

# A User's Guide to the Public Information Act

(as amended by the 76th Legislature)



By Consumers Union  
Southwest Regional Office  
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## A User's Guide to the Amended Texas Public Information Act (June, 1999)

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Each year the Southwest Regional Office issues reports on consumer and good government issues of particular concern in Texas and the southwestern United States. Topics include financial services, health, utilities, and access to public information, and the environment. You may order copies of reports by calling the Southwest Regional Office at (512) 477-4431 or writing to us at 1300 Guadalupe, Suite #100, Austin, Texas 78701. Reports are also posted on our web site at [www.consumersunion.org](http://www.consumersunion.org) in html and PDF formats.

The following reports were released in 1999:

Looking Back at the Promises of Medicaid Managed Care (April, 1999)

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Texas Digital Divide: Telephone Competition Promise Falls Short (February, 1999)

The following reports were released in 1998:

Break the Dam: Access to Public Information in Texas (November, 1998)

Preserving the Charitable Trust: Nonprofit Hospital Conversion in Texas (July, 1998)

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## Executive Summary

### Ten Things You Should Know about the New Public Information Act

The 76th Legislature significantly changed many aspects, both substantive and procedural, of the Public Information Act. The new procedures are faster, and should be more fair to requestors, but also create new fees and new burdens for requestors that may lead to delays or barriers to access.

- 1. It is more important than ever that you pick up your copies.** A governmental body no longer has to provide copies of the exact same information more than once, even if you never actually picked up the copies. And if there is a charge for those copies, you may owe the money whether or not you collect the copies.
- 2. You may now be charged to inspect records** if the request is voluminous or time consuming to put together. If the governmental body is small (fewer than 16 full time employees), you may be charged to inspect records if the records are older than three years and will take more than two hours to make available. For larger agencies the information requested must be older than five years or fill six or more archival boxes, and take more than five hours to compile.
- 3. If a request will cost you more than \$40 you will receive a detailed, itemized estimate which you must respond to (either by fax, email, letter or in person)** or your request will be deemed withdrawn. You may negotiate changes in the request, decide to view the information without making copies, or accept the charges.
- 4. Final charges may not exceed the itemized estimate by more than 20%** or the governmental body must send you another statement of actual final charges. At this point you may again negotiate changes in the request, decide to view the information without making copies, or accept the charges.
- 5. The attorney general must release its open records opinions within 55 working days** from the time you originally filed your request. This is several weeks faster than before.
- 6. The streamlined attorney general process includes additional notices and information to the requestor.** The governmental body must forward to you a copy of its request for an attorney general opinion. Third parties who file briefs with the attorney general to protect information must now send a copy directly to you by about the 21<sup>st</sup> working day from the time you originally made your request. These notices will help you make arguments for disclosure and get them to the attorney general in a reasonable time. You will still need to ask for a copy of the *governmental body's* legal arguments (brief) from the attorney general. This document must be filed by the 15<sup>th</sup> business day from the time you made your request.
- 7. If the attorney general says something is open, it's open.** The governmental body must either give it to you or be prepared to go to court to protect it within 30 calendar days. Governmental bodies may not send the request back to the attorney general for a "reconsideration."
- 8. The "categories of public information" (552.022) are now clearly public.** Governmental bodies may no longer claim *any of the Act's exceptions* for information that falls into one of these categories. As you design your request, review these categories to see if the information you seek falls into one of them, and make a note of this in your request.
- 9. The exceptions for audit working papers (552.116), litigation (552.103), and commercial and financial information (552.110) have been significantly narrowed.** If a governmental body claims these exceptions, review the new language carefully.
- 10. The Act now has significant new exceptions. Information about tax or other financial incentives being proposed to businesses that may relocate to (or leave) Texas is protected until the deal is done. Public utilities may protect a broad range of "competitive" information. Crime victims who apply to the crime victim's compensation fund at the attorney general's office may elect to keep identifying information confidential.**

**Common Cause Texas** has already incorporated into the statute the changes to the Act adopted in SB 1851 and SB 7 (electric deregulation). The revised statute can be found in three consecutive parts at <http://www.ccsi.com/~comcause/news/pubin.html> . This document will ultimately reflect all the changes made by the 76th Legislature.

