

# **PUBLIC INFORMATION ACT ESSENTIALS**



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**State Bar Of Texas Government Law Section Roadshow**  
April 26, 2019  
Laredo, Texas

# PUBLIC INFORMATION ACT ESSENTIALS

## I. INTRODUCTION

The Public Information Act may be intimidating at times, but it basically makes sense. Once you understand the core principles (*e.g.* governmental bodies do not get to unilaterally decide what is public), then applying them is just a matter of mechanics.

This is a brief overview of the essentials – for a deeper dive, I highly commend the Attorney General’s Public Information Handbook, available online at [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov). It has *everything* you would need to evaluate a request and properly respond.

## II. WHAT DO YOU DO WHEN YOU RECEIVE A REQUEST FOR INFORMATION UNDER THE PUBLIC INFORMATION ACT?

Too often, a request for information goes unrecognized, unanswered, or set aside without consideration of the consequences. And the consequences can be considerable: under current Texas law, an aggrieved requestor can compel the local county or district attorney to review PIA complaints and file civil actions (or force the attorney to explain a decision not to file the action). A requestor who substantially prevails in a mandamus suit against a scofflaw governmental body is generally entitled to attorneys’ fees and costs. Failure to timely seek attorney general opinions (or to keep the requestor apprised of the decision to seek an opinion) will render almost all requested information automatically public and subject to immediate disclosure.

There are criminal consequences as well: both failure to disclose public information and failure to protect confidential information are actions subject to criminal prosecution under the PIA. Accordingly, knowledge of when you *must* disclose information and when you *cannot* disclose public information is essential.

In short, you remain unfamiliar with the PIA at your own peril. Here’s a brief checklist of what you must do to perfect your rights and avoid trouble under the PIA. Statutory citations are to the Texas Government Code.

### A. Recognize the Request.

First, you should train your staff to recognize what a request for public information is. A proper request under the PIA may be in writing, by fax, or by e-mail. Verbal requests do not trigger the PIA, however, nor do requests from inmates or their agents. *See* Section 552.028(a) (excluding inmates and their agents, but not their attorneys, from the PIA). Also, a subpoena duces tecum or other discovery request does not trigger the PIA. *See* Section 552.0055.

No special language is required in the request to invoke the PIA, other than the request itself. Instead, the PIA is triggered if the request “reasonably can be identified as a request for public records.” *See, e.g.*, Tex. Att’y Gen. ORD-497 (1988). For example, a request for information under the Freedom of Information Act will trigger the protections of the PIA, even if the state statute is not also invoked.

### B. Date-stamp the Request.

Next, because one of the things you now have to prove is when you received the request for information, *see* Section 552.301(e)(1)(C), you should make some notation on the request to indicate when it was received. If the date that you receive a public information request cannot be adequately established, the written request is considered to have been received by you on the third business day after the date of the postmark on a properly addressed request. *See* Section 552.301(a-1).

### C. Is This a Repetitious or Redundant Request?

Now, determine whether this request seeks information that has already been provided to the same requestor. Under Section 552.232, if you’ve provided “copies to the requestor or made copies available to the requestor on payment of applicable charges,” you may reject the request for information by sending the requestor a certification that contains the following information:

- A description of the information already furnished or made available.
- The date of the original request for information.
- The date the information was furnished or made available.
- A certification that “no subsequent additions, deletions, or corrections have been made to that information”
- The name, title and signature of the officer for public information making the certification.

### D. Does the Request Seek Public Information?

Next, read the request and ask yourself whether this request seeks “public information” as defined in the PIA. The records included in the definition of “public information” include any media upon which information can be recorded, and any information “collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by a governmental body, or for a governmental body and the governmental body owns the information or has a right of access to it. *See* Section 552.002. This includes records that may have been created by another public or private entity or person that have been collected by you.

## E. Do You Have the Information They Seek?

Next, you need to determine whether you have the information they seek.

