.W.2d 519 (Tex. Civ. App. – El Paso 1992, writ denied) (Gov't Code § 552.108 not applicable where no criminal investigation or prosecution of police officer resulted from investigation of allegation of sexual harassment); Tex. Att'y Gen. ORD-350 (1982) (predecessor provision of Gov't Code § 552.108 not applicable to IAD investigation file when no criminal charge against officer results from investigation of complaint against police officer).

¹⁷¹ Tex. Att'y Gen. ORD-127 (1976).

¹⁷² Tex. Transp. Code § 550.065.

¹⁷³ *Id.* § 550.065(b).

- d) an employer, parent, or legal guardian of a driver involved in the accident;
- e) the owner of the a vehicle or property damaged in the accident;
- f) a person who has established financial responsibility for a vehicle involved in the accident in a manner described by section 601.051 of the Transportation Code; including a policyholder of a motor vehicle liability insurance policy covering the vehicle;
- g) an insurance company that issued an insurance policy covering a vehicle involved in the accident;
- h) an insurance company that issued a policy covering any person involved in the accident;
- i) a person under contract to provide claims or underwriting information to a person described above in f, g, or h;
- j) a radio or television station that holds a license issued by the Federal Communication Commission;
- k) a newspaper that is:
 - i) a free newspaper of general circulation or qualified under section 2051.044 of the Government Code to publish legal notices;
 - ii) published at least once a week; and
 - iii) available and of interest to the general public in connection with the dissemination of news; or
- l) any person who may sue because of death resulting from the accident.¹⁷⁴

Any person, with a written request and payment of the required fee, can receive a redacted version of the motor vehicle accident report.¹⁷⁵ The following information must be withheld in the redacted version of the accident report:

- 1) personal information as defined by section 730.003 of the Transportation Code¹⁷⁶;

¹⁷⁴ *Id.* § 550.065(c).

¹⁷⁵ *Id.* § 550.065(c-1).

¹⁷⁶ *Id.* § 730.003(6) ("Personal information" means information that identifies a person, including an individual's photograph or computerized image, social security number, driver identification number, name, address, but not the zip code, telephone number, and medical or disability information. The term does not include:
 (A) information on vehicle accidents, driving or equipment-related violations, or driver's license or registration status; or

- 2) the first, middle, and last name of any person listed in an accident report, including a vehicle driver, occupant, owner, or lessee, a bicyclist, a pedestrian, or a property owner;
- 3) the number of any driver's license, commercial driver's license, or personal identification certificate issued to any person listed in an accident report;
- 4) the date of birth, other than the year, of any person listed in an accident report;
- 5) the address, other than zip code, and telephone number of any person listed in an accident report;
- 6) the license plate number of any vehicle listed in an accident report;
- 7) the name of any insurance company listed as a provider of financial responsibility for a vehicle listed in an accident report;
- 8) the number of any insurance policy issued by an insurance company listed as a provider of financial responsibility;
- 9) the date the peace officer who investigated the accident was notified of the accident;
- 10) the date the investigating peace officer arrived at the accident site;
- 11) the badge number or identification number of the investigating officer;
- 12) the date on which any person who died as a result of the accident died;
- 13) the date of any commercial motor vehicle report; and
- 14) the place where any person injured or killed in an accident was taken and the person or entity that provided the transportation.¹⁷⁷

57. Can a governmental body release a body worn camera recording?

Body worn cameras are subject to chapter 1701 of the Occupation Code. Chapter 1701 provides the procedures a requestor must follow when seeking a body worn camera recording. A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

-
- (B) information contained in an accident report prepared under:
(i) Chapter 550; or
(ii) former Section 601.004 before September 1, 2017.)

¹⁷⁷ *Id.* § 550.065(f).

- 1) The date and approximate time of the recording;
- 2) The specific location where the recording occurred; and
- 3) The name of one or more persons known to be a subject of the recording.¹⁷⁸

Failure to provide this information does not preclude a requestor from requesting the same information again.¹⁷⁹ However, even if the requestor provides the proper information to obtain the body worn camera recording, chapter 1701 provides for the confidentiality of the recordings under certain circumstances.

The body worn camera recording is confidential if it was not required to be made under a law or policy adopted by the appropriate law enforcement agency and does not relate to a law enforcement purpose.¹⁸⁰ Also, any recording that documents the use of deadly force or related to an administrative or criminal investigation of an officer is considered confidential and remains confidential until all criminal matters are finally adjudicated and all administrative investigations are complete.¹⁸¹ However, a law enforcement agency may choose to release such information if doing so furthers a law enforcement purpose.¹⁸² Before releasing a body worn camera recording that was made in a private place or in connection with a fine-only misdemeanor, the law enforcement agency must receive authorization from the person who is the subject of the recording, or if the person is deceased, from the person's authorized representative.¹⁸³ A governmental body may continue to raise section 552.108 or other applicable exception to disclosure or law for body-worn camera recordings.¹⁸⁴

Also, section 1701.662 extends the ten and fifteen business day deadlines associated with requesting a ruling from the attorney general to twenty and twenty-five business days, respectively.¹⁸⁵ Additionally, a governmental body that receives a "voluminous request" for body worn camera recording is considered to have complied with the request if it provides the information not later than twenty-one business days after it receives the request.¹⁸⁶

¹⁷⁸ Tex. Occup. Code § 1701.661(a).

