

# Public Information Act: An Overview

# Background of the legal requirements for open records and public information

- Applicability of the Public Information Act
- Procedures and requirements for complying with a public information request
- The role of the Attorney General under the Public Information Act
- Penalties and other consequences for failure to comply with the Public Information Act

# Policy and Construction

a) 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 provisions of this chapter shall be liberally construed to implement this policy.

# Policy and Construction

(b) This chapter shall be liberally construed in favor of granting a request for information.

# Definition of Public Information

- “Public Information” means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
  - 1) By a governmental body;
  - 2) For a governmental body and the governmental body owns the information; has a right of access to the information; or spends or contributes public money for the purpose of writing, producing, collecting, assembling or maintaining the information or;
  - 3) By an individual officer or employee of the governmental body in their official capacity and the information pertains to official business of the body.

# Definition of Public Information

- Information is in connection with the transaction of official business of a governmental body if the information is created by, transmitted to, received by, or maintained by an officer or employee of the government body in that officer or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

# Definition of Public Information

- The definition of “public information provided by Subsection (a) applies to and includes any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.

# Definition of Official Business

- “Official business” means any matter over which a governmental body has any authority, administrative duties, or advisory duties.

# Forms of Public Information

- Information recorded on physical media
  - Paper, film, tape, stone tablet, etc.
- And in any form
  - Audio/Video recordings
  - Photographs, Maps, Drawings
  - E-mails, internet postings, text messages, etc.

# Definition of Governmental Body

- The definition of “governmental body” encompasses all public entities supported in whole or in part by public funds including:
  - State agencies
  - Cities and counties
  - Public school districts and utility districts
  - Local boards
  - Does not include the judiciary.

# What is a Public Information Request?

- Must be in writing
- Must ask for information in existence as of the date the request was received
- No requirement to create new documents.
- No requirement to answer questions
- No requirement to perform legal research
- No magic words required
- No requirement to label as open records request or public information request

# What if request is unclear or unduly broad?

- Cannot ask requestors why they want the information.
- Can ask requestor to clarify request and/or discuss with requestor how scope of request can be narrowed.
- When a governmental body, acting in good faith, requests clarification or narrowing of an unclear or over-broad request, the ten-business-day period to request an Attorney General opinion is measured from the date the request is clarified or narrowed.

# Sample Requests

## What if the request asked for:

- Robert Jones' personnel file pursuant to FOIA, the United States Constitution, and the United Nations disclosure policies?

# What if the request asked for:

- Any and all documents pertaining to the Executive Commissioner including, but not limited to, e-mails he has sent or received during the past 3 years?

# What if the request asked for:

- Any and all e-mails communications sent or received by Jane Smith over the next 30 days?

# What if the request asked for:

- All of Jane Smith's evaluations for the past five years because I am considering renting a house to her and would like to know about her personal background.

# What if the request asked for:

- What are the legal requirements to appeal a ruling. Also, do you think I should appeal the ruling?

# E-mail and Faxes

- A governmental body may designate a person who is authorized to receive requests by e-mail or fax.
- If the governmental body makes such a designation, the Public Information Act is triggered only if the e-mail or fax request is directed to the designated person.
- Written requests that are not sent by e-mail or fax do not have to be directed to any specific employee or officer of the governmental body.

# What must you do when you receive a request?

- A governmental body must:
- Promptly produce information for inspection, duplication, or both;  
or
- Ask for a decision from the Attorney General about whether the information is excepted from disclosure unless there has been a previous determination that the information is excepted.

# How much time do you have to produce information?

- Information must be produced “promptly.”
- Promptly is defined as “as soon as possible under the circumstances, that is, within a reasonable time, without delay.”
- If you cannot produce information within 10 business days after the date the information is requested, you must certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available.

# How much time do you have to request an Attorney General ruling?

- If you wish to withhold information from the requestor, you must request a decision from the Attorney General not later than the 10<sup>th</sup> business day after the date of receiving the request, unless you have a “previous determination” for the information.

# Previous determinations

- Type 1
  - Most common
    - Only applies to a specific governmental body.
    - Record has already been ruled upon by Attorney General.
    - Law, facts, circumstances are same as they were when Attorney General ruled.

# Previous determinations

- Type 2
  - Potentially broad applicability
  - Can apply to all governmental bodies, a subset of all governmental bodies, or an individual governmental body.
  - Applies to a precise, clearly delineated category of information or records.

# When Requesting a Decision from the Attorney General

- Not later than the 10<sup>th</sup> business day, you must:
  - Ask the Attorney General for a ruling and state the exceptions that apply;
  - Notify the requestor in writing that you have asked for a ruling;
  - Provide the requestor a copy of the ruling request letter you submitted to the Attorney General; and
  - Notify any third parties with proprietary interests in the requested information that they may submit comments to the Attorney General stating why information should be withheld.

