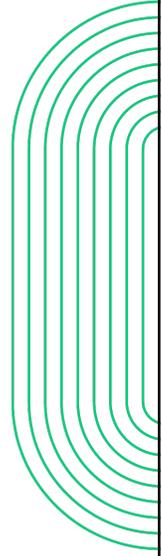


Navigating the Shark-Infested Waters of the PIA

Katie Anderson
214.651.4685
kanderson@clarkhill.com

Kathryn Monroe
214-651-2024
kmonroe@clarkhill.com

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Navigating the Shark-Infested Waters of the PIA

How you feel



Navigating the Shark-Infested Waters of the PIA

Our job is to help you feel



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What We Will Cover Today

- The Bottom Line of What PIA Requires and Allows
- Best Exceptions
- How to Seek Relief from AG
- Q&A and Discussion of Challenges of Complying



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Key Takeaways

- Timing is everything!
- Requests should be read strictly.
- Start gathering responsive documents immediately, even if protected by law.



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Policy of the Public Information Act

- The Texas Public Information Act (PIA) gives the public the right to request access to government records.
- All government information is **presumed to be available to the public** (with certain exceptions).
- Public has right to request government records at any time and for any reason.
 - Governmental bodies are not allowed to ask why someone is requesting the information.
- Requestors have the right to receive **prompt** access to information that is not confidential or otherwise protected (more on this later).



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What It Is

- “Public Information” - any information that is **written, produced, collected, assembled, or maintained** under a law or ordinance or **in connection with the transaction or official business**:
 - (1) **By** a governmental body; or
 - (2) **For** a governmental body and the governmental body:
 - (a) **owns** the information;
 - (b) has a **right** to the information; or
 - (c) spends or contributes public money for the purpose of writing, producing collecting, assembling or maintaining the information; **or**
 - (3) **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



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Electronic Communication

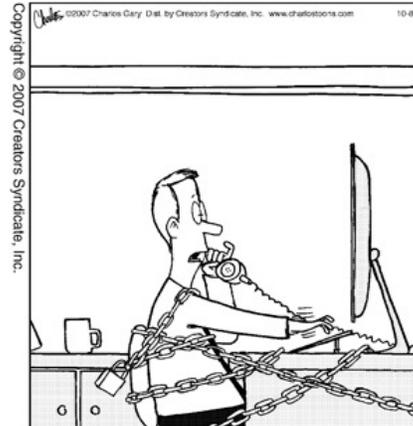
- Public Information now includes: “any **electronic communication** created, transmitted, received, or maintained **on any device** if the communication **is in connection with the transaction of official business.**”
 - “in connection with the transaction of ‘official business,’” - “**any matter over which a governmental body has any authority, administrative duties, or advisory duties**”
- The Act does **not** distinguish between **personal or employer-issued devices**. Focuses on the **nature** of the communication or document.
 - Includes information related to business on a public official's **personal** email account, cell phone, or computer.



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What It Is Not

- Does **not** require a governmental body to:
 - Prepare new information
 - Answer questions or conduct legal research
 - Inform Requestor, if and when, the requested information comes into existence after a request has been made
 - Comply with a continuing request to supply information on a periodic basis as information is prepared in the future



"That's right. I'm literally chained to my desk."



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Availability of Public Information



- Tex. Gov't Code § 552.021
 - "Public information is available to the public at a minimum during the normal business hours of the governmental body"
- Texas State Library and Archives Commission's Records Retention Schedule



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Governmental Body - Who is Covered?

- Tex. Gov't Code § 552.003
- Includes:
 - Board, commission, department, committee, institution, agency, or office *that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members*
 - County commissioners court
 - Municipal governing body
 - School district board of trustees
 - Governing body of a special district
 - The part, section, or portion of an organization, corporation, commission, committee, institution, or agency *that spends or is supported in whole or in part by public funds*
- The judiciary is expressly excluded.



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Recent Case Law

- *Greater Houston Partnership v. Paxton*, 468 S.W.3d 51 (Tex. 2015)
 - To be considered a governmental body under the PIA, an entity must be "sustained" rather than "supported in all or in part" by public funds.
- *City of Dallas v. Paxton*, 509 S.W.3d 247 (Tex. 2017)
 - Attorney-client privilege is a "compelling reason" to set aside the presumption that a governmental body's failure to timely claim an exception requires that public information be released.