# The Texas Public Information Act

## A Users Guide to Major Changes Made by the 76th Legislature

Effective September 1, 1999, changes to the Public Information Act (Government Code Chapter 552) will improve access to records for most people seeking information from state or local government. As a follow-up to our report "Break the Dam: Access to Public Information in Texas," Consumers Union publishes this short guide to the reforms enacted by the 76<sup>th</sup> Legislature. We also identify some new concerns, and hope that well informed requestors can avoid the potential pitfalls in the revised Act. This guide should not be construed as legal advice, and we recommend that anyone attempting to use the Public Information Act refer directly to the statute or consult a qualified attorney.

### New Pitfalls:

#### "Repetitious or redundant" requests (SB 1851)

Despite opposition from public interest and media organizations, the legislature enacted a new provision in the statute that could delay or limit access to public information, *unless* requestors know about it and plan ahead. Under new Texas Government Code Chapter 552.232, **a governmental body does not have to provide copies of the exact same information more than once.**

Under the new provision, if you have asked for and been given access to copies—and you ask for it again—the governmental body may respond with a letter "certifying" that you have already been given access to this information. The governmental body can respond in this **way even if you never actually saw the information.** This could happen if you request copies, never pick them up, and request them again later. This new provision, purportedly drafted to prevent "harassment" of officials, could be used to limit or deny access to public records.

The "certification" procedure only applies when *the same person* asks for the information more than once. The government's

right to "certify" does not apply to information for which the governmental body has not previously furnished copies. It is unclear what governmental bodies will do with requests where a portion of the information was previously made available but much of the request is new.

To avoid this problem altogether, it is more important than ever to collect the copies you request.

### Application of the Public Information Act

You may now review records of certain quasi-governmental entities that were not clearly covered by the Act in the past.

- **Certain Houston-Area Property Owners Associations (new 552.0035, HB 3407):** A property owners association is subject to the Public Information Act if it is in Harris or an adjacent county, membership is mandatory for certain categories of residents, the association has the power to assess a fee on residents, and the fee is (or has ever been) based on property value.

- **Open-enrollment charter schools (amendment to Education Code 12.105(b), HB 211):** The education code now specifies that any requirement of the Public Information Act that applies to school districts, school boards, or school children now applies to open-enrollment charter schools.

### New Exceptions

Unfortunately, the legislature elected to close access to several types of information formerly available to the public.

- **Economic development information (new 552.131, SB 1851):** A new exception will allow governmental bodies to keep information confidential if it relates to "a financial or other incentive being offered" to a business prospect or if it relates to a trade secret or commercial or financial information of the business prospect. After an agreement (for tax incentives, utility discounts, land development, etc) is actually made between a governmental body and a company, the details of the financial incentives are public. It is not clear from the statutory language whether information about financial incentives offered but not

taken will become public. We believe it will.

- **Public Utility Information (new 552.131, SB 7):** The electricity deregulation bill created a broad new exception for information that the governing body of a public electric or gas utility “in good faith determines” is related to the utility’s competitive activity. This exception applies even if the public utility *opts out* of competition. The new provision also excepts the text of any resolution of the utility governing body that outlines which issues, activities or matters constitute competitive matters. The attorney general’s determination will be limited to (1) whether the governing body acted in good faith, and (2) whether the information sought is reasonably related to a competitive matter. This exception is extremely broad, but the statute also contains a list of items still available to the public and anyone researching a public utility should review this list.

- **Information relating to Inmates (new 552.131, HB 1379):** This new exception generally closes information related to inmates of the Department of Criminal Justice. However, the breadth of the exception was mitigated by a new provision at 552.029 that lists specific information about inmates that must be released, including inmates names, unit, offense, dates of parole or release, basic information about the death of an inmate in custody, incidents involving the use of force, crimes involving inmates and more.

