

ABOUT THE PUBLIC INFORMATION ACT

Some Basic Information For County Officers 2007 Update

Prepared by the Legal Department
of the

TEXAS ASSOCIATION OF COUNTIES

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I. About the Public Information Act

Prepared by the Texas Association of Counties
Legal Department¹

A. The General Policy

1. People are Entitled to Information About the Government. The Public Information Act is a Texas statute codified as chapter 552 of the Texas Government Code. It declares that it is the public policy of Texas that people are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.

2. The Freedom of Information Act, Public Information Act, Sunshine Law, etc. You may hear people refer to the “Freedom of Information Act,” and you may see the Freedom of Information Act invoked by name in a request for access to County records. Strictly speaking, the Freedom of Information Act is the federal equivalent of the Public Information Act, and applies to information in the possession of a federal agency. However the Public Information Act is certainly a freedom of information law, and people often will use the federal name when they mean to refer to the state law. This is of no consequence to the validity of a request for access to records.

Similarly, the Public Information Act may be referred to by different names. Since the 1995 session of the Legislature, the official name of the Act has been the “Public Information Act.” However, the Act is often referred to as the Open Records Act, its former name. Open government laws like the Public Information Act and the Open Meetings Act are sometimes generically referred to as “Sunshine Laws.” As stated above, it doesn’t matter what someone calls it so long as their request is in writing and reasonably identifies the information sought.

3. Information is Presumed Open to the Public. To accomplish this policy, the Public Information Act makes all “public information” open to the public unless the information is specifically excepted by the Public Information Act. “Public information” is defined very broadly to include information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a “governmental body.”² It also includes information that is created for a governmental body, if the governmental body either owns or has access to the information.

The Public Information Act provides a nonexclusive list of types of public information that is not excepted from disclosure under the Act and that is public unless “another law” makes the

¹This Handbook includes changes adopted by the 80th Legislature in 2007. Significant portions of this handbook were adapted with permission from the City of Austin’s Public Information Handbook.

²Access to records of the judiciary is governed by rules of the Texas Supreme Court or other law, not the Public Information Act.

information confidential. Among the examples listed in the Act are: a *completed* report, audit, evaluation, or investigation (except for law enforcement or prosecutor information); the names, sex, ethnicity, salary, title, and dates of employment of governmental officers and employees; and the name of each official and the final record of voting on all proceedings of a governmental body. The Attorney General does not consider the exceptions to disclosure in the Act itself to be “another law,” if the exceptions may be waived by the governmental body. In other words, the fact that one part of the Act allows a governmental body to withhold information under certain circumstances does not mean that the governmental body may always withhold the information.

A county commissioners court is one of the entities specifically listed in the Public Information Act as a “governmental body.” The Attorney General has determined that the records maintained in the offices of individual county officers are also subject to the Public Information Act, reasoning that county offices are funded wholly or partly with public funds. The boards and commissions created by the County, as well as that part of any corporation or other organization that is funded in whole or in part with public funds, are also covered by the Public Information Act. Under the Public Information Act, information is presumed to be open.

4. The Act Lists Specific Exceptions to Required Public Release. If a governmental body wishes to withhold requested information from public release, the governmental body has the burden of overcoming the presumption of openness by establishing that the information is within one of the specific exceptions listed in the Public Information Act. The Public Information Act provides a specific process for determining whether information is within an exception. Because the intent of the law is to encourage prompt disclosure of requested information, this process is extremely time sensitive.

5. Some Information Cannot Be Disclosed. The Public Information Act protects confidential information in the custody of a governmental body. It is **unlawful** for a county officer or employee to disclose confidential information. A county officer or employee may be punished by confinement in county jail for up to six months and by a fine of up to \$1,000, or both.

The Public Information Act also makes it official misconduct to disclose confidential information. Under Chapter 87 of the Local Government Code, a county officer is subject to removal from office for official misconduct. Obviously, a county officer should be extremely careful about releasing information that may be confidential. The wisest course of action to follow if a requestor seeks information that may be confidential is to seek an Attorney General opinion.³

6. You Work for the Public. It is important to remember that you are public officers and employees. The government belongs to the public. In making a request for public information, a requestor is not attacking you, your office, or the county. The requestor is exercising a specific statutory right, and it is appropriate and legitimate to do so. A requestor should always be treated with respect, and the request should be taken seriously and handled promptly.

³ See also Chapter 39 of the Penal Code. Examples of information that the Attorney General has determined to be confidential are: reports of allegations of child abuse; communications between a patient and a mental health professional; certain information relating to emergency medical services; and certain medical records.

7. Don't Promise Confidentiality. Keep in mind that under the Public Information Act, information may only be withheld if a specific exception in the Act protects the information. The County may not confer confidentiality on information or on a particular record by promising to keep it confidential. Disappointment and unhappiness will result if someone is promised confidentiality and the County is later required to release the information to the public.

B. The Role of the Attorney General

The Texas Attorney General's Office plays an important role in the administration of the Public Information Act. If the County wishes to withhold information or believes information must be withheld, it must seek a decision from the Attorney General that one of the exceptions to required disclosure enumerated in the Act applies to the information in question. Thus, the Attorney General oversees the decisions of the County to ensure compliance with the Act. This is important to understand when your office wishes to withhold information that has been requested.

The Attorney General's Office must be provided with copies of the information in question in order to perform its oversight role. In the case of records that are voluminous or repetitive, the Attorney General will accept representative samples of the records. The Attorney General is prohibited by the Public Information Act from releasing records submitted to it by the County for review under the Public Information Act. If the Attorney General finds that records must be released, that office will return the records to the County along with a finding that the records must be released. This gives the County an opportunity to seek judicial relief, should that be deemed appropriate.

1. The Role of Your Lawyer. If your office wishes to withhold information, your lawyer should assist you in seeking a decision from the Attorney General. *The Public Information Act is Time Sensitive.* When the County wishes to withhold information that has been requested, you must seek a determination from the Attorney General within 10 business days of receiving the request. For this reason prompt attention to requests for public records is essential.

2. Your Role. Each County office should design and implement management practices that permit compliance with the Public Information Act.