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Funding Determines Which Laws Apply

- **Texas Open Meetings Act 551.077** – AGENCY FINANCED BY FEDERAL GOVERNMENT.

“This chapter does not require an agency financed entirely by federal money to conduct an open meeting.”



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Funding Determines Which Laws Apply

- **Local Government Code 392.053** – PUBLIC MEETING ON PROPOSED HOUSING PROJECT.

(a) In this section, "housing project" includes, in addition to the works or undertakings described by Subdivision (6) of Section 392.002:

(1) a work or undertaking implemented for a reason described by Subdivision (6) of Section 392.002 that is financed in any way by public funds or tax-exempt revenue bonds; or

(2) a building over which the housing authority has jurisdiction and of which a part is reserved for occupancy by persons who receive income or rental supplements from a governmental entity.



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Funding Determines Which Laws Apply

- **Local Government Code 392.053 –**

(b) Unless the commissioners of an authority hold a public meeting about a proposed housing project before the site for the project is approved, the authority may not authorize the construction of the housing project or obtain a permit, certificate, or other authorization required by a municipality or other political subdivision for any part of the construction of the housing project. A majority of the commissioners must attend the public meeting.

(c) The commissioners shall hold the meeting at the closest available facility to the site of the proposed project.

(d) The commissioners shall allow a person who owns or leases real property within one-fourth mile of the proposed site to comment on the proposed project.

(e) If a housing authority has not complied with the requirements of this section and Section 392.054, a municipality or other political subdivision may not issue a permit, certificate, or other authorization for any part of the construction of, or for the occupancy of, a housing project.



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Funding Determines Which Laws Apply

- **Local Government Code 392.054 - NOTICE OF PUBLIC MEETING.**

(a) In addition to any other notice required by law, the commissioners of an authority shall post notice of the date, hour, place, and subject of a meeting required by Section 392.053. The notice must be posted before the 30th day before the date of the meeting on a bulletin board at a place convenient to the public in:

- (1) the county courthouse of the county in which the proposed site is located; and
- (2) the city hall of the municipality in which the proposed site is located, if applicable.

(b) Before the 30th day before the date of the meeting, the commissioners shall publish a copy of the notice required by Subsection (a) in a newspaper with, or in newspapers that collectively have, general circulation in the county in which the proposed project is located.

(c) Before the 30th day before the date of the meeting, the commissioners shall mail a notice containing the same information as the notice required by Subsection (a) to each person who owns real property within one-fourth mile of the site of the proposed project. The commissioners may rely on the most recent county tax roll for the names and addresses of the owners.

(d) At a location at the proposed site that is visible from a regularly traveled thoroughfare, before the 30th day before the date of the meeting the commissioners shall post a sign not less than four feet by four feet with a caption stating "Site of Proposed Housing Project" in eight-inch letters. The sign must state the nature and location of the proposed project, the names and addresses of the governmental entities involved in the development of the project, and the date, time, and place of the meeting.



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Duty to Inform Public

- Section 552.205 requires officer for public information to prominently display a sign at one or more places in the administrative offices of the governmental body
- Should contain basic information about the rights of the requestor, the responsibilities of the governmental body, and the procedures for inspecting or obtaining a copy of public information under the PIA



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PIA Request

Open Records Home
Find Information
Submit Records Request
My Records Center

Open Records Center

PLEASE CLICK THE CREATE ACCOUNT LINK BELOW IF THIS IS YOUR FIRST TIME HERE

*Email Address:

*Password:

[Forgot your password?](#)

FIRST TIME USERS CLICK BELOW:

[Create Account](#)

- Requestor must deliver a **written** request to the governmental body's **public information officer** or the **officer's designee** by:
 - U.S. mail
 - Email
 - In person (hand deliver); or
 - Any other method approved by the governmental body
- Should require all verbal requests to be submitted in writing



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PIA Request

- No magic language needed
- No requirement to name the PIA
- May be typed or hand written
- No signature required
- Cannot require use of a specific form to submit request (but may **request** a specific form or specific procedure be used)



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Request Received: Duty Fulfilled

- Must either provide the information for inspection or duplication in your offices or send copies of the information via first class United States mail. Tex. Gov't Code § 552.221
- A governmental body may also comply with section 552.221 by referring the requestor to an exact Internet location or URL address maintained by the governmental body and accessible to the public, if the requested information is identifiable and readily accessible on the website." Gov't Code § 552.221(b-1).
 - Requestor may still choose to inspect the information or receive copies of the information.