¹⁷⁹ *Id.* § 1701.661(b).

¹⁸⁰ *Id.* § 1701.661(h).

¹⁸¹ *Id.* § 1701.660(a).

¹⁸² *Id.* § 1701.660(b).

¹⁸³ *Id.* § 1701.661(f).

¹⁸⁴ *Id.* § 1701.661(e).

¹⁸⁵ *Id.* § 1701.662.

¹⁸⁶ *Id.* § 1701.663.

G. Lawsuit or Other Legal Information

58. What type of information is excepted from disclosure under the attorney/client privilege?

Section 552.107(1) of the Government Code protects information coming within the attorney client privilege. When asserting the attorney client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue.¹⁸⁷ The elements are as follows:

- 1) A governmental body must demonstrate that the information constitutes or documents a communication.¹⁸⁸
- 2) The communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body.¹⁸⁹ The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body.¹⁹⁰ Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.
- 3) The privilege applies only to communications between or among clients, client representatives, lawyers and lawyer representatives.¹⁹¹ Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made.
- 4) The attorney client privilege applies only to a confidential communication,¹⁹² meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."¹⁹³

¹⁸⁷ Tex. Att'y Gen. ORD-676 at 6-11 (2002).

¹⁸⁸ *Id.* at 7.

¹⁸⁹ *Id.* See Tex. R. Evid. 503(b)(1).

¹⁹⁰ Tex. Att'y Gen. ORD-676 at 7 (2002). See *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App. – Texarkana 1999, orig. proceeding) (attorney client privilege does not apply if attorney acting in a capacity other than that of attorney).

¹⁹¹ Tex. Att'y Gen. ORD-676 at 8 (2002). See Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E).

¹⁹² Tex. Att'y Gen. ORD-676 at 10 (2002). See Tex. R. Evid. 503(b)(1).

¹⁹³ Tex. Att'y Gen. ORD-676 at 10 (2002). See Tex. R. Evid. 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated.¹⁹⁴ Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body.¹⁹⁵ Also, if a governmental body fails to timely seek an open records ruling to withhold information subject to the attorney-client privilege, the privilege is not waived and constitutes a compelling reason to withhold information under section 552.302 of the Government Code.¹⁹⁶

59. When can a governmental body refuse to release information that relates to pending or anticipated litigation?

Under Section 552.103 of the Government Code, a governmental body can withhold information about pending or reasonably anticipated civil or criminal litigation. The litigation must be pending or reasonably anticipated as of the date the open records request is received by the governmental body.¹⁹⁷ The governmental body, its officials, or its staff must be a party to such litigation.¹⁹⁸

Whether litigation is reasonably anticipated is a question that involves both factual and legal issues.¹⁹⁹ There must be concrete evidence that litigation is likely. It must be more than mere conjecture. The governmental body must identify the issues that are involved in the litigation and explain how the information to be withheld relates to those issues. The governmental body should provide a copy of the relevant pleadings if the case has been filed.

Information that falls under the litigation exception generally can be withheld until the litigation has concluded or is no longer anticipated.²⁰⁰ Criminal litigation is considered concluded once the statute of limitations has expired or when the defendant has exhausted all appellate and post-conviction remedies in state and federal court.²⁰¹ State law does not specifically define when civil litigation is considered to be concluded. Generally, civil litigation is considered to be concluded when all right of appeal has been

¹⁹⁴ Tex. Att'y Gen. ORD-676 at 10 (2002). See *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ).

¹⁹⁵ See *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

¹⁹⁶ *Paxton v. City of Dallas*, 509 S.W.3d 247, 262, 271 (Tex. 2017).

¹⁹⁷ Tex. Gov't Code. § 552.103(c).

¹⁹⁸ *Id.* § 552.103(a).

¹⁹⁹ See *University of Texas Law School v. Texas Legal Foundation*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.).

²⁰⁰ Tex. Att'y Gen. ORD-647 (1996).

²⁰¹ Tex. Gov't Code § 552.103(b).

exhausted and/or a final judgment has been entered. However, generally if the parties to civil litigation have inspected the records under discovery or through other means, the litigation exception would no longer apply.

60. When can a governmental body withhold attorney work product?

Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure.²⁰² Rule 192.5 defines work product as:

- 1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- 2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.²⁰³

For a governmental body to use this exception, the governmental body bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative.²⁰⁴ To show that the information was made or developed in anticipation of litigation, the governmental body has to prove that:

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation 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.²⁰⁵

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."²⁰⁶

Also, the governmental body has to prove that the materials or mental impressions must have been prepared or developed by or for a party or party's representatives, as well as, the communication was between a party and the party's representatives.²⁰⁷

²⁰² *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Tex. Att'y Gen. ORD-677 at 4-8 (2002).

²⁰³ Tex. R. Civ. P. 192.5(a).

²⁰⁴ *Id.*; Tex. Att'y Gen. ORD-677 at 6-8 (2002).

²⁰⁵ *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993).