C. Officer For Public Information

1. Elected County Officer. The Public Information Act designates each elected county officer as the officer for public information and as the custodian of the information created or received by that person's office. For example, the county clerk is the officer/custodian of records maintained in the clerk's office. But the clerk is not the officer/custodian for records maintained by the sheriff, county judge, county attorney, or other elected county official. Each elected officer is responsible for the records of his or her office.

2. Request Made to Wrong Officer. When one county officer receives a request for information that is not kept by that officer, the officer may want to advise the requestor to redirect the request to the appropriate county officer.

3. Department Heads. The Public Information Act states that each department head serves as an agent of the officer for public information for the purpose of complying with the Public Information Act. This means that receipt of a request within a department of a county officer is considered receipt by the officer. The officer should take necessary steps to ensure that all department heads understand the time sensitive nature of the Public Information Act and their respective duties under the Act.

4. Duties of Officer for Public Information. Each officer for information must make public information available for inspection and copying. The officer must keep the records safe and properly maintained.

5. Officer to Display Notice Regarding Public Information. Since January 3, 2000, the officer for public information has been required to prominently display a sign that contains basic information about the rights of a requestor of information, the responsibilities of the governmental body, and the procedures for inspecting or obtaining copies of public information. The Attorney General prescribes the form, content, and size of the sign. The officer for public information must place the sign in one or more locations in the administrative offices where the sign will be clearly visible to the public and to the employees who receive and respond to public information requests.⁴

D. Training Required for County Officials

Effective January 1, 2006 all elected and appointed county officials must complete a training course on the Public Information Act.⁵ The Attorney General makes the training available at no cost on video and on his website. The one-time course may not exceed two hours.

A county official who assumes office on or after January 1, 2006 must complete the training not later than 90 days after taking office. A county official who took office before January 1, 2006 must have completed the training before January 1, 2007. The statute does not impose a penalty for failure to complete the required training.

E. A Request for Records

1. Routine or Over-the-Counter Records Requests. Many County employees process routine or over-the-counter requests for records as part of their ordinary duties. These transactions do not ordinarily raise issues under the Public Information Act because no written

⁴ A copy of the current (as of publication time) sign is included in Appendix A. The sign is also available on the Attorney General's website www.oag.state.tx.us/opinopen/pia

⁵ A county official may designate a "public information coordinator" to complete the training on the official's behalf, if the designee is primarily responsible for administering the public official's duties under the Act.

request is made for the records or because no real issue exists about whether the records must be, or may be, released.

Some examples of records routinely requested from County offices include property records maintained by the county clerk and voter registration records maintained by the voter registrar.

2. Written Request Triggers the Public Information Act. The Public Information Act is triggered when a person submits a written request for information to the County.⁶ While the request must be in writing to trigger the Public Information Act, it need not be in any special form, and it need not invoke or mention the Public Information Act. The request need not name any particular official. **A request is valid so long as it is in writing (including electronic mail) and reasonably identifies the information sought.** A requestor may not know exactly what you call specific documents, or know exactly how they might be stored. If you can't be sure what information is being sought, you must contact the requestor to clarify the issue. **Keep in mind that you may not ask the requestor WHY the requestor wants the information.**

3. Request Considered Withdrawn. If you seek clarification, discussion, or additional information about a request you receive, the requestor must respond to you in writing by the 61st day or the request is considered to have been withdrawn. Your letter must be sent by certified mail to the address the requestor provided in the underlying request for information, and you must include in your letter a statement of the consequence if the requestor fails to timely respond to your letter.

F. What the Public Information Act Requires

1. Access to Records. The Public Information Act requires the County to provide access to information that exist at the time of the request, or to seek a determination from the Attorney General that the information may or must be withheld. Access to requested information must be provided promptly. If the requested information cannot be produced for inspection or duplication within 10 business days after the request is received, the governmental body must certify that fact in writing to the requestor, and must set a date and hour within a "reasonable time" when the information will be available. If the information is in active use or in storage, the governmental body must also certify this fact in writing, and arrange for this information to be available to the requestor within a reasonable amount of time. All requests for information must be treated uniformly. The requestor may choose merely to inspect records or to seek copies of them. When a record may be partially withheld, unless the requestor agrees otherwise, the requestor is entitled to a copy of the actual record with the confidential or nondisclosable parts excised. A requestor may request that records be sent by mail. The County may charge for copies or access in certain circumstances.

If the requested information is available in an electronic or magnetic medium, the County must comply with a request for information in those formats if it has the technological ability to do so.

⁶ A subpoena duces tecum or a request for discovery is not a request under the Public Information Act.

2. What the Public Information Act Doesn't Require. The Public Information Act applies only to information in existence at the time the request is made. The Public Information Act does not require the County to prepare new information in response to a request. The Public Information Act does not require the County to provide access to records that did not exist at the time of the request, or to advise a requestor about new information that comes into existence after the request has been made. The County need not comply with a "standing" request for information that may come into existence in the future, or that comes into existence periodically. The County need not do legal research for a requestor or answer questions or interrogatories. The requestor is entitled to copies of the actual records as they exist. Generally, the Public Information Act does not require that information be prepared or organized in a particular way to suit the needs of the requestor. *However*, if the information is available in an electronic or magnetic medium, the County must comply with a request for information in those formats if it has the technological ability to do so.

3. Repetitious or Redundant Requests. The Public Information Act addresses the reality that counties and other governmental bodies sometimes experience redundant or repetitive requests for the same information by the same requestor. If a person requests information that the County has previously provided to that person, the County *may* certify that fact to the requestor rather than producing the information again. This procedure is not available if there have been additions, deletions, or corrections, to the information since the earlier request was received by the County.