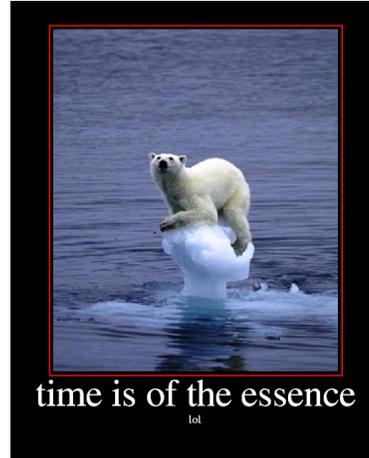


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Request Received: Time is of the Essence

- Upon receiving a request, the officer for public information of a governmental body shall **promptly produce** public information for inspection, duplication, or both. See Tex. Gov't Code § 552.221
- "Promptly" –
 - "as soon as possible under the circumstances"
 - "within a reasonable time, without delay"
- Business day –
 - Generally, when the governmental body is open for business to the public.



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PIA Response Timeline

- Deadline to request additional time: **10 business days**
 - If the governmental body "cannot produce public information for inspection or duplication within 10 business days after the date the information is requested...the officer shall certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication."
- Deadline to request an Attorney General opinion and notify requestor: **10 business days**



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PIA Response Timeline

- Notice that information is active use or in storage: (reasonable time) **10 business days**
 - “If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.” 552.221 (c)
- Notice that the request requires programming or data manipulation: **20 business days** 552.231 (a)
- Notice to third-party that a request may implicate someone else’s proprietary information: **10 business days** 552.305(d)



Impacted by a “catastrophe”

- “Catastrophe” - a condition or occurrence that directly interferes with the ability of a governmental body to comply with the requirements of the Act. Gov't Code § 552.2325(a)(1)
 - **Does not include** a period when staff is required to **work remotely** and can access information, even if the physical office is closed. Gov't Code § 552.2325(a)(2)
- To suspend requirements:
 - Governmental body must provide notice to the OAG
- Suspension period: up to seven days (may begin up to two days prior to the submission of the notice); one extension allowed; no more than fourteen consecutive calendar days for any single catastrophe.



Missing Deadlines

- Information presumed public if submissions and notifications under Section 552.301 are not timely made
- Limited exception:
 - Presumption may be overcome only by demonstration of a "compelling reason"
 - Mandatory v. Permissive exceptions



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PIA Request: Unclear or Broad

- **Cannot** inquire as to why he or she wants information
- But **can**:
 - Ask a requestor to clarify the request
 - If a large amount of information has been requested, discuss with requestor how the scope of the request may be narrowed
- Timeline: (reasonable time) 10 business days
 - This request pauses the 10-day clock to seek AG opinion.
 - Always confirm in **writing**.



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Producing Information: Possible Responses

- Release the Information
- Withhold Information
- Additional Time Needed to Produce Records: "If an officer for public information cannot produce public information for inspection or duplication within 10 business days after the date the information is requested under Subsection (a), the officer shall certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication." (Tex. Govt. Code § 552.221 (d))
- Additional Time Needed to Produce Record because in Active Use or in Storage (Tex. Govt. Code § 552.221 (c))



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Releasing Information

Cost of Copies and Access

- Charges for copies and access generally allowed
- Must be calculated according to the Attorney General's rules
 - Production: request for copies may generally be assessed charges for labor, overhead (which is calculated as a percentage of the total labor), and materials.
 - Inspection: may charge for copies for any page that must be copied so that confidential information may be redacted
- If charges will exceed \$40, must provide requestor with written itemized statement of estimated charges **before** undertaking work



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Withholding Information

- Previous determinations by the Attorney General
 - Specific previous determination
 - General previous determinations
- Specific PIA provisions allowing information to be withheld automatically.
- Pursuant to an AG opinion.



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Withholding Information



- A governmental body is required to ask the Attorney General for an open records ruling (ORR) in almost all cases if it wants to withhold requested documents or information based upon an exception of the PIA.
- Tex. Gov't Code § 552.301: No later than the **10th business** day:
 - Must ask AG for a ruling and state the exceptions that apply.
 - Must notify Requestor that a ruling is requested.
 - Must provide Requestor a copy of the notice to the OAG.
 - Must notify any 3rd Parties with proprietary interest in the information concerned in the requested ruling.



