



## FOIFT outlines legislative concerns

Private communications among public officials and issues concerning private persons performing public functions are two high priority subjects for the coming legislative session for the Freedom of Information Foundation of Texas.

The Board of Directors adopted a list of concerns for the 2009 session drawn up by a committee headed by attorney Paul Watler and Southern Methodist University professor Tony Pederson along with board Vice President Laura Prather.

Opinions by Attorney General Greg Abbott have held that under current law "personal" e-mails sent on government servers are not public information.

The Foundation believes the law needs to be changed to state explicitly that all e-mails sent on government servers and private e-mails discussing public business on private accounts should be considered public. Also it believes that access to all information sent on electronic devices used by government officials, such as text messages, should be public.

The public also should have access to the privatization costs when government entities outsource their functions to third-party vendors.

"This is becoming a growing area of concern as more governmental bodies turn over once strictly governmental functions to private companies or quasi-governmental agencies," the committee's report stated.

The Legislature also needs to clean up the issue of private companies claiming copyrights on what should be public documents. Also, the same policies applied to governmental agencies concerning the cost of obtaining records should also apply to private companies doing public business. And the public is entitled to access information concerning the use of government funds provided to private entities, the Foundation believes.

Private companies, such as the ones running Texas Youth Commission facilities, should be defined as governmental entities for the purpose of getting AG

opinions on whether something is a public record open to the public.

Four other items are on the list, but with second-tier priority.

**Sealed Records:** Right now a prosecutor and criminal defendant can agree to a nondisclosure order and there is no mechanism for unsealing the information based on the public interest or otherwise. There is no way to find the file or to confirm its existence so that one would know where or how to file a request to unseal it. A method to unseal a criminal agreed order of nondisclosure is needed.

**E-Mail Retention:** A policy is needed on the retention of e-mails by the governor and the Archives Commission. A further concern is the outsourcing of electronic archive information to a private vendor by the Texas Department of Information Resources.

**"Paper Terrorism":** Add magazines and online newspapers to the media exception definition in the "paper terrorism" exemption.

**Superintendent Finalists:** The law now requires school boards to release the names of finalists for school superintendent so members of the public can learn about their qualifications. School boards have gotten around this requirement by releasing the name of only one finalist, who then is given the job. The public never knows who else applied.

Seven items are listed among the long-term needs including changing "reasonable" cost to "actual cost of duplication" for electronic records held by district and county clerks.

Another relates to records of court cases that are closed but are not considered public because they did not result in a conviction or deferred adjudication.

Language about Grand Jury subpoenas needs to be clarified. A news organization can be held criminally liable if it reports that the organization itself has been subpoenaed.



# Many requests for AG rulings are unnecessary

By Timothy M. Kelly  
FOIFT president

As any cop manning a speed trap will cheerily tell you, ignorance of the law is no excuse for skirting it. Why then do so many government entities continue to routinely seek rulings from the Texas Attorney General on public information requests, even when similar requests have been upheld previously?

There are two possible answers, neither of which should hearten taxpayers:

1. The entity knows the information should be released but is availing itself of the delays built into the ruling process, a tactic reminiscent of the insurance company in John Grisham's "The Rainmaker," which denied every claim the first three times it was submitted.

2. Despite Texas Attorney General Greg Abbott's considerable efforts to educate elected officials and public servants, they still do not know the law or care enough to find out.

The most often-used information is easily found on the AG's Web site (<http://www.oag.state.tx.us/open/>). It is part of officials' mandatory training. And it is on the sign that is supposed to hang in all government offices. No matter. Too many officials still think the requirement to respond "promptly" to requests means they have 10 days, among other misconceptions.

Help for open records requests might be on the way. The AG's office faces an ever-increasing load of requests for rulings, the number of which has tripled to more than 17,000 in just a few years. To be sure, a great number of the requests for rulings are legitimate. To be surer, a great number are deliberate efforts to stall the release of information or are Hail Mary passes heaved in hopes of surprise favorable rulings.

Abbott and some FOIFT representatives recently discussed ways to see that government agencies have some skin in the game. Maybe that will motivate them to learn what they need to know to be responsive to the public. One possibility is an annual open record report card from the AG's office for each government entity in Texas. The AG welcomes other ideas for remedies, legislative and otherwise.