²⁰⁶ *Id.* at 204; Tex. Att'y Gen. ORD-677 at 7 (2002).

²⁰⁷ Tex. R. Civ. P. 192.5(a); Tex. Att'y Gen. ORD-677 at 7-8 (2002).

Therefore, the governmental body must identify the parties and potential parties to the litigation, the person that prepared the information, and any individual with whom the information was shared in order to claim the work product privilege.²⁰⁸

H. Government-Operated Utility Information

61. What information about government-operated utility customers can be disclosed?

Certain personal information about government-operated utility customers is confidential if the customer makes a written request that the information not be disclosed.²⁰⁹ A government-operated utility would include governmental entities that for compensation provide water, wastewater, sewer, gas, garbage, electricity, or drainage service.²¹⁰ Personal information is defined to include a customer's address, telephone number, and social security number.²¹¹ The government utility is responsible for giving customers a notice of their right to request confidentiality of this personal information that must include a statement of the amount of any fee applicable to the request and a form by which the customer may request confidentiality by marking an appropriate box on the form and returning it to the government-operated utility.²¹² The notice must be included with a bill that is sent to each customer. This confidentiality does not affect the ability of the utility to release such information to other governmental agencies for official purposes, to consumer reporting agencies, or to another entity providing utility service.²¹³

Although the utility has a duty to notify customers of their right to confidentiality of such information, the ultimate duty to request confidentiality remains with the customer. If the utility customer does not make such a written request, much of the personal information within the utility records is considered open to the public. If a member of the public requests access to this personal information, it would be too late for the utility to seek a written confidentiality request from that customer. If the customer subsequently files a written request that this information be kept confidential, the customer's request for confidentiality would apply only to later-received public information requests. Also, the utility will be able to withhold the customer's personal information without asking for an open records ruling if the customer has submitted a written confidentiality request.²¹⁴

²⁰⁸ Tex. Att'y Gen. ORD-677 at 8 (2002).

²⁰⁹ Tex. Util. Code § 182.052(a).

²¹⁰ *Id.* § 182.051(3).

²¹¹ *Id.* § 182.051(4).

²¹² *Id.* § 182.052(c). See *id.* § 182.053 (ability to charge fee for confidentiality request).

²¹³ *Id.* § 182.054.

²¹⁴ *Id.* § 182.052(e).

62. What information about a public power utility²¹⁵ may be confidential?

Section 552.133 of the Government Code excepts from disclosure a public power utility's information related to a competitive matter. The exception defines "competitive matters" as a utility-related matter that is related to the public power utility's competitive activity.²¹⁶ In order to be "utility-related", the matter must relate to the following six enumerated categories of information:

- 1) generation unit specific and portfolio fixed and variable costs, including forecasts of those costs, capital improvement plans for generation units, and generation unit operating characteristics and outage scheduling;
- 2) bidding and pricing information for purchased power, generation and fuel, and Electric Reliability Council of Texas bids, prices, offers, and related services and strategies;
- 3) effective fuel and purchased power agreements and fuel transportation arrangements and contracts;
- 4) risk management information, contracts, and strategies, including fuel hedging and storage;
- 5) plans, studies, proposals, and analyses for system improvements, additions, or sales, other than transmission and distribution system improvements inside the service area for which the public power utility is the sole certificated retail provider; and
- 6) customer billing, contract, and usage information, electric power pricing information, system load characteristics, and electric power marketing analyses and strategies.²¹⁷

Also, there is a list of fifteen categories of information that may not be deemed competitive matters and therefore cannot be withheld under this exception.²¹⁸ Additionally, a city may disclose information pertaining to a city-owned power utility to a city-appointed citizen advisory board without waiving its right thereafter to assert an exception under the Act in response to a future public information request for this information.²¹⁹

²¹⁵ Tex. Gov't Code § 552.133(a).

²¹⁶ *Id.* § 552.133(a-1).

²¹⁷ *Id.* § 552.133(a-1)(1).

²¹⁸ *Id.* § 552.133(a-1)(2).

²¹⁹ Tex. Att'y Gen. ORD-666 (2000).

I. Purchasing/Public Work Information

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

Section 552.104 of the Government Code allows governmental bodies to withhold information that is submitted for competitive bids if its disclosure would give advantage to a competitor or bidder.²²⁰ The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.”²²¹ This exception is not limited to only ongoing competitive situations. If it can be shown that release of the bidder’s competitively sensitive information would give an advantage to a competitor even after a contract is executed, then the bid can be withheld even if bidding is completed and the contract has been awarded.²²² Both governmental bodies and third parties can invoke this exception.²²³ Also, section 552.104(b) allows a governmental body to withhold information under 552.104(a) even if the information falls within one of the categories of information listed in section 552.022(a).²²⁴

64. What information may be withheld regarding the acquisition of real estate or personal property by a governmental body?

Section 552.105 of the Government Code provides governmental bodies with limited authority to withhold information that relates to the governmental body’s acquisition of real estate or personal property.²²⁵ Specifically, this exception is designed to protect a governmental body’s planning and negotiating position with respect to particular transactions.²²⁶ The authority to withhold this information generally ends once the governmental body acquires the involved property.²²⁷ However, this exception is not limited solely to transactions not yet finalized. The attorney general’s office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body’s negotiating position with respect to the remaining parcels.²²⁸ As long as the governmental body makes a good faith determination that the release of information would damage its negotiating position with respect to the acquisition of property, the attorney general will generally accept the

²²⁰ Tex. Gov’t Code § 552.104(a).

