The Senate Interim Committee on Public Information

Interim Report to the 76th Legislature

October 1998

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I. INTRODUCTION AND COMMITTEE CHARGES

In the interim following the 75th Legislature, Lieutenant Governor Bob Bullock created the Senate Interim Committee on Public Information (the "Committee"). The Committee membership includes Senator Jeff Wentworth, Chairman, Senator Kenneth Armbrister, Senator John Carona, Senator Eliot Shapleigh, and Senator John Whitmire.

Lieutenant Governor Bullock assigned the Committee the following interim charge:

> Identify areas of concern associated with the Public Information Act, (formerly known as the Open Records Act), including harassment, commercial enterprise, circumvention of the Act's requirements, delays in production of information, access and availability of information, costs and expenditure of public resources. If necessary, make recommendations for legislative action.
>
> Study the impact of the Public Information Act on privacy interests of Texans and monitor the implementation of SB 1069, passed by the Legislature during the 1997 regular session, and developments in federal law regarding these issues.
>
> Review the role of technology as it applies to the Public Information Act, such as the Internet, and study pertinent issues in the public information process, including but not limited to whether HB 1718, passed by the Legislature during the 1995 regular session, adequately responds to technological advances.

The Committee held eight meetings around the state to take testimony on the Committee charges. The Committee held its first meeting in Austin, then traveled to San Antonio, El Paso, Houston, Tyler, Harlingen, Fort Worth, and Amarillo. The events of these meetings are chronicled in this report.

The Committee has completed its hearings on the charge and has adopted the Committee recommendations which are included in this final report to the Lieutenant Governor and the full Senate.

Finally, the Committee would like to express appreciation to the citizens of Texas, some individually and others representing associations and specific businesses, who testified at the hearings, for their time and efforts in assisting the Committee fulfill its charge.

II. EXECUTIVE SUMMARY

Senate Bill 1069

Texas Senate Bill 1069, as filed during the 75th Legislature, implements the mandate of the Federal Driver's Privacy Protection Act (FDPPA). The Federal Act and the state law both include an opt-out provision that attempts to strike a balance between privacy interests and access to public information.

It is important to note, however, that the Federal Act has been challenged as a violation of the 10th Amendment to the United States Constitution. Even though the FDPPA probably exceeds Congressional power under the Commerce Clause, the Texas Legislature has enacted its own version of the Act which would remain in effect even if the Federal law is deemed unconstitutional.

The state law contains two provisions that go beyond the federal law's content that have proved to be troublesome to advocates of open government and First Amendment rights. First, Section 13 of Texas Senate Bill 1069 cuts off access to accident reports, in clear contravention of Section 2 of the bill that states that information found in accident reports does not constitute "personal information" as defined in the Act.

Secondly, an amendment to Senate Bill 1069 prevents publishing or disclosing, on the Internet, personal information from a motor vehicle record unless the subject of the information has granted his consent. The amendment also prohibits an agency from providing a person with personal information from the agency's motor vehicle records, unless the person receiving the information agrees in writing that the person will not publish the information on the Internet.

By striking Section 13 of the bill, many inconsistencies would be eliminated. In the opinion of the Committee, the clear language of Section 2, in the absence of Section 13, means that information contained in accident reports is not considered "personal information" under the Act. Therefore, requestors could continue to access accident reports in the same manner as prior to the passage of Section 13 of Senate Bill 1069. If Section 13 of the bill is stricken, online newspapers publishing information contained in accident reports should not encounter any problems, as the information contained in the accident reports will no longer be considered personal information under the Act.

The purpose of Section 13, to reduce or eliminate unwanted solicitation, is achieved by House Bill 1327 of the 75th Legislature. House Bill 1327 is more narrowly tailored and achieves the same goal in a less restrictive manner.

Additionally, the definition of "consent" in Section 2 of the bill regarding the publishing or posting of "personal information" on the Internet, needs statutory clarification. By clarifying that not opting out equates to consent, personal information pertaining to individuals that have not opted out and information which is found in accident reports would be able to be released on the Internet. Thus, all a person need do before publishing personal information on the Internet obtained from motor vehicle records is to determine whether the subject of the information has opted out. If a person has opted out, thereby keeping his information private, his information may not be published on the Internet. If the information is that contained in an accident report, however, it is not considered personal information and would be able to be published regardless of whether the subject of the information has opted out.

