Senate Bill 944 Legal Q&A
Prepared by TML Legal Department
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1. **What is S.B. 944 and how does it change current law?**

Senate Bill 944 by Senator Kirk Watson (D – Austin) adds additional procedures and exceptions to the Public Information Act (PIA).

Of primary importance, the bill defines a "temporary custodian" and creates a procedure to deal with public information held by a temporary custodian. In plain English, the bill relates to the PIA and how it applies to information held by a city official in a private electronic account or on a private device. That such information is subject to the PIA has been settled law for years. The key change made by the bill is that it provides civil and criminal mechanisms for a requestor to force a city official to turn over that type of information.

It also makes technical changes to the PIA that are unrelated to the temporary custodian provisions. (See questions 12-19, below, for a discussion of those.)

The bill was effective on September 1, 2019. The following Q&A discusses the current state of the law following the passage of S.B. 944.

2. **What is a "temporary custodian" as defined by S.B. 944?**

A temporary custodian is a current or former officer or employee of a governmental body who, in the transaction of official business, creates or receives public information that the officer or employee has not provided to the officer for public information of the governmental body or the officer's agent. TEX. GOV'T CODE § 552.003(7).

3. **Does a temporary custodian have a personal or property right to pubic information that was created or received while acting in their official capacity?**

A temporary custodian does not have a personal or property right to public information that was created or received while acting in their official capacity. *Id*. § 552.233(a).

4. **Is a temporary custodian required to retain public information on his/her privately owned device?**

A temporary custodian who has public information on a privately owned device is required to either: (1) forward or transfer the public information to the governmental body or a governmental body server to be preserved for the required record retention schedule; or (2) preserve the public information in its original form on the privately owned device and in a backup or archive for the required record retention schedule. *Id*. § 552.004(b)-(c).

5. **Are the temporary custodian requirements in S.B. 944 new?**

Not really. The bill actually codifies the law as it has existed for almost two decades. In 2001, the City of Arlington received a request for any city-related e-mails on any computer used by a city councilmember. The city released the e-mails from the councilmember's city e-mail account, but requested an attorney general letter ruling as to whether the e-mails maintained in the councilmember's home computer were required to be released.

The city argued that, even though the councilmember used her home computer e-mail account to interact with her constituents and others, the fact that no city funds were used to pay for the e-mail account or the computer, coupled with the fact that the e-mails were not held by the city, meant that the e-mails were not public information as defined by the PIA.

Section 552.002(a) of the PIA defined public information at the time as "information that is *collected, assembled, or maintained under a law or ordinance* or in connection with the transaction of *official business*: (1) *by a governmental body*; or (2) *for a governmental body and the governmental body owns the information or has a right of access to it.*"

The city and TML argued that a councilmember's home e-mails are not collected, assembled, or maintained by the governing body of a city, nor does the governing body of a city own or have a right of access to such e-mails. Neither the City of Arlington's records control schedule at the time, nor the city's charter, required the retention of this type of information. The e-mails were not required to be maintained by the city, nor could the city require their disclosure.

In Letter Ruling No. OR2001-1790, the attorney general's office disagreed. In the opinion, the attorney general's office concluded that information is generally "public information" when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, *even though it may be in the possession of one person*. Citing the preamble of the PIA, the opinion states that "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 opinion cited Tex. Att'y Gen. ORD-635 (1995) for the proposition that

> Records that [are] clearly related to official business are public records subject to the act regardless of whether an individual member of a governmental body, the governmental body's administrative offices, or the custodian of records holds the records. If a governmental body could withhold records relating to official business simply because they are held by an individual member of the governmental body, it could easily and with impunity circumvent the act merely by placing all records relating to official business in the custody of an individual member. The legislature could not have intended to permit governmental bodies to escape the requirements of the act so easily.

Further, the opinion repudiated the argument that the e-mails were not information connected with "official business" because one city councilmember's statements cannot constitute an official act binding the city. According to the City of Arlington, the case was appealed, but ultimately settled to provide for the release of the e-mails relating to city business. The attorney general's office

later, in Letter Opinion No. OR2001-3828, created a balancing test for determining whether personal e-mails should be released. Then, in 2013, the legislature passed S.B. 1368. The bill amended the definition of public information to include “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business…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.

