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Temporary Custodian: New Definitions and Responsibilities under the Texas Public Information Act

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> *"Government transparency is critical for accountability and to prevent waste, fraud, and abuse,… SB 943 and SB 944 made many changes to restore the public's right to know, including changes to ensure government officials cannot hide public information on their private devices and that the public can obtain critical contracting information like total price, deliverables and deadlines."*[1]

Shortly after the close of the 2019 legislative session, there was much discussion about changes to the Texas Public Information Act ("TPIA") and "new" requirements. There has been a long-standing concern that government officials and public employees are circumventing the requirements of the TPIA by using personal devices to conduct government business. Court cases and rulings from the Office of the Attorney General ("OAG") were consistent that the TPIA applies to all governmental records and does not make a distinction based upon where the information is stored. Yet, there continued to be concerns that government officials and public employees were intentionally using personal devices to conduct government business outside of the reach of the public. Senate Bill 944 ("S.B. 944") was the result of the demand to do more to ensure that an officer or employee of a governmental body who creates or receives records on a privately-owned device or account provides that information to the government's public information officer. The purpose is to protect that information and ensure transparency. The changes imposed by the bill are a codification of previous court cases, OAG rulings and best practices. This paper will outline the state of the TPIA prior to passage of the law and what the changes enacted by S.B. 944 mean for government officials and public employees.

1 Groves, Patrick (2019, October 30). *Texas Quietly Updates Records Laws to Include Personal Devices*. https://www.govtech.com/policy/Texas-Quietly-Updates-Records-Laws-to-Include-Personal-Devices.html (quoting Texas State Senator Kirk Watson, author of Senator Bills 943 and 944).

Rules Pre-S.B. 944

The long-standing presumption was that the governmental body was solely responsible for maintaining government records in accordance with the state records retention policy. Early Attorney General decisions focused on the governmental body's role in maintaining the requested records. In one such ruling, a faculty member requested the notes created by individual members of the university's grievance committee. The university argued that the notes, which were not shared, were not a requirement of the committee or university, were not maintained by the university and served solely as a memory reminder for the creator of the notes. Because the notes were not "information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business," the Attorney General ruled that the requested records were not within the reach of the Act.[2] Similar reasoning was used to deny a request for personal notes and appointments on a desk calendar kept by the governor's aide, as well as a request for handwritten personal notes placed on the university president's calendar by his secretary.[3] This reasoning served as the standard for analyzing these requests for many years. Later Attorney General decisions, beginning in the 1980s, however, found that records clearly related to the governmental body's business were subject to the TPIA regardless of whether an individual employee or officer held the information or the records were maintained by the governmental body itself.[4] Therefore, later rulings held that personal notes and calendar appointments were not necessarily excluded from the Act simply because they were in the possession of an individual rather than the governmental entity.[5] The mere fact that a governmental body did not possess the record or information did not automatically take the record or information outside the reach of the Act.[6] The decisions analyzed whether or not the record or information were made, transmitted, maintained, or received **in connection with a governmental body's official business**. (*emphasis added*).[7]

If the rulings were clear, why was there still uncertainty?

The reality is that technology has fundamentally altered how business, including business with a governmental entity, is conducted. Government officials and public employees routinely use email, text messages and other electronic means of communication to conduct business. The

[2] Open Records Decision No. 77 (1975) (quoting statutory predecessor to Gov't Code § 552.021).
[3] Open Records Decision No. 116 (1975) (portions of desk calendar kept by governor's aide comprising notes of private activities and aide's notes made solely for his own informational purposes are not public information); *see also* Open Records Decision No. 145 (1976) (handwritten notes on university president's calendar are not public information).
[4] Open Records Decision No. 425 (1985) (information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)).
[5]Open Records Decision No. 425 at 3-4; Open Records Decision No. 635 (1995) (appointment calendar purchased with private funds by a public official or employee is public information when another public employee maintains the calendar as part of his or her job because it related to official business of governmental body)
[6] Open Records Decision No. 635 at 6-8 (1995) (information maintained on privately-owned medium and used in connection with transaction of official business would be subject to Act).
[7] Open Records Decision No. 425 at 3-4.

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