

TEXAS PUBLIC INFORMATION ACT UPDATE

Presented at:

**88th Annual South Texas County Judges
and Commissioners Association Conference**

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TXOAG PUBLIC INFORMATION HANDBOOK

- ▶ Texas Public Information Act (TEX. GOV'T CODE Ch. 552, -- “TPIA”) is subject of legislative changes, case law, and opinions of Office of the Texas Attorney General (“TXOAG”)
- ▶ TXOAG publishes: **2022 Public Information Handbook**
- ▶ **YOU NEED A COPY -- DOWNLOAD FROM TXOAG WEBSITE**

HISTORY OF TPIA

- ▶ TPIA = formerly Texas Open Records Act + enacted by Legislature in 1973 as response to “Sharpstown” scandal of 1969-72

- ▶ Part of national trend of “Sunshine Laws” to make government more transparent and accessible to the people

- ▶ Under TPIA:
 - All records of a governmental body are presumed to be public -- unless authorized exception/exemption exists
 - TPIA allows people to inspect/copy public information
 - TPIA provides exceptions/exemptions to disclosure
 - TPIA provides procedures for public information requests and responses

TPIA POLICY GOALS

Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.

TEX. GOV'T CODE § 552.001.

PUBLIC INFORMATION DEFINED

- “Public Information” = all information written, produced, collected, assembled or maintained under law or ordinance or in connection with transaction of official business: (1) by governmental body; or (2) for governmental body -- if body owns the information or has a right of access to it

- Includes all formats/media/types of information

- **WATCH OUT FOR:**
 - “Personal Information” (maintained on personal information devices)
 - “3rd Party Information” (maintained by 3rd party for governmental body)

GOVERNMENTAL BODIES SUBJECT TO TPIA

- ▶ “Governmental Body” = includes county commissioners court + municipal governing body + school district board of trustees + governing body of special district + some private organizations (if supported by public funds)

- ▶ **JUDICIAL RECORDS EXCEPTED/EXEMPTED:**
 - Records of judiciary not subject to TPIA
 - Access to information collected/assembled/maintained by/for judiciary is governed by rules adopted by Texas Supreme Court or other applicable statutes/rules
 - Rule 12 of Rules of Judicial Administration

SIGN REQUIRED

- Public information officer **MUST DISPLAY SPECIAL SIGN**
- At one or more plainly visible locations in administrative office of governmental entity
- In form approved by TXOAG containing basic TPIA information about: rights of Requestor + responsibilities of governmental body + procedures for inspecting/copying public information
- Copies of approved TXOAG sign (English and Spanish) may be downloaded from TXOAG website

OPEN RECORDS REQUEST SEQUENCE/DEADLINES

- **WRITTEN REQUEST REQUIRED** – Requestor may seek inspection/review/copying + governmental body may designate specific person as authorized recipient of fax/email requests
- **CONFIRM RECEIPT FACTS:** date/time of receipt + method of receipt + correct name of receipt person
- **IMPROPER REQUEST** = verbal request + nonexistent information + government not required to create new information, do legal research, answer questions -- or treat request as continuing duty to provide information
- Prompt government response required -- **timely response** = 10 *business* days from receipt, unless otherwise allowed by TPIA
- **CLARIFICATION PROCEDURE** -- If request is overbroad or unclear, government may seek good faith clarification + clarification request must inform requestor of consequences of failure to timely respond within 60 days (request considered withdrawn)

OPEN RECORDS REQUEST

SEQUENCE/DEADLINES

(CONTINUED)

- ▶ **BASIC RESPONSE RULE:** 10 Day Notice Letter to Requestor (due 10 “Business Days” from receipt of request for information)
- ▶ If government cannot produce information within 10 business days, **GOVERNMENT SHALL CERTIFY** that fact in writing to Requestor and set date/hour within a reasonable time when information will be available
- ▶ **GOVERNMENT MAY NOT** refer Requestor to government’s website -- unless Requestor agrees
- ▶ Requestor must complete review within 60 days after information made available -- **IF NOT, REQUEST IS DEEMED WITHDRAWN** -- but extension may be granted
- ▶ **PERSONAL COPYING** by Requestor must be allowed (with Requestor’s personal equipment) -- **UNLESS TO DO SO WILL:** (1) be unreasonably disruptive; (2) interfere with inspection/copying rights of others; or (3) violate federal copyright law
- ▶ **REASONABLE POLICIES** for information access/copying, consistent with TPIA requirements, may be enacted by government

OPEN RECORDS REQUEST

SEQUENCE/DEADLINES

(CONTINUED)

- ▶ **BASIC RULE** -- Government **MAY NOT REFUSE** proper request for information
- ▶ Should government choose to withhold information (based on good faith belief that information is excepted/exempted from disclosure under TPIA) -- **TXOAG APPROVAL/RULING IS REQUIRED + TIMELY LETTER BRIEF TO TXOAG REQUIRED**
- ▶ **EXCEPTIONS** -- **Limited circumstances** exist when TPIA allows “**physical redaction**” of information
- ▶ **TXOAG Open Government Hotline [(512) 478-6736; or toll-free at (877) OPEN TEX [numerically (877) 673-6839]** -- for answering questions related to public information/TPIA procedures + receiving complaints against folks who violate TPIA

OPEN RECORDS REQUEST

SEQUENCE/DEADLINES

(CONTINUED)