Whether the motive is to control costs or seine out sandbaggers, reducing the number of requests for open records rulings cannot help but benefit the public.

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### FOI FOCUS

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*The Freedom of Information Foundation of Texas*  
P.O. Box 192627  
Dallas, TX 75219  
Office Telephone  
(214) 989-3215  
HOTLINE  
1(800) 580-6651  
Web site -  
[www.foift.org](http://www.foift.org)  
e-mail - [foift@foift.org](mailto:foift@foift.org)

Keith Shelton, Editor  
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Contributing Editor,  
FOIFT,  
Vinson & Elkins L.L.P.



## From the AG...

Since joining my office in 2005 as the Open Records Division's Cost Rules Administrator, Hadassah Schloss has handled more than 430 formal complaints of governmental bodies overcharging for public information. Many more cost issues have been resolved informally, with a phone call from Hadassah to the governmental body to explain the law and the rules, or to the requestor to explain how to refine a request.

Since the scope and breadth of a request for public information will necessarily impact the applicable charges, I have asked Hadassah to provide some helpful tips for requestors and governmental bodies. Remember, a governmental body can, and probably will, charge for making information available to you.

### **If you are the requestor:**

1. Make your request clear. Whenever possible, provide time parameters. Broad requests usually result in higher labor charges.
2. Ask for what you want. Avoid language such as "any and all" or "any other records related to this matter." If the document exists in several places, you may receive multiple copies of that document, and increase your charges.
3. If you can, avoid calling a record by a specific name. Rather, request the information you believe the record will contain, such as "a copy of the report that shows your annual expenditures." This may help you avoid charges for data manipulation.
4. Be aware that the nature of the request has more impact on the labor charges than the amount of information you receive. Requests for very specific or old information may result in few pages, but could be labor intensive, which will be reflected in the charges.
5. Governmental bodies keep their records in the manner that is most effective for their functions. Before you ask for a special format, determine if the format in which it already exists will suffice for your purposes. It may save you money.

### **If you are the governmental body:**

1. Follow the law and the rules when determining charges.
2. When labor charges are applicable, they are allowed for locating, compiling and reproducing the information. Consultations with your attorneys, meetings to decipher the request, and composing correspondence to the requestor are not tasks for which you may charge the requestor.
3. If the request is voluminous, find "units of measure" and do sample tests on them to estimate charges for the entire request. Units of measure may be letters of the alphabet, months of the year, or one-day's (one week, one month) worth of a specific type of records.
4. If you cannot find a unit of measure, determine what you can do in one hour. Keep track of your time, and deduct any interruption longer than five minutes. Extend your test to the entire request to estimate charges.
5. If your filing system is not in the best shape, or your employees' knowledge is lacking, do not pass on to the requestor the cost of making your office more efficient.

Like the rest of my staff, Hadassah is always willing and ready to help you. Whether you are a requestor or a provider of public information, you may contact her with cost questions by phone at 512.475.2497, by fax at 512.481.1992, or by email at [hadassah.schloss@oag.state.tx.us](mailto:hadassah.schloss@oag.state.tx.us).

## Judge rules governor's travel information public

A district judge in Austin has ruled that travel information about Gov. Rick Perry's protective detail from the Department of Public Safety must be made public.

The DPS argued that releasing the information would compromise the safety of the governor and others who travel with them because it would provide useful details to someone trying to harm them. Reporters said the trips are paid for with public money and that the public should be allowed to see how the money is spent, according to the *Austin American-Statesman*.

Judge Scott Jenkins said he found no evidence that

releasing the records would place the governor or anyone else in imminent danger.

The requested documents contain travel expenses for the state troopers who accompany Perry and his family on trips, including trips that are not on state business.

The *Statesman*, *Houston Chronicle* and *San Antonio Express-News* sued for access to the documents after a request under the Public Information Act was denied.

Matthew Baumgartner, an attorney for the newspapers, said: "If a basic accounting document can be restricted on security grounds, there is no limit to what can be withheld."