- **Informers against school districts (new 552.131, HB 211):** Although the statute previously exempted information that would reveal the identity of an informer, its application outside the criminal investigation context has been unclear. This new exception specifically closes the names of people who inform against a school district for either criminal, civil or regulatory enforcement, unless the person was involved in the illegal activity.

- **Officers killed in the line of duty (amended 552.117, SB 1846):** Certain personal information about officers killed in the line of duty will no longer be disclosed.

- **Crime Victim’s Compensation Fund (new 552.132, SB 1851):** Crime victims who seek assistance from the Attorney General’s crime victim compensation fund will be given the opportunity to elect to keep their name and other identifying information confidential. If a crime victim is actually awarded compensation, the name of the crime victim and the amount of compensation awarded are public.

### Improvements to the Act: Narrower Exceptions

The changes to existing exceptions *narrow* them and fix problems long identified by advocates and citizens trying to get information.

- **Audit working papers (552.116, SB 1851):** “Draft” audit reports have been confidential under this exception, even if a “final” audit report was never released. Amendments to the audit working papers exception made “draft” audits open.

- **Litigation (552.103, SB 1851):** The attorney general and members of the public have consistently argued that the litigation exception is not designed to protect from the public anything that a governmental body believes might one day become a subject of litigation. Governmental bodies, however, have used

### New Procedures for Billing May Create Delays

Governmental bodies told the Legislature that requestors sometimes make voluminous, time consuming requests that they never pick up, and the governmental bodies cannot recoup their costs. They wanted requestors to owe any allowable charges at the time the staff compiled the information, rather than when the copies are actually handed over. Public interest groups were able to modify this proposal by creating new, earlier cost disclosures. Overall, however, requestors must understand the new procedure clearly or it will create **unforeseen delays**.

- If a request (for copies or inspection) will result in a charge exceeding \$40, the governmental body **must provide the requestor with a written, itemized statement detailing all estimated charges that will be imposed**, including any allowable labor or personnel costs. Prior to this legislation, General Service Commission rules did not require an itemized statement and many governmental bodies simply presented a bill when the copies were ready.

- If a lower cost alternative is available (for example, you have requested copies, but inspection would be free) the statement must notify you of this alternative.

- **You must respond to this statement (via fax, email, snailmail or in person) within 10 days of the date the bill is sent by the governmental** to either accept the charges or modify the request (for example, elect to inspect only and then decide which if any items to copy) **or the request is deemed withdrawn and you have to start all over. *The 10 days starts when the governmental body drops the statement in the mail, not when you get it. So if you elect to mail your response, plan on doing it as quickly as possible.***

- **The final charges may not exceed the charges in the itemized statement by more than 20%**, or the governmental body must send a new itemized statement reflecting the final, actual charges and the requestor may again modify the request. **Again, if you do not respond to the second statement within 10 days (as above), the request is deemed withdrawn and you have to start all over.**

- **If you have accepted the charges in an itemized bill, you owe the money at that point.** A governmental body can refuse to provide the information if you don’t pay the bill, and can refuse to provide information in the future if you owe more than \$100 from past requests. **The governmental body is prohibited from seeking payment of unpaid amounts through any other means.** This means it cannot be added to a student fee bill, or sent to a collection agency. Since governmental bodies were able to require payment upon collection of copies in the past, this amendment will primarily affect people who go through the whole process and never actually go to collect their copies or look at the information.

this exception to keep information confidential for months or even years, waiting for some party to file a suit. The statute has now been amended to state clearly that the litigation exception only applies to information related to litigation that is “pending or reasonably anticipated on the date that the requestor applies”

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# New Procedures for Records Access (SB 1851)

## Working Day 1

You file a request to inspect or copy public information under Chapter 552.

If you file this request in person, you can expect to see a **new sign posted that describes your rights as a requestor**, the responsibilities of the governmental body, and the procedures for inspecting or getting copies of records (effective January 3, 2000).