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Withholding Information

- No later than the **15th** business day, must submit to the AG:
 - 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 the governmental body or evidence sufficient to establish that date; and
 - A copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested Tex. Gov't Code § 552.301 (e)
- Label that copy of the specific information, or representative samples, to indicate which exception applies to which parts of the copy.
- Must send a copy of written comments (but not enclosures!) to requestor



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Unfavorable Ruling

- Requests for reconsideration are prohibited by the PIA. Tex. Gov't Code § 552.301 (f)
- File suit against the AG in accordance with the PIA no later than the **10th calendar day** after the receipt of AG's Letter Ruling; otherwise, the information is public. See Gov't Code § 552.353(b)(3), (c)
- May file later (30th calendar day) but no affirmative defense to criminal prosecution under Gov't Code § 552.324 (b) 552.353.



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Penalties

- Criminal penalties may be imposed for:
 - Failure to refusal to give access to public information
 - Releasing information considered confidential under the PAI
 - Willful destruction, mutilation, removal without permission, or alteration of public information



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Exceptions to Disclosure (if ask AG for Opinion)

- 552.101 Information confidential by Law (either constitutional, statutory, or by judicial decision)
- 552.102 Certain Personnel Information
- 552.103 Information Relating to Litigation
- 552.104 Information Related to Competition or Bidding
- 552.105 Information Related to Location or Price of Property
- 552.107 Certain Legal Matters
- 552.108 Law Enforcement Exception
- 552.110 Confidentiality of Trade Secrets; Confidentiality of Certain Commercial or Financial Information
- 552.111 Agency Memoranda
- 552.117 Certain Addresses, Telephone Numbers, Social Security Numbers, and Personal Family Information
- 552.147 Social Security Number of a Living Person



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Exceptions to Disclosure

- Information confidential by Law (either constitutional, statutory, or by judicial decision)
Gov't Code § 552.101
- For example:
 - Medical records
 - Reports, records, etc. used in an investigation of alleged child abuse or neglect
 - Private information of no legitimate use to public



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Exceptions to Disclosure

- Litigation Exception – can seek to withhold documents that may be subject to litigation.
Gov't Code § 552.103
- Requestor cannot circumvent discovery process to get documents that are litigation materials
- How/When to Argue:
 - If litigation has been filed
 - If litigation threatened PLUS some other formal complaint (i.e., complaint filed with school district or law enforcement agency)
 - The information requested must relate to that litigation
 - Describe facts. It is case by case basis.



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Exceptions to Disclosure

- Information Related to Competition or Bidding –
information that would give advantage to a competitor or bidder.
Gov't Code § 552.104
- Under *Boeing Co. v. Paxton* (Tex. 2015), broad protection applies to materials used in any bidding process, including final, executed contracts awarded in bid process.
- When to argue:
 - If bid proposal requested
 - If contract requested, and contract was result of bidding process
 - Private third parties may invoke this exception



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Exceptions to Disclosure

- Attorney Client Privilege
Gov't Code § 552.107
- Must demonstrate:
 - It is communication.
 - Communication was made to facilitate legal services to client (gov. body).
 - Communication was made between or among clients, client representatives, lawyers, and/or lawyer representatives.
 - Communication not intended to be disclosed to third persons.
 - Privilege has not been waived.



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Exceptions to Disclosure

- Law enforcement exception – under some circumstances may withhold police reports and other law enforcement records.
Gov't Code § 552.108
- May assert in two situations:
 - *Investigation is ongoing* - release of the information would interfere with the detection, investigation, or prosecution of crime; or
 - *Investigation concluded and no action taken* - information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication
- Must release basic information on front page of police report



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Exceptions to Disclosure

- Confidentiality of Trade Secrets; Confidentiality of Certain Commercial or Financial Information
Gov't Code § 552.110
- May assert in two situations:
 - *Trade Secret* – “all forms and types of information . . . if the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret” and the information derives independent economic value from not being generally known
 - *Commercial or Financial Information* - disclosure would cause substantial competitive harm to the person from whom the information was obtained



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Exceptions to Disclosure

- Agency Memoranda - interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency
Gov't Code § 552.111
- May assert in two situations:
 - *Deliberative Process Privilege* – protects from disclosure communications (i.e., emails) consisting of advice, opinion or recommendations on policymaking matters of the governmental body at issue. The purpose is “to encourage frank and open discussion within the agency in connection with its decision-making processes.”
 - *Work Product Privilege* - communication made or material prepared in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys and agents.