- **Yes.** If you have the information, you need to physically assemble it for the next step in the process.
- **No.** If you do not have the information because it does not exist, you should notify the requestor. Note that you have no responsibility under the PIA to create a document that does not exist, to answer a list of questions or interrogatories, to prepare the information in the form requested by a member of the public, or to do legal research for the requestor or answer general questions. You also have no responsibility to respond more than once to a standing request for information.
- **Yes, but not immediately available.** If you do not have the information because it is not immediately available, you are obliged under the PIA to certify that fact in writing and set a date and hour when the information will be available. Section 552.221(c) & (d).

## F. Does the Requestor Owe You Money?

Some provisions of the PIA allow the governmental body to predicate payment of outstanding debt before you are obliged to honor a request for information. For example:

- **Outstanding Debt in Excess of \$100.** For example, prior to honoring a request for public information, you may require the requestor to make a deposit or bond for payment of documented outstanding unpaid amounts only if those unpaid amounts exceed \$100. Once you request the deposit or bond, the deadlines for seeking an attorney general opinion are tolled until the deposit or bond is tendered. Section 552.263.
- **Payment of Postage and Any Outstanding Debt as Predicate to Mail Service.** Also, you may deny a request that copies of the requested information be mailed to the requestor until the requestor “pays the postage and any other applicable charges that the requestor has accrued under Subchapter F [the section pertaining to charges for providing copies of public information].” Section 552.221(b)(2).

## G. What Will It Cost?

You should now determine what it will cost to fill the request. This is important, because the PIA provides a series of mechanisms to prevent a governmental body from expending too many resources without advance approval and compensation from the requestor.

- **Narrow the Request, If Possible.** As a threshold matter, if the request is for a voluminous number of records, you may wish to “discuss with the requestor how the scope of a request might be narrowed,” but you may **not** inquire into the purpose for the request. It is proper for you to

respond to a request by advising the requestor of the types of information available so that he may narrow his request. *See, e.g.,* Tex. Att’y Gen. ORD-633 (1995). If you receive a narrowed request, the PIA deadlines are reset to give the governmental body the full ten and fifteen days to seek an Attorney General opinion after the date of receipt. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding “when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the 10-day period to request an attorney general opinion is measured from the date the request is clarified or narrowed”).

- **Costs for Paper Records.** If the request is for copies of paper records, you may charge for photocopying costs, but note that you may **not** charge labor and overhead costs for reproduction of less than fifty pages of paper records **unless** the requested records are stored in either two or more separate buildings that are not physically connected to each other, or a remote storage facility. *See* Section 552.261(a) & (c). You may also charge personnel costs for the time required to redact information that is confidential by law in the records (this does **not** include redaction of information that may be excepted from the PIA at the discretion of the governmental body, however). *See* Tex. Att’y Gen. ORD-633 (1995).
- **Costs for Other Records.** You may charge reasonable costs for materials, labor and personnel costs for reproduction of (and redaction of confidential information from) any other kinds of public information. You may not charge the costs of accessing or copying information that exists in an electronic medium “unless complying with the request will require programming or manipulation of data.” *See* Section 552.272.

## H. Can You Require Prepayment?

Next, you should determine whether you can require prepayment of your expenses. You may require a deposit or bond for payment of anticipated costs for preparation of a copy of public information if the charge for providing the copy of the information will exceed \$100 (for large offices) or \$50 (for small offices). *See* Section 552.263(a). If the request calls for either a large amount of records or old records that will take you longer than usual to make available, you may require prepayment, a deposit, or a bond for personnel costs. *See* Section 552.271. The predicate requirements depend on the size of the governmental body:

- **Large office** (16 or more full-time employees) – the public information specifically requested by the requestor must either (A) be *older than five years*, or (B) completely fill, or when assembled will completely fill, *six or more archival boxes*; and the officer for public information or the officer's agent estimates that more than *five hours* will be required

to make the public information available for inspection.

- **Small office** (less than 16 full-time employees) – the public information specifically requested by the requestor must: (A) be *older than three years*; or (B) completely fill, or when assembled will completely fill, *three or more archival boxes*; and the officer for public information or the officer's agent estimates that more than *two hours* will be required to make the public information available for inspection.

If the requestor narrows the scope of the request in response to a required deposit or bond, the timetables for responding to the narrowed request are reset to the date of receipt of the narrowed request. See new 552.263(e-1).