*"If a basic accounting document can be restricted on security grounds, there is no limit to what can be withheld."*

*- Matthew Baumgartner, an attorney for the newspapers*



# Republicans block shield law, threaten veto

A vote in the U.S. Senate fell nine votes short of the 60 votes needed to end Republican blockage of a journalists' shield law at the end of July.

Senate Bill 2035 would protect the confidentiality of journalists' sources in civil and criminal cases in federal courts. It would be similar to shield laws in numerous states and the District of Columbia.

Both Sen. Kay Bailey Hutchison and Sen. John Cornyn voted no on ending the blockage, the *Fort Worth Star-Telegram* reported.

Clinton Brewer, president of the Society of Professional Journalists, said SPJ was disappointed that the bill stalled. "SPJ will continue to encourage its members and public citizens to contact members of Congress and express part of the Society's mission to encourage a climate where journalism can be practiced freely. A federal shield law would be a major step toward that goal."

Supporters of the bill hope to take it up again later this year. However, advisers to President Bush have recommended that he veto any shield law bill that passes, according to the AP.

In a letter to Senate Democrats, Attorney General Michael Mukasey and National Intelligence Director Mike McConnell said a shield law would harm national security and encourage leaks of classified information. Homeland Security Director Michael Chertoff and Defense Secretary

Robert Gates also have spoken against a shield law.

Republicans said they voted against the bill in order to keep the Senate's focus on energy legislation, the *Wall Street Journal* reported. Republicans and Democrats have been unable to agree on the energy issue, creating an impasse on other issues before the Senate, the paper reported.

Republicans and Democrats on the Senate Judiciary Committee are largely in agreement on a shield bill, the *Journal* said.

Sens. Arlen Specter, the sponsor of the bill, and Charles Schumer (D., N.Y.) issued a statement July 30 announcing an agreement on a substitute version that would make it easier for intelligence officials to prosecute leaks of classified information and clarifies that intelligence-gathering powers authorized by the Foreign Intelligence Surveillance Act won't be affected.

It also narrows the definition of a journalist to cover only those who gather information with the intention of publishing it. That, the paper said, was aimed at distinguishing those bloggers and freelance journalists who are legitimate from those who aren't.

Specter was one of five Republicans who voted in favor of moving to debate the bill, while all Democrats present voted in favor.

A coalition of 66 media organizations and companies sent a letter to senators June 21 in support of the bill.

## Abbott announces support for federal shield law

Attorney General Greg Abbott has announced his support for the enactment of a federal shield law.

The AG sent a letter on June 20 to Senate Majority Leader Harry Reid and Minority Leader Mitch McConnell in favor of senate Bill 2035 that would create a federal shield law.

Such a law would protect reporters from being forced to identify their sources under certain circumstances.

"As attorney general, I have consistently supported a qualified reporter's privilege that would allow journalists to conceal their confidential sources under specific and appropriate circumstances," Abbott wrote.

The AG filed a brief with the U.S. Supreme Court in

2005 arguing that federal courts should recognize the protection for journalists.

"An informed citizenry and the preservation of news information sources are of vital importance to a free society," the AG argued.

As for a new law, "As Texas' chief law enforcement official, however, I believe that any legislation creating a reporter's privilege must be balanced with law enforcement and national security interests."

Abbott said a shield law should have a mechanism that would allow access to confidential sources only after satisfying an independent arbiter that the government met the burden established by Congress.

## Auditor says cell phone allowance avoids OR law

County issued cell phones are subject to the Public Information Act and records could be accessed by members of the public or the media, Anderson County commissioners were told.

However, if the county shifted to

a cell phone allowance, the user's records would not be subject to an open records request, they were told, according to the *Palestine Herald Press*.

County Auditor Stan Chambers said that under the current practice

the employee's entire cell phone usage is deemed personal if they fail to provide a complete log of their activity. In that case, the cell phone is considered a fringe benefit under IRS rules and subject to income tax.



"An informed citizenry and the preservation of news information sources are of vital importance to a free society."

- Texas Attorney General Greg Abbott



# District judge rules against e-mail deletion policy

A state district judge in Houston has ruled that the Harris County Sheriff's Office policy of automatically deleting e-mails after 14 days violates state law.