²²¹ *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015).

²²² *Id.* at 839.

²²³ *Id.* at 833.

²²⁴ Tex. Gov’t Code § 552.104(b).

²²⁵ *Id.* § 552.105. See Tex. Att’y Gen. ORD-222 (1979)

²²⁶ Tex. Att’y Gen. ORD-564 (1982); ORD-310 (1982).

²²⁷ Tex. Att’y Gen. ORD-348 (1982).

²²⁸ Tex. Att’y Gen. ORD-564 at 2 (1982).

determination, unless the records or other information show the contrary as a matter of law.²²⁹

Also, this exception has equal application to information pertaining to a lease of real or personal property.²³⁰ Similarly, the information about the lease is considered an open record once the governmental body enters into the lease agreement. It should be noted that if the information falls under section 552.022, the governmental body cannot withhold it under this exception.

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

Section 552.110 of the Government Code provides that certain information within bids and other documents may be protected under the exception for trade secrets²³¹ or the exception for commercial or financial information that would give an advantage to competitors.²³²

A “trade secret”, that is privileged or confidential by court order or by statute, must be withheld.²³³ In determining whether particular information constitutes a trade secret, the Attorney General’s office considers the Restatement of Torts’ definition of trade secret which includes a list of six trade secret factors.²³⁴ These factors are:

- 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 other 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.

²²⁹ *Id.*

²³⁰ Tex. Att’y Gen. ORD-348 (1982).

²³¹ Tex. Gov’t Code § 552.110(a).

²³² *Id.* § 552.110(b).

²³³ *Id.* § 552.110(a).

²³⁴ Restatement of Torts ' 757 cmt. b (1939). See *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 U.S. 898 (1958).

Alternatively, there are varying standards that determine whether information is protected under the exception for commercial or financial information. The information is confidential if its release is likely to cause substantial harm to the competitive position of the entity that provided the information. To qualify under this exception, it must be shown with specific factual evidence that disclosure of the commercial or financial information would cause substantial competitive harm to the person or business that supplied the information to the governmental body.²³⁵ The substantial injury or harm must be more than speculative; it must be likely to occur if disclosure is made.²³⁶

Information submitted to a governmental body is not automatically protected from disclosure just because the company submitting that information claims the information is a trade secret or is “proprietary”. The Office of the Attorney General cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.²³⁷

J. Economic Development Information

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

Section 552.131 of the Government Code allows governmental bodies to withhold certain information related to economic development negotiations between a governmental entity and a business that the governmental body is seeking to have locate, stay or expand within or near the territory of the governmental body. Under this provision, the governmental body could withhold trade secrets of the business prospect that were related to economic development negotiations.²³⁸ Similarly, governmental bodies may withhold certain commercial and financial information about the business prospect that was acquired during economic development negotiations if release of the information would result in substantial competitive harm to the business prospect.²³⁹ The test for which this information may be withheld under this section is the same as the test for trade secrets under section 552.110 of the Government Code.

Additionally, until an agreement is made with the business prospect, the governmental body may withhold information about a financial or other incentive being offered to the business prospect by the governmental body or another person.²⁴⁰ Any information

²³⁵ Tex. Gov't Code § 552.110(b). See *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

²³⁶ Tex. Att'y Gen. ORD-639 (1996).

²³⁷ Tex. Att'y Gen. ORD-402 (1983).

²³⁸ Tex. Gov't Code. § 552.131(a)(1).

²³⁹ *Id.* § 552.131(a)(2).

²⁴⁰ *Id.* § 552.131(b).

about a financial or other incentive that is withheld under this provision would have to be released after an agreement is executed with the business prospect.²⁴¹

V. Ability to Recover Costs for Providing Copies of Public Information

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

The Public Information Act allows governmental bodies to set a charge for providing copies of public information.²⁴² However, a governmental body may not charge more than 25 percent above the charges set by the Attorney General's Office.²⁴³ The Attorney General's Office has set a charge of 10 cents per page for making simple photocopies or printouts. If a governmental body's actual cost for producing copies of public information exceeds the Attorney General's Office charges by more than 25 percent, the governmental body may apply to the Attorney General's Office for permission to charge more.²⁴⁴ In no case may the charge by the governmental body exceed the actual cost of producing the requested copies.²⁴⁵

68. When can a governmental body recover labor charges for a public information request?

Labor to Produce Paper Copies: A governmental body may recover labor charges to handle a public information request for paper copies in three circumstances:

- 1) if the responsive records will result in over 50 pages of paper copies;
- 2) if the records to be copied are located in more than two separate buildings or in a remote storage facility;²⁴⁶ or
- 3) if the governmental body provides access to paper documents that meet certain specifications.²⁴⁷

Presently, the Attorney General's office allows a maximum labor charge of \$15 per hour.²⁴⁸ If the governmental body assesses a charge for labor, the requestor may require the governmental body to provide a statement of the amount of time that was needed to prepare the requested copies. This statement must be signed by the officer

²⁴¹ *Id.* § 552.131(c).