Since that time, the attorney general’s office has issued thousands of letter rulings concluding that various city-related information held on a private device or in a private account must be released. For example:

E-mails:

a. **Letter Opinion No. OR2003-0951**: E-mails between school board trustees sent from school board trustees’ personal e-mail addresses concerning grievance against board president are public information.
b. **Letter Opinion No. OR2007-07157**: E-mails that are personal e-mails are not public information under the Act, but e-mails related to school district business are public information under the Act.
c. **Letter Opinion No. OR2010-08803**: E-mails between the mayor and consultants hired by the city pertaining to legislative affairs involving the city that were sent to and from mayor’s personal e-mail account are public information and subject to the Act.
d. **Letter Opinion No. OR2014-19309**: Most of submitted e-mails are personal e-mails and are not subject to the Act. However, the remaining emails were written, produced, collected, assembled, or maintained in connection with the transaction of official business by employees of the district attorney’s office in their official capacity and are subject to the Act.
e. **Letter Opinion No. OR2019-07672**: E-mails about employee’s leave are considered public information under the Act.

Social Media:

a. **Letter Opinion No. OR2015-14798**: Personal social media messages sent by the superintendent at home in his personal time unrelated to official business are not subject to the Act.
b. **Letter Opinion No. OR2016-23161**: Related to comments on city department’s Facebook page that is moderated by the city’s director of communications, as appointed by the city manager. All posts and comments moderation are reviewed by and approved by the city manager in accordance with the city’s social media policy. Concludes that the comments are considered public information under the Act.
c. **Letter Opinion No. OR2019-14729**: Most of the submitted information that was on the personal social media accounts of city employees that are maintained in the employees’ private capacities does not constitute information that is written, produced, collected,

assembled, or maintained under a law or ordinance or in connection with the transaction of official business by or for the city. However, a portion of the information at issue was created and is maintained by the city employee in the employee's official capacity and pertain to the city's official business and therefore subject to the Act.

Text Messages:

a. **Letter Opinion No. OR2010-07120**: To the extent the cellular telephone records and text messages maintained by the individuals at issue relate to the official business of the city, they are subject to the Act. If a city claims no exceptions to disclosure for these records, they must be released. To the extent the personal cellular telephone records and text messages do not relate to the official business of the city, they are not subject to the Act and need not be released.
b. **Letter Opinion No. OR2011-08166**: Text messages that consist of communications sent to or from the city council representative in her capacity as a city official and employer, and that concern city business, are considered information that was collected, assembled, or maintained by the city in connection with the transaction of the city's official business.
c. **Letter Opinion No. OR2015-10978**: Some of the responsive information on the specified county employee's personal e-mail account and personal text messages reflects it was written, produced, collected, assembled, or maintained under a law or ordinance in connection with the transaction of official business by or for the county and it constitutes public information under the Act.
d. **Letter Opinion No. OR2019-14415**: Cellular telephone text messages received by the city manager from one of the specified entities in the request for public information that the city acknowledged were sent in connection with the city taking action on a contract are considered public information under the Act.

6. If S.B. 944 only codifies current law, why did legislators think the bill was needed?

Even though the attorney general had concluded for years that city-related business on a personal device or account is subject to the Public Information Act, a Bexar County commissioner challenged that logic in a lawsuit a few years ago.

In response to a request for information, the county contended that any correspondence in the commissioner's personal e-mail accounts, regardless of its content, is not public information as defined by the PIA because it was not either collected, assembled, or maintained by the governmental body or prepared on behalf of the governmental body and the governmental body did not have a right of access to the correspondence. *Adkisson v. Paxton*, 459 S.W.3d 761, 765 (Tex. App. – Austin 2015).

The Austin Court of Appeals rejected that argument and cited the attorney general with approval to ultimately hold that "[a] governmental body may not circumvent the applicability of the [PIA] by conducting official public business in a private medium." *Id*. at 766.

In a similar case, a requestor sought information relating to any public-business communications that may have been conducted on the personal email accounts of certain City of El Paso officials. *City of El Paso v. Abbott*, 444 S.W.3d 315, 318 (Tex. App. – Austin 2014). The court again concluded that the city-related emails in private accounts are subject to the PIA. During the pendency of the lawsuit, the legislature amended the PIA's definition of "public information" to codify, the parties contend, the attorney general's long-held position that public information includes documents or other items created "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," regardless of where that information is located. *Id*.