Judge David J. Bernal issued a permanent injunction in April stopping the Sheriff's Office from implementing the policy ever again, according to the *Houston Chronicle*.

He also ordered the release of 750,000 e-mails erased from sheriff's employees' in-boxes between Jan. 12 and 19. The e-mails were erased the day after investigative reporter Wayne Dolcefino of KTRK in Houston asked for the e-mails. At the time, then-District Attorney Chuck Rosenthal was in

a controversy over the public release of his e-mails, some of which included racist and sexually explicit materials and romantic messages to his secretary, the newspaper reported.

The sheriff argued that the deleted e-mails were no longer subject to the open records law once they were moved to backup tapes. The judge's ruling, however, said all the e-mails were public, regardless of their storage medium.

The ruling said the sheriff's policy of deleting e-mails after 14 days went against the Texas Municipal Code, which requires all public employees' correspondence to be kept for two years.

# Teachers sue to prevent release of background checks

A teachers association has sued to prevent the release of information gathered from background checks of public school teachers.

The Legislature passed a law requiring that all certified teachers and substitute teachers be fingerprinted by Sept. 1, 2011. The Austin school district was the first to implement the requirement.

The *Austin American-Statesman* asked for a school-by-school breakdown of crimes revealed in the background checks. It did not ask for names or other identifying information.

Fingerprints taken from the teachers are scanned and sent to the FBI for a check against a national criminal history database.

The school district withheld the information, citing exemptions in the Public Information Act.

Attorney General Greg Abbott ruled that some of the information was not exempt. Attorneys in the AG's Office said the school district must withhold detailed criminal histories, but not a summary by campus, according to *The Associated Press*.

The Association of Texas Professional Educators filed a lawsuit against the Austin school board and the attorney general to keep the information secret.

"While we had certainly hoped that the district and the Attorney General's Office would have respected the privacy of individual citizens, we're now forced to protect the fundamental rights of AISD employees," Doug Rogers, ATPE executive director, said.

The new law says that teachers who have been convicted of certain felonies will lose their state certification.

Teacher advocates are concerned

that teachers could be fired when the background checks show old, minor offenses.

The *American-Statesman* reported that the background checks revealed that 310 district employees have criminal histories.

The paper said the district has not said how many were charged with felonies, how many were convicted or how many were teachers.

In a letter to the AG, the teachers association said that the ruling "has the potential to harm thousands of Texas educators, some of whom may have been arrested for an alleged misdemeanor (with no resulting conviction) or received deferred adjudication decades ago. Countless educators could find themselves facing undeserved and unnecessary public scrutiny if this important issue is left unconsidered."



*"While we had certainly hoped that the district and the Attorney General's Office would have respected the privacy of individual citizens, we're now forced to protect the fundamental rights of AISD employees."*

*-Doug Rogers, ATPE executive director*



## FOIFT State Conference postponed until Oct. 24

Because of Hurricane Ike, the annual State Conference of the FOIFT was postponed until Oct. 24 in Austin.

The Sept. 11 meeting of the Board of Directors was held in Austin as scheduled, but many board members could not make it to Austin because of the hurricane, and several scheduled speakers and attendees for the State Conference cancelled so the board voted to move the event to October.

Refunds will be issued for those registered for the conference that cannot attend on the rescheduled date. Registration of \$150 remains open for those wanting to attend on the new date.

This year's conference, "View from the Summit" will feature open government experts examining how current trends in technology and privatization are affecting FOI, discussing existing laws that might need clarification or procedural corrections and looking at the future of open government on the state and federal levels.

Please see the FOIFT's Web site at [www.foift.org](http://www.foift.org) for more information.



## FOI Forum

Thomas J. Williams is a director and FOIFT Hotline attorney. He is partner in the Fort Worth law firm of Haynes and Boone.

*Question: My school district's offices are closed on Fridays, thus it takes longer to get open records requests fulfilled because the school district is open fewer days of the week. Is this legal?*

*Answer:* There is still a misconception among some people that a governmental body has 10 business days to produce public information in response to a Public Information Act request.

In fact, Section 552.221 of the Public Information Act provides that disclosure of public information in response to a Public Information Act request is to be made "promptly," which the statute defines as "as soon as possible under the circumstances, that is, within a reasonable time, without delay."