G. Access to Computer and Electronic Information

If the requested information is available in an electronic or magnetic medium, the County must comply with a request for information in those formats if it has the technological ability to do so, and if there are no copyright problems. If satisfying a request will involve programming or manipulation of data that will substantially interfere with the office's ongoing operations, or can be supplied in requested form only at a cost that covers programming and manipulation, the County is required to provide the requestor with a written statement noting these circumstances. The notice must inform the requestor of the following: (1) the form in which the information is available; (2) what is required to provide the information in the requested form; and (3) the estimated cost and time to provide the information in the requested form. This notice must be provided within 20 days of the date the request for information was received. If additional time is needed to calculate the costs and timing, the County may wait and send the statement within 30 days of receiving the request, provided that notice is sent to the requestor within the 20-day response period that more time is needed. The requestor may choose to obtain the information in the format that is already available, or may pay to have it put in the requested format. If the estimated charge for the information, regardless of format in which it is provided, exceeds \$100.00, a cash deposit or bond may be required from the requestor. You are not required to produce the requested information unless this bond is provided. The County need not provide untrammelled access to its files or premises, or provide a computer terminal for the use of a requestor. The County is not required to purchase hardware or software to comply with a request.

The County need not copy the information on a diskette or other materials supplied by the requestor. Instead, the County may use its own materials. This is intended to protect against the introduction of viruses into the County's computer system.

H. The Requestor

1. The Motives of the Requestor Don't Matter. Obviously, the Public Information Act is an important tool for journalists and attorneys, and many requests for public information will come from members of these professions. However, the County is prohibited from making any inquiry of the requestor beyond establishing the requestor's identity, and identifying the records sought, and, if a large amount of information is sought, discussing how the request might be narrowed. Therefore, the motives, occupation, or status of the person requesting the information does not determine whether the information must be disclosed. The County may charge for copies of records and for other costs of making information available.

2. Selective Release. The general rule is that all members of the public have equal access to public information. Accordingly, if you voluntarily release a record to one person, you will usually waive any privilege the County has to withhold that record from another requestor. There are some exceptions to this rule. First, keep in mind that, for these purposes, the County is a single entity. Information may be shared among County offices. That is not considered a release to the public. Generally speaking, when the County is working with another unit of government, including the federal government, information may be shared with the other governmental body, without waiving any privilege to withhold it from the public. When information is required to be released to a specific individual by law, or in discovery in a lawsuit (even if the discovery is cooperative), the release will not be considered voluntary and any remaining privileges under the Public Information Act will not be waived.

3. Inmate Requests. The Public Information Act relieves the state and its political subdivisions of the duty to respond to requests for information from incarcerated individuals and a person acting as the agent of the incarcerated individual, unless the requestor is the inmate's lawyer.⁷ It is not uncommon for a County to be bombarded with rather burdensome requests from persons confined in jail or their agents asking for extremely voluminous materials. More often than not, the requestors are unable to pay for the information. The County may comply with the request from an inmate or the inmate's non-lawyer agent, but it is not required to do so.

I. Information Subject to the Public Information Act

1. Generally. The Public Information Act applies to information that exists in some form of record. It does not reach information that exists only in your head. The Public Information Act does not require you to prepare new information or answer questions. However, the Public Information Act reaches information that exists in any kind of medium: paper, audio tape, video

⁷This rule applies whether the individual is confined in Texas, another state, or a federal facility.

tape, microfilm, microfiche, drawings, photographs, photostats, charts, graphs, Mylar, linen, silk, vellum, electronic signals, or any other form of storage medium.

2. Information Stored in a Computer. Information stored in a computer, including electronic mail, is subject to the Public Information Act even if the information has never been printed out.

3. Information in the Possession of a Consultant or Contractor. It is difficult to avoid the Public Information Act by leaving information in the hands of a consultant or contractor. Where the consultant or contractor has prepared information on behalf of a governmental body, the information has been held to be subject to the Public Information Act even though it is not in the governmental body's physical custody.

4. Copyrighted Materials. Copyrighted materials in the possession of the County are subject to the Public Information Act and must be made available for **inspection** unless otherwise excepted. However, the Attorney General has opined that the Public Information Act does not require the County to provide copies of copyrighted material, and the County should not violate the copyright by making copies (either photocopies of copyrighted information or copies of copyrighted information stored on a computer), or by aiding the requestor in doing so. In addition, materials and publications that are available commercially need not be reproduced by the County.⁸

J. The "Ten-Day Rule"

One of the most widely misunderstood provisions of the Public Information Act is the ten-day rule. The Public Information Act establishes a deadline of ten business days for the County to request an open records ruling from the Attorney General. These are *county business days*, not calendar days.

The clock starts when the written request is received by the County office that maintains the record being requested.⁹ So it is important that each department in your office communicate quickly if one department receives a request that should be handled by another department of your office. The ten days do not begin to run against the Sheriff's office, for example, on a request that was originally misaddressed to the Voter Registrar. If you receive a request that does not relate to records maintained in your office, you may want to communicate that fact to the requestor.

⁸ This means, for example, that a county official may decline to make a copy of a map, a book, or a pamphlet that the county obtained commercially. Also, a requestor seeking copies of published cases or statutes may be directed to the county law library or other appropriate library facility.

⁹ The ten-day period is tolled during the time the county officer and the requestor are attempting to clarify the actual scope of the request but resumes when the officer receives clarification from the requestor. ORD-663 (1999). It is recommended that the county officer seek clarification from the requestor in writing or confirm any oral discussion in writing.

If the County does not submit a written request for a ruling to the Attorney General within ten days, the information is presumed open to the public, and only a compelling interest can overcome that presumption. The only interests that the Attorney General has found to be “compelling” are those belonging to third parties or those relating to confidential information. It is not compelling that the County would have been permitted to withhold the information had it sought a ruling within the allotted time frame.

However, the ten-day rule is *not* a deadline for the production of records. If the County is not seeking to withhold information by obtaining a ruling from the Attorney General, and if the information cannot be produced (for inspection, duplication or both) within 10 business days of the date the request is received, the County is required to certify this fact in writing to the requestor and establish a date and hour (within a “reasonable time”) when the information will be available. Many requestors will use a form letter that contains a recitation that the records must be produced for inspection within ten days according to the Public Information Act. This, however, is incorrect. The Public Information Act does not require that information be produced within ten days. Instead, the Public Information Act requires that requested information be produced “promptly.” What is prompt depends on the circumstances.¹⁰ For records that are archived in off-site storage, “promptly” may mean one thing, while for readily available records it could mean another.