In perhaps an oversimplified explanation, the city asked the official for the responsive information, but the official in possession refused to turn over the responsive emails. In response, the court stated that "[o]ur review of the PIA reveals no methods by which the City could compel the disclosure of public-information emails located on private email accounts, other than what the City did here—i.e., request the documents from the targeted individuals and change the City's policy regarding public business on private emails." *Id*. at 324. That holding is essentially what prompted the filing of legislation in 2015 (H.B. 1764), 2017 (H.B. 2670), and 2019 (S.B. 944, the subject of this Q&A). The bills, all in different ways, sought to overturn the opinion by proposing ways to enforce the law as it had existed for years.

Senate Bill 944 ultimately did so, as discussed in more detail below.

7. **Is the records retention requirement in S.B. 944 a new one?**

No. The Local Government Records Act (LGRA) is codified in Chapters 201 through 205 of the Texas Local Government Code. The LGRA provides that, on or before June 1, 1990, the governing body of each local government should have designated a records management officer. TEX. LOC. GOV'T CODE § 203.025(a). The LGRA further provides that, by January 1, 1991, the governing body should have established a records management program. *Id.* § 203.026(a). On or before January 4, 1999, all cities were required to prepare a records control schedule and file with the Director of the Texas State Library and Archives Commission (TSLAC) a written certification of compliance that the local government has adopted records control schedules that comply with the minimum requirements established on records retention schedule issued by TSLAC. *Id.* §203.041(a).

TSLAC has promulgated model records retention schedules. The schedules are available on the TSLAC's website at https://www.tsl.texas.gov/slrm/localretention. Public information, in whatever format, has always been subject to retention requirements. The Record Management Division of TSLAC has various articles concerning electronic records and record retention on it's website under The Texas Record at https://www.tsl.texas.gov/slrm/blog/. Some examples include:

FAQ Redux: How long do I keep email?

https://www.tsl.texas.gov/slrm/blog/2018/11/faq-redux-how-long-do-i-keep-email/.

Using Personal Email for Government Business is a Bad Idea – Here's Why

https://www.tsl.texas.gov/slrm/blog/2015/11/using-personal-email-for-government-business-is-a-bad-idea-heres-why/.

FAQ: Are text messages records? (redux)
https://www.tsl.texas.gov/slrm/blog/2017/09/faq-are-text-messages-records-redux/.
Social Media Policies and Procedures
https://www.tsl.texas.gov/slrm/blog/2016/05/social-media-policies-and-procedures/.

For more information on the Record Management Division of TSLAC, go to https://www.tsl.texas.gov/slrm. The Record Management Division can be contacted at 512-463-7610 or by email at slrminfo@tsl.texas.gov. In addition, TSLAC conducts training for local governments around the state.

8. **What are some methods and best practices for complying with record retention requirements for electronic information held on a personal device or account?**

Various options exist for retention compliance. For example, in relation to e-mails on a personal device or account, a city official could: (1) copy all city-related correspondence to a city email address for appropriate archiving by city staff; or (2) save all city-related correspondence in a file on the device or account in accordance with the city's records retention schedule.

With regard to texts, a city can: (1) issue city phones to officials and employees, adopt a policy that all city-related business must be conducted on them, and develop an archiving system for the phones; (2) ask the temporary custodian to provide a screenshot of texts that must be retained; or (3) use third-party software to automatically capture each text message sent and received into a repository or into an e-mail sent to the governmental entity. With regard to (3), city officials should be very wary of vendors seeking to sell them archiving software. While some cities may decide that type of service is needed, many can comply with the law without the additional expense. Of course, one key aspect of retention is the "administratively valuable" designation. That designation means, assuming information doesn't fall under a specific retention period in a city's records retention schedule, it can be deleted when it is no longer needed. Many texts will fall under this category.

With regard to social media, a city official can: (1) copy and paste social media post into a word processing program or taking screen shots of content; or (2) purchase software that captures social media records.

For information on best practice in retaining e-mails, texts, or social media post, contact the Record Management Division of TSLAC. (See question above.)

9. **What is a temporary custodian required to do if the city's public information officer receives a request for public information that includes public information in his/her possession, custody, or control?**

A temporary custodian is required to surrender or return public information that is in his/her possession, custody, or control not later than the 10th day after the date the public information officer requests that the temporary custodian surrender or return the public information. TEX. GOV'T CODE § 552.233(b). If the temporary custodian fails to surrender or return the public

information requested by the public information officer, the governmental body will have grounds to discipline an employee that is a temporary custodian. *Id*. § 552.233(c) Also, the temporary custodian will be subject to any penalties provided by the PIA or other laws. This is the key legal modification made by S.B. 944: According to the attorney general's office, it overrules the cases discussed in question 6, above, by inserting a method for a requestor to obtain information from the temporary custodian if he or she refuses to provide it. For example, a temporary custodian can be subject to a writ of mandamus under section 552.321 of the Government Code or criminally charged with failure to provide access to public information under section 552.353 of the Government Code.

