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Technical Problem: How City of Dallas v. Dallas Morning News, LP Exposed a Major Loophole in the Texas Public Information Act Comment.

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COMMENT

TECHNICAL PROBLEM: HOW *CITY OF DALLAS V. DALLAS MORNING NEWS, LP* EXPOSED A MAJOR LOOPHOLE IN THE TEXAS PUBLIC INFORMATION ACT

ALEXANDER J. YOAKUM

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I. INTRODUCTION

The Texas Public Information Act (TPIA) grants every person a statutory right to access the records of a governmental body unless disclosure would violate the law.[1] Generally, the TPIA has been construed broadly to favor disclosure of information.[2] However, modern technology, specifically electronic mail (e-mail) and text messaging, reveals how dated the TPIA really is. The following example illustrates the problem: Imagine that a concerned citizen has questions about some of the recent decisions made by the local mayor. This citizen decides to contact the mayor's office to make an open records request for information, including e-mails from the mayor's personal account and text messages from a privately owned cellular phone. The citizen's request pertains to information related only to official business; none of the requested information involves the mayor's personal affairs. According to a recent Texas court of appeals decision in *City of Dallas v. Dallas Morning News, LP*,[3] a governmental body is not required to release any of this information if the requestor cannot prove that the governmental body owns the information or has a right of access to it.[4] According to *Dallas Morning News*, a governmental

1. *See* TEX. GOV'T CODE ANN. § 552.001(a) (West 2004) (announcing the state's policy that people have the right to information regarding the affairs of the government as well as its officials and employees, except where explicitly prohibited by law). This right was first guaranteed under the TPIA's predecessor, the Texas Open Records Act. *See, e.g.*, John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 596 (1987) (emphasizing that people have a right to access government records unless the law prohibits disclosure).

2. *Cf.* Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 356 (2004) (concluding that, after a study of recent open record rulings, the Texas Attorney General required some or all requested records to be disclosed over 70% of the time).

3. City of Dallas v. Dallas Morning News, LP, 281 S.W.3d 708 (Tex. App.—Dallas 2009, no pet.).

4. *See id.* at 714 (ruling that the requestor has the burden of showing that a governmental body refused to disclose information that it owned or had a right of access to). If the e-mails in the hypothetical had been from a work account, they would be subject to the disclosure provisions of the TPIA. *See* TEX. GOV'T CODE ANN. § 552.002(a) (West 2004) ("'[P]ublic information' means information that is collected,

official or employee can conduct official business through a personal e-mail account without being subject to the disclosure provisions of the TPIA unless the requestor establishes the governmental body's right to that information.[5] While the court's decision can be reconciled with the TPIA's definition of "public information,"[6] *Dallas Morning News* exposes how the statute has failed to keep up with modern communication technology.

Today, the vast majority of information is created in electronic format.[7] However, courts have struggled to incorporate these new forms of communication into existing open government statutes.[8] In Texas, much of the problem stems from how the TPIA defines "public information." Under the statute, records are classified as "public" based on physical properties as well as on their content.[9]

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assembled, or maintained . . . in connection with the transaction of official business . . . ."); *see also* Tex. Att'y Gen. OR2007-07157 (refuting a school district's claim that "e-mails categorically are not public information subject to the Act"); *cf.* Tex. Att'y Gen. OR2004-10226 (requiring a city to disclose e-mails, which did not fall within statutory exceptions, from an employee's work account); Tex. Att'y Gen. OR2004-0234 (ordering the Texas Education Agency to disclose e-mail communications from work accounts unless they fall within one of the statutory exceptions); Tex. Att'y Gen. OR2003-3512 (declaring that a county sheriff's department must disclose e-mails from work accounts unless excepted by statute).

5. *See Dallas Morning News*, 281 S.W.3d at 714 (requiring the requestor to provide summary judgment evidence that the city owned or had access to the requested e-mails).

6. *See* TEX. GOV'T CODE ANN. § 552.002(a) (West 2004) (defining "public information" as information created "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"). A government official cannot be considered a governmental body under the TPIA. *See* TEX. GOV'T CODE ANN. § 552.003(1) (West 2004) (providing a definition of the term "[g]overnmental body"); *see also* Keever v. Finlan, 988 S.W.2d 300, 305 (Tex. App.—Dallas 1999, pet. dism'd) (ruling that a governmental official did not meet the TPIA's definition of a governmental body).

7. *See* Peter S. Kozinets, *Access to the E-mail Records of Public Officials: Safeguarding the Public's Right to Know*, COMM. LAW., Summer 2007, at 18 (emphasizing the growing importance of electronic communication); *see also* MICHAEL R. ARKFELD, ELECTRONIC DISCOVERY AND EVIDENCE § 1.1 (perm. ed., rev. vol. 2006) (describing a study that found that 93% of new information created in 1999 was in electronic format).

8. *Compare* Peter S. Kozinets, *Access to the E-mail Records of Public Officials: Safeguarding the Public's Right to Know*, COMM. LAW., Summer 2007, at 17–22 (arguing that state courts have incorrectly limited public access to e-mails despite broad statutory language favoring access), *with* John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to E-Mail Correspondence*, 12 GEO. MASON L. REV. 719, 720–21 (2004) (noting that the application of open meetings statutes becomes more difficult in the wake of new communication technology such as e-mail, instant messaging, and Internet chat rooms).

9. *See* TEX. GOV'T CODE ANN. § 552.002 (West 2004) (labeling records as "public information" when they are held "by a governmental body . . . or . . . for a governmental

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The TPIA's definition of public information creates problems when a person conducts official business through a private e-mail account or personal cell phone because it is unclear what rights the governmental body has regarding that information.[10] *Dallas Morning News* held that the TPIA required the requesting party to establish the rights of the governmental body to the information within personal e-mails.[11] This burden, however, contradicts the stated policy of the TPIA, which is to interpret liberally its provisions in favor of disclosure.[12] The *Dallas Morning News* decision emphasizes the need for the Texas legislature to amend the statute in a way that ensures disclosure of all electronic records that relate to government business, regardless of the source. Otherwise, the TPIA could become irrelevant as information continues to shift from paper to electronic sources.

This Comment examines the history and the policies behind the TPIA and open records statutes in general to suggest changes that should be made to reconcile the statute's application with those policies. *City of Dallas v. Dallas Morning News, LP* revealed that the current statute cannot be applied to e-mails and text messages in a way that sufficiently protects the public's right to access. While *Dallas Morning News* requires the requesting party to prove that the governmental body either owns or has a right of access to

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body and the governmental body owns the information or has a right of access to it"). While the TPIA disregards the content of the record when determining whether the record constitutes public information, content plays a larger role in many of the exceptions under the statute. *Cf.* TEX. GOV'T CODE ANN. § 552.101 (West 2004) (allowing information to be withheld if its content makes it confidential by law); TEX. GOV'T CODE ANN. § 552.109 (West 2004) (providing an exception for private communications by elected officials from disclosure); TEX. GOV'T CODE ANN. § 552.111 (West 2004) (creating an exception for "interagency or intraagency memorand[a] or letter[s]").

10. *Compare* Appellant's Brief & Appendix at 31, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2008 WL 4223190 (claiming that a governmental body only has a right of access to information from a Blackberry when it has a relationship with the wireless provider), *with* Brief of Appellee at 14, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2005 WL 6197478 (arguing that records held by a private source for the benefit of a governmental body are public records under the TPIA).

11. *See Dallas Morning News*, 281 S.W.3d at 714 (requiring the requesting party to prove that the governmental body has a right of access to the requested information).

12. *See* TEX. GOV'T CODE ANN. § 552.001(a) (West 2004) ("[I]t 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 provisions of this chapter shall be liberally construed to implement this policy.").

the information,[13] this Comment explains that, with respect to e-mails and text messages, such a requirement is inconsistent with the policies of the TPIA. It is also unrealistic given the nature of this modern technology. Instead, the Texas legislature should amend the statute to ensure that e-mails and text messages maintained by a governmental official or employee in a personal account must be disclosed when the information relates to official business. A more radical approach to the problem would require the definition of public information to be based completely on content rather than the governmental body's relationship to it. However, this approach could be costly and inefficient, as debates over what constitutes public information would result in more requests for opinions from the Texas Attorney General and an increase in litigation in Texas courts. This Comment endorses a more practical alternative that would entail clarification by the Texas legislature that a governmental body has a right of access to records from personal sources when the records relate to official business. Additionally, by highlighting the procedural protections afforded under existing TPIA exceptions, this Comment addresses possible privacy concerns parties might have regarding disclosure of personal e-mails.

II. BACKGROUND

A. *The History and Policy of Open Government*

The concept of open government is not a new phenomenon. The principles of transparency in government can be found in the works of philosophers such as John Locke, John Stuart Mill, Jean-Jacques Rousseau, Jeremy Bentham, and Immanuel Kant.[14]

13. *See Dallas Morning News*, 281 S.W.3d at 714 (holding that the requesting party has the burden of proving that the governmental body owns the requested information or has a right of access to it).

14. *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–96 (2006) (listing Locke, Mill, Rousseau, Bentham, and Kant as philosophers who have advocated transparent government in their written works); *see also* JEREMY BENTHAM, POLITICAL TACTICS 29–32 (Cyprian Blamires et al. eds., Oxford University Press 1999) (arguing that open government serves important functions such as ensuring that governmental officials carry out their duties as well as fostering confidence among the people in those officials); IMMANUEL KANT, ETERNAL PEACE (1795), *reprinted in* THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS 470 (Carl J. Friedrich ed., Modern Library 1949) ("[E]ach law and rightful claim . . . carries with it the possibility of . . . publicity, since without publicity there cannot be justice . . .

Several Framers of the United States Constitution, most notably James Madison, favored a transparent system of government.[15] Despite these sentiments, there has never been a constitutionally protected right to access government information.[16]

Proponents of open government legislation argue that transparency in government serves a variety of useful purposes. Supporters cite public participation in government decision-making as an advantage of open government laws.[17] Participation

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and hence also no right, since that is only attributed by justice."); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 262 (1862) ("It should be apparent to all the world who did every thing, and through whose default any thing was left undone. Responsibility is null when nobody knows who is responsible . . . ."); JEAN-JACQUES ROUSSEAU, TO THE REPUBLIC OF GENEVA (1754), *reprinted in* THE FIRST AND SECOND DISCOURSES 81 (Roger D. Masters ed., Roger D. Masters & Judith R. Masters trans., St. Martin's Press 1964) ("I would have sought a country where the right of legislation was common to all citizens; for who can know better than they under what conditions it suits them to live together in the same society?").

15. *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–96 (2006) (stating that several Framers of the United States Constitution, including James Madison, were proponents of open government); *see also* Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE COMPLETE MADISON: HIS BASIC WRITINGS 337 (Saul K. Padover ed., Harper & Brothers 1953) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives . . . .").

16. *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 896 n.31 (2006) (arguing that the Framers of the United States Constitution never intended to recognize a constitutional right to access information); Wallace Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 10 (1957) (suggesting that the Drafters of the United States Constitution never specifically intended to include a right to access the information of the executive and administrative agencies in the First Amendment); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 652 (1984) (recognizing that the statutory rights granted under the Freedom of Information Act are not constitutionally protected).

17. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 896 (2006) (stating that proponents of open government laws believe that people should be made aware of the workings of government so that they can play their proper role in it); *see also* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 175 (1997) (advocating the idea that efforts to reform government often focus on enhancing the public's ability to participate in agency decision-making); Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1166 (1993) (arguing that the public "must be informed to exercise effectively their right to self-government"); *cf.* TEX. GOV'T CODE ANN. § 552.001(a) (West 2004) (declaring that people must be "informed so that they may retain control over the instruments they have created").

gives people a sense of responsibility in their own governance.[18] Proponents of open government legislation argue that participation should be considered a cornerstone of constitutional democracy.[19] They claim that the public, in order to participate effectively, must be allowed to inform themselves of the workings of the government.[20] Open records statutes and open meetings statutes developed as a means to keep the public informed of government decision-making.[21]

Supporters of open government laws believe that participation is beneficial because it promotes society's interest in keeping

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18. *See* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 188 (1997) (explaining that participation is important because it "inspir[es] a sense of civic responsibility" and makes people feel like a part of society).

19. *See id.* at 175 (noting that participation is considered an important element of democracy); *see also* Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 68 (2006) (arguing that open government laws are fundamental to representative democracy); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 897 (2006) (emphasizing that transparency in government action is an important part of liberal democratic theory); Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1166 (1993) (claiming that an informed public is crucial in a representative democracy); *cf.* TEX. GOV'T CODE ANN. § 552.001(a) (West 2004) ("[T]he fundamental philosophy of the American constitutional form of representative government . . . adheres to the principle that government is the servant and not the master of the people . . . .").

20. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 896 (2006) (stating supporters of open government statutes argue that if the public is knowledgeable of government action, it "can play its proper role[]" in the decision-making process); *see also* Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 68 (2006) (noting that democracy requires that people be allowed to understand the workings of the government); Randolph May, Recent Development, *Reforming the Sunshine Act*, 49 ADMIN. L. REV. 415, 419 (1997) (claiming that a "fundamental objective in [a] constitutional democracy" is to keep the public informed of the workings of the government).

21. *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 897–98 (2006) (explaining that Congress's passage of the Freedom of Information Act was justified by society's need for an informed electorate); John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to E-Mail Correspondence*, 12 GEO. MASON L. REV. 719, 719 (2004) (stating that open records and open-meetings legislation was intended to make "government more accessible to the public at large"); Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1166 (1993) (arguing that open meeting statutes ensure that the public has the opportunity to remain informed); *cf.* Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 68 (2006) (emphasizing the importance of open-records legislation in keeping the public apprised of the workings of the government).

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governmental entities accountable to the public for these agencies' decisions.[22] Advocates believe that governmental entities must be accessible so that their decisions can be considered legitimate in the eyes of the public.[23] These supporters believe that participation results in better decisions from governmental bodies[24] and fewer instances of abuse and corruption.[25]

B. *The Freedom of Information Act*

State open records legislation has been largely influenced by the federal open records statute, the Freedom of Information Act

22. *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 899 (2006) (emphasizing that a positive consequence of transparent government is that the public can oversee government activity and hold officials responsible for their actions); Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1166 (1993) (arguing that open meeting laws help the public oversee the decisions of government officials); *cf.* TEX. GOV'T CODE ANN. § 552.001(a) (West 2004) ("The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 182–83 (1997) (noting that a common justification for participation in agency decision-making is that it makes officials accountable for their actions).

23. *See, e.g.*, Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 897 (2006) (emphasizing that laws must "gain the consent of the governed" in order to be legitimate, and that the only means of accomplishing this is opening the process to public scrutiny); *cf.* Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 187–88 (1997) (explaining that agencies have more legitimacy if the public is able to participate in the decision-making process); Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1166 (1993) (arguing that open meeting laws allow the public to determine whether officials are representing the public's best interests, which results in more public faith in government).

24. *See* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 900 (2006) (claiming that transparency in government allows for the "free flow of information among public agencies and private individuals" which, in the end, improves the quality of decision-making); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 185–87 (1997) (explaining how participation by informed citizens benefits agency decision-makers).

25. *See, e.g.*, Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 899 (2006) (noting that a positive result of transparent government is that "incompetent and corrupt" officials are held accountable for their actions); *cf.* Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1166 (1993) (claiming that a central purpose of open meeting statutes is to "guard against corruption and deceit," and that an informed public is an integral part of representative democracy).

(FOIA).[26] The FOIA,[27] signed by President Lyndon Johnson in 1966,[28] sought to address concerns that federal agencies lacked accountability.[29] The Act was intended to serve as a means of

26. *E.g.*, Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1407 (2000) (recognizing the influence the FOIA has on state open government laws). While the FOIA influenced state open records legislation, state statutes and the FOIA are not always similar. *See* Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 354 (2004) (highlighting significant differences between the TPIA and the FOIA); Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179, 190 (1995) (stating that there are differences between the FOIA and state open records legislation).

27. Freedom of Information Act, 5 U.S.C. § 552 (2009) (originally enacted as Act of July 4, 1967, Pub. L. No. 90-23, 81 Stat. 54).

28. *See generally* Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 76 (2006) (noting that the FOIA was enacted in 1966); Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 46 (1994) (explaining that President Johnson signed the FOIA on July 4, 1966); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 652 (1984) (detailing President Johnson's comments as he signed the FOIA in 1966). Some argue that President Johnson signed the FOIA reluctantly. *See* Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1401 (2000) (emphasizing that President Johnson was hesitant to sign the FOIA, which was "radical legislation"); *cf.* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 658 (1984) (noting that "the executive branch was never enthusiastic about the [FOIA]" in its early years and its agencies were hesitant to comply with the statute).

29. *See* Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 46 (1994) (summarizing that the FOIA resulted from the concerns of citizens and politicians that bureaucrats lacked accountability); Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1401 (2000) (arguing that the enactment of the FOIA resulted, in part, from "public distrust of government"); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650 (1984) (asserting that agency accountability was a major factor in the creation of the FOIA). The press, in particular, urged for the passage of more liberal open records legislation. *See* Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1401 (2000) (emphasizing the importance of the press in the formation of the FOIA); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650 (1984) (noting that the news media played an important role in the enactment of the FOIA by exposing agencies' unwarranted refusal to disclose information). Prior to the enactment of the FOIA, the Administrative Procedure Act (APA) governed records requests to federal agencies. *See* Dep't of Air Force v. Rose, 425 U.S. 352, 360 (1976) (recognizing the FOIA is an amendment to the disclosure provisions of the APA); Fred H. Cate et al., *The Right to Privacy and the Public's Right to*

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removing the perception that secrecy blocked communication between agencies and the public.[30] In its early years, the FOIA had little effect on agencies' ability to withhold requested information.[31] However, Congress amended the FOIA in 1974[32] to increase its effectiveness by narrowing some of its exceptions and placing deadlines on agencies to comply with requests.[33]

Know: The "Central Purpose" of the Freedom of Information Act, 46 ADMIN. L. REV. 41, 46 (1994) (noting that, prior to the enactment of the FOIA, record requests were handled by the APA). The APA gave agencies more discretion in deciding whether or not to disclose records. *See Rose*, 425 U.S. at 360 (acknowledging that the APA gave agencies freedom to withhold information much more often than it required them to disclose it (citing EPA v. Mink, 410 U.S. 73, 93 (1973))); Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 46 (1994) (describing how the APA allowed federal agencies to avoid disclosure by requiring the requestor to have a sufficient purpose for requesting the information and permitting the agency to withhold information that it deemed to be confidential).

30. *See Rose*, 425 U.S. at 361 (finding that Congress's objective in the enactment of the FOIA was to remove the barrier of administrative secrecy and open up agency decision-making to the public (citing Rose v. Dep't of Air Force, 495 F.2d 261, 263 (2d Cir. 1974))); Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 46 (1994) (describing the FOIA as Congress's response to a perceived barrier that existed between agencies and the public); *cf.* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 654 (1984) (emphasizing that the FOIA had to be created to prevent a disconnect between federal agencies and the public).

31. *Cf.* Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 47 (1994) (stating that early court decisions allowed "agencies to apply the exemptions [under the FOIA] broadly"). *See generally* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 658–59 (1984) (listing examples of how courts, in early FOIA decisions, broadly interpreted the exceptions under the statute, which allowed the agencies to withhold more information and, as a result, reduced the overall amount of requests made under the statute).

32. Act of Nov. 21, 1974, Pub. L. No. 93-502, §§ 1–3, 88 Stat. 1561 (current version at 5 U.S.C. § 552 (2009)).

33. *See* Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 76 (2006) (acknowledging that the FOIA was amended in 1974); Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 48 (1994) (summarizing that the 1974 amendment to the FOIA sought to reduce instances of agency "discretionary nondisclosure" by limiting exemptions and establishing fee systems and deadlines); *cf.* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 659 (1984) (listing the major changes the 1974 amendment made to the FOIA, including imposing deadlines on agencies to respond to requests, giving more discretion to courts to review an agency's decision to withhold information, and limiting

The FOIA establishes a statutory right to access information from federal agencies.[34] The FOIA requires disclosure of nearly all records held by agencies,[35] except those of Congress and the judiciary.[36] The agencies themselves make the determination on whether information should be exempt from disclosure.[37] When

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some of the exceptions under the Act). The Watergate Scandal played a pivotal role in the 1974 amendment to the FOIA. *See* Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 48 (1994) (attributing Congress's enactment of the 1974 amendment to the "lingering" effects of the Watergate Scandal); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 659 (1984) (explaining that the 1974 amendment to the FOIA was Congress's attempt to regain credibility after the Watergate Scandal). Like the original statute, the 1974 amendment to the FOIA faced opposition from the executive branch, as President Gerald Ford unsuccessfully attempted to veto the bill. *See, e.g.*, Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 48 (1994) (indicating that Ford attempted to veto the 1974 bill, but Congress overrode his veto).

34. *See* 5 U.S.C. § 552(a)(3)(A) (2009) (requiring disclosure of agency records when a request is made in accordance with the agency's published rules for disclosure and the request reasonably describes the records); *see also* Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179, 186 (1995) (explaining that the FOIA creates a statutory right to access and duplicate records held by agencies); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 655–57 (1984) (stressing the significance of the statutory right conferred by Congress in the FOIA).

35. *See* 5 U.S.C. § 552(a)(3)(A) (2009) ("[E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, and fees (if any), and procedures to be followed, shall make the records promptly available to any person."); *see also* Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179, 186 (1995) (claiming that the FOIA requires the disclosure of nearly all records held by federal agencies).

36. 5 U.S.C. § 551(1) (2009) ("[A]gency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) Congress; [or] (B) the courts of the United States . . . ."); *see also* Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 49 (1994) (explaining that Congress and the judiciary do not fall under the disclosure requirements of the FOIA); Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179, 186 (1995) (noting that Congress and the judiciary are exempted from the disclosure requirements of the FOIA); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 652 n.7 (1984) (commenting that Congress exempted itself from the disclosure requirements of the FOIA).

37. *See* 5 U.S.C. § 552(a)(1) (2009) (mandating that each federal agency publish, in the Federal Register, guidelines for members of the public to follow when submitting requests for information); Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 354 (2004) (emphasizing that

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an agency refuses to disclose requested information, the requesting party may immediately seek judicial review.[38] Courts interpret the disclosure requirements broadly[39] and construe the nine disclosure exemptions narrowly.[40] The reviewing court is not

under the FOIA, no central body determines what information should be disclosed and the decision is left to the individual agency to make).

38. *See* 5 U.S.C. § 552(a)(4)(B) (2009) ("On complaint, [a] district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant."); *see also* Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 49 (1994) (recognizing that a party has a right to judicial review if an agency does not disclose the requested information); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 658 (1984) (implying that judicial review is an important factor of the FOIA's enforcement).