²⁴² *Id.* § 552.262. *See generally, id.* §§ 552.261-.275.

²⁴³ *See generally* 1 Tex. Admin. Code §§ 70.1-.13. (cost rules promulgated by the Attorney General's Office).

²⁴⁴ Tex. Gov't Code § 552.262(c).

²⁴⁵ *Id.* § 552.262(a).

²⁴⁶ *Id.* § 552.261(a).

²⁴⁷ *Id.* § 552.271(c)-(d).

²⁴⁸ 1 Tex. Admin. Code § 70.3(d)(1).

for public information or the agent of that officer with the signer's name clearly typed below the signature. The governmental body is not permitted to charge for providing this statement.²⁴⁹

Labor to Produce Copies from Electronic Records: Charges for copies of records that are stored electronically may include reasonable costs of materials, labor, and overhead if it results in more than 50 pages.²⁵⁰

If the governmental body assesses a charge for labor, the requestor may require the governmental body to provide a statement of the amount of time that was needed to prepare the requested copies. This statement must be signed by the officer for public information or the agent of that officer with the signer's name clearly typed below the signature. The governmental body is not permitted to charge for providing this statement.²⁵¹

A governmental body can recover labor charges for providing access to electronic records if providing such access requires programming or manipulation of data.²⁵² In such a case, the governmental body must provide a special written notice to the requestor as provided under the Public Information Act.²⁵³ Additionally, the governmental body must obey the rules of the Attorney General's office in determining how much to charge for the labor.²⁵⁴

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

A governmental body may charge for the labor cost of retrieving records that are located in two or more separate buildings that are not connected to each other or that are located in a remote storage facility.²⁵⁵ Buildings are considered to be "separate" if they are not connected by a covered or open sidewalk, or by an elevated or underground walkway.²⁵⁶ The charge for labor can be recovered in such a situation even if the requestor seeks fewer than 50 pages of copies.²⁵⁷

²⁴⁹ Tex. Gov't Code § 552.261(b).

²⁵⁰ *Id.* § 552.261(a).

²⁵¹ *Id.* § 552.261(b).

²⁵² *Id.* § 552.231.

²⁵³ *Id.*

²⁵⁴ *Id.* § 552.262(b). *See generally* 1 Tex. Admin. Code §§ 70.1-.13 (cost rules promulgated by the Attorney General's office).

²⁵⁵ Tex. Gov't Code § 552.261(a)(1)-(2).

²⁵⁶ *Id.* § 552.261(c).

²⁵⁷ *Id.* § 552.261(a).

70. When and how much can a governmental body charge for overhead when handling a public information request?

A governmental body may impose a charge for overhead whenever a personnel (labor) charge is applicable to a public information request. Any overhead charge cannot exceed 20 percent of the personnel charge.²⁵⁸

71. Can a governmental body recover costs for any modifications to its computer program that are necessary to respond to a public information request?

A governmental body may charge a requestor for the cost of any programming or manipulation of data that is necessary to answer a public information request.²⁵⁹ Presently, the Attorney General's office allows a maximum programming charge of \$28.50 per hour.²⁶⁰ Unlike most other charges for public information, this charge may be imposed even if the requestor only wants access to the requested information and does not request any copies.²⁶¹ However, before a governmental body may impose such a charge, it must provide the requestor with certain written information in advance, including a statement of the estimated charges.²⁶²

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

If a requestor asks the governmental body to mail the information, the governmental body can send the information by first class mail and can require that the requestor pay in advance for postage, along with other permitted charges related to producing the information.²⁶³ A governmental body is not required to provide public information by mail until the requestor pays all applicable charges.

73. Can a governmental body refer a requestor to the governmental body's website if the public information being requested is available on the governmental body's website?

A governmental body complies with the Act when it refers a requestor to the governmental body's website if the information being requested is available on the governmental body's website.²⁶⁴ The governmental body will have to refer the requestor

²⁵⁸ 1 Tex. Admin. Code § 70.3(e)(3).

²⁵⁹ Tex. Gov't Code § 552.231.

²⁶⁰ 1 Tex. Admin. Code § 70.3(c)(1).

²⁶¹ Tex. Gov't Code § 552.272(a).

²⁶² *Id.* See also *id.* § 552.231.

²⁶³ *Id.* § 552.221(b)(2).