**INFORMATION THAT IS NOT SUBJECT TO ANY EXCEPTION**

**Promptly:** Public information must be produced promptly.

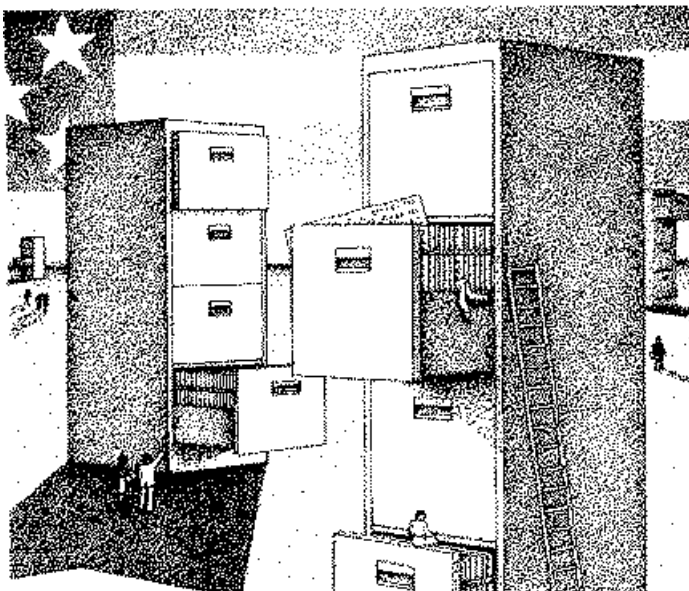
## Working Day 10

If it cannot be produced within 10 working days, the public information officer must notify the requestor and set a date within a reasonable time when the information will be available for inspection or copying. (This section is current law and was not amended.)

**NEW: 10th Day from the time a bill is sent (mail, email or faxed) to you, you must respond.**

**For requests that will cost more than \$40, the requestor must accept an itemized bill in writing (including email), or modify the request, within 10 days of the date the bill is sent by the governmental body or the request is deemed withdrawn (see sidebar, page 5).**

**\*\*NEW REQUIREMENT:** If a governmental body has fewer than 16 full time employees, the governmental body may require you to post a bond if the cost of records will exceed \$50 (all other entities may require a bond only if the costs will exceed \$100) *and* the governmental body has provided the written, itemized statement required above.



**INFORMATION THAT MAY BE SUBJECT TO AN EXCEPTION**

## Working Day 10

As before, an official must request an AG opinion, and state which exceptions apply, by the 10<sup>th</sup> business day. Further:

- the governmental body must now notify the requestor and provide the requestor a copy of the governmental body's letter to the AG asking for an opinion *by the 10<sup>th</sup> business day*.
- government officials must *raise all the exceptions* they intend to argue at this time. Under amended Section 552.324, a governmental body may raise in court only those exceptions raised before the AG, unless the additional exceptions are based on a requirement of federal law or involve third party property or privacy interests.
- failure to request an AG decision within 10 working days *and provide the requestor with notice of the request for AG opinion* results in a presumption that the information is "subject to required public disclosure and must be released unless there is a compelling reason to withhold."
- governmental bodies must notify third parties (this will apply most commonly when the trade secret exception is claimed) of the request by the 10<sup>th</sup> business day.

## Working Day 15

The governmental body must submit full arguments stating why the exceptions raised in the initial notice apply to the requested information (existing law).

## Working Day 21 (approx.)

Any third party that intends to argue for confidentiality based on a third party interest (most often privacy or trade secret) must file its brief with the AG in support of confidentiality within 10 business days of receipt of notice from the governmental body. This new deadline will considerably speed the AG process when requests involve information from regulated industries or other third parties. *The third party is also now required to send a copy of its brief to the requestor, who may respond with arguments favoring release.*

## Working Day 45

The AG must issue an opinion or notify the governmental body and the requestor of its need for additional time. Previously the law allowed 60 working days.