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Directory Information

- **Section 552.024. Electing to Disclose Address and Telephone Number**
 - (a) Except as provided by Subsection (a-1), each employee or official of a governmental body and each former employee or official of a governmental body shall choose whether to allow public access to the information in the custody of the governmental body that relates to the person's home address, home telephone number, emergency contact information, or social security number, or that reveals whether the person has family members.



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Directory Information

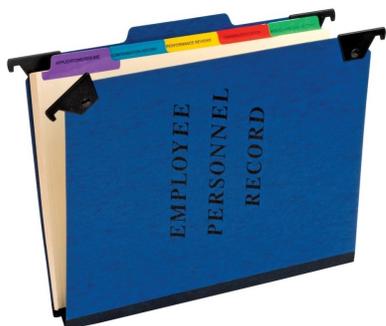
- (b) Each employee and official and each former employee and official shall state that person's choice under Subsection (a) to the main personnel officer of the governmental body in a signed writing not later than the 14th day after the date on which:
 - (1) the employee begins employment with the governmental body;
 - (2) the official is elected or appointed; or
 - (3) the former employee or official ends service with the governmental body.



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Special Rights of Access



- PIA prohibits selective disclosure of information to members of the public
- **But** a governmental body may, without waiving exceptions to disclosure, transfer or disclose records by doing the following:
 - Provide confidential information to a member, agency, or committee of the legislature (Tex. Gov't Code § 552.008)
 - Provide confidential information to an individual about that individual (Tex. Gov't Code § 552.023)



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Recent Case Law

- *Greater Houston Partnership v. Paxton*, 468 S.W.3d 51 (Tex. 2015)
 - To be considered a governmental body under the PIA, an entity must be “sustained” rather than “supported in all or in part” by public funds.
- *City of Dallas v. Paxton*, 509 S.W.3d 247 (Tex. 2017)
 - Attorney-client privilege is a “compelling reason” to set aside the presumption that a governmental body’s failure to timely claim an exception requires that public information be released.



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Recent Case Law

- *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015)
 - Governmental bodies *and* the private companies that do business with them may withhold information that would give a competitive advantage to another bidder or competitor.
 - Has been cited more than 2,700 times in AG opinions foreclosing access to information under the PIA.
 - Has been applied to instances involving PIA requests for information regarding final contracts.



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Recent Legislative Changes

- In 2021, the Texas legislature provided for the temporary suspension of the requirements of the Act when a governmental body is significantly impacted by a catastrophe. Gov't Code § 552.2325
- In 2019, Legislature amended PIA to make is clear public officials have certain obligations regarding public information on personal, private devices
 - 552.004: Gov't officials who use personal devices to conduct the transaction of public business are responsible for turning over those messages to an official gov't account or preserving them for retention period
 - 552.233: no personal or property right in public records, even if on personal device
 - Must surrender or return information on personal device to governmental body not later than 10th business day following request from public information officer
 - Failure to do so is grounds for disciplinary action or other penalties



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Recent Legislative Updates

- SB 943 – seeks to balance private companies' interests in protecting proprietary information with the public's right to know how the government is spending taxpayer money
 - Requires details of a contract between a private entity and government agency be public, while continuing to protect trade secrets and proprietary information.
 - Exception for information relating to competition or bidding can only be invoked if the competitive situation is ongoing or likely to reoccur.
- SB 494 – PIA requirements do not apply to governmental bodies impacted by certain types of "catastrophes"
- SB 944 – public information on a privately owned device must be maintained or transferred to the governmental body to be preserved
- SB 988 – reasonable attorneys' fees and costs typically are not granted



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Recent Legislative Updates

- HB 81 – receipt or expenditure of funds related to a publicly-funded “entertainment event” must be disclosed
- The following bills exempt from public disclosure certain personal information:
 - HB 2446 – regarding firefighters, volunteer firefighters, and emergency medical services personnel
 - HB 3175 – provided in connection with applications for disaster recovery funds
 - HB 3913 – obtained by Harris County flood control districts in connection with operations related to a declared disaster or flood
- HB 4181 – allows lawmakers to assert “legislative privilege” to withhold work-related records that are subject to the PIA



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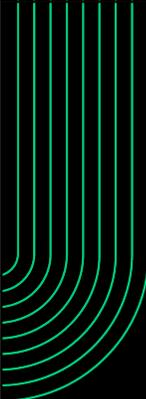


Katie Anderson
kanderson@clarkhill.com



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Thank You

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