39. *See* John Doe Agency v. John Doe Corp., 493 U.S. 146, 151–52 (1989) ("'Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.'" (quoting EPA v. Mink, 410 U.S. 73, 80 (1973))); Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 69 (2006) (acknowledging that the FOIA presumes that "records belong to the people and should be disclosed unless they fall within one of nine specific" exceptions); Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179, 186 (1995) (emphasizing that the disclosure provisions under the FOIA are interpreted broadly); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 655 (1984) (explaining that the FOIA requires disclosure unless the agency can prove that the requested information falls within one of the nine exceptions under the Act).

40. *See Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (describing the exceptions under the FOIA as "limited exemptions [that] do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act"); Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 49 (1994) (stating that information must be disclosed to requestors unless it is specifically exempted under the FOIA); Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179, 186 (1995) (noting that the exceptions under the FOIA are interpreted narrowly); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 656 (1984) (recognizing that the exceptions under the FOIA are the exclusive exceptions that an agency can claim and that they are construed narrowly by courts); *cf.* Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 76 (2006) (arguing that, although Congress recognized the necessity for some confidentiality in government, the goal of the FOIA is full disclosure). The FOIA excepts records from disclosure that are:

> (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact

obligated to give deference to the decision of the agency.[41]

As a result of the FOIA, information requests from federal agencies have increased on a yearly basis.[42] In the majority of

properly classified pursuant to such Executive order;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute . . . if that statute—(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . , (E) would disclose techniques and procedures for law enforcement investigations or prosecutions . . . , or (F) could reasonably be expected to endanger the life or physical safety of any individual;
(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
(9) geological and geophysical information and data . . . .

5 U.S.C. § 552(b) (2009). If information falling under one of the exemptions can be separated from the requested information, the agency must do so. *See id.* (requiring the agency to separate exempted information from a record, if possible, and providing procedures for doing so).

41. *See* 5 U.S.C. § 552(a)(4)(B) (2009) ("[T]he court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in . . . this section, and the burden is on the agency . . . ."); *cf.* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 658 (1984) (arguing that allowing reviewing courts to make the determination on their own regarding whether information should be disclosed, without giving deference to the decision of the agency, is the source of the FOIA's power).

42. *Compare* U.S. Dep't of Justice, Office of Info. & Privacy, Summary of Annual FOIA Reports for Fiscal Year 2007, http://www.justice.gov/oip/foiapost/2008foiapost23.htm (last visited Dec. 22, 2011) (declaring that, in the 2007 fiscal year, federal agencies received 21,758,651 information requests), *with* U.S. Dep't of Justice, Office of Info. & Privacy, Summary of Annual FOIA Reports for Fiscal Year 2006, http://www.justice.gov/oip/foiapost/2007foiapost11.htm (last visited Dec. 22, 2011) (claiming that, in the 2006 fiscal year, federal agencies received 21,412,571 information

cases, agencies opt to disclose some or all of the requested information.[43] When information is not disclosed, agencies most often cite the Act's confidentiality and personal privacy exceptions as the reasons why information should be withheld.[44] The statistics indicate that the FOIA and the TPIA share similar objectives;[45] however, the two statutes contain several distinct differences.[46]

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requests). In 2007, the Department of Justice (DOJ) revised the reporting requirements for agencies under the FOIA. *See* U.S. Dep't of Justice, Office of Info. & Privacy, Summary of Annual FOIA Reports for Fiscal Year 2008, http://www.justice.gov/oip/foiapost/2009foiapost16.htm (last visited Dec. 22, 2011) (noting that the DOJ now only requires agencies to report requests that invoke the FOIA). As a result, the number of reported requests decreased dramatically in 2008. *See id.* (stating that in the 2008 fiscal year, federal agencies received 605,491 information requests under the FOIA).

43. *Cf.* Summary of Annual FOIA Reports for Fiscal Year 2008, http://www.justice.gov/oip/foiapost/2009foiapost16.htm (last visited Dec. 22, 2011) (claiming that, in 2008, federal agencies disclosed some or all of the requested information approximately 60% of the time). The percentage where the agency discloses information increases when the number of withdrawn requests is factored. *Cf. id.* (noting that in 2008 only 3% of requests made to federal agencies were eventually withdrawn by the requestor).

44. *See id.* (stating that the most common exceptions agencies cited in 2008 were those involving personal privacy); U.S. Dep't of Justice, Office of Info. & Privacy, Summary of Annual FOIA Reports for Fiscal Year 2007, http://www.justice.gov/oip/foiapost/2008foiapost23.htm (last visited Dec. 22, 2011) (claiming that the personal privacy exceptions were the ones most cited by agencies in 2007, but suggesting the law enforcement exception would be considered more frequently if each subsection, under the law enforcement exception, were not counted separately); Summary of Annual FOIA Reports for Fiscal Year 2006, http://www.justice.gov/oip/foiapost/ 2007foiapost11.htm (last visited Dec. 22, 2011) (declaring that the personal privacy exceptions were the ones most cited by agencies in 2006, but noting that this result was observed solely because the subsections of the law enforcement exception were counted separately for reporting purposes).

45. *Compare* Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 356 (2004) (concluding, following a study of Texas Attorney General opinions, that governmental bodies were required to disclose all or part of the requested information 74% of the time), *with* Summary of Annual FOIA Reports for Fiscal Year 2008, http://www.justice.gov/oip/foiapost/2009foiapost16.htm (last visited Dec. 22, 2011) (stating that federal agencies responded to FOIA requests by disclosing some or all of the requested information 60% of the time).

46. *See, e.g.*, Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 354 (2004) (distinguishing the TPIA, under which the Texas Attorney General determines what information needs to be disclosed, from the FOIA, which lets individual agencies make that determination). *Compare* 5 U.S.C. § 552(a)(4)(B) (2009) (allowing judicial review of an agency's decision to withhold information, and requiring the reviewing court to "determine the matter de novo" when an agency claims an exception under the Act), *with* TEX. GOV'T CODE ANN. § 552.301(a) (West 2004) (requiring a governmental body that wishes to claim an exception under the TPIA to submit a request for an opinion from the Texas Attorney

C. *The Texas Public Information Act*

The Texas Open Records Act[47] was enacted in 1973 along with the Texas Open Meetings Act.[48] Both statutes were part of a series of state open government laws created following Congress's passage of the FOIA.[49] The Texas Open Records Act and the Texas Open Meetings Act resulted, in large part, from an event called the "Sharpstown Scandal."[50] The Sharpstown Scandal was

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General), *and* Rainbow Group, Ltd. v. Tex. Emp't Comm'n, 897 S.W.2d 946, 949 (Tex. App.—Austin 1995, writ denied) (determining that while the opinion of the Texas Attorney General is not binding, it should be afforded "due consideration" because of the statutory mandate that the attorney general interpret the exceptions under the TPIA).

47. Act of 1973, 63d Leg., p. 1112, ch. 424, §§ 1, 14(d), *repealed by* Act of May 4, 1993, 73d Leg., R.S. ch. 268, § 46, 1993 Tex. Gen. Laws 583 (codified as amended at TEX. GOV'T CODE ANN. ch. 552 (West 2004)).

48. *See* Dustin C. George, *HIPAA, the Privacy Rule, and the Texas Public Information Act: How Texas Health and Human Services Agencies Should Referee the Game of Exception Ping-Pong that These Laws Play*, 8 TEX. TECH ADMIN. L.J. 277, 282–83 (2007) (commenting that the Texas Open Records Act was first passed in 1973); Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 352–54 (2004) (explaining that prior to 1973, when the Texas Open Records Act and the Texas Open Meetings Act were passed, Texas did not have any open government statutes); John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 596 (1987) (noting that the Texas Open Records Act and Texas Open Meetings Act were both passed by the Texas legislature in 1973); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 1 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (stating that the statute that would become the TPIA was enacted in 1973).

49. *See* John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 596 (1987) (emphasizing that the Texas Open Records Act and the Texas Open Meetings Act were "part of a wave of open government laws which began with the federal Freedom of Information Act"); *cf.* Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 76 (2006) (explaining that the FOIA influenced most state open record statutes); Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1407 (2000) (concluding that part of the FOIA's legacy is that it serves as a model for similar state legislation). The Texas Supreme Court has recognized similarities between the FOIA and the TPIA. *See* Indus. Found. of the S. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 681 (Tex. 1976) (acknowledging the similarities between the TPIA and the FOIA).

50. *See* Dustin C. George, *HIPAA, the Privacy Rule, and the Texas Public Information Act: How Texas Health and Human Services Agencies Should Referee the Game of Exception Ping-Pong that These Laws Play*, 8 TEX. TECH ADMIN. L.J. 277, 282–83 (2007) (noting that the Texas Open Records Act was passed in response to the revelations of corruption in government from the Sharpstown Scandal); Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 354 (2004) (describing how the Texas Open Records Act and the Texas Open Meetings Act were created as a result of the Sharpstown Scandal); John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 596 (1987) (summarizing that

a corruption incident involving members of the Texas legislature and other government employees.[51] Two legislators and an executive assistant were charged with conspiracy after they made stock purchases in a company called National Bankers Life Insurance Company.[52] These purchases occurred after correspondence between one of the officials, Gus Mutscher, and Frank W. Sharp, who was the chairman of the board of directors of National Bankers Life Insurance Company.[53] Sharp attempted to gain Mutscher's support for insurance legislation in which Sharp had an interest.[54] These initial charges led to further allegations of corruption in the Texas state government.[55]

In 1993, the Texas Open Records Act was amended and became the Texas Public Information Act.[56] Unlike the FOIA, the TPIA

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the Texas Open Records Act and the Texas Open Meetings Act were "spurred" by the events of the Sharpstown Scandal); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 2 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (stating that the Sharpstown Scandal provided the Texas legislature with "motivation" to pass open record legislation).

51. *See* Mutscher v. State, 514 S.W.2d 905, 909–12 (Tex. Crim. App. 1974) (summarizing the charges against two members of the Texas legislature and another government employee at the center of the scandal); *cf.* Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 354 (2004) (describing the Sharpstown Scandal as a "revelation of corruption in [the] Texas state government").

52. *See Mutscher*, 514 S.W.2d at 910–12 (detailing the stock purchases made by defendants Mutscher, Shannon, and McGinty). The defendants obtained large profits when they later sold the stock. *See generally id.* at 911 n.2 (summarizing the profits that each defendant received from his respective sale of the stock).

53. *Id.* at 910.

54. *See generally id.* at 910 (describing the correspondence between defendants Mutscher and Sharp).

55. *See* Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 354 (2004) (noting that the scandal eventually led to charges against two-dozen government officials); *Frank W. Sharp is Dead at 87; Financier in 70's Stock Scandal*, N.Y. TIMES, Apr. 5, 1993, at B8, *available at* 1993 WLNR 3408240 (claiming that the Sharpstown Scandal "destroyed dozens of political careers"). The scandal even affected Governor Preston Smith. *See, e.g.*, *Frank W. Sharp is Dead at 87; Financier in 70's Stock Scandal*, N.Y. TIMES, Apr. 5, 1993, at B8, *available at* 1993 WLNR 3408240 (explaining how Governor Smith lost his re-election campaign after it was discovered that he had profited from the stock transactions with Sharp).