²⁶⁴ *Id.* § 552.221(b-1).

to the exact Internet location or uniform resource locator (URL) address on its website. The information has to be accessible to the public and the requested information must be identifiable and readily accessible. However, if the requestor prefers to receive the requested information in a manner other than access through the URL, the governmental body must supply the information in the manner requested. Also, if the governmental body provides by e-mail an Internet location or URL address for requested information, the e-mail must contain a statement in a conspicuous font clearly indicating that the requestor may nonetheless access the requested information by inspection or duplication or by receipt through U.S. mail.²⁶⁵

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

A governmental body is required to provide detailed information to the requestor if the charges for a public information request are likely to exceed \$40.²⁶⁶ The governmental body must provide the requestor with a written statement that contains:

- 1) an itemized estimate of the expected cost;²⁶⁷
- 2) inform the requestor about contacting the governmental body about an alternative method for supplying the requested records if an alternative method exists and it would be less costly;²⁶⁸
- 3) inform the requestor that he or she has ten business days to provide the governmental body with a written response stating whether:
 - a. the charges are accepted,
 - b. the request is modified, or
 - c. a complaint has been lodged with the Attorney General's office alleging overcharges for providing the copies;²⁶⁹ and
- 4) notify the requestor that failure to respond to the statement within ten business days results in the automatic withdrawal of the public information request.²⁷⁰

If the governmental body finds that the costs will exceed more than 20 percent of the original estimate, the governmental body must provide the requestor with an updated itemized statement.²⁷¹ The requestor again has ten business days to provide the

²⁶⁵ *Id.* § 552.221(b-2).

²⁶⁶ *Id.* § 552.2615.

²⁶⁷ *Id.* § 552.2615(a).

²⁶⁸ *Id.*

²⁶⁹ *Id.* § 552.2615(a)-(b).

²⁷⁰ *Id.* § 552.2615(a)(2), (b).

²⁷¹ *Id.* § 552.2615(c).

governmental body with a written response to the updated statement, or the request will be considered to be withdrawn.

If the actual charges are more than \$40, a governmental body may only charge the amount estimated in the latest itemized statement that was provided to the requestor.²⁷² However, if the governmental body did not provide the requestor with an updated itemized statement, the governmental body is limited to charging no more than 20 percent more than the amount of the original itemized statement.²⁷³

75. Can a governmental body require a monetary deposit or bond in order to comply with a public information request?

A governmental body can require a deposit or bond to comply with a public information request if the governmental body provides the requestor with an appropriate estimated itemized statement.²⁷⁴ If such a statement is provided, a governmental body that has 16 or more full-time employees may require a deposit or bond if the estimated charge for producing copies of the requested records exceeds \$100.²⁷⁵ A governmental body with fewer than 16 full-time employees may require a deposit if the estimated charges for producing copies of information are more than \$50.²⁷⁶ If the requestor modifies the request, then the modified request is considered a separate request.²⁷⁷ This separate modified request is considered received on the date the governmental body receives the written modified request. If the requestor does not make a deposit by the 10th business day after the date the deposit is required, then the public information request is considered withdrawn.²⁷⁸

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

A governmental body shall reduce or waive the normal charge for copies of public information if providing the copies would benefit the public.²⁷⁹ The governmental body may waive a charge for such copies if the cost of collecting the fee would exceed the amount of the charge.²⁸⁰

²⁷² *Id.* § 552.2615(d)(1).

²⁷³ *Id.* § 552.2615(d)(2).

²⁷⁴ *Id.* § 552.263(a)(1).

²⁷⁵ *Id.* § 552.263(a)(2)(A).

²⁷⁶ *Id.* § 552.263(a)(2)(B).

²⁷⁷ *Id.* § 552.263(e-1).

²⁷⁸ *Id.* § 552.263(f).

²⁷⁹ *Id.* § 552.267(a).

²⁸⁰ *Id.* § 552.267(b).

77. Can a governmental body count multiple public information requests from the same requestor as a single request for the purpose of calculating cost?

Section 552.261 of the Government Code allows a governmental body that receives multiple requests from the same requestor in one calendar day to treat those requests as a single request for the purposes of calculating cost.²⁸¹ However, if a governmental body receives the same request from different individuals on behalf of an organization, it will not be able to combine those requests for the purpose of calculating cost.

VI. Vexatious Requestors

78. What is a vexatious requestor?

A vexatious requestor is a person who abuses the Act by sending frequent and/or voluminous public information requests to a governmental body, especially small governmental bodies, to disrupt the operations of the governmental body's business.

79. How can a governmental body deal with vexatious requestors who ask for voluminous amounts of information?

Section 552.275 allows a governmental body to establish a reasonable monthly or annual time limit on the amount of personnel time spent to produce a public information request for inspection or to prepare copies for a requestor.²⁸² For cities, this would be done by ordinance. Here are the specifics:

- 1) If the governmental body establishes an annual time limit, the limit may not be less than 36 hours for a requestor during a 12-month period starting at the beginning of the governmental body's fiscal year.²⁸³
- 2) If the governmental body establishes a monthly time limit, the limit may not be less than 15 hours per requestor per month.²⁸⁴
- 3) Every time a requestor submits a public information request, the governmental body must keep track of the amount of time spent to compile the information for the request. (This means for *every requestor*, not just the alleged vexatious requestor.)
- 4) When responsive information is sent, the governmental body is required to send a letter to the requestor informing him of the amount

²⁸¹ *Id.* § 552.261(e).

²⁸² *Id.* § 552.275(a).

²⁸³ *Id.* § 552.275(b).

