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PUBLIC INFORMATION AND OPEN MEETINGS IN THE ELECTRONIC ERA

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One of the more significant open meetings cases arose in connection with a hearing before the Texas Water Commission. During a break in a contested case hearing, two members of the three-member Commission were overheard in the restroom commenting on an aspect of the case. *Acker v. Texas Water Comm'n*, 790 S.W.2d 299 (Tex. 1990). The Supreme Court ruled that the overheard, casual conversation could constitute an improper closed meeting. *Id.* at 302 (Because the case involved an appeal of a summary judgment and there were controverting affidavits denying that the conversation occurred, the Supreme Court merely held that such a conversation would result in a violation of the Act and remanded for further proceedings where the facts could be developed). Twenty-one years ago when *Acker* was decided, proving that an improper closed meeting had taken place was largely dependent on the chance occurrence that someone overheard or observed the violation. Today, though, advances in technology and the heavy dependence on electronic communications and records mean that the same type of violation might occur even though the commissioners were not in each other's presence and that the violation might be revealed by someone reviewing emails or similar electronic records. Technology has resulted in significant changes in how the Open Meetings and Public Information Act operate and has created potential pitfalls for governmental officials and potential opportunities for citizens using the Act.

When the Texas Open Records Act, the predecessor to the Public Information Act, was enacted in 1973, documents were prepared on typewriters. Personal computers that a person

might have in his or her home were a dream for the future. Phones were something that plugged into the wall and were used for talking with other persons. The drafters of the Act surely did not contemplate that records would be developed and retained largely in electronic form and that the capability to create and store such records would be commonplace in person's homes and even on wireless cell phones, laptop computers, tablet computers, and other portable devices. In fact, in the original version of the Act, "public records" were defined as "documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which [contain] public information." Texas Open Records Act; Act of May 17, 1973, 63rd Leg., R.S., ch. 424, sec. 2, 1973 Tex. Gen. Laws 1112, 1113. In the 38 years since the Act's initial passage it has been amended to recognize new technology and now specifically recognizes that information may be recorded on "a magnetic, optical, or solid state device that can store an electronic signal" and can be "held in computer memory." Texas Public Information Act, TEX. GOV'T CODE §§ 552.002(b)(3), (c). While the statute has been amended as new technology became commonplace, compliance and interpretation of how the statute interacts with new technology is still developing.

The emergence of electronic records has produced at least three impacts on the operation of the Act and on open government law generally. First, it has greatly increased the volume and accessibility of records. Second, it raises questions of whether the records created and stored on personal devices rather than on workplace computers are covered by the Act. Third, the ability of public officials easily to communicate on personal electronic devices has increased the opportunity to unknowingly violate the Open Meetings Act and other laws and, at the same time, to leave a record of the violation.

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