56. Act of May 4, 1993, 73d Leg., R.S. ch. 268, § 46, 1993 Tex. Gen. Laws 583, 986 (codified as amended at TEX. GOV'T CODE ANN. ch. 552 (West 2004)); *see also* Dustin C. George, *HIPAA, the Privacy Rule, and the Texas Public Information Act: How Texas Health and Human Services Agencies Should Referee the Game of Exception Ping-Pong that These Laws Play*, 8 TEX. TECH ADMIN. L.J. 277, 283 (2007) (stating that the Texas Open Records Act became the TPIA in 1993). This change only amended the name of the

begins by explaining the policy supported by the Act.[57] The policy appears in section 552.001(a) of the TPIA, which states:

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. . . .[58]

Therefore, in support of this policy, the provisions of the Act are meant to be "interpreted liberally" with disclosure of information being favored over nondisclosure.[59]

Under the TPIA, public information is information "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" either by a governmental body or on its behalf for information it owns or has a right to access.[60] Any records that meet this definition must be

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Act and where it was codified. *Cf.* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 1 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining that the 1993 change was not substantive).

57. *See* TEX. GOV'T CODE ANN. § 552.001(a) (West 2004) (describing the policies justifying the TPIA); *see also* John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 596 (1987) (explaining the policies of the Texas Open Records Act, the predecessor to the TPIA); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 1 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that the preamble to the TPIA "declares the basis for the policy of open government").

58. TEX. GOV'T CODE ANN. § 552.001(a) (West 2004).

59. *Id.* ("This chapter shall be liberally construed in favor of granting a request for information."); *see also* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 2 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (indicating that the Act requires the Texas Attorney General to interpret it liberally in favor of granting requests); John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 596 (1987) (acknowledging that the TPIA is meant to be construed liberally); *cf.* Dustin C. George, *HIPAA, the Privacy Rule, and the Texas Public Information Act: How Texas Health and Human Services Agencies Should Referee the Game of Exception Ping-Pong that These Laws Play*, 8 TEX. TECH ADMIN. L.J. 277, 283 (2007) (explaining that all information must be disclosed under the TPIA unless it falls within an exception).

60. TEX. GOV'T CODE ANN. § 552.002(a) (West 2004); *see also* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 2 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining that information is "public" when it is

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disclosed upon request[61] unless the requested information falls within an exception to the Act.[62] Unlike the FOIA, which only has nine narrow exceptions, the TPIA contains dozens of exceptions to disclosure.[63]

While the FOIA allows individual agencies to decide whether

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maintained by a governmental body by law or during the transaction of official business and the body owns or has a right to it); Dustin C. George, *HIPAA, the Privacy Rule, and the Texas Public Information Act: How Texas Health and Human Services Agencies Should Referee the Game of Exception Ping-Pong that These Laws Play*, 8 TEX. TECH ADMIN. L.J. 277, 283 (2007) (explaining that "public information," under the TPIA, is any information collected under law or during the transaction of official business); John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 598 (1987) (describing "public information" as any information collected by a governmental body under law or during the transaction of official business).

61. *See* TEX. GOV'T CODE ANN. § 552.021 (West 2004) ("Public information is available to the public at a minimum during the normal business hours of the governmental body."); *see also* Holmes v. Morales, 924 S.W.2d 920, 922 (Tex. 1996) (stating that the Texas Open Records Act requires disclosure of information held by a governmental body); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 2 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf ("[I]nformation in the possession of a governmental body is generally available to the public.").

62. *See* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 2 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (interpreting the Act as requiring that all information be available to the public unless it falls within an exception); Dustin C. George, *HIPAA, the Privacy Rule, and the Texas Public Information Act: How Texas Health and Human Services Agencies Should Referee the Game of Exception Ping-Pong that These Laws Play*, 8 TEX. TECH ADMIN. L.J. 277, 283–84 (2007) (commenting that the public has a right to any governmental information that does not fall within an exception to the disclosure provisions of the TPIA); John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 596 (1987) (stating that the TPIA's predecessor, the Texas Open Records Act, made all information public that did not fall within one of the Act's exceptions). *See generally* TEX. GOV'T CODE ANN. §§ 552.101–.151 (West 2004) (listing the exceptions to disclosure under the TPIA).

63. *Compare* 5 U.S.C. § 552(b) (2009) (limiting agencies' ability to withhold information to nine specified exceptions), Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 49 (1994) (noting that the FOIA allows nine exemptions to disclosure), *and* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 656 (1984) (explaining that, under the FOIA, the nine exemptions to disclosure are exclusive), *with* TEX. GOV'T CODE ANN. §§ 552.101–.151 (West 2004 & Supp. 2009) (permitting numerous exemptions to the disclosure provisions of the TPIA), Dustin C. George, *HIPAA, the Privacy Rule, and the Texas Public Information Act: How Texas Health and Human Services Agencies Should Referee the Game of Exception Ping-Pong that These Laws Play*, 8 TEX. TECH ADMIN. L.J. 277, 283–84 (2007) (explaining that there are numerous exceptions to the disclosure provisions of the TPIA), *and* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 67–155 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (detailing the exceptions under the TPIA).

requested information falls within one of its exemptions, the TPIA empowers the Texas Attorney General to make that determination.[64] In Texas, when a governmental body believes that information should be withheld, it must first seek an opinion from the attorney general's office unless that office has already rendered a decision on the requested information.[65] After

64. *Compare* 5 U.S.C. § 552(a)(6)(A)(i) (2009) (noting that agencies must "determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore"), Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 49 (1994) (claiming that agencies have a "narrow window" to respond to requests for information under the FOIA), *and* Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 655–56 (1984) (describing how agencies must justify their determination not to release requested information), *with* TEX. GOV'T CODE ANN. § 552.301(a) (West Supp. 2009) ("A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception . . . ."), Dustin C. George, *HIPAA, the Privacy Rule, and the Texas Public Information Act: How Texas Health and Human Services Agencies Should Referee the Game of Exception Ping-Pong that These Laws Play*, 8 TEX. TECH ADMIN. L.J. 277, 284–85 (2007) (explaining how the TPIA empowers the attorney general to make decisions with regard to its interpretation), Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 354 (2004) (stating that the attorney general has the power to determine whether production is required under the TPIA), John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 599 (1987) (arguing that "the attorney general plays a crucial role in ensuring the Act's effectiveness"), *and* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 33–47 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining the attorney general's role in decisions involving the TPIA).

65. *See* TEX. GOV'T CODE ANN. § 552.301(a) (West Supp. 2009) (requiring governmental bodies to seek an opinion from the attorney general before withholding information unless that information has already been determined to fall under one of the TPIA's exemptions by the attorney general's office); Dustin C. George, *HIPAA, the Privacy Rule, and the Texas Public Information Act: How Texas Health and Human Services Agencies Should Referee the Game of Exception Ping-Pong that These Laws Play*, 8 TEX. TECH ADMIN. L.J. 277, 284 (2007) (commenting that governmental bodies must obtain a decision from the attorney general prior to refusing information unless that specific information is ruled exempt by the attorney general in a prior opinion); Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 354 (2004) (discussing the requirement that governmental bodies obtain an attorney general opinion prior to withholding information); John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 599 (1987) (describing how an attorney general opinion must be requested prior to refusing an information request unless the attorney general's office has already issued an opinion on the exact information at issue); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 33–34 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_

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requesting an opinion, the governmental body must send the attorney general the original information request, a signed statement or other evidence establishing the date the information request was received, copies of the information the governmental body seeks to withhold, and written arguments explaining why the information submitted to the attorney general falls under one of the TPIA's exceptions.[66] If the governmental body does not seek an attorney general opinion or misses the deadline for doing so, then the information is presumed to fall under the disclosure requirements of the TPIA.[67] Within forty-five business days of receiving a request for an opinion, the attorney general must issue

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hb2008.pdf (explaining that governmental bodies generally must seek an attorney general opinion if they believe that requested information falls under one of the exceptions to the TPIA). A governmental body must seek an attorney general opinion within ten business days of receiving the information request. *See* TEX. GOV'T CODE ANN. § 552.301(b) (West Supp. 2009) ("The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the [requestor's] written request."). A governmental body may waive any permissive exception to the TPIA. *See* Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (explaining that even when a statutory exception exists, the governmental body may choose to waive the exception and disclose the information unless the exception is mandatory).

66. *See* TEX. GOV'T CODE ANN. § 552.301(e) (West Supp. 2009) (detailing what must be submitted by governmental bodies to the attorney general in order to obtain an opinion letter); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 37–38 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining which materials the governmental body must submit in order to obtain an attorney general opinion); *cf.* John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 599 (1987) (explaining that the governmental body must specifically explain what exceptions apply to the information it is seeking to withhold). This information must all be submitted within fifteen days of the initial information request. *E.g.*, TEX. GOV'T CODE ANN. § 552.301(e) (West Supp. 2009) (requiring governmental bodies to submit their arguments and the information at issue within fifteen business days of receiving the initial request).

67. TEX. GOV'T CODE ANN. § 552.302 (West Supp. 2009) ("If a governmental body does not request an attorney general decision . . . 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 also* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 42 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining that if a governmental body misses any deadline under the TPIA, the records are presumed to be public information and must be disclosed unless there is a "compelling reason" not to do so). In most situations, the governmental body cannot show a "compelling reason" to overcome a presumption that the information should be disclosed. *See* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 42 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (claiming that the burden on a governmental body who fails to seek an attorney general opinion is difficult to overcome).

a decision explaining whether the information may be withheld under an exception to the TPIA or must be disclosed.[68]

Once the attorney general has made a determination about requested information, the governmental body cannot ask for reconsideration.[69] If the attorney general rules that any of the requested information must be disclosed, then the governmental body may respond by filing a suit against the attorney general seeking declaratory relief.[70] The TPIA gives the governmental body thirty business days after the attorney general's office issues its opinion to file a suit against the attorney general.[71] However,

68. TEX. GOV'T CODE ANN. § 552.306(a) (West Supp. 2009) ("[T]he attorney general shall promptly render a decision . . . not later than the 45th business day after the date the attorney general received the request for a decision."); *see also* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 46–47 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/ publicinfo_hb2008.pdf (stating that the attorney general has forty-five days to issue an opinion after the governmental body seeks an opinion); *cf.* Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 354 (2004) (explaining that the "short" forty-five day deadline for the attorney general to issue an opinion on information that a governmental body seeks to withhold is a "recent development" in the TPIA). The attorney general's office may extend the time limit by ten days if it gives the parties notice of its intent to do so. TEX. GOV'T CODE ANN. § 552.306(a) (West Supp. 2009) ("[T]he attorney general may extend the period for issuing the decision by an additional 10 business days by informing the governmental body and the requestor, during the original 45-day period, of the reason for the delay."); *see also* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 47 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (claiming that the attorney general's office may seek a ten-day extension if it notifies the parties of its intent to do so).

69. *See, e.g.*, TEX. GOV'T CODE ANN. § 552.301(f)(1) (West Supp. 2009) (stating that a governmental body may not ask for an attorney general's opinion if "the governmental body has previously requested and received a determination from the attorney general concerning the precise information at issue in a pending request").

70. *See* TEX. GOV'T CODE ANN. § 552.324 (West Supp. 2009) ("The only suit a governmental body may file seeking to withhold information from a requestor is a suit that . . . seeks declaratory relief from compliance with a decision by the attorney general . . . ."); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 58 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that there are judicial remedies available to governmental bodies after the attorney general issues an opinion that requested information be disclosed). The proper venue for such a suit is Travis County. *See* TEX. GOV'T CODE ANN. § 552.324(a)(1) (West Supp. 2009) (declaring that the suit against the attorney general must be filed in Travis County); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 58 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that Travis County is the county of proper venue for a declaratory suit against the attorney general).