In ORD-664 (2000) the attorney general concluded that the statute requires a governmental body to produce requested public information "as soon as reasonably possible," and noted that "what constitutes a reasonable period of time depends on the facts in each case." A

"reasonable period of time," the opinion concluded, "may be less than or greater than 10 business days, depending on the circumstances."

Although the closure of the office on Fridays might be factor in determining the "promptness" or "reasonableness" of the district's response, it should not automatically mean it takes longer to obtain public information.

If a governmental body believes that the requested information is exempt from disclosure, it must request an opinion from the attorney general within 10 "business days" after receipt of the request. Although the Public Information Act does not contain a definition of "business days," it has generally been the practice of the Attorney General's Office to construe "business days" to mean days on which the governmental body making the request is actually open for business.



*"These reports are, at best, a waste of time. At worst, they are a way for public officials to conduct the public's business without any advance notice."*

- Galveston County Daily News editorial



## Paper calls for end to 'reports' on agendas

The *Galveston County Daily News*, in a column by Heber Taylor, has called for an end to the practice of posting on the agendas reports by mayors, council members, school superintendents and school trustees without listing the subjects in the reports.

"These reports are, at best, a waste of time. At worst, they are a way for public officials to conduct the public's business without any advance notice," the paper said.

State Sen. Jeff Wentworth, chairman of the Senate Jurisprudence Committee, has asked Attorney General Greg Abbott if these reports are

legal, the *Daily News* said.

The paper cited the Open Meetings Act saying the meeting notice "must be sufficient to apprise the general public of the subjects to be considered during the meeting." Generic postings such as "employee briefing" and "staff briefing" do not provide the public with sufficient notice as to what's going to be discussed.

Sen. Wentworth's letter to the attorney general was prompted by questions about agendas published by the Corpus Christi City Council.

"If you match the minutes of what comes up in the 'mayor's report' or

'council report' in Corpus Christi—or in just about any town in Texas—you are likely to get anything from an oration about a grandson's military service to substantive discussions about bond issues," the paper said.

The average citizens looking at the agenda to decide whether to attend, has no clue what's going to be discussed, the paper said. "If the average citizen failed to attend, is he going to miss a lecture on the importance of shopping locally? Or is he going to miss a discussion of regulations that are going to have a huge effect on his business?"

## District attorney says illegal meeting wasn't criminal

The Galveston school board violated the Open Meetings Act, but they didn't break any criminal laws, the Galveston County district attorney has said.

The DA closed his investigation into the alleged Open Meetings Act violations, according to the *Galveston County Daily News*. He said he would not prosecute any of the six trustees who attended a rezoning committee meeting Jan. 31 because there are no criminal penalties for those violations.

School Board President Andy Mytelka said he disagreed with the district attorney's ruling that a meeting was held subject to the Open Meetings Law because six trustees did not know that the others would be there.

District Attorney Kurt Sistrunk said a quorum of trustees was present at a January rezoning meeting and that they discussed public business. But he said failure to keep minutes or post the meeting is not prosecutable as a criminal offense.

# Foundation needs your FOIFT membership

More than 1,200 Hotline calls. More than 32,000 newsletters. More than 20 legal briefs. More than 500 people. That's what the Freedom of Information Foundation of Texas did last year.

The FOIFT's volunteer attorneys and staff answered more than 1,200 Hotline calls from individuals, government officials, media professionals and academics about open meetings and public information issues affecting them.

The Foundation sent out our quarterly newsletter, the *FOI Focus*, that you are currently reading, to more than 8,000 recipients with articles about the latest open government issues and threats.

On behalf of individuals, news organizations and governmental bodies, the FOIFT filed more than 20 legal briefs on issues such as to how long email should be kept by government officials and the constitutionality of the Texas Open Meetings Act.

Between the Foundation's Annual State Conference, our Open Govern-

ment and our Responsible Rights: Government in the Sunshine Seminars, the FOIFT educated more than 500 people about their rights and responsibilities under the Texas Public Information and Open Meetings acts.