¹⁰ In ORD-664 (2000) the Attorney General described “promptly” to require the release of information “as soon as possible under the circumstances, that is, within a reasonable time, without delay.” In 2003, the Legislature codified this language.

II. What to Do About Public Information Requests

A. Set Up a System for Reviewing Your Mail

How can you plan for a request for public information? Your office may have a mail intake system that screens for public information requests. All incoming mail (and for this purpose you should consider “mail” to include faxes, electronic mail, hand deliveries, federal express, and the like) should be reviewed by someone who knows how to identify an open records request when they see one. Remember that a public information request is any writing that asks for records or information; it does not have to mention the Public Information Act. Of course, plan for vacations and absences, and make sure you have a backup for checking your mail and handling public information requests.

B. Time Stamp Your Mail

All incoming mail (again, including faxes, etc.) should be date stamped when received. This is very important as the ten days starts ticking when the request is received. Often a letter dated on the 10th, for example, will not be received until the 15th. An established business practice of date stamping mail when received will ensure you have as much of the allotted 10 days to work in as possible. A statement of the date your office received a request must be included in your letter to the Attorney General, if you decide to seek a determination from the Attorney General.

C. When You Should Contact Your Lawyer

Decide whether you need legal assistance. If the requested information is routinely released, if your office has no objection to the release of the information, and if no one's privacy or property interests seem to be at issue, there is probably no reason to contact your lawyer.

If your office does not want to release the information, or you are concerned that there may be a reason that the information should be withheld, get the request over to your lawyer as soon as possible. In some instances, you may want to call your lawyer and then fax the request to him or her. Do not wait until you have gathered the requested documents. Once you have the requested documents together, send them over to the lawyer as soon as possible as well. ***Remember that the Public Information Act is extremely time sensitive.***

If you anticipate difficulty or delay in getting the documents together, talk to your lawyer about this. Sometimes, when documents are voluminous or difficult to compile, you may find it necessary to send your request to the Attorney General without the documents in order to meet the 10 day deadline, and provide the documents later under separate cover. You have only an additional 5 days to follow the request with the documents or a representative sample of voluminous documents.

D. Never Destroy Records That Have Been Requested

The Public Information Act, the Local Government Records Act, and the Penal Code all prohibit the destruction of government records. The Public Information Act applies to public information, that is, to government records. If records don't exist, you don't have to worry about the Public Information Act. It follows that if you want to be 100% sure a record will never be released to the public, don't create it in the first place. It does *not* follow, however, that you can avoid the provisions of the Act by destroying a record that already exists, or by taking some other action to impair the record's availability. Under the Penal Code, penalties for intentional destruction of a government record range from Class A Misdemeanor to Second Degree Felony, depending on the circumstances. The Penal Code permits the destruction of a government record in accordance with the Local Government Records Act. However, no record can be legally destroyed under the Local Government Records Act if there is a pending request for public information with respect to the record.¹¹

E. Seeking a Determination from the Attorney General

1. Generally. Once you have identified the information sought by the requestor, you must consider the nature of the information. Basically, there are three types of information: (1) information that must be released, (2) information that *may* be withheld, and (3) information that *must* be withheld.

Information that *must* be withheld is confidential by law; the law forbids its public release. Often this information will concern privacy interests of an individual, or concern the trade secrets or commercial interests of a business. If you think information falls in a category that must be withheld, contact your lawyer. Some examples of information made confidential by law are: medical records; mental health records, HIV or AIDS test results; polygraph exam results; certain income tax return information; and concealed handgun information.

Information that *may* be withheld is information that may be released or withheld at the County's discretion. Typically, this information will concern criminal investigations, ongoing or expected litigation, pending bids, or advice from legal counsel. Some advice and recommendations in internal memoranda may be withheld, as may drafts of the County budget before it is made public.

If you think that requested records *may* be withheld, you must then decide what to do. Most of the time, openness is the best response to a request for public information. If possible, release the records to the requestor. Under the Public Information Act, information is presumed to be open. In order to withhold information, the County must overcome the presumption of openness by convincing the Attorney General that the Public Information Act permits the information to be withheld.

2. Contact your Lawyer. If you feel that you should withhold the records, time is of the essence. It is imperative that you get the request to your lawyer as soon as possible so that the

¹¹ See Gov't Code Section 552.351, Local Gov't Code Section 202.002, and Penal Code Section 37.10.

lawyer may seek a determination from the Attorney General that you may withhold the records. The County has 10 business days to seek an Attorney General's determination that the records may be withheld. Saturdays, Sundays, Christmas, Thanksgiving, and all other holidays are excluded from the 10 days.

Your lawyer will have to prepare a written argument for the Attorney General explaining why the law permits the County to withhold the information at issue. This takes some time, even in the best of cases. The lawyer also needs to review the records, or if the records are voluminous, at least a sample. The information to be withheld must be marked or highlighted to indicate which exception applies to which part of the copy. The reason for this is twofold: First, it is often difficult for your lawyer to write a convincing case to the Attorney General if the lawyer doesn't have some idea what the records look like. Second, the Attorney General's office requires the documents for their review in connection with processing the County's request, so the lawyer will need the records to send them to the Attorney General for review.

3. Notice to Requestor. When the County seeks a determination from the Attorney General, the County must send a written statement to the requestor indicating its decision to seek the ruling. The notice must include a copy of the County's letter to the Attorney General. The copies must be edited if they contain the information at issue in the request. The notice to the requestor *must* be provided by the County no later than the 10th business day after the County receives the request. A failure to provide the notice to the requestor timely creates the presumption that the information is public as well as a copy of the written comments the county sends to the Attorney General.

4. Notice to Third Party. When the County receives a request for proprietary information relating to a *third party*, the County must make a good faith effort to notify the third party of the County's request for an Attorney General's determination. The County's written notice to the third party must be sent no later than the 10th business day after the County receives the request for information, and it must include a copy of the request for information. The notice must inform the third party that it is entitled to submit a statement to the Attorney General explaining why the requested information should be withheld from the requestor. The County's notice must also inform the third party that its letter to the Attorney General must be sent no later than the 10th business day after receipt of the County's notice.