71. TEX. GOV'T CODE ANN. § 552.324(b) (West Supp. 2009) (requiring that a suit by a governmental body, challenging an attorney general's opinion that requested information must be disclosed, be brought no later than thirty business days after the attorney general's office issues its opinion); TEX. ATT'Y GEN., PUBLIC INFORMATION

the suit must be filed within ten business days if the governmental body intends to continue withholding the information; otherwise, the governmental body's public information officer could face criminal charges.[72] The attorney general's office may not release, under any circumstance, the information directly to the requestor.[73] If the governmental body refuses to release information that the attorney general has determined to be public information, or if it refuses to seek an attorney general opinion, then the requestor may file a suit for writ of mandamus to compel the governmental body to disclose the information.[74] A requestor may also seek mandamus to compel a governmental body to

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HANDBOOK 59 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that the TPIA requires a governmental body to file a suit against the attorney general within thirty business days after receiving an opinion).

72. TEX. GOV'T CODE ANN. § 552.353 (West Supp. 2009) (declaring that an officer of public information commits a misdemeanor if the officer does not disclose information, as required by the attorney general, unless the officer has filed a lawsuit against the attorney general's office for its decision within ten business days of receiving its decision); *cf.* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 55–56 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining that a public information officer has an affirmative defense to criminal prosecution if the governmental body files suit against the attorney general no later than ten business days after the attorney general's office releases its opinion).

73. TEX. GOV'T CODE ANN. § 552.3035 (West 2004) ("The attorney general may not disclose to the requestor or the public any information submitted to the attorney general . . . ."); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 46 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that the TPIA "expressly prohibits the attorney general from disclosing information that is the subject of a request for an attorney general decision").

74. TEX. GOV'T CODE ANN. § 552.321(a) (West 2004) ("A requestor . . . may file a suit for a writ of mandamus compelling a governmental body to make information available for public inspection if the governmental body refuses to request an attorney general's decision . . . or refuses to supply . . . information that the attorney general has determined to be public information . . . ."); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 56 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining that a requestor has a right to mandamus relief if a governmental body refuses to seek an attorney general opinion prior to refusing to disclose records or if the governmental body withholds records previously determined to be public information by the attorney general). A requestor seeking mandamus relief against a governmental body must file suit in the county where the governmental body has its principle office. *See* TEX. GOV'T CODE ANN. § 552.321(b) (West 2004) ("A suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located."); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 56 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (stating that venue is proper, for a mandamus proceeding filed by a requestor to compel a governmental body to disclose information, in the county where the governmental body's main office is located).

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disclose information if the attorney general rules that any of the information falls within an exception to the TPIA.[75]

The TPIA contains no specific rules concerning electronic communications, although the definition of public information under the Act does include the media on which such information is stored.[76] Furthermore, the TPIA does not distinguish between information stored in public sources and that stored in private sources.[77] Instead, the Act requires that public information kept on behalf of a governmental body be owned by or rightfully accessible to the governmental body.[78] The attorney general, through opinion letters, has interpreted the TPIA to apply to e-mails maintained in work accounts[79] and personal accounts.[80]

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75. *See* Tex. Dep't of Pub. Safety v. Gilbreath, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ) (holding that an attorney general opinion ruling that requested information falls under one of the TPIA's exceptions does not preclude the requestor from filing a petition for writ of mandamus); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 56 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining that the TPIA allows a requestor to seek mandamus relief even if the attorney general has ruled that the records at issue are not public information).

76. *See* TEX. GOV'T CODE ANN. § 552.002(b) (West 2004) ("The media on which public information is recorded include[s] . . . a magnetic, optical, or solid state device that can store an electronic signal."); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 16 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that the TPIA's definition of public information includes devices "that can store an electronic signal").

77. *See generally* TEX. GOV'T CODE ANN. § 552.002 (West 2004) (defining public information and listing the media that public information can be stored on).

78. TEX. GOV'T CODE ANN. § 552.002(a) (West 2004) ("'[P]ublic information' means information that is collected, assembled, or maintained . . . 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 also* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 2 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining that, under the TPIA, information must be maintained by the governmental body or on its behalf, and that the governmental body owns it or has a right of access to it).

79. *Cf.* Tex. Att'y Gen. OR2004-10226 (holding that a municipality must release e-mails from work accounts that were not exempt under the TPIA); Tex. Att'y Gen. OR2004-0234 (requiring the Texas Education Agency to disclose all requested e-mails that were not covered under one of the TPIA's exemptions); Tex. Att'y Gen. OR2003-3512 (ruling that a sheriff's department was obligated, under the TPIA, to release e-mail messages requested from employees' work accounts).

80. *See* Tex. Att'y Gen. OR2005-01126 (stating that information in a public official's personal e-mail account may be covered by the TPIA if it relates to official business); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 17 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf ("[T]he attorney general has determined in several informal letter rulings that e-mail correspondence in personal e-mail accounts can sometimes be subject to the Act."); *cf.* Tex. Att'y Gen.

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III. *CITY OF DALLAS V. DALLAS MORNING NEWS, LP*

In *City of Dallas v. Dallas Morning News, LP*, the Dallas court of appeals made an important decision regarding the TPIA and its applicability to modern technology.[81] The controversy in *Dallas Morning News* surrounded two separate information requests made by newspaper reporters Dave Levinthal and Reese Dunklin for personal e-mails from several Dallas government officials, including former Dallas Mayor Laura Miller.[82] The purpose of the requests was to obtain e-mails relevant to a federal corruption investigation involving Dallas city employees.[83]

OR2007-07157 (mandating disclosure of personal e-mails not exempted under the TPIA); Tex. Att'y Gen. OR2005-06753 (requiring a municipality to disclose personal e-mails requested under the TPIA); Tex. Att'y Gen. OR2003-1890 (noting that records' classification as public information does not depend "on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information"); Tex. Att'y Gen. OR2003-0951 (declaring that a school district was required to disclose personal e-mails because they met the definition of public information under the TPIA).

81. *See generally* City of Dallas v. Dallas Morning News, LP, 281 S.W.3d 708, 718 (Tex. App.—Dallas 2009, no pet.) (reversing a trial court's decision granting partial summary judgment in favor of a requestor seeking disclosure of personal e-mails and remanding the case to the trial court for further proceedings).

82. *See id.* at 710–11 (explaining that two reporters for the *Dallas Morning News* requested, among other records, e-mails to and from Mayor Miller as well as emails from other Dallas City Hall employees); Appellant's Brief & Appendix at 2, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2008 WL 4223190 (noting that the controversy involved information requests by *Dallas Morning News* reporters); Brief of Appellee at 2, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2005 WL 6197478 (describing the two separate information requests made by *Dallas Morning News* reporters for e-mails from Mayor Miller and other Dallas officials); Michael Grabell, *News Suing City of Dallas in Bid to Get Officials' E-mails Released: Paper Had Requested Messages on Housing, Hunt Tax Abatement*, DALLAS MORNING NEWS, July 18, 2006, at 5B, *available at* 2006 WLNR 12366230 (indicating that the controversy arose from TPIA requests by two news reporters); Jennifer LaFleur, *News Wins E-mails' Release: Dallas City Must Provide Messages from Officials' Personal Accounts*, DALLAS MORNING NEWS, Oct. 30, 2007, at 1B, *available at* 2007 WLNR 21386944 (stating that the issue in *Dallas Morning News* was over TPIA requests for e-mails sent and received by Mayor Miller and other Dallas City Hall employees).

83. *See* Brief of Appellee at 3, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2005 WL 6197478 (explaining that the information requests at issue were "related to the federal investigation into allegations of corruption involving officials in city-sponsored affordable housing developments"); Michael Grabell, *News Suing City of Dallas in Bid to Get Officials' E-mails Released: Paper Had Requested Messages on Housing, Hunt Tax Abatement*, DALLAS MORNING NEWS, July 18, 2006, at 5B, *available at* 2006 WLNR 12366230 (stating that one of the reporters requesting information had been working on a story related to an FBI investigation of corruption at Dallas City Hall); Jennifer LaFleur, *News Wins E-mails' Release: Dallas City Must Provide Messages from*

In response to both requests, the City sought letter rulings from the attorney general arguing that some of the information fell under exceptions to the TPIA.[84] In one of its requests for an attorney general opinion, the City did not contest that the e-mails were public information under the Act.[85] In its other request, the City initially argued that the e-mails did not meet the TPIA's definition of public information, then later redacted that argument.[86]

When the newspaper and the City failed to resolve issues regarding both requests, the newspaper filed suit seeking a writ of mandamus to compel the City to disclose the requested e-mails as well as grant declaratory relief.[87] Both parties filed motions for summary judgment.[88] The trial court subsequently granted the newspaper's motion for partial summary judgment.[89]

On appeal, the Dallas court of appeals first determined that the City did not waive its right to withhold the requested e-mails by

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Officials' Personal Accounts, DALLAS MORNING NEWS, Oct. 30, 2007, at 1B, *available at* 2007 WLNR 21386944 (explaining the request for e-mails was related to an FBI investigation into corruption among Dallas officials).

84. *See Dallas Morning News*, 281 S.W.3d at 711 (stating that the City of Dallas sought opinions from the attorney general's office in response to both information requests); Appellant's Brief & Appendix at 3, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2008 WL 4223190 (claiming that the city sought decisions from the attorney general to determine whether certain information requested was exempt from the TPIA); Brief of Appellee at 3, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2005 WL 6197478 (acknowledging the city had sought opinion letters from the attorney general in response to the information requests).

85. *Dallas Morning News*, 281 S.W.3d at 711 (explaining that the city sought an attorney general opinion in response to the Dunklin request, but that the city did not argue that all personal e-mails should be excepted from disclosure under the TPIA).

86. *Id.* (stating that in its submission to the attorney general in response to the Levinthal request, the city originally asserted that e-mails sent to and from Mayor Miller's personal e-mail account did not meet the definition of public information under the TPIA, but subsequently redacted that argument).

87. City of Dallas v. Dallas Morning News, LP, 281 S.W.3d 708, 711 (Tex. App.—Dallas 2008, no pet.) (describing how the parties failed to resolve their issues over the disclosure of the requested e-mails, resulting in the newspaper filing a suit seeking a writ of mandamus and declaratory relief).

88. *See id.* at 711–12 (stating that the newspaper filed a motion for partial summary judgment and that the City subsequently filed a motion for summary judgment).

89. *See id.* at 712 (noting that the trial court granted the requestor's partial summary judgment); Jennifer LaFleur, *News Wins E-mails' Release: Dallas City Must Provide Messages from Officials' Personal Accounts*, DALLAS MORNING NEWS, Oct. 30, 2007, at 1B, *available at* 2007 WLNR 21386944 (reporting that the trial court ruled that the City must comply with the newspaper's request for disclosure of certain personal e-mails).