#### **I. Has the Requestor Exceeded His Annual Allowance of Employee or Personnel Time?**

A governmental body can “establish a reasonable limit on the amount of time that personnel of the governmental body are required to spend producing public information for inspection or duplication by a requestor, or providing copies of public information to a requestor, without recovering its costs attributable to that personnel time.” Section 552.275(a). This limit cannot be less than 36 hours during the governmental body’s fiscal year. Section 552.275(b).

Accordingly, if you have established that limit, you can set up a protocol to account for the time you or your staff have spent on an individual’s requests for information and to provide to the requestor, each time a request is fulfilled, a written statement of the cumulative time accrued. See Section 552.275(d). Once your limit has been exceeded, you can then submit a written estimate to the requestor describing the anticipated costs (including personnel and overhead) and, if the requestor does not commit to pay the costs of production, the request is deemed withdrawn. See Section 552.275(e)-(h).

Note that certain kinds of journalists and government officials are exempted from this rule. See Section 552.275(j)-(l).

#### **J. Is a Written Statement of Costs Required?**

Now, determine whether you have to provide a written statement of costs to the requestor. Section 552.2615 requires you to submit an estimate to the requestor if you anticipate that the costs of copying or providing access will exceed \$40. The estimate must include:

- A written itemized statement that details all estimated charges that will be imposed, including any allowable charges for labor or personnel costs.
- Notice that the requestor may contact the governmental body regarding any alternative less costly method of viewing the records.
- The duties imposed on the requestor by Section 552.2615 and give the requestor the information needed to respond.

If the requestor does not respond to the estimate within ten business days, the request is deemed withdrawn. If, before you make the copies or the record available, you determine that the actual costs will exceed your original estimate by more than 20 percent, you may issue an updated estimate that the requestor must respond to as before. Thereafter, your actual costs are capped at either the updated estimate; or, if no updated estimate is made, your original estimate plus 20 percent.

#### **K. Is the Requested Information Confidential by Law?**

Now, you need to determine whether you have any authority to release the information. This is an important consideration because, as a public information officer, it is a Class B misdemeanor and official misconduct to distribute information considered confidential under the PIA. See Section 552.352. Familiarize yourself with the various statutory confidentiality provisions in Texas and federal law. The 2011 Legislature has helpfully amended the headings of 32 of the 52 exceptions to the PIA as “confidential” categories of information, *i.e.*, that are non-discretionary exceptions to disclosure. When in doubt, send the information to the Attorney General’s office for an opinion, citing Section 552.101, the confidential by law exception to the PIA.

#### **L. Is the Information In a Category of Automatic Disclosure?**

Next, if the information is not confidential as a matter of law, you should determine whether you have any discretion to withhold the information. The PIA provides a list of eighteen categories of information that are **always** subject to disclosure, unless “unless made confidential under this chapter or other law.” See Section 552.022. In short, if not confidential, these items must be disclosed even if there is a discretionary exception to disclosure in the PIA.

#### **M. Is the Requested Information Otherwise Exempted from the PIA?**

After making an initial determination of confidentiality and disclosure as a matter of law, you should next determine whether you wish to invoke any of the remaining discretionary exceptions to disclosure. You should familiarize yourself with those exceptions, which are located in Sections 552.102, *et seq.*

#### **N. When Don’t You Need to Seek an Opinion?**

A governmental body need not request an attorney general opinion if there has been “a previous determination about whether the information falls within one of the exceptions” in the PIA. See Section 552.301.

This makes sense. Like *res judicata*, collateral estoppel, and other issue preclusion doctrines, the previous determination rule appears to have been intended to maximize efficiency in the opinion request process and to conserve the scarce resources of both the governmental body and the Attorney General.

Unfortunately, the previous determination doctrine has been construed almost out of existence. In Tex. Att’y Gen. ORD-673 (2001), the Attorney General construed this discretion very narrowly, limiting its application to two situations:

1. Where the request seeks information from a governmental body that has already received an attorney general’s opinion evaluating the public availability of the precise information at issue.
2. Where the request seeks information from a “specific, clearly delineated category of information” that the attorney general has held may be withheld without the necessity of seeking an opinion.