In addition to lawfully obtaining information contained in an accident report, it is also important to recognize that even if an individual has opted out, his personal information can still be obtained under one of the permissible uses allowed by law. The problem here is with resale or reuse of information originally obtained by consent (a person who has not opted out) or through one of the permissible uses. Although the original requestor of the information may have lawfully obtained the information under one of several permissible uses, the person to whom he is selling may not have.

Judicial Records

Although there was a legitimate debate as to whether or not the Legislature intended judicial records to be completely exempted from disclosure under the Public Information Act, it has become clear to the Committee throughout the deliberation process that the time for a Judicial Records Rule is now.

The Judicial Council and the Texas Supreme Court has made the first attempt at drafting a rule defining disclosure requirements regarding "non-core," administrative judicial records. The Judicial Council has submitted a version of the proposed rule to the Public Information Committee. However, a final and

possibly different version will be submitted to the Texas Supreme Court for consideration and adoption at a later date.

Although the Committee heard testimony specifically recommending that the Public Information Act's criminal provisions apply to judges that violate the Judicial Records Rule, the Committee feels a system of accountability can be established in the rule, if properly drafted. The State Commission on Judicial Conduct is charged with policing the conduct of judges and is authorized to sanction certain misconduct of its members.

The Legislature, in creating this body, and the citizens of Texas, in ratifying its creation, have agreed that the Commission is the appropriate manner in which to address certain misconduct by judges. It is vital, however, that specific authority be given to the Commission to sanction judges violating that rule, and that authority should be stated in clear and unequivocal language in the rule and the Code of Judicial Conduct.

Sanctions by the Commission, furthermore, *could* likely be a greater deterrent to judges than would the possibility of criminal sanctions under the Public Information Act. As the Committee testimony illustrated, county and district attorneys have not actively pursued prosecution for violations of the Public Information Act. The established system of sanctions by the Commission, therefore, should be given an opportunity to work in conjunction with a proposed judicial records rule containing clear language addressing disciplinary action against judges who violate the rule.

It is the desire of the Committee that the Supreme Court promulgate a rule that has clear and effective enforcement authority. The Supreme Court and the Commission on Judicial Conduct should remain mindful that the Legislature can, and will if necessary, legislatively address issues of non-enforcement or lax enforcement in the future.

Harassment Issues

The Committee received testimony from a number of governmental entities that the law requiring records be made available for public inspection has been used as a tool of harassment. The harassment can occur in several ways. A requestor might ask that public information be made available for inspection with

no intention of actually viewing the records. As testimony in the Fort Worth meeting illustrated, a request may be made for ulterior motives, only to be withdrawn when the motive has been realized.

The goal of unfettered access to public records should be balanced with the reality that some requestors make voluminous requests solely for the purpose of harassment.

Commercial Users

The Committee received testimony from a number of governmental entities that "data miners," or commercial operations that make public information requests for the sole purpose of turning such information into proprietary gain, take up an inordinate amount of the entities' time. Those entities have asked the Committee for legislative permission to charge such commercial requestors a higher fee for access to public information.

Allowing such differential treatment violates the public policy principles of the Public Information Act. In large part, the Act achieves its goals only in an equitable environment. Allowing the custodians of public records to inquire into the purpose of the requestor results in a slippery slope that this Committee is not willing to create. Furthermore, many commercial requestors take otherwise useless, raw data and manipulate it into information that ultimately benefits the economy and its citizens.

Required Posting of the Public Information Act

The Committee received substantial, unfortunate testimony that a number of employees of governmental entities simply do not have an adequate grasp and understanding of the basics of the Public Information Act. The public may also not have an understanding of their rights under the Act. The public and employees of governmental entities need a tool of reference, such as a poster enumerating the Act's requirements, which provides basic information on the Act in places where open records requests are routinely made.

Circumvention/Enforcement

The Committee received testimony that governmental bodies have an arsenal of techniques to delay production of public documents. Many requests for public information are time sensitive; therefore, records delayed are often records denied. A solution to many of the problems encountered by witnesses who testified before the Committee is simply better enforcement of current law.

The Committee received testimony that District and County Attorneys have been reticent to pursue alleged violators of the Public Information Act, possibly due to the fact that a violation of the Act is a criminal offense, with higher standards for prosecution.

Reconsiderations/Previous Determination/Delays

The Committee also received testimony that, although not specifically allowed for under the Public Information Act, governmental entities have routinely requested "reconsiderations" of Attorney General decisions. These "reconsiderations" have lengthened the amount of time it takes requestors to obtain public information.