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failing to seek an attorney general opinion.[90] Since the City did not assert that the e-mails were exempt from the TPIA, but instead argued that they did not meet the definition of public information, the court reasoned that the City was under no obligation to seek the attorney general's opinion prior to withholding the requested e-mails.[91] Next, the court decided that personal e-mails did not meet the definition of public information under the TPIA unless the newspaper could prove that the governmental body owned the e-mails or had a right to access them.[92] Since both parties could not meet the burden to warrant summary judgment, the court remanded the case to the trial court.[93]

IV. *DALLAS MORNING NEWS* HIGHLIGHTS MAJOR DEFICIENCIES IN THE TPIA

Dallas Morning News marked the first time a Texas court ruled on whether personal e-mails were subject to the disclosure provisions of the TPIA.[94] The case represents a nationwide pattern of cases where courts have placed limitations on access to e-mail records in order to protect personal privacy.[95] While appropriate

90. *See Dallas Morning News*, 281 S.W.3d at 714 (indicating that the City did not have a responsibility to seek an attorney general opinion).

91. *See id.* ("The City was required to seek an attorney general decision only as to information it believed to be an 'exception.' The City does not claim an exception. Rather, it argues that personal account e-mails are not public information subject to the Act." (citing TEX. GOV'T. CODE ANN. § 552. 301(a) (West 2004))).

92. *See id.* ("Accordingly, the News had the burden to show the City had refused to produce existing e-mails . . . owned by the City or to which it has a right of access.").

93. *See id.* at 718 (affirming the trial court's denial of the City's motion for summary judgment and reversing the summary judgment granted in favor of the newspaper by the trial court).

94. *See, e.g.*, Jennifer LaFleur, *News Wins E-mails' Release: Dallas City Must Provide Messages from Officials' Personal Accounts*, DALLAS MORNING NEWS, Oct. 30, 2007, at 1B, *available at* 2007 WLNR 21386944 (quoting an executive of the newspaper's parent company as claiming that the *Dallas Morning News* case was the first Texas case to determine whether personal e-mails were subject to the TPIA).

95. *Cf.* Peter S. Kozinets, *Access to the E-mail Records of Public Officials: Safeguarding the Public's Right to Know*, COMM. LAW., Summer 2007, at 17, 18 ("Despite statutory language that would seem to indicate a contrary result, several [state] courts have held that the presence of e-mails on a publicly funded computer system does not automatically render the e-mails subject to public records laws. Rather, these courts have held that the e-mails may be deemed to fall within the scope of public records laws only if they relate to public business and only after a trial judge reviews them in camera."). Some states require the requested e-mails to be related to public business in some manner. *Cf.*

limits on open records statutes are necessary, the TPIA should be interpreted as facilitating rather than restricting the disclosure of information.

Dallas Morning News illustrates some of the flaws with the current TPIA; however, the case itself is not the problem. The *Dallas Morning News* opinion does not directly contradict the statute in any way.[96] Under the TPIA, a record's status as public information depends in large part on the governmental body's relationship to that information.[97] Since the City did not own these e-mails and its right of access to them is unclear, it was reasonable for the court to determine that the newspaper had not

Griffis v. Pinal Cnty., 156 P.3d 418, 422 (Ariz. 2007) (mandating that Arizona courts apply a balancing test to determine whether "privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure"); Pulaski Cnty. v. Ark. Democrat-Gazette, Inc., 260 S.W.3d 718, 725 (Ark. 2007) (holding that courts should conduct an in-camera review of requested e-mails to determine whether a "substantial nexus" exists between the requested e-mails and government business); Denver Publ'g Co. v. Bd. of Cnty. Comm'rs of Arapahoe, 121 P.3d 190, 202 (Colo. 2005) (concluding that the Colorado Open Records Act only applies to e-mails "that address the performance of public functions or the receipt or expenditure of public funds"); Cowles Publ'g Co. v. Kootenai Cnty. Bd. of Cnty. Comm'rs, 159 P.3d 896, 901 (Idaho 2007) (declaring that information is a "public record" if it has a "relation to [a] legitimate public interest"); State *ex rel.* Wilson-Simmons v. Lake Cnty. Sheriff's Dep't, 693 N.E.2d 789, 792–93 (Ohio 1998) (per curiam) (finding that e-mails containing racial slurs and insults did not meet the criteria for public information under Ohio law because they did not document the governmental body's "organization, functions, policies, decisions, procedures, operations, or other activities"); Tiberino v. Spokane Cnty., 13 P.3d 1104, 1109 (Wash. Ct. App. 2000) (noting that disclosure of records is required under Washington law only when there is a showing of a legitimate public interest in the records). *See generally* Peter S. Kozinets, *Access to the E-mail Records of Public Officials: Safeguarding the Public's Right to Know*, COMM. LAW., Summer 2007, at 17, 18–21 (tracking the decisions of state courts that have required a connection between e-mail messages and legitimate public functions). Other states have specifically placed restrictions on a requestor's ability to obtain personal e-mails. *Cf.* State v. City of Clearwater, 863 So. 2d 149, 155 (Fla. 2003) (ruling that personal e-mails do not meet the definition of public information under Florida law).

96. *Compare* TEX. GOV'T CODE ANN. § 552.002(a) (West 2004) (defining public information to be information that is maintained "by a governmental body[] or . . . for a governmental body and [that] the governmental body owns . . . or has a right of access to"), *with Dallas Morning News*, 281 S.W.3d at 714 ("Accordingly, the News had the burden to show the City had refused to produce existing e-mails . . . owned by the City or to which it has a right of access").

97. *See* TEX. GOV'T CODE ANN. § 552.002(a) (West 2004) (stating that public information must be owned by the governmental body or the governmental body must have a right to access it); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 2 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that the TPIA requires the governmental body to maintain, own, or have access to information for it to be subject to the Act).

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met its summary judgment burden. The court's decision does not misinterpret the TPIA. Instead, the opinion highlights major limitations in the current TPIA, especially with regard to modern technology.

The result in *Dallas Morning News* cannot be justified with the policies behind the TPIA. The TPIA states "the policy of [Texas] 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."[98] Furthermore, the TPIA must be "liberally construed in favor of" disclosure.[99] Withholding information that would otherwise be subject to the TPIA because it is created or maintained by an individual rather than an institution does not conform to these policies. Permitting such a loophole to the disclosure requirements of the TPIA directly contradicts the policies stated by the Texas legislature in the Act and could eventually render the statute meaningless.[100]

Since 1989, the TPIA has required the governmental body to have a "right of access" to requested information.[101] However,

98. TEX. GOV'T CODE ANN. § 552.001(a) (West 2004).

99. TEX. GOV'T CODE ANN. § 552.001(b) (West 2004); *see also* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 2 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that the TPIA requires the Texas attorney general's office to liberally construe the Act in favor of granting the request for information); John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 596 (1987) (explaining that the Texas Open Records Act, the predecessor to the TPIA, mandated that the statute should be "liberally construed").

100. *Cf.* Tex. Att'y Gen. OR1985-425 ("If a governmental body could withhold information which clearly relates to 'official business' on the ground that the information is maintained by the individual members of that body rather than in the body's administrative offices, it could easily and with impunity circumvent disclosure requirements. The legislature could not possibly have intended to allow governmental entities to escape from the Act's disclosure requirements in this manner."); *see also* Tex. Att'y Gen. OR1995-635 (suggesting that a governmental body should not be allowed to circumvent the disclosure provisions of the TPIA merely because information is maintained by an individual member of the governmental body rather than the institution itself and acknowledging that such a practice violates the intent of the Texas legislature); Brief of Appellee at 19, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2005 WL 6197478 (arguing that allowing governmental bodies to avoid the disclosure provisions of the TPIA because the records at issue are held by an employee rather than the governmental body itself would reduce the effectiveness of the statute and violate the clear intent of the Texas legislature).

101. *See generally* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 12 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that the right-of-access requirement was added to the TPIA in 1989). Prior to 1989,

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the access provision has only recently become a significant issue of dispute between requestors and governmental bodies.[102] Two compelling factors explain why the provision has become more significant in recent years. First, the access provision predates much of the modern technology that is frequently used in business today. When the Texas legislature enacted the first Texas Open Records Act in 1973,[103] e-mailing, text messaging, and other forms of modern communication technology did not yet exist. Today, this technology is frequently used by government agencies to

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the attorney general ruled that information held by third parties on behalf of a governmental body could be public information under the TPIA. *See, e.g.*, John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 598 (1987) (noting that the Texas Open Records Act required requested information to actually be held by the governmental body, but that the attorney general considered information held by third parties to be public if it met several criteria, one of which was that the governmental body had a right of access to the information); *cf.* Tex. Att'y Gen. OR1987-462 (holding that a law firm maintaining records on behalf of a public university acted as an agent of the university for purposes of the TPIA); Tex. Att'y Gen. OR1986-437 (ruling that records held by an independent contractor for a public utility district were subject to disclosure under the Texas Open Records Act).

102. *Cf.* Tex. Att'y Gen. OR2003-1890 (declaring that personal e-mails were not exempt from the TPIA solely because they were in the possession of employees and not the governmental body); Tex. Att'y Gen. OR2003-0951 (holding that a governmental body could have a right to access personal e-mails even though they were in possession of individuals and the governmental body did not have a policy establishing its right to the information). *Compare* Appellant's Brief & Appendix at 30, City of Dallas v. Dallas Morning News, LP, 281 S.W.3d 708 (Tex. App.—Dallas 2009, no pet.) (No. 05-07-01736-CV), 2008 WL 4223190 (contending that the City of Dallas did not have a right to access a city official's e-mails stored on a personal cellular phone), *with* Brief of Appellee at 20, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2005 WL 6197478 (arguing that a city has constructive possession of e-mails created during the transaction of official business even if they are maintained by an individual on a personal source). *But cf.* Tex. Att'y Gen. OR1985-425 (declaring that requested records were public information, under the statute, even though they were within the possession of individual school board members rather than the school district itself); Tex. Att'y Gen. OR1982-332 (determining that requested letters were subject to disclosure even though they were held by individual school board members and not the school district itself).

103. Act of 1973, 63d Leg., p. 1112, ch. 424, §§ 1, 14(d), *repealed by* Act of May 4, 1993, 73d Leg., R.S. ch. 268, § 46, 1993 Tex. Gen. Laws 583 (codified as amended at TEX. GOV'T CODE ANN. ch. 552 (West 2004)); *see also* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 1 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining that the TPIA was first adopted in 1973); Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 352, 354 (2004) (noting that the TPIA was first enacted in 1973 as the Texas Open Records Act); John H. Spurgin, II, *The Texas Open Records Act*, 50 TEX. B.J. 596, 596 (1987) (stating that the Texas Open Records Act was enacted in 1973).

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conduct business.[104] Electronic records can be created more quickly and easily than written records.[105] As a result, it is more feasible to create and maintain records personally today than it was when the original Texas Open Records Act was passed. Second, governmental bodies did not have to contend with as many requests for information in the 1970s as they do today.[106] Fewer requests resulted in less controversy between requestors and the governmental bodies.[107] As the number of open records requests increased, issues that may have seemed less significant became more important.[108]

Dallas Morning News illustrates the need for the Texas legislature to amend the TPIA's requirement that governmental bodies own or have a right of access to requested information. The right of access requirement is so vague that it led the court in the *Dallas Morning News* case and the Texas Attorney General to reach different interpretations of the same language.[109] The

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104. *Cf.* MICHAEL R. ARKFELD, ELECTRONIC DISCOVERY AND EVIDENCE § 1.1 (perm. ed., rev. vol. 2006) (referencing a study that found that 93% of information created in the United States was in electronic format); Peter S. Kozinets, *Access to the E-mail Records of Public Officials: Safeguarding the Public's Right to Know*, COMM. LAW., Summer 2007, at 17, 18 (emphasizing the importance of e-mail technology in government).