# When Requesting a Decision from the Attorney General

- Not later than the 15<sup>th</sup> business day you must:
  - Submit a copy of the written request for information.
  - Submit a signed statement or sufficient evidence to establish the date on which the request for information was received.
  - Submit a copy, or a representative sample, of the requested information with markings to indicate which exceptions apply to which parts of the copy.
  - Submit written comments to the AG stating the reasons why the stated exceptions apply to the information at issue.
  - Send a copy of your written comments to the requestor.

# Counting Business Days

- Start counting the next business day after receiving the written request.
- “Received” means when the request is physically received, not when the request is open or read.
- Saturdays, Sundays, and holidays are not business days.
- Skeleton crew days and days the governmental body is closed do not count, but make sure to inform the Attorney General of such days in writing.

# Consequences of Missing Deadlines

- Mandatory exceptions are not waived.
- Permissive exceptions are waived.

# Consequences of Missing Deadlines

- Some examples of ways to waive permissive exceptions:
  - Fail to request a ruling by 10-business-day deadline.
  - Fail to raise all applicable exceptions by 10-business day deadline. (exceptions raised after deadline waived)
  - Fail to notify a requestor within 10 business days that you are requesting a ruling.
  - Fail to submit information or representative sample thereof within 15-business-day deadline.

# Exceptions to disclosure

## Common Exceptions

- 552.101- Information Confidential by Law
- 552.103- Information Related to Litigation
- 552.104- Information related to competition or bidding
- 552.107- Certain Legal Matters (Attorney-Client Privilege)
- 552.108- Certain Law Enforcement Records
- 552.110- Trade Secrets

# Exceptions to disclosure

## Common Exceptions

- 552.111- Agency Memoranda
- 552.116- Audit Working Papers
- 552.117- Confidentiality of Certain Employee Information
- 552.130- Confidentiality of Certain Motor Vehicle Records
- 552.136- Confidentiality of Credit Card, Debit Card, Charge Card, and Access Device Numbers
- 552.137- Confidentiality of Certain E-mail Addresses
- 552.147- Social Security Numbers

# Super Public Information

- Section 552.022(a) provides that certain categories of information are public information and not excepted from required public disclosure unless made confidential under chapter 552 or other law.

# Super Public Information

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108;
- (2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