5. Previous Determinations. The Public Information Act permits a governmental body to withhold information if the Attorney General has previously determined the information is within one of the Act's exceptions. However, relying on prior Attorney General decisions is very risky because the Attorney General may later decide the information in question is not covered by his earlier ruling. Don't do it without seeking legal advice.¹²

¹² In ORD-670 (2000) the Attorney General concluded that the home phone numbers and addresses of peace officers and security officers, in addition to social security numbers and information that reveals whether the officers have family members may be withheld without requesting an Attorney General decision. The Attorney General held that ORD-670 is a "previous determination" for purposes of the Act. Likewise, ORD-670 serves as a "previous determination" for personal cellular phone numbers and personal pager numbers of peace officers.

6. Prohibited Requests for Determinations. Except under the limited circumstance discussed below, a County is prohibited from seeking a determination from the Attorney General about whether specific information is excepted from disclosure under the Public Information Act if: (a) the County has previously received a determination from the Attorney General on the precise information at issue in the pending request; and (b) either the Attorney General or a court has determined that the information is public and must be released. To avoid accusations that you are intentionally violating this new provision, you should make certain that your record keeping includes measures for noting whether specific information has already been determined to be public.

A County may ask for another decision from the Attorney General about the specific information if: (a) a suit challenging the prior decision was timely filed against the Attorney General concerning the precise information; (b) the Attorney General determines that the requestor has voluntarily withdrawn the request in writing or has abandoned the request; and (c) the parties agree to dismiss the lawsuit.

III. The Exceptions

There are approximately 50 exceptions to required public disclosure of records listed in the Public Information Act. Not all of these are of interest to County officers and employees. The following list is not meant to be exhaustive or to completely explain how the exceptions work. It's just intended to give you an idea of the kinds of things that may be excepted. The exceptions are discussed at length in the Attorney General's Public Information Handbook. You may request a copy of the handbook from the Attorney General's Office. The Attorney General's Public Information Handbook is also available on the internet at <http://www.oag.state.tx.us>.

A. Privacy and Confidential Information

The Act excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This is the most sweeping and important of the exceptions, and is unique in that: (1) most of the information it excepts from public disclosure *may not* be released, even if the County wants to release it; and (2) many of the interests it protects belong to *third parties* who may be the subjects of information kept by the County.

Information may be considered "private" under the law if it contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person or if it concerns the more intimate aspects of human affairs, such as medical matters, marriage, procreation, and family relationships. Always contact your lawyer before releasing information of this nature.

County employees (other than peace officers) may elect to keep confidential their home addresses, home phone numbers, social security numbers, and information revealing whether they have family members. The election must be made in writing not later than the 14th day after employment with the county begins. Always check to see whether an employee has exercised

this right before releasing such information. To be effective, the confidentiality election must occur before a request is received.

In contrast, this same information regarding a peace officer, or an officer or employee of a community supervision and corrections department is categorically made confidential by the Act. It may not be released. Nor may this information be released when it relates to a peace officer, reserve law enforcement officer, commissioned deputy game warden, or correctional officer if the person was killed in the line of duty.

As a general rule, other kinds of information in the personnel files of County employees are only subject to the protection they are afforded under the privacy doctrine. Certain information in personnel files may be subject to specific confidentiality statutes (e.g., medical records) or other exceptions from required disclosure available to the County under the Public Information Act.

The privacy right belongs to the individual and not to the County. The Public Information Act does not permit information to be withheld from a requestor if the only reason for withholding the information is to protect the requestor's own privacy.

B. Social Security Numbers

The social security number of a living person is excepted from disclosure but is not considered confidential under the Public Information Act. The county may redact the social security number of a living person from any information the county discloses under the Public Information Act without requesting a decision from the Attorney General. Before this exception was added to the Act in 2005, virtually all political subdivisions were required to wander a maze of federal and state laws to determine whether the disclosure of social security numbers was required, permitted, or prohibited in a particular situation.

In 2007 the Act was amended to authorize a county or district clerk to disclose social security numbers that appear in the clerk's records and to provide that such a disclosure is not official misconduct and does not subject the clerk to civil or criminal liabilities. The amendment also requires the clerk to redact all but the last four digits of a person's social security number from the clerk's records if the person identifies the specific records from which the partial redaction is to be made.¹³

C. Commercial Information

Certain commercial and financial information, particularly trade secrets, are protected by both the common law and statutory law. This kind of information may come into the County's possession in a number of ways; often it is received in bids or proposals, or in regard to licensing or regulation. Protection of this kind of information is usually of more concern to the business from which it was received than it is to the County. In the case of information that may be considered proprietary business or commercial information, the County must attempt to notify

¹³ See Gov't Code Section 552.147

the business of the request for information. If the business objects to the release, your lawyer can seek an Attorney General determination on their behalf, and allow them to make their arguments directly to the Attorney General. In this way the lawyer can make sure the County doesn't violate the rights of a third party and protect the County from potential liability.

D. Intra-County Memoranda

The Public Information Act protects certain inter-agency and intra-agency memoranda to encourage frank and open discussion within government agencies. This provision has been one of the most relied upon sections of the Public Information Act since the Act's inception. However, this exception will only protect internal advice, opinion, or recommendation related to policymaking matters. It will not usually except information related to routine internal administrative or personnel matters.

E. Attorney-Client Privilege

The Public Information Act incorporates the attorney-client privilege and protects legal advice that the County's attorney is prohibited from disclosing under the Rules of the State Bar of Texas.

F. The Litigation Exception

The Public Information Act protects a governmental body's position in litigation by forcing parties seeking information relating to the litigation to obtain it through court processes known as "discovery." As this provision protects the County, it may be voluntarily waived by the County, or waived by failure to seek an Attorney General's determination within 10 days.

G. The Law Enforcement Exception

The Public Information Act excepts from required public disclosure any records relating to the detection, investigation, or prosecution of a crime for which there has been no conviction or deferred adjudication, offense reports other than the information normally released to the public on the front page of an offense report, and prosecutor's records.