105. *See* John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to E-Mail Correspondence*, 12 GEO. MASON L. REV. 719, 770 (2004) (explaining how e-mails can be created more quickly and easily compared to written correspondence and leave a better "record trail" than other forms of traditional correspondence).

106. *See* Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 352, 355 (2004) (declaring that from 1973 to 1978 there were a total of 220 open records rulings, while in 2003 there were over 9,000 requests to the attorney general for letter rulings).

107. *Cf. id.* at 355 (indicating that there were a low number of requests for attorney general opinions during the early years of the TPIA).

108. *Cf.* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 17 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (noting that older attorney general opinions regarding the disclosure of personal notes could not be relied upon when determining whether personal e-mails had to be disclosed).

109. *Compare* City of Dallas v. Dallas Morning News, LP, 281 S.W.3d 708, 714 (Tex. App.—Dallas 2009, no pet.) (requiring the requestor to show that the governmental body refused to disclose all e-mails that it owned or had a right of access to), *with* Tex. Att'y Gen. OR2003-1890 (mandating the disclosure of requested e-mails even though they were held by an individual and the governmental body had no particular policy involving its right to access the e-mails), Tex. Att'y Gen. OR2003-0951 (holding that e-mails were not exempt from the TPIA's disclosure requirements even though the governmental body was not authorized by any policy, statute, or ordinance to collect or maintain an individual's personal e-mails), *and* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 17 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (ac-

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Dallas Morning News decision needlessly places burdens on requesting parties since some governmental bodies have no formal policies establishing the governmental body's right to access information created by individual employees through personal sources.[110] It is inconceivable that the Texas legislature intended for the "public information" status of records to depend on the records' physical locations. Such a requirement would allow a governmental employee to avoid the TPIA altogether if he or she chooses to do so.[111] To ensure that the policies of disclosure are maintained, the TPIA must be amended to adapt to modern technology.

V. POSSIBLE SOLUTIONS TO ENSURE THAT PUBLIC INFORMATION IS PROPERLY DISCLOSED

A. *Use Content Rather than Physical Properties to Define Public Information Under the TPIA*

One possible solution to the problem presented by e-mail and other forms of modern technology would be to amend completely the TPIA's definition of public information. Under the current statute, records are classified as public information based on both their content and certain physical characteristics, such as the medium they are stored on and the people who have access to them.[112] While physical characteristics are useful to determine

knowledging that the attorney general's office has determined that personal e-mails can constitute public information in some circumstances).

110. *Cf.* Tex. Att'y Gen. OR2003-1890 (noting that the municipality seeking the attorney general opinion did not have custody or access to the requested e-mails and stating that "characterization of information as 'public information' under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information"); Tex. Att'y Gen. OR2003-0951 (acknowledging that no law or ordinance requires the school district seeking the attorney general opinion to collect or maintain the requested e-mails).

111. *See, e.g.*, Tex. Att'y Gen. OR1985-425 ("If a governmental body could withhold information which clearly relates to 'official business' on the ground that the information is maintained by the individual members of that body rather than in the body's administrative offices, it could easily and with impunity circumvent disclosure requirements."); *see also* Brief of Appellee at 19, *Dallas Morning News*, 281 S.W.3d 708 (No. 05-07-01736-CV), 2005 WL 6197478 (warning that allowing governmental bodies to withhold e-mails in a personal account could undermine the effectiveness of the TPIA).

112. *Compare* TEX. GOV'T CODE ANN. § 552.002(a) (West 2004) (defining "public information" as "information that is collected, assembled or maintained" for "the

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what actually constitutes a record, the content of the information should always be carefully considered.[113] The attorney general included content as one of its criteria to determine whether records maintained outside the governmental body's possession constituted "public information."[114]

A completely content-based definition of "public information" would resolve many of the problems presented by personal e-mail. Under such a definition, records would be classified as public information based on whether a link could be established between the requested information and official business without considering the physical characteristics of the information. This revision would bypass the issue of determining who holds the information and would conform to the policies stated at the initial enactment of the TPIA. Even if the definition of public information is changed, a strong presumption in favor of disclosing public information should still exist. Information that seems personal at first glance may instead have significant connections to official business.[115]

However, completely redefining the TPIA's definition of public information would have significant drawbacks. First, such a

transaction of official business"), *with* TEX. GOV'T CODE ANN. § 552.002(a)(1)–(2) (West 2004) (requiring that public information be collected "by a governmental body[] or . . . for a governmental body and [that] the governmental body own[] the information or ha[ve] a right of access to it"), *and* TEX. GOV'T CODE ANN. § 552.002(b)–(c) (West 2004) (listing the media that public information may be recorded and maintained on).

113. *Cf.* Peter S. Kozinets, *Access to the E-mail Records of Public Officials: Safeguarding the Public's Right to Know*, COMM. LAW., Summer 2007, at 17, 23 (emphasizing the importance of considering content when a court conducts an in-camera review to determine whether information should be disclosed).

114. *See* Tex. Att'y Gen. OR1995-635 (discussing relevant factors to determine whether information is private or public, including "who prepared the document; the nature of its contents; its purpose or use; who possessed it; who had access to it; whether the [governmental body] required its preparation; and whether its existence was necessary to or in furtherance of [official] business"); Tex. Att'y Gen. OR1999-3778 (noting that factors to determine whether a document is personal or public information include the substance of its content). The test utilized by the attorney general was adopted from a similar test used by the United States Court of Appeals for the Fifth Circuit to determine whether documents were corporate or legal in nature. *Cf. In re* Grand Jury Proceedings, 55 F.3d 1012, 1014–15 (5th Cir. 1995) (per curiam) (adopting the multi-part test that was later utilized by the attorney general).

115. *See* Peter S. Kozinets, *Access to the E-mail Records of Public Officials: Safeguarding the Public's Right to Know*, COMM. LAW., Summer 2007, at 17, 17 (explaining the difficulties in applying open-records statutes to e-mails that are seemingly personal but that have deeper, less obvious effects on governmental activity).

radical departure from the current TPIA would be costly in both time and resources. The attorney general's office already has seen exponential growth in the number of requests for opinions related to open records issues.[116] Many of these cases can currently be resolved with Open Records Letter Rulings—informal rulings unique to the particular information at issue.[117] Major changes in the TPIA would require the attorney general to issue more Open Records Decisions, which are formal opinions reserved for more difficult legal questions pertaining to public information requests.[118] This increased workload for the attorney general's office would not be an efficient use of resources. Second, major changes to the TPIA could result in less clarity in the law. The precedential value of existing attorney general opinions and case law involving the TPIA would be questionable if major changes were made to the Act. Finally, using physical characteristics to describe "public information" does have some benefits. For example, the attorney general's office and Texas courts have determined that the TPIA does not require a governmental body to release information that no longer exists at the time the request is made because it does not meet the physical definition of public information.[119] Eliminating physical characteristics could create more conflict over what actually constitutes a record. Therefore,

116. *See, e.g.*, Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 355 (2004) (acknowledging the significant increase in the workload at the Open Records Division of the attorney general's office).

117. *See, e.g.*, *id.* (stating that informal Open Record Letter Rulings comprise the majority of decisions issued by the attorney general's office and that they are issued when the information request can be decided using already established law). These decisions have no precedential value when seeking an opinion from the attorney general's office. *Id.* at 355–56.

118. *See, e.g.*, *id.* at 355 (noting that Open Records Decisions are formal rulings issued when there is a complex legal issue at stake). Open Records Decisions have precedential value when submitting a brief to the attorney general's office. *Id.*

119. *See* A & T Consultants, Inc. v. Sharp, 904 S.W.2d 668, 676 (Tex. 1995) (explaining that the Texas Open Records Act did not require governmental bodies to create new information to satisfy an information request); Econ. Opportunities Dev. Corp. v. Bustamante, 562 S.W.2d 266, 268 (Tex. Civ. App.—San Antonio 1978, writ dism'd) (ruling that a governmental body cannot be compelled to disclose information that does not exist, as such an act would be "impossible"); Tex. Att'y Gen. OR1986-452 (indicating that nonexistent records did not meet the Texas Open Records Act's definition of public information); *see also* Tex. Att'y Gen. OR2003-3512 (acknowledging that the TPIA does not require governmental bodies to create new records when a request is received, as such records do not meet the definition of "public information").

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completely redefining public information would likely be inefficient and unfeasible.

B. *Amend the TPIA So It Establishes a Governmental Body's "Right of Access" to Any Information Created by an Employee Related to Official Business*

Instead of making major changes to the TPIA, the Texas legislature should make minor amendments to the Act to ensure that personal e-mails and similar communications meet the same disclosure requirements as other forms of records. One significant change would be to amend the "right of access" provision so that it establishes a governmental body's right of access to any information created by one of its employees in the transaction of official business, regardless of the source. Such legislative action would not be drastic, as the attorney general's office has already ruled that e-mails maintained by employees in personal accounts and related to official business should be disclosed even when the governmental body does not sanction their creation.[120] Furthermore, the effect of amending the TPIA's right of access requirement would likely be limited to modern communication technology. E-mail, text messaging, and similar media are unique in that they can be used quickly and easily.[121] Other forms of record keeping are not as convenient and, therefore, less likely to be created and stored in a personal setting.

An individual employee does not constitute a governmental body for the purposes of the TPIA.[122] However, the attorney general's office and Texas courts have recognized instances where a governmental body can contract with a third party who acts as

120. *See* Tex. Att'y Gen. OR2005-06753 (holding that a mayor's personal e-mails must be disclosed because they involved the transaction of official business); Tex. Att'y Gen. OR2003-1890 (compelling disclosure of requested phone records and e-mails that related to government business even though they were maintained by individual employees rather than the governmental body itself); Tex. Att'y Gen. OR2003-0951 (requiring disclosure of e-mails from school board members' personal accounts even though they were not created or maintained at the direction of the district).

121. *See* John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to E-Mail Correspondence*, 12 GEO. MASON L. REV. 719, 770 (2004) (emphasizing the convenience of e-mail as compared to written correspondence).

122. *See Keever v. Finlan*, 988 S.W.2d 300, 305 (Tex. App.—Dallas 1999, pet. dism'd) (explaining that an individual school board member did not constitute a governmental body under the Texas Open Records Act).

the governmental body's "agent" for purposes of the TPIA.[123] Even though the third party holds the information, the governmental body retains "constructive custody" over it, making it subject to disclosure under the TPIA.[124] If the Act extends to third parties who act on behalf of a governmental body, the Act should also extend to the governmental body's employees. When employees use personal e-mail accounts or telephones to conduct official business, they do so on behalf of the governmental body, whether they have permission to do so or not.[125] Therefore, the governmental body should have an equal or superior right to any information created on the personal media of its employees.[126]

C. *Require Governmental Bodies to Seek an Attorney General Opinion Every Time They Wish to Withhold Requested Information*

Dallas Morning News revealed another major flaw in the TPIA when the court of appeals determined that the City was not obligated to seek an opinion from the attorney general prior to withholding the requested e-mails. The City was not claiming an exception to the TPIA but rather was arguing that the e-mails did not meet the Act's definition of public information.[127] The TPIA

123. *See* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 12 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (acknowledging that a governmental body can delegate its authority to create and maintain records to third parties, who then become "agents" of the governmental body); *cf.* Baytown Sun v. City of Mont Belvieu, 145 S.W.3d 268, 271 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (deciding that since the City had a contractual right to inspect the records of a third-party company operating a facility on its behalf, those records were "public information").