²⁸⁴ *Id.*

of personnel time spent on the request and how much personnel time has cumulatively been spent on his requests.²⁸⁵

- 5) Once the requestor has surpassed the established time limit, the governmental body can impose certain costs on the requestor and provide a written cost estimate for any public information request received thereafter.²⁸⁶
- 6) The written cost estimate must be sent to the requestor on or before the 10th day after the date on which the public information was requested.
- 7) If the governmental body needs more time to prepare the written cost estimate, the governmental body must provide a letter to the requestor explaining it needs additional time to provide the written cost estimate.²⁸⁷
- 8) After sending the additional time letter, the governmental body must send the written cost estimate as soon as possible, but either on or before the 10th day after the governmental body provided the additional time letter.
- 9) A requestor must pay the amount in the governmental body's written cost estimate before the governmental body will process the request if the governmental body has sent a written cost estimate and the requestor has exceeded the monthly or annual time limit.²⁸⁸
- 10) If the requestor fails or refuses to pay the amount in the cost estimate, the request is considered withdrawn.²⁸⁹

Also, if the requestor has made previous public information requests in which the governmental body: (1) has located and compiled documents in response to those requests; (2) sent written cost estimates that remain unpaid; and (3) the requests have not been withdrawn on the date the requestor submits a new request, the governmental body is not required to locate, compile, produce or provide copies of documents or prepare a written cost estimate until the date the requestor pays each unpaid cost estimate in connection with any previous requests or the previous requests are withdrawn.²⁹⁰

²⁸⁵ *Id.* § 552.275(d).

²⁸⁶ *Id.* § 552.275(e).

²⁸⁷ *Id.* § 552.275(f).

²⁸⁸ *Id.* § 552.275(g).

²⁸⁹ *Id.* § 552.275(h).

²⁹⁰ *Id.* § 552.275(e-1).

80. Are any requestors exempted from Section 552.275?

Yes. The law does not apply if a requestor is an individual who, for a substantial portion of the individual's livelihood or for substantial financial gain, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information for and is seeking the information for:

- 1) dissemination by a news medium²⁹¹ or communication service provider²⁹², including:
 - a. an individual who supervises or assists in gathering, preparing, and disseminating the news or information; or
 - b. an individual who is or was a journalist, scholar, or researcher employed by an institution of higher education at the time the person made the request for information; or
- 2) creation or maintenance of an abstract plant (i.e., title records).²⁹³

Also, elected officials of the United States, Texas, or a political subdivision of Texas, and representatives of a publicly-funded legal service organization that is a 501(c)(3) exempt organization are exempted from section 552.275.²⁹⁴

VII. Enforcement of the Public Information Act

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

A requestor is allowed to bring a declaratory judgment or injunctive relief against a governmental body for violations of the Public Information Act. The requestor may file a complaint against a governmental body with the local county or district attorney.²⁹⁵ The complaint must meet the following requirements:

- 1) be in writing and signed by the complainant;
- 2) state the name of the governmental body that allegedly committed the violation, as accurately as can be done by the complainant;
- 3) state the time and place of the alleged commission of the violation, as definitely as can be done by the complainant; and

²⁹¹ *Id.* § 552.275(m)(2) (definition of news medium).

²⁹² *Id.* § 552.275(m)(1) (definition of communication service provider).

²⁹³ *Id.* § 552.275(j).

²⁹⁴ *Id.* § 552.275(k)-(l).

²⁹⁵ *Id.* § 552.3215(e).

4) describe the violation, in general terms.²⁹⁶

Before the 31st day after receiving the complaint, the local prosecuting attorney must determine if a violation has been committed, decide whether to take action against the governmental body, and notify the person who filed the complaint of that decision.²⁹⁷

If the local prosecutor declines to proceed with an action against a governmental body, the complainant can file a complaint with the attorney general before the 31st day after the date the complaint is returned to the complainant by the local prosecuting attorney.²⁹⁸ Also, if the local prosecutor does not bring any action on or after the 90th day after the date the complaint is filed, the complainant can file a complaint with the attorney general. The attorney general must determine if a violation has been committed, decide whether to take action against the governmental body, and notify the person who filed the complaint of that decision. The attorney general's office must notify the complainant of its determination before the 31st day after receiving the complaint.²⁹⁹

If either the local prosecuting attorney or the attorney general decides to bring a lawsuit against a governmental body, the governmental body must be notified prior to the filing of the lawsuit.³⁰⁰ The governmental body has three days to remedy the problem.

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

If a governmental body refuses to release public information or refuses to request an attorney general ruling, either the requestor or the attorney general may bring a lawsuit to force the release of the records in question.³⁰¹ Even if the attorney general has determined that the governmental body may withhold the requested information, the requestor may still file a lawsuit against the governmental body to seek disclosure of the requested information.³⁰² Under certain circumstances, a third party may file litigation to prevent the release of records that implicate that person's privacy or proprietary interests.³⁰³

In a lawsuit brought to compel the release of public information, a requestor or the attorney general is entitled to an award of attorney fees and costs if they prevail in their suit.³⁰⁴ In a lawsuit by a governmental body seeking relief from compliance with an

²⁹⁶ *Id.*

²⁹⁷ *Id.* § 552.3215(g).

²⁹⁸ *Id.* § 552.3215(i).

²⁹⁹ *Id.*

³⁰⁰ *Id.* § 552.3215(j).

³⁰¹ *Id.* § 552.321.

³⁰² *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.— Austin 1992, no writ).