An example of the second kind of “previous determination” is Tex. Att’y Gen. ORD-670 (2001), which held that a governmental body may withhold the home address, home telephone number, personal cellular number, personal pager number, social security number and information that reveals whether the individual has family members, of any individual who meets the definition of “peace officers” under Section 552.117(2) of the Government Code without having to request a decision from the attorney general.

The Legislature has identified various categories of information that can be redacted without obtaining an Attorney General opinion, but that require the governmental body to provide notice of the redaction to the requestor on a form prescribed by the Attorney General. *See, e.g.*, Sections 552.1175 (certain addresses, telephone numbers, social security numbers, and personal family information); 552.130 (information related to a driver’s or operator’s license or a government-issued personal identification document); 552.136 (credit card, debit card, charge card and access device numbers); and 552.138 (family violence shelter center and sexual assault program information). A requestor who believes that the redaction was unauthorized can appeal the redaction to the Attorney General.

**Bottom line:** Be extremely careful about invoking the previous determination doctrine. If you incorrectly rely upon it in lieu of seeking an opinion from the Attorney General, you have waived all objections under the Act (except for confidentiality).

#### **O. Three Things You Need to Do Within Ten Business Days from the Day You Receive the Request for Information.**

There are three things you need to do within a reasonable time, but no later than ten days after the date of receiving the request for information:

- **Submit Your Reasons for Nondisclosure.** You need to ask for the attorney general’s decision about whether the requested information is within one of the Subchapter C exceptions to disclosure and state the exceptions that apply. List *every possible exception* because you waive the right to raise in subsequent proceedings (*i.e.* declaratory judgment actions) any

exception not listed in your AG opinion request. *See* Section 552.326.

- **Submit a Letter to the Requestor.** The PIA now requires that you send the requestor: (1) a “written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure” and (2) a copy of your AG opinion request letter, with redactions as necessary to protect against disclosure of the information at issue. *See* Section 552.301(d). If you fail to timely submit these documents to the requestor, the requested information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information. *See* Section 552.302.

- **Notify Persons With Proprietary Interests in the Information.** “If release of a person’s proprietary information may be subject to exception under Section 552.101 [confidential by law], 552.110 [trade secrets, certain commercial or financial information], 552.113 [geological or geophysical information], or 552.131 [economic development information]” you must notify that person in writing that you are seeking an Attorney General opinion and include a copy of the request for information and “a statement, in the form prescribed by the attorney general, that the person is entitled to submit in writing to the attorney general within a reasonable time not later than the 10<sup>th</sup> business day after the date the person receives the notice, each reason the person has as to why the information should be withheld; and a letter, memorandum, or brief in support of that reason.” *See* Section 552.305(d).

#### **P. Six Things You Need to Do Within Fifteen Business Days from the Day You Receive the Request for Information.**

Within a reasonable time, but no later than fifteen business days of receiving the request for information, you need to prepare the following for submission to the Attorney General:

- Written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld.
- A copy of the written request for information.
- A signed statement as to the date on which the written request for information was received by you or evidence sufficient to establish that date.
- A copy of the specific information requested, or representative samples of the information if a voluminous amount of information is requested.
- Labels on the submitted information indicating which exceptions apply to which parts of the copy.

*See* Section 552.301(e).

In that same fifteen business day time period, you have to send a copy of the written comments to the requestor. *See* Section 552.301(e-1).

### **Q. What If You're Late?**

If a governmental body does not request an attorney general decision as provided by Section 552.301 and/or fails to notify the requestor as required by Section 552.301(d), the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information. *See* Section 552.302. A reason generally is not "compelling" under the PIA unless your disclosure of the information would violate a legal confidentiality. *See* Tex. Att'y Gen. ORD-630 (1994); *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017) (recognizing information protected by attorney-client privilege as legally confidential and compelling).

Another governmental body may be able to bail you out, however. The Attorney General has held that "the need of a governmental body, other than the one that has failed to seek our ruling within 10 days of receiving an open records request, to prevent disclosure of the information may provide a compelling reason sufficient to overcome the presumption of openness." *See* ORD-586 (1991); ORD-630 (1994).