124. *See* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 12 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining that a governmental body retains possession over documents created on its behalf by third parties it contracts with).

125. *Cf.* Tex. Att'y Gen. OR2003-1890 (explaining that the TPIA's definition of public information does not depend on whether the employee creating the information had permission to do so); Tex. Att'y Gen. OR2003-0951 (noting that records can still meet the definition of public information under the TPIA even if their creation is not sanctioned by the governmental body).

126. *See* Brief of Appellee at 18, City of Dallas v. Dallas Morning News, LP, 281 S.W.3d 708 (Tex. App.—Dallas 2009, no pet.) (No. 05-07-01736-CV), 2005 WL 6197478 (arguing that under the TPIA, a city should have a right to access e-mails from a mayor's Blackberry that was used to conduct official business).

127. *See generally Dallas Morning News*, 281 S.W.3d at 714 (determining that the City did not waive its right to withhold the requested e-mails by not seeking an attorney general opinion beforehand).

empowers the attorney general to make the determination of whether requested information falls within one of the statute's exceptions.[128] However, the statute contains no requirement that a governmental body seek an attorney general opinion when it seeks to withhold records that the governmental body believes do not meet the TPIA's definition of public information.[129]

The TPIA should be amended so that an attorney general's opinion is required when any controversy exists over whether information should be disclosed. This revision would not be a significant change because the attorney general's office already considers questions about whether requested information meets the TPIA's definition of public information, and the attorney general's office often resolves those matters in the same opinion that addresses whether requested information meets one of the TPIA's exceptions.[130] If the attorney general's opinion is necessary to determine whether information meets one of the Act's numerous exceptions, then it should also be necessary to determine whether the information meets the definition of public information in the first place. The attorney general's office, which maintains an entire division devoted to open records requests,[131]

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128. *See* TEX. GOV'T CODE ANN. § 552.301(a) (West Supp. 2009) ("A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under [the TPIA] must ask for a decision from the attorney general about whether the information is within that exception . . . ."); *see also* Thomas v. Cornyn, 71 S.W.3d 473, 480 (Tex. App.—Austin 2002, no pet.) (noting the requirement that a governmental body seeking to withhold information must first seek an attorney general opinion); Dominguez v. Gilbert, 48 S.W.3d 789, 792 (Tex. App.—Austin 2001, no pet.) (explaining the attorney general's role in determining whether information may be withheld under the TPIA); Arlington Indep. Sch. Dist. v. Tex. Att'y Gen., 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.) (discussing the requirement that governmental bodies seek an attorney general opinion prior to withholding requested information).

129. *See generally* TEX. GOV'T CODE ANN. §§ 552.301–.308 (West 2004 & Supp. 2009) (explaining the attorney general's role in disputes involving the TPIA).

130. *Cf.* Tex. Att'y Gen. OR2007-07157 (determining that requested e-mails met the TPIA's definition of public information before deciding whether they fell within one of the Act's exceptions); Tex. Att'y Gen. OR2005-06753 (ruling that requested e-mails could constitute public information before determining whether they were excepted from disclosure); Tex. Att'y Gen. OR2003-1890 (deciding that requested e-mails were public information before addressing exceptions claimed by the governmental body); Tex. Att'y Gen. OR2003-0951 (holding that requested e-mails did meet the Act's definition of public information before considering exceptions to the TPIA raised by the governmental body).

131. *See, e.g.*, Susan Denmon Gusky, *The Texas Public Information Act After 30 Years: What Businesses Need to Know*, 67 TEX. B.J. 352, 355 (2004) (explaining that the Open Records Division was created in 1995 to hear TPIA controversies).

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is in a better position than Texas courts to make decisions related to the TPIA.

Furthermore, allowing governmental bodies to bypass the attorney general wastes judicial resources. The attorney general's office employs numerous attorneys whose duty is to issue decisions on TPIA disputes.[132] Their expert opinions should be utilized whenever possible. If the TPIA required that governmental bodies obtain an attorney general opinion any time they wished to withhold requested information, some disputes could be resolved before resort to judicial determinations, saving both the courts' and the parties' time and resources. Even if the issue could not be resolved at the attorney general level and subsequently resulted in a lawsuit, the court hearing that case would have the attorney general opinion to assist in making its decision. Allowing governmental bodies to avoid seeking an attorney general opinion deprives expert attorneys the chance to give their opinion on the issue and, as a result, wastes resources.

VI. PRIVACY CONCERNS CAN BE ADDRESSED THROUGH EXISTING EXCEPTIONS TO DISCLOSURE UNDER THE TPIA

Some people, especially government officials and employees, may be skeptical of any attempt to broaden the TPIA's disclosure requirements. Open government statutes cause legitimate concerns regarding privacy and the disclosure of sensitive government information.[133] However, the TPIA could be amended in a way that does not significantly impact employees' privacy or a governmental body's ability to conduct business.

First, many of the changes advocated in this Comment would merely codify what already has been accepted as law by the attorney general and many Texas courts. While major changes could be made to the TPIA to help it adapt to modern technology, the same results could be achieved by less drastic means.

132. *See id.* at 356 (noting that the Open Records Division employs over twenty attorneys to issue open records opinions).

133. *See* Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 64 (2006) ("The government . . . must protect the public interest by maintaining the privacy of personal information in government files."); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 906–09 (2006) (noting that transparency in government can have negative consequences on security and the government's ability to make certain policy decisions outside of the public eye).

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Furthermore, clarification of certain points of the TPIA would benefit everyone as it would mean less time and resources spent litigating the issues in court.

Second, privacy and governmental interests would still be protected by the numerous exceptions to disclosure under the TPIA. Government interests are protected by provisions such as the exceptions for agency memoranda,[134] privileged communications between a governmental body and its attorney,[135] and law enforcement investigations.[136] Personal privacy is protected by numerous exemptions including those for information made confidential by law[137] and for information found in personnel files.[138] These exceptions and dozens of others ensure that certain information remains safe from disclosure. Because procedural

134. *See* TEX. GOV'T CODE ANN. § 552.111 (West 2004) ("An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from [disclosure] requirements . . . ."); *cf.* City of Garland v. Dallas Morning News, 22 S.W.3d 351, 364 (Tex. 2000) (discussing how the agency memoranda exception protects communications that relate to the agency's policymaking from disclosure). Information must create new policy rather than implement existing policy to fall within the exception. *See* Lett v. Klein Indep. Sch. Dist., 917 S.W.2d 455, 457 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (holding that requested information did not fall within the agency memoranda exception because it implemented existing policy rather than create new policy).

135. *See* TEX. GOV'T CODE ANN. § 552.107 (West 2004) (declaring that information is exempt from disclosure if it involves privileged communications between a governmental body and its attorney); *cf.* Richmond v. Coastal Bend Coll. Dist., No. C-07-458, 2009 WL 1940034, at *3 (S.D. Tex. July 2, 2009) (holding that requested information was privileged information between a governmental body and its attorney and, therefore, exempt from disclosure under the TPIA).

136. *See* TEX. GOV'T CODE ANN. § 552.108(a) (West Supp. 2009) ("Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of a crime is excepted from [disclosure] requirements . . . ."); *cf.* Simmons v. Kuzmich, 166 S.W.3d 342, 346 (Tex. App.—Fort Worth 2005, no pet.) (explaining the scope of the TPIA's law enforcement exception but holding that it did not apply to the case at bar because the governmental body waived its right to raise the exception by not seeking an attorney general opinion).

137. *See* TEX. GOV'T CODE ANN. § 552.101 (West 2004) ("Information is excepted from [disclosure] requirements . . . if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision."); *see also* Abbott v. City of Corpus Christi, 109 S.W.3d 113, 118 (Tex. App.—Austin 2003, no pet.) (noting that the TPIA excepts records that are "confidential by law").

138. *See* TEX. GOV'T CODE ANN. § 552.102 (West 2004) ("Information is excepted from [disclosure] requirements . . . if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . . ."); *see also* Hubert v. Harte-Hanks Tex. Newspapers, Inc., 652 S.W.2d 546, 549 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (discussing how the Texas Open Records Act excepted certain information found in personnel files).

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safeguards already exist to protect individuals and the government from unwarranted disclosure of the individual's information, there would not be any additional burden if the Texas legislature made minor revisions to the TPIA.

VII. CONCLUSION

The Texas legislature created the TPIA to ensure that Texas residents had the opportunity to properly inform themselves about government affairs.[139] To that end, the legislature mandated that the Act should be enforced liberally in favor of disclosure.[140] *Dallas Morning News* proved that the TPIA, in its current state, can no longer effectively serve these policies. The Act's amorphous definition of public information may have been sufficient in the 1970s, but it fails to meet the needs of modern society. While technology advanced significantly in the last decade, the TPIA has remained stagnant. As a result, a record's status as "public information" can depend upon who made it and where they stored it. Distinguishing records in this way cannot be reconciled with the stated policies of the TPIA.

The TPIA serves as an important means of keeping governmental bodies and employees accountable for their actions. However, the statute can no longer accomplish its goals if the TPIA cannot successfully incorporate modern technology. The decision whether the TPIA requires disclosure should not be based solely on where information is stored and whether the governmental body had access to the information, as established by statute or policy. Governmental employees would be able to avoid the TPIA whenever they wished merely by creating and

139. TEX. GOV'T CODE ANN. § 552.001(a) (West 2004) (declaring that it is the policy of the State of Texas that people have the right to "complete information about the affairs of government and the official acts of public officials and employees"); *see also* Houston Chron. Publ'g Co. v. City of Houston, 531 S.W.2d 177, 184 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.) (recognizing that the purpose of the Texas Open Records Act was to open up government activities to public scrutiny); TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 1 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (explaining the policy behind the TPIA that people should have a right to information about governmental affairs).

140. TEX. GOV'T CODE ANN. § 552.001(b) (West 2004) (demanding that the TPIA be "liberally construed in favor of granting a request for information"); *see also* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 1 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (discussing how the TPIA requires a liberal construction by those applying it).

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storing a record on their personal e-mail account rather than a public one. If requestors cannot have access to the media where records are stored, then the idea of open government becomes meaningless.

Changes to the TPIA do not have to be drastic to have a significant effect. Minor alterations or clarifications could explain when governmental bodies have a right to personal communications and when these communications must be disclosed. Any changes made would not create a significant impact, as the attorney general has already determined that governmental bodies can have a right of access to personal e-mails in some instances,[141] regardless of whether a policy exists establishing that right.[142] While these changes would be minor, they would go a long way toward ensuring the TPIA's continued relevance in modern society.

141. *See* TEX. ATT'Y GEN., PUBLIC INFORMATION HANDBOOK 17 (2008), *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/publicinfo_hb2008.pdf (commenting that the attorney general has declared personal e-mails to be public information in some instances); *cf.* Tex. Att'y Gen. OR2005-01126 (declaring that a city had to disclose certain requested e-mails from employee's personal accounts); Tex. Att'y Gen. OR2003-1890 (requiring a city to disclose personal e-mails that related to official business); Tex. Att'y Gen. OR2003-0951 (ruling that a school district was required to disclose personal e-mails that involved the transaction of official business).

142. *Cf.* Tex. Att'y Gen. OR2003-1890 (noting that an employee's personal e-mails can qualify as public information even if the governmental body does not have a particular policy establishing its right to those e-mails); Tex. Att'y Gen. OR2003-0951 (establishing that personal e-mails can be subject to the TPIA regardless of the governmental body's policy regarding its right to access those e-mails).

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