## Working Day 55

The AG must absolutely issue its opinion. If the AG determines that information is public:

- **governmental bodies must file suit to protect it in court within 30 calendar days** (from the date the governmental body the decision of the AG) or comply with the decision.
- Governmental bodies may no longer ask the AG to "reconsider" an opinion that information should be released, if the AG has already ruled once that the information is public.

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for the information.

- **Trade secret (552.110, SB 1851):** Regulated businesses and the agencies that supervise them have used the trade secret exception to protect a broad range of “commercial or financial” information filed with government. The legislature amended the Act to specify that “commercial or financial” information is only excepted if it is “demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm.”

### Certain Information Clearly Public (552.022, SB 1851)

Many have argued over the years that information falling into one of the “Categories of Public Information” (Sec. 552.022) is clearly public. These categories include completed government reports, names of officials, information used to estimate public expenditures, agency procedures, rules, policies, etc. However, the courts allowed governmental bodies to protect even this information if it also appeared to fall under one of the Act’s exceptions.

The statute now states that the information listed in the “Categories of Public Information” is public, and *not subject to the exceptions in the Public Information Act itself*, unless the information is explicitly excepted under another provision of law. For example, a completed report by or for a governmental body is now clearly public, but a “market conduct” report issued by the Texas Department of Insurance remains confidential because a provision of the insurance code explicitly closes this report. The amendments to this section further clarify that a court may not order a governmental body to withhold any of the information in the “Categories of Public Information” unless the information is expressly made confidential under other law.

Some of the key items on this list include:

- administrative staff manuals and instructions to staff that affect members of the public,
- a completed audit, evaluation or investigation made of, for or by a governmental body (except criminal investigation files closed under the law enforcement exception),
- most information relating to accounts, vouchers or contracts for the expenditure of public funds, and
- information used to estimate the need for public funds upon completion of the estimate.

### Enforcement

- **Mandamus**—If a governmental body refuses to provide public information, you may file a writ of mandamus as before. However, the mandamus suit is facilitated in two ways:
  1. As noted above, the governmental body may not argue exceptions that it did not first bring to the AG; and
  2. Attorney fee provisions are somewhat more friendly to requestors. Under the new statute, a requestor *will* receive attorney fees unless the governmental body reasonably relied on a

decision of the court or an AG opinion when it withheld the information.

- **New Complaint Procedure**—If you believe a governmental body has violated any provision of the Act you can file a complaint with your local district or county attorney. The district or county attorney must respond to your complaint within 31 days, and tell you whether a violation was committed and an action will be brought. If the local attorney elects not to bring an action, you may take your complaint to the AG.

### Costs

For information the governmental body intends to provide you, it may charge for copies as before, but it may also **charge for inspection of records** where you take no copies if:

1. The governmental body has 16 or more full-time employees; and
2. The information requested is either older than five years or completely fills six or more archival boxes; and
3. The information will take more than five hours to make available for inspection;

### Or

1. The governmental body has fewer than 16 full-time employees; and
2. The information requested is either older than three years or completely fills three or more archival boxes; and
3. The information will take more than two hours to make available for inspection.

If only *some* of the information is older than five years (or older than three years for smaller entities), we believe agencies cannot charge for inspection. The intent of this section was to provide some cost reimbursement for the time governmental bodies spend compiling records that are truly voluminous or in storage due to age. This issue may be clarified when the General Services Commission produces new rules governing charges under this section.

### More Information

**Consumers Union** wants to know how governmental bodies use these new provisions. If you are unable to get information because an official “certifies” that it has already been given to you, or the new requirement that you accept an estimate of charges results in unnecessary delays, or any other provision becomes a problem for you, **please give us a call at 512-477-4431, or email us at [mitcka@consumers.org](mailto:mitcka@consumers.org).**

If you have specific questions related to a request for information, you may call the **Open Records Hotline at the Office of the Attorney General at 512-478-6736.**

If you wish to speak with an attorney related to an open records request, you may also contact the **Freedom of Information Foundation of Texas Legal Hotline at 1-800-580-6651.** While these attorneys cannot provide legal advice, they can help you with general information about your rights under the Act based on the facts you present.

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