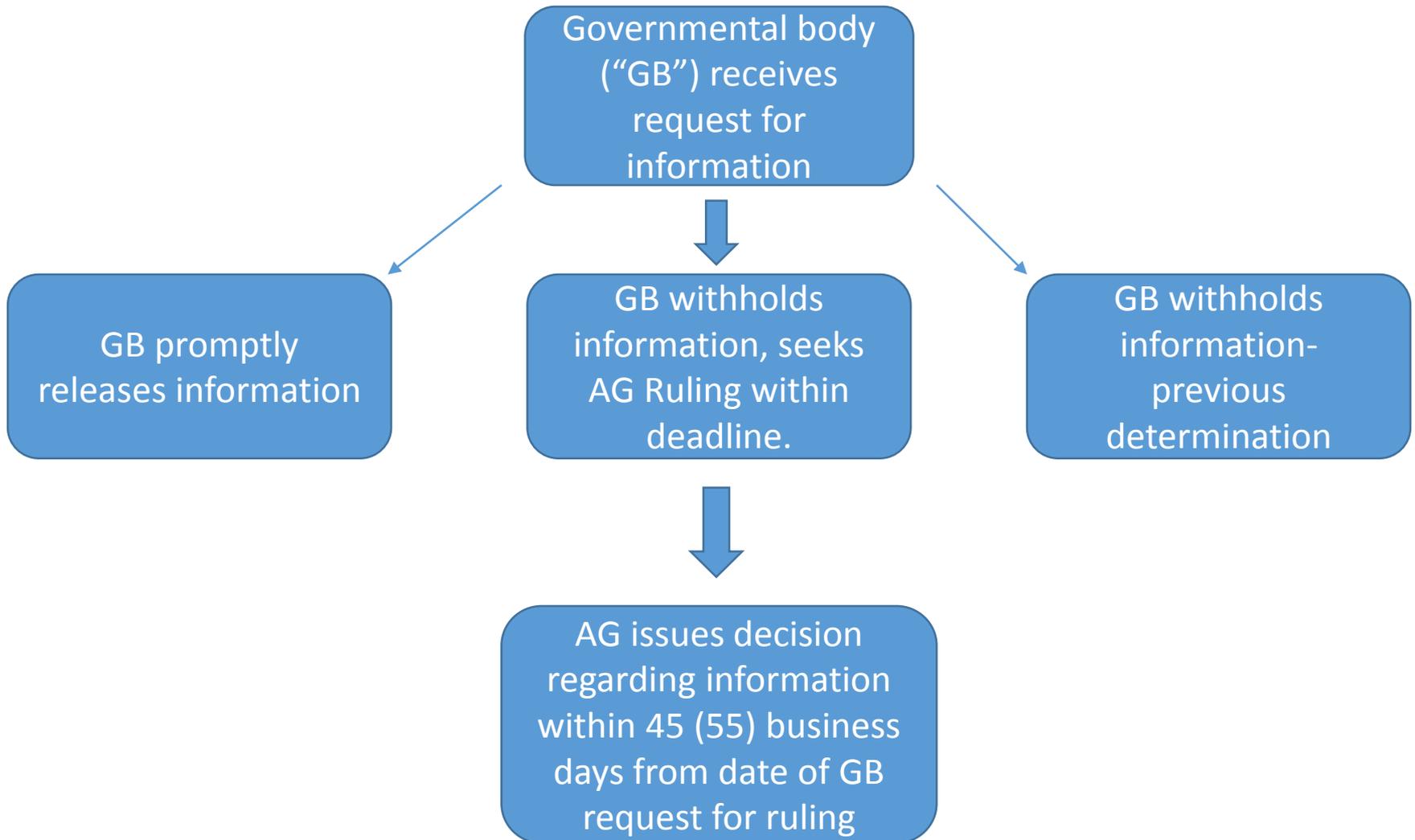
# Super Public Information

- (5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, upon completion of the estimate;
- (13) a policy statement or interpretation that has been adopted or issued by an agency;
- (17) information that is also contained in a public court record;
- (18) a settlement agreement to which a governmental body is a party.

# When Can You Redact Information Without First Requesting a Ruling?

- Generally, to withhold information from the public, you must first request a ruling from the Attorney General's Office.
- Withholding information without requesting a ruling
  - Section 552.130- Information related to driver's license, motor vehicle title or registration, or personal identification document.
  - Section 552.136- Credit Card, debit card, and access device numbers
  - 552.024, 552.1175- Personnel information of public employees

# Basic Public Information Process



# Ruling from the Attorney General

- The Attorney General's Office will issue an informal letter ruling in response to the governmental body's request for ruling.
- Rulings are issued within 45 business-days unless the Attorney General extends the deadline, in which case the ruling will be issued within 55 business days.
- The ruling will be issued to the governmental body and the records will be returned.
- The requestor will be provided a copy of the ruling.

# Challenging Attorney General Ruling

- Governmental body cannot request reconsideration of a ruling.
  - If a governmental body wishes to challenge an AG ruling, it must file suit against the Attorney General's office within 30 days of receiving the ruling.

# Challenging Attorney General Ruling

- Declaratory Judgement or Injunctive Relief
  - Complaint filed by requestor with district attorney or county attorney in county where governmental body is located.
  - For state agencies, the Travis County District Attorney or Office of the Attorney General may bring action only in Travis County District Court.
- Before the 31<sup>st</sup> day after the complaint was filed, district or county attorney must determine whether there was a violation, whether an action will be brought, and notify the complainant of the determination.

# Writ of Mandamus

- Used to compel a governmental body to make information available for inspection.
- Filed by the requestor or by the Attorney General.
- Filed when GB refuses to provide copies or access to information that is clearly public, GB refuses to request an Attorney General Ruling, or the GB refuses to release information as required by an unchallenged AG ruling.
- Prevailing party can get attorney's fees.

# Criminal Penalties

- The failure or refusal of an officer for public information to provide access, permit copying, or provide copies of public information with criminal negligence can result in
  - A fine of not more than \$1,000 and/or county jail for not more than 6 months.
  - Misdemeanor Offense
  - Constitutes Official Misconduct

# Affirmative Defense for Failure to Provide Access

- There is an affirmative defense against prosecution for failure to provide access.
  - Reasonable belief that public access to the information is not required and reliance upon a court order, court opinion, or AG opinion.
  - An AG decision was sought and no decision was issued.
  - Suit was filed in Travis County challenging the AG decision and the suit is pending.
  - The public information officer's agent reasonably relied upon written instruction from the public information officer.

# Distribution or misuse of Confidential Information

- A person commits an offense if the person distributes information considered confidential under the terms of chapter 552 of the Government code.
- Fine not more than \$1,000 and/or confinement in the county jail for not more than six months.
- Constitutes official misconduct.

# Questions?