³⁰³ See, e.g., *Morales v. Ellen*, 840 S.W. 2d 519 (Tex. App.— El Paso 1992, writ denied). See also Tex. Gov't Code. § 552.325.

³⁰⁴ Tex. Gov't Code § 552.323.

attorney general ruling, a court may order the losing side to pay litigation costs and attorneys' fees, but is not required to.

Additionally, a requestor who feels he or she has been overcharged for copies of public information may file a complaint with the attorney general's office.³⁰⁵ The attorney general's office may require the governmental body to pay the requestor the amount of any overcharge. If the attorney general's office finds that the overcharge was due to bad faith on the part of the governmental body, the requestor who is overcharged may recover up to three times the amount of the overcharge from the governmental body.³⁰⁶

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

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

Failure to Give Access to Public Information.³⁰⁷ A person responsible for releasing public information commits a crime if he or she fails to give access to or fails to permit copying of public information as required by the Public Information Act. This violation is a misdemeanor punishable by a fine of up to \$1,000, a six-month jail term, or both. Also, the Public Information Act states that this violation constitutes official misconduct. Thus, a public official may be subject to removal from office for such an offense. However, there are affirmative defenses to this violation.³⁰⁸ The affirmative defenses are:

- 1) Reasonable belief that public access to information not required and relied on a court order, court opinion, or ruling by the attorney general's office;³⁰⁹
- 2) A ruling from the attorney general's office has been sought and no decision has been issued;³¹⁰
- 3) A suit filed in Travis County district court challenging ruling by the attorney general's office and suit is pending;³¹¹ or
- 4) Officer's agent reasonably relied upon written instruction from the officer of public information.³¹²

Release of Confidential Information.³¹³ A person commits a crime if he or she distributes information considered confidential under the Public Information Act. This

³⁰⁵ *Id.* § 552.269.

³⁰⁶ *Id.* § 552.269(b).

³⁰⁷ *Id.* § 552.353.

³⁰⁸ *Id.* § 552.353(b)-(d).

³⁰⁹ *Id.* § 552.353(b)(1).

³¹⁰ *Id.* § 552.353(b)(2).

³¹¹ *Id.* § 552.353(b)(3); (c).

³¹² *Id.* § 552.353(d)

violation is a misdemeanor punishable by a fine of up to \$1,000, a six-month jail term, or both. This violation also constitutes official misconduct.

Illegal Destruction or Alteration of Public Information.³¹⁴ A person commits a crime if that person willfully destroys, mutilates, or alters public information or removes such information without permission. This offense is a misdemeanor and is punishable by a fine between \$25 and \$4,000, three days to three months of jail time, or both.

It is important to note that there are provisions of Texas law outside of the Public Information Act that criminalize tampering with a governmental record which may constitute a felony.³¹⁵

VIII. Additional Information on the Public Information Act

84. How long must a governmental body retain various types of records?

All governmental bodies have a record retention schedule to preserve its records for a certain amount of time.³¹⁶ The Local Government Record Act requires that all local governments have a record retention schedule that meets the approval of the Texas State Library and Archives Commission. The schedule must detail how long a governmental body will keep various types of government records. A governmental body may not destroy records prior to the time set for the destruction of those records in the governmental body's retention schedule. For more information concerning record retention, including the Local Government Record Act, and how to comply, contact the State and Local Records Management Division of the Texas State Library and Archives Commission either at its website: <https://www.tsl.texas.gov/slrinfo>, by phone at (512) 463-7610, or by email at slrminfo@tsl.texas.gov.

85. Are all elected or appointed governmental officials required to take training about the Act?

Elected and appointed officials must have a minimum of one hour but no more than two hours of training.³¹⁷ Newly elected or appointed officials have 90 days to complete the required training. If the governmental body has designated a public information coordinator, then the officials can opt out of taking the training provided that they designate their public information coordinator to receive the training in their place. The public information coordinator must be the person who is primarily responsible for the processing of open records requests for the governmental body. The official or public

³¹³ *Id.* § 552.352.

³¹⁴ *Id.* § 552.351.

³¹⁵ See, e.g., Tex. Pen. Code. § 37.10.

³¹⁶ See Tex. Loc. Gov't Code, subtitle C (Chap. 201 *et seq.*) (Local Government Record Act); Tex. Gov't Code §§ 441.180 - .205 (state agency record retention).

³¹⁷ Tex. Gov't Code § 552.012.

information coordinator should receive a certificate of completion. The governmental body shall maintain the certificates and make them available for public inspection.

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

The Office of the Attorney General produces a *Public Information Act Handbook*, an in-depth publication about the Act and its interpretation through attorney general rulings and court cases. That publication can be found on the attorney general's website at <https://texasattorneygeneral.gov/og/open-government-related-publications>. Also, the Open Records Division of the Office of the Attorney General sponsors an Open Record Hotline where public officials and concern citizens can get answers to basic questions about the Public Information Act and an Open Records Cost Hotline where staff can answer questions about charges relating to the Public Information Act. The phone number for the Open Government Hotline is (512) 478-OPEN (6736) or (877) OPEN-TEX (673-6839) and for the Open Government Cost Hotline is (512) 475-2497 or (888) OR-COSTS (672-6787).