This exception was rewritten by the legislature in 1997. How it will be construed by the Attorney General and the courts is unsettled. Because a county's law enforcement records are some of the most requested county records, you may want to ask your attorney to pay close attention to judicial developments relating to this exception.

H. Exceptions that Protect the County's Negotiating Position

The Public Information Act generally permits bids and proposals to be withheld until a contract has been awarded. To protect the County's bargaining, planning, and negotiating position with respect to the purchase of property, it also excepts "information pertaining to" the location, appraisals, and purchase price of property.

I. Economic Development Information

In 1999, the Legislature added a provision to the Public Information Act that is intended to support the efforts of governmental entities regarding economic development within the entities' territories. Under the provision, certain information about a business prospect with whom the County or other governmental body is negotiating to locate, expand, or remain in the territory is excepted from disclosure. If the business prospect is being offered any financial or other incentive by the governmental body or any incentive by another person that may result in the expenditure of public funds or a reduction in revenue to the governmental body, information about the incentive is excepted from disclosure until an agreement is reached with the business prospect.

J. Audit Working Papers

The exception to disclosure of audit working papers was broadened in 2003 to include those of county and municipal auditors. The exception applies regardless of the date the working papers were created.

IV. Charging for Copies or Inspection

A. Generally

1. The County May Charge for Copies. The Attorney General adopts rules that set the amounts that may be charged for copies obtained under the Act, and it is important for the County to follow these rules.¹⁴ The requestor is entitled to recover three times the amount of an overcharge if the governmental body did not act in good faith in computing the costs. The County may not charge a member of the Legislature for copies requested in connection with the member's duties. The County may require advance payment. The County may charge for shipping and postage at the actual cost.

2. Waiver of Charges. The County may waive charges or reduce charges for copies if it determines that release of the information benefits the general public. Be careful to treat requestors uniformly in this regard. In any case, discretion should be exercised in charging for labor and overhead, even when permitted by the Attorney General rules.

3. Charging for Inspection of Records. If the requestor simply wants to inspect information that is available on paper, the County may impose a charge for copying those pages that must be edited for confidential information.

¹⁴ The charges permitted under the Attorney General's rules do not apply when another statute establishes the cost for copies. For example, LOCAL GOV'T CODE, sec. 118.011(a)(4), requires the county clerk to charge \$1.00 for a noncertified copy of each page or part of a page of a document that is provided in paper format and LOCAL GOV'T CODE, sec. 118.144, allows the county treasurer to collect \$1.00 for a certified or noncertified copy of a page or part of a page.

4. Itemized Statement Required. When the County intends to impose a charge for inspection or copies that exceeds \$40, the County must provide to the requestor an itemized statement of the estimated charges. The County must also notify the requestor of any less costly method of viewing the records. Furthermore, the County must inform the requestor that the *request is considered to be automatically withdrawn* unless the requestor responds in writing within 10 business days that the requestor will accept the estimate, is modifying the estimate, or has sent a complaint to the Attorney General alleging that the County is overcharging for the copies.

5. Requiring a Deposit or Bond for Inspection of Records. A County with more than 15 full-time employees may also require payment or a deposit or bond for anticipated personnel cost associated with making paper records available for inspection if the officer for public information estimates that more than 5 hours will be required to make the information available for inspection and the information is either older than 5 years or it will fill 6 or more archival boxes once assembled. A County with fewer than 16 full-time employees may charge anticipated personnel costs if the officer for public information estimates that more than 2 hours will be required to gather the information and the information is either older than 3 years or will fill 3 or more archival boxes once assembled.

If the requestor wants to inspect information that exists in an electronic medium (but is not available on-line to the requestor), the County may not impose a charge unless complying with the request will require programming or manipulation of data. In that case, the County must notify the requestor of the estimated charges.

6. Requiring a Deposit or Bond for Copies. A county with more than 15 full-time employees may require a deposit or bond for payment of anticipated costs if the estimated charge for the copy exceeds \$100. A county with fewer than 16 full-time employees may require a deposit or bond if the estimated charge for the copy exceeds \$50. The County must certify this in writing to the requestor, but is not required to produce the information until such deposit or bond has been satisfied. If a requestor fails to make the deposit or bond before the 10th day after the county requires it, the **request** for the information is **considered withdrawn**.

7. Limiting Personnel Time Spent on Requests. The Commissioners Court may establish a limit on the amount of time that county personnel are required to spend in producing information for inspection or copying or in providing copies of information to the same requestor without recovering its costs. The County may not set a time limit that is less than 36 hours per county fiscal year.

A County that imposes a time limit must provide a statement to a requestor of the personnel time spent on a specific request and the cumulative time spent on that person's requests during the fiscal year. For a request that will exceed the time limit, the County must provide a written estimate of the total personnel cost. The requestor must respond with a written commitment to pay the related costs, or the request is considered withdrawn.¹⁵

¹⁵ A time limit does not apply to requests from representatives of the press or media, elected officials, or representatives of a publicly funded legal services organization.

8. Requiring a Deposit or Bond for Unpaid Amounts. An officer for public information may require a deposit or bond for payment of unpaid amounts owing to the County for previous requests from a requestor before preparing documents in response to a new request if the unpaid amounts exceed \$100. The County is prohibited by the Public Information Act from seeking payment of the unpaid amounts through any other means. The County must fully document the existence and amount of the unpaid sum.

9. The County may charge for shipping and postage at the actual cost The costs for shipping and postage may be added to the other reproduction costs the county charges the requestor.

B. Guidelines for Charging For Copies

1. Legal or letter size paper copies. Under the current Attorney General rules,¹⁶ there are permissible charges for standard paper copies reproduced by means of an office machine copier or a computer printer. Each side that has a printed image is considered a page. The permitted charges below are those in effect in September 30, 2007.

(a) 50 or fewer pages of standard paper copies -- Charge .10¢ per copy. The statute provides that no charge for materials, labor, or overhead is permitted, and that the cost shall be limited to the charge for each page of paper record that is photocopied, unless the documents to be copied are located in two or more separate buildings or at a remote storage facility.¹⁷

(b) More than 50 pages of standard paper copies -- \$.10 per page, plus labor and overhead.