- ▶ **Initial Response Letter to Requestor** - Government must: respond in writing to Requestor within **10 business days** regarding responsive information + state date/time for inspection/copying of disclosed information + state whether any information is being withheld pursuant to request for TXOAG decision
- ▶ **Notice of Additional Time Needed** - If longer time needed to provide information, government must: certify that fact in writing to Requestor within **10 business days** + give specific and reasonable date/hour/location for disclosure of information
- ▶ **Notice of Programming/Manipulation Costs** - If production of information is requested in particular format which will require additional programming/manipulation to produce, government must provide written notice **within 20 business days** of this fact to Requestor stating: information not available in requested format + description of available format + description of contract or services that would be required to provide the information in requested format + estimated cost/time of providing the information as requested

OPEN RECORDS REQUEST

SEQUENCE/DEADLINES

(CONTINUED)

- ▶ **Request for TXOAG Ruling:** If government withholds information (except for permissible redactions), timely request for TXOAG decision must be filed within **10 business days** to TXOAG
- ▶ **Letter Brief to TXOAG:** If government withholds information, letter brief (written comments with all required attachments) must be filed within **15 business days** to TXOAG
- ▶ **Notices to Third-Party with Protected Privacy/Property Interest:** If request seeks disclosure of protected privacy/property information of third-party -- and should TXOAG decision be sought -- government must: (1) send **10 business day** notice to third-party indicating that the information has been withheld + TXOAG decision is being sought; and (2) send notice to third-party regarding it's right to file letter brief with TXOAG within 10 business days of notice receipt
- ▶ **Favorable TXOAG decision** = Government may withhold the information; **Unfavorable TXOAG decision** = Government must release the information immediately -- or challenge by filing suit against TXOAG

EXCEPTIONS TO DISCLOSURE

- ▶ **More than 70** exist in TPIA; other non-TPIA statutory exceptions also exist
- ▶ Most TPIA disclosure exceptions are discretionary
- ▶ Commonly encountered exceptions:
 - attorney-client privilege matters
 - government employee personal contact and health care information
 - trade secrets/commercial information of 3rd party
 - economic development negotiations
 - social security number of living person
 - contemplated or active litigation
 - location/price of property
 - certain law enforcement records

CIVIL ENFORCEMENT SUITS

(TEX. GOV'T CODE § 552.321-.327)

- ▶ **Requestor** may file suit against government to compel disclosure of information for TPIA violations
- ▶ **TXOAG or District/County Attorney** may file suit against government to compel disclosure of information for TPIA violations
- ▶ **Government** may file suit against TXOAG challenging unfavorable TXOAG disclosure ruling
- ▶ **Third-party** may file suit against TXOAG challenging unfavorable disclosure ruling regarding protected third-party information
- ▶ **Costs of litigation and reasonable attorney's fees** may be recovered against government for civil enforcement suit – if plaintiff “substantially prevails” – unless government acted in reasonable reliance on a court decision or written TXOAG opinion

CRIMINAL PROSECUTION AGAINST INDIVIDUALS WHO VIOLATE TPIA

(TEX. GOV'T CODE § 552.351-.353)

- ▶ **Destruction, Removal, or Alteration of Public Information** -- involving willful destruction, mutilation, removal without permission, or alteration of public information (maximum punishment = \$4,000 fine + 3 months in jail)
- ▶ **Distribution or Misuse of Confidential Information** -- involving distribution of information considered confidential under TPIA (maximum punishment = \$1,000 fine + 6 months in jail)
- ▶ **Failure to Allow Access/Copying of Public Information** -- involving failure (by criminal negligence) to give access to, or permit copying of, public information as required by TPIA (maximum punishment = \$1,000 fine + 6 months in jail)
- ▶ **CRIMINAL CONVICTIONS = OFFICIAL MISCONDUCT FOR WHICH CERTAIN PUBLIC OFFICIALS MAY BE REMOVED FROM OFFICE**

JUDICIARY EXCEPTION TO TPIA

- **TEX. GOV'T CODE § 552.002:** TPIA applies to “public information” written, produced, collected, or assembled in connection with transaction of official business: (1) by “governmental body”; or (2) for “governmental body” if body owns that information or has right of access to it.
- **TEX. GOV'T CODE § 552.003(1)(B) (“Judiciary Exception” to TPIA):** Governmental body “**does not include the judiciary**” -- so certain judicial records are not subject to the rules/procedures of TPIA.
- **R. JUD. ADMIN. 12 (“Rule 12”):** Is an administrative rule of Texas Supreme Court providing access to *certain* records of the judiciary.
- **QUESTIONS:**
 - Regarding a submitted Request for Information, upon what basis of authority does it rely: the TPIA or Rule 12?
 - If the TPIA is the basis, is a proper TPIA response ever required -- or desired to reduce litigation risk -- if the records requested appear to be subject to the Judiciary Exception of the TPIA?

RECENT TPIA AMENDMENTS OF INTEREST

- ▶ **TEX. GOV'T CODE § 552.2325 Temporary Suspension of TPIA/Catastrophe Notice:** TPIA procedure may be temporarily suspended with notice to TXOAG and the public due to “catastrophe” events; suspension period = one 7-day period, plus one 7-day extension; special posting rules exist
- ▶ **TEX. GOV'T CODE § 552.233 Public Information on Private Device:** a current or former officer/employee of government with possession/control of “public information” on a “personal device” must surrender said information to governmental body within 10 days after the body’s request; said current or former officer/employee is now viewed by TPIA as a “Temporary Custodian” of that public information
- ▶ **TEX. GOV'T CODE § 552.004 Preservation of Information on Private Device:** current or former officer/employee of government shall forward “public information” maintained on private device to governmental body, or preserve said information in original or back-up form for a time period determined by the governmental body (or for information of elective county office, the elected county officer), subject to applicable laws governing the destruction/disposition of government records or public information

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