This year the FOIFT is already drafting a list of legislative issues that will include improving access to information from all electronic devices of government officials, ensuring access to the money government agencies spend on private companies performing government functions and improving access to the lists of finalists for academic institutions. These are just a few of our top priorities for the upcoming 2009 legislative session.

As you can see, the FOIFT does a great deal of work that directly and indirectly benefits you. However, it can't continue to do it without your help. By joining the FOIFT, your membership will directly benefit the Foundation's programs.

Memberships begin as low as \$25 and are tax-deductible. As a Samuel Adams Level member (\$25) of the

FOIFT, you can have online access to the "Texas FOI Handbook" for the length of your membership.


As a Thomas Paine Level member (\$100) or higher, you will receive a copy of the CD-ROM and printed version of the "Texas FOI Handbook" as well as online access to the handbook.

The Thomas Jefferson Level membership (\$250) will receive a FOIFT notepad in addition to the previously listed materials.


The James Madison Level membership (\$500) will receive a set of limited edition cartoons about open government issues in addition to the materials previously listed.

The Freedom Level membership (\$1,000) will receive a free registration to the FOIFT's annual state conference in addition to the other materials.

To join the FOIFT online, please go to <http://foift.org/memberepayment.html> or you can contact the FOIFT by phone at 214.989.3215, by e-mail at [foift@foift.org](mailto:foift@foift.org) or mail at P.O. Box 192627, Dallas, TX 75219.

  
The FOIFT filed more than 20 legal briefs on issues such as to how long email should be kept by government officials and the constitutionality of the Texas Open Meetings Act.

## Revised FOI handbook available in several versions

  
After a complete rewrite, the fifth edition of the "Texas FOI Handbook" is available from the Freedom of Information Foundation of Texas.

The handbook provides information about access laws, privacy and libel issues, risks and loopholes in the laws, key cases and sample letters for use in seeking information at the federal and state levels.

This version will be offered as an online edition, a searchable CD-ROM and in a printed version. With the options available, the Foundation has the ability to update the Handbook more readily. The CD-ROM and online editions can be updated very easily and cost-effectively, while the printed edition will receive regular addendums.

"We are very excited to have the new options available," Katherine Garner, FOIFT's executive director said. "It's going to make it that much better of a product and that much easier to use."

Several unforeseen problems caused delays with the release of the fifth edition of the book, but with new technology Garner believes this will be a one-time problem.

"We apologize to those who have already ordered their handbook and have been waiting for it," Garner said. "We greatly appreciate their patience."

A searchable CD-ROM that has the Texas Public Information and Open Meetings Acts, the Federal of Information and Open Meeting Acts, Privacy and Libel, Court Access and Sample Letters and Appeals is available for \$30.

A three-ring binder printed version that contains all of the same information as the CD-ROM is available for \$35. You also can order both for \$40.

The "Texas FOI Handbook" is also available online. Access to the first two chapters of the online edition is free. Access to the remainder of the handbook online requires membership in the FOIFT. Memberships start at \$25. Members will have online access to the Texas FOI Handbook for the length of their membership.

To order the handbook online, go to [http://foift.org/handbook\\_order.html](http://foift.org/handbook_order.html) or you can contact the FOIFT by phone at 214.989.3215, by e-mail at [foift@foift.org](mailto:foift@foift.org) or mail at P.O. Box 192627, Dallas, TX 75219.



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### Requestors shouldn't be sued

Members of the public who request records through the Public Information Act should not be sued and forced to pay thousands of dollars in attorney fees because they received the information. That was the argument of attorneys representing defendants in a lawsuit in Bee County in April.

District Court Judge Mike Welborn apparently agreed, according to the *Beeville Bee-Picayune*. He dismissed the lawsuit filed by Coastal Bend College.

The lawsuit requested that the 16 defendants return copies of DVD disks that contained personal e-mails between college employees and the college's attorney as well as confidential personnel information on college employees.

Coastal Bend College was trying to recover "tens of thousands of dollars in attorney fees" during its efforts to recover the disks and have them sealed.

Two newspapers, the *Bee-Picayune* and the *Alice Echo News Journal*, requested and received the information under the Public Information Act. They promptly returned the disks when they were ordered to.