2. Labor Costs. You may charge for labor and overhead at these rates:

Programming personnel--\$28.50 per hour;
Other personnel--\$15 per hour.

3. Overhead. Overhead charge--20% of labor charge

4. Copies on a medium other than standard size paper. Under the current rules, these charges are permissible for copies on a medium other than standard size paper:

Diskette--\$1.00 each;
Magnetic tape: Actual cost;
Data Cartridge: Actual cost;

¹⁶ The rules are codified at 1 T.A.C. 70. Cost of copies of Public Info §70.9-70.10. A copy of the rules is attached as Appendix B. The rules are also available on the Attorney General's website www.oag.state.tx.us/opinopen/pia.

¹⁷ The Public Information Act considers buildings that are connected by a covered or open sidewalk or an elevated or underground passageway *not* to be separate buildings.

Tape Cartridge: Actual cost;
Rewritable CD (CD-RW) -- \$1.00;
Non-rewritable CD (CD-R) -- \$1.00;
Digital video disk (DVD) -- \$3.00;
JAZ drive – Actual cost;
Other electronic media – Actual cost;
VHS video cassette--\$2.50 each;
Audio cassette--\$1.00 each;
Oversized Paper copy--\$.50 each;
Specialty paper – Actual cost;
Microfiche or microfilm charge: (i) Paper copy--\$.10 per page; (ii) Fiche or film
copy--Actual cost.
Photographs, other --Actual cost.

- 5. Sales Tax.** No sales tax may be applied to copies

APPENDIX A

Sign

The Public Information Act

Texas Government Code, Chapter 552, gives you the right to access government records; and an officer for public information and the officer's agent may not ask why you want them. All government information is presumed to be available to the public. Certain exceptions may apply to the disclosure of the information. Governmental bodies shall **promptly** release requested information that is not confidential by law, either constitutional, statutory, or by judicial decision, or information for which an exception to disclosure has not been sought.

Rights of Requestors

You have the right to:

- Prompt access to information that is not confidential or otherwise protected;
- Receive treatment **equal** to all other requestors, including accommodation in accordance with the Americans with Disabilities Act (ADA) requirements;
- Receive certain kinds of **information without exceptions**, like the voting record of public officials, and other information;
- Receive a **written statement of estimated charges**, when charges will exceed \$40, in advance of work being started and opportunity to modify the request in response to the itemized statement;
- Choose whether to inspect the requested information (most often at no charge), receive copies of the information or both;
- A **waiver** or reduction of charges if the governmental body determines that access to the information primarily benefits the general public;
- Receive a copy of the communication from the governmental body asking the Office of the Attorney General for a ruling on whether the information can be withheld under one of the accepted exceptions, or if the communication discloses the requested information, a redacted copy;
- Lodge a written complaint about overcharges for public information with the Office of the Attorney General. Complaints of other possible violations may be filed with the county or district attorney of the county where the governmental body, other than a state agency, is located. If the complaint is against the county or district attorney, the complaint must be filed with the Office of the Attorney General.

Responsibilities of Governmental Bodies

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

- Establish **reasonable procedures** for inspecting or copying public information and inform requestors of these procedures;
- Treat **all** requestors uniformly and shall give to the requestor all reasonable comfort and facility, including accommodation in accordance with ADA requirements;
- Be informed about open records laws and educate employees on the requirements of those laws;
- Inform requestors of the estimated charges greater than \$40 and any changes in the estimates above 20 percent of the original estimate, and **confirm that the requestor** accepts the charges, has amended the request, or has sent a complaint of overcharges to the Office of the Attorney General, in writing before finalizing the request;
- Inform the requestor if the information cannot be provided promptly and set a **date and time to provide it** within a reasonable time;
- Request a **ruling from the Office of the Attorney General** regarding any information the governmental body wishes to withhold, and send a copy of the request for ruling, or a redacted copy, to the requestor;
- **Segregate** public information from information that may be withheld and provide that public information **promptly**;
- Make a good faith attempt to **inform third parties** when their proprietary information is being requested from the governmental body;
- Respond in writing to all written communications from the Office of the Attorney General regarding charges for the information. Respond to the Office of the Attorney General regarding complaints about violations of the Act.

Procedures to Obtain Information

- ✓ Submit a request by mail, fax, email or in person according to a governmental body's reasonable procedures.
- ✓ Include enough description and detail about the information requested to enable the governmental body to accurately identify and locate the information requested.
- ✓ Cooperate with the governmental body's reasonable efforts to clarify the type or amount of information requested.

A. Information to be released

- You may review it promptly, and if it cannot be produced within 10 working days the public information officer will notify you in writing of the reasonable date and time when it will be available.
- Keep all appointments to inspect records and to pick up copies. Failure to keep appointments may result in losing the opportunity to inspect the information at the time requested.

Cost of Records

- **You must respond to any written estimate of charges within 10 business days of the date the governmental body sent it or the request is considered automatically withdrawn.**
- If estimated costs exceed \$100.00 (or \$50.00 if a governmental body has fewer than 16 full time employees) the governmental body may require a bond, prepayment or deposit.
- You may ask the governmental body to determine whether providing the information primarily benefits the general public, resulting in a waiver or reduction of charges.
- Make a timely payment for all mutually agreed charges. A governmental body can demand payment of overdue balances exceeding \$100.00, or obtain a security deposit, before processing additional requests from you.

B. Information that may be withheld due to an exception

- By the 10th business day after a governmental body receives your written request, a governmental body must:
 1. request an Attorney General opinion and state which exceptions apply;
 2. notify the requestor of the referral to the Attorney General; and
 3. notify third parties if the request involves their proprietary information.
- Failure to request an Attorney General opinion and notify the requestor within 10 business days will result in a presumption that the information is open unless there is a compelling reason to withhold it.
- Requestors may send a letter to the Attorney General arguing for release, and may review arguments made by the governmental body. If the arguments disclose the requested information, the requestor may obtain a redacted copy.
- The Attorney General must issue a decision no later than the 45th working day from the day after the attorney general received the request for a decision. The attorney general may request an additional 10 working day extension.
- Governmental bodies may not ask the Attorney General to "reconsider" an opinion.