10. Does the request to surrender or return public information from a temporary custodian affect when a request for public information is considered received by the governmental body?

Yes. The governmental body is considered to have received the request for public information on the date the information is surrendered or returned to the governmental body by the temporary custodian. *Id*. § 552.233(d).

11. What is the duty of the public information officer concerning retrieving public information from a temporary custodian?

The public information officer is required to make a reasonable effort to obtain public information from a temporary custodian if:

1. The information has been requested from the governmental body;
2. The public information officer is aware of facts sufficient to warrant a reasonable belief that the temporary custodian has possession, custody, or control of the requested information;
3. The public information officer is unable to comply with their duties without obtaining the information from the temporary custodian; and
4. The temporary custodian has not provided the information to the public information officer.

Id. § 552.203(4).

12. How may a person make a written request for public information?

A person can make a written request for public information under the PIA only by delivering the request by one of the following methods to the public information officer:

1. United States mail;
2. e-mail;
3. hand delivery; or
4. any other appropriate method approved by the governmental body, including fax and electronic submission through the governmental body's website.

Id. § 552.234(a).

13. May the governmental body designate a mailing address or an e-mail address that a request for public information must be sent to in order for the request to be considered received by the governmental body?

The governmental body may designate one mailing address and one e-mail address for receiving request for public information. *Id*. § 552.234(c). The governmental body shall post the designated mailing address and e-mail address on the governmental body's website and on its required PIA informational sign, and provide to any person on request. *Id*. § 552.234(c); (d).

Once the governmental body has posted the designated mailing address and e-mail address on the their website and PIA sign, the governmental body is not required to respond to a request for public information unless the requests is received at the designated mailing address, designated email address, and/or hand delivered. In addition, the governmental body may create additional methods to submit, but those methods may not eliminate any of the methods in the previous sentence (see next question). *Id*. § 552.234(d).

14. How does a governmental body approve other appropriate methods for receiving a request for public information?

A governmental body is considered to have approved other appropriate methods for receiving a request for public information only if the governmental body includes a statement that a request for public information may be made by these other appropriate methods on the required PIA sign or on the governmental body's website. *Id*. § 552.234(b).

15. Is the office of the attorney general required to create a PIA request form?

The office of the attorney general (OAG) is required to create a PIA request form that will provide the requestor the option of excluding from a request information that the governmental body determines is confidential or subject to an exception to disclosure that the governmental body would assert if the information were subject to the request. *Id*. § 552.235(a). The OAG is required to create the request form by October 1, 2019.

16. Is a governmental body required to allow requestors to use the OAG's PIA request form?

A governmental body is not required to allow requestors to use the OAG's PIA request form. However, if the governmental body does allow a requestor to use the OAG's PIA request form and the governmental body maintains a website, the governmental body is required to post the OAG's PIA request form on the its website. *Id*. § 552.235(b).

17. What is "protected health information"?

Protected health information is any information that reflects that an individual received health care from a covered entity as defined by Section 181.001(b)(2) of the Health & Safety Code. TEX.

GOV'T CODE § 552.002(d); TEX. HEALTH & SAFETY CODE § 181.006(1). Examples of covered entities include hospitals and medical centers.

A more specific definition of "protected health information" is individually identifiable health information that is transmitted or maintained in electronic media or any other form or medium. *Id*. at § 181.001(a). *See* 45 C.F.R §160.103. (Chapter 181 of the Health and Safety Code borrows definitions for the Health Insurance Portability and Accountability Act and Privacy Standards (HIPAA) for term not defined by this chapter. This Chapter borrows the HIPAA definitions of "protected health information" and "individually identifiable health information".)

18. Is protected health information considered public information under the PIA?

Protected health information is not considered public information and is not subject to disclosure under the PIA. TEX. GOV'T CODE § 552.002(d). *See also* TEX. HEALTH & SAFETY CODE § 181.006(2).

19. Is information provided by an out-of-state health care provider considered confidential and excepted from disclosure under the PIA?

Information obtained by a governmental body that was provided by an out-of-state health care provider in connection with a quality management, peer review, or best practice program that the out-of-state health care provider pays for is considered confidential and excepted under the PIA. TEX. GOV'T CODE § 552.159.