To request information from this governmental body, please contact:

You may send your request

By mail to:

By e-mail to:

By fax to:

In person at:

For complaints regarding failure to release public information please contact your local County or District Attorney at:

- You may also contact the **Office of the Attorney General**, Open Government Hotline, at 478-6736 or toll-free at 1-877-673-6839.
- For complaints regarding overcharges, please contact the **Office of the Attorney General's Cost Rules Administrator** at 512-475-2497.

If you need special accommodation pursuant to the Americans With Disabilities Act (ADA), please contact our ADA coordinator, _____ at _____.

APPENDIX B

Cost Rules

TEXAS ADMINISTRATIVE CODE
TITLE 1. ADMINISTRATION
PART 3. OFFICE OF THE ATTORNEY GENERAL
CHAPTER 70. COST OF COPIES OF PUBLIC INFORMATION

Current through September 30, 2007

§ 70.9. Examples of Charges for Copies of Public Information

The following tables present a few examples of the calculations of charges for information:

(1) TABLE 1 (Fewer than 50 pages of paper records): \$.10 per copy x number of copies (standard-size paper copies); + Labor charge (if applicable); + Overhead charge (if applicable); + Document retrieval charge (if applicable); + Postage and shipping (if applicable) = \$ TOTAL CHARGE.

(2) TABLE 2 (More than 50 pages of paper records or nonstandard copies): \$.10 per copy x number of copies (standard-size paper copies), or cost of nonstandard copy (e.g., diskette, oversized paper, etc.); + Labor charge (if applicable); + Overhead charge (if applicable); + Document retrieval charge (if applicable); + Actual cost of miscellaneous supplies (if applicable); + Postage and shipping (if applicable) = \$ TOTAL CHARGE.

(3) TABLE 3 (Information that Requires Programming or Manipulation of Data): Cost of copy (standard or nonstandard, whichever applies); + Labor charge; + Overhead charge; + Computer resource charge; + Programming time (if applicable); + Document retrieval charge (if applicable); + Actual cost of miscellaneous supplies (if applicable); + Postage and shipping (if applicable) = \$ TOTAL CHARGE.

(4) TABLE 4 (Maps): Cost of paper (Cost of Roll/Avg. # of Maps); + Cost of Toner (Black or Color, # of Maps per Toner Cartridge); + Labor charge (if applicable); + Overhead charge (if applicable) + Plotter/Computer resource Charge; + Actual cost of miscellaneous supplies (if applicable); + Postage and shipping (if applicable) = \$ TOTAL CHARGE.

(5) TABLE 5 (Photographs): Cost of Paper (Cost of Sheet of Photographic Paper/Avg. # of Photographs per Sheet); + Developing/Fixing Chemicals (if applicable); + Labor charge (if applicable); + Overhead charge (if applicable); + Postage and shipping (if applicable) = \$ TOTAL CHARGE.

Source: The provisions of this §70.9 adopted to be effective September 18, 1996, 21 TexReg 8587; amended to be effective February 11, 2004, 29 TexReg 1189; transferred effective September 1, 2005, as published in the Texas Register September 29, 2006, 31 TexReg 8251.

1 TAC § 70.9, 1 TX ADC § 70.9
1 TX ADC § 70.9

TEXAS ADMINISTRATIVE CODE
TITLE 1. ADMINISTRATION
PART 3. OFFICE OF THE ATTORNEY GENERAL
CHAPTER 70. COST OF COPIES OF PUBLIC INFORMATION

Current through September 30, 2007

§ 70.10. The Attorney General Charge Schedule

The following is a summary of the charges for copies of public information that have been adopted by the Attorney General.

(1) Standard paper copy--\$.10 per page.

(2) Nonstandard-size copy:

(A) Diskette: \$1.00;

(B) Magnetic tape: actual cost;

(C) Data cartridge: actual cost;

(D) Tape cartridge: actual cost;

(E) Rewritable CD (CD-RW)--\$1.00;

(F) Non-rewritable CD (CD-R)--\$1.00;

(G) Digital video disc (DVD)--\$3.00;

(H) JAZ drive--actual cost;

(I) Other electronic media--actual cost;

(J) VHS video cassette--\$2.50;

(K) Audio cassette--\$1.00;

(L) Oversize paper copy (e.g.: 11 inches by 17 inches, greenbar, bluebar, not including maps and photographs using specialty paper)--\$.50;

(M) Specialty paper (e.g.: Mylar, blueprint, blueline, map, photographic)-- actual cost.

(3) Labor charge:

(A) For programming--\$28.50 per hour;

- (B) For locating, compiling, and reproducing--\$15 per hour.
- (4) Overhead charge--20% of labor charge.
- (5) Microfiche or microfilm charge:
 - (A) Paper copy--\$.10 per page;
 - (B) Fiche or film copy--Actual cost.
- (6) Remote document retrieval charge--Actual cost.
- (7) Computer resource charge:
 - (A) mainframe--\$10 per CPU minute;
 - (B) Midsize--\$1.50 per CPU minute;
 - (C) Client/Server system--\$2.20 per clock hour;
 - (D) PC or LAN--\$1.00 per clock hour.
- (8) Miscellaneous supplies--Actual cost.
- (9) Postage and shipping charge--Actual cost.
- (10) Photographs--Actual cost as calculated in accordance with §70.9(5) of this title.
- (11) Maps--Actual cost as calculated in accordance with §70.9(4) of this title.
- (12) Other costs--Actual cost.
- (13) Outsourced/Contracted Services--Actual cost for the copy. May not include development costs.
- (14) No Sales Tax--No Sales Tax shall be applied to copies of public information.

Source: The provisions of this §70.10 adopted to be effective September 18, 1996, 21 TexReg 8587; amended to be effective January 16, 2003, 28 TexReg 439; amended to be effective February 11, 2004, 29 TexReg 1189; transferred effective September 1, 2005, as published in the Texas Register September 29, 2006, 31 TexReg 8251; amended to be effective February 22, 2007, 32 TexReg 614.

1 TAC § 70.10, 1 TX ADC § 70.10

1 TX ADC § 70.10