Currently, the Act allows the Attorney General to make a "previous determination" that a record is *exempt* from the Act, yet the Attorney General is not allowed to make such a "previous determination" that a record should be subject to the *disclosure* requirements of the Public Information Act. In the spirit of openness, "previous determinations" should be allowed under the Act for both exempt records and those which have been clearly determined to be public.

In response to complaints regarding delays in the production of public information, the legislature can simply statutorily reduce the amount of time the Attorney General has to issue opinions and Open Records Decisions. The committee acknowledges that there are costs associated with this option, but feels that reductions in delays experienced in obtaining public information are worthy of the cost.

Litigation Exception

The Committee has been advised that in practice, the litigation exception in the Act as it now exists is so broad that it almost "swallows the rule." Governmental bodies are withholding information that only vaguely relates to litigation in order to take advantage of the litigation exception to the Act and therefore circumvent its requirements. This needs to be balanced with the public policy goal of the exception which is to prevent the use of the Public Information Act's disclosure requirements from being used in circumvention of the requirements of the discovery rules.

Copy Costs

The General Services Commission (GSC) administers Chapter 552, Subchapter F of the Government Code, titled "Charges for Providing Copies of Public Information". In that capacity, the General Services Commission promulgates rules relating to charges for copies made by governmental entities, determines the applicability of exemptions related to copy costs, and investigates and makes determinations on complaints of overcharges for copies. Additionally, the GSC conducts a biennial study of state agencies' procedures and charges for copies of public information. The study also includes data on cities, counties and school districts.

The testimony received by the Committee from the GSC and the general public indicated general satisfaction with the current GSC rules and copy cost guidelines. Some minor changes, however, were recommended.

The threshold amount for requiring a deposit on copy costs is currently $100. This deposit protects the governmental entity should the situation arise where a requestor asks that documents be copied, the agency copies them, and the requestor never shows up to pay for the copies. The governmental entity then must absorb the cost. If the agency is a small one, that $100 threshold may be too high. If small agencies are forced to absorb the cost for say, a $50 copy job several times, that could have just as significant an impact on them as the $100 absorption would on a much larger agency over time.

Under current law, governmental entities are permitted to charge for personnel costs, even if the records requested are less than 50 pages, but only if the

records that are the subject of the request are located in a "separate building" or in "remote storage." The Committee has received testimony that requestors have been charged personnel time to retrieve documents that, although technically are in separate buildings, the distance or the effort expended to retrieve the documents does not equate to leaving the building.

Internet Access

The Committee received repeated testimony from governmental bodies that responding to open records requests takes an inordinate amount of staff time and resources. The Committee also received testimony from governmental bodies that placing much of this information online has cut down significantly on personnel time dedicated to fulfilling open records requests.

Testimony received by the Committee revealed that there are definable types and classifications of open records requests. Placing such information on the Internet can greatly reduce staff time required to search for the information.

Mediated Settlement Agreements

The state law surrounding the public disclosure requirement of the Public Information Act is unsettled. There have been a number of Open Records Decisions and Opinions interpreting the litigation exception in conjunction with Section 154.073 of the Civil Practices and Remedies Code, which refers to the confidentiality of documents created during Alternative Dispute Resolution procedures.

The decisions and the opinions of the Attorney General have been inexplicably inconsistent and require a legislative remedy. Sound public policy and common sense dictate that the public know and understand how their tax dollars are being spent.

Open Records Impact Statement

Many open government advocates expressed concern to the Committee that it has become increasingly difficult to keep up with the onslaught of legislation aimed at reducing the public's ability to access public information and to monitor deliberations of governmental entities. House and Senate rules currently mandate

that legislation that impacts certain areas of the law carry impact statements. These impact statements serve the purpose of placing the public on notice that the proposed legislation affects these important areas of the law.

III. OVERVIEW OF SB 1069, 75TH LEGISLATURE-ACCIDENT REPORTS AND PERSONAL INFORMATION CONTAINED IN MOTOR VEHICLE RECORDS

A. BACKGROUND

In 1994, Congress passed the Federal Driver's Privacy Protection Act (FDPPA). The Act was intended to address growing public concerns about crime and regulates the dissemination and use of "personal information contained in state motor records. The "stalking" of persons was cited as one of the principle reasons for the passage of this legislation.

The Federal Driver's Privacy Protection Act prohibits the motor vehicle departments of all 50 states from disclosing certain personal information about an individual obtained in connection with a motor vehicle record. The language in Senate Bill 1069, as originally filed, was intended to put Texas in compliance with the FDPPA to restrict the use of information made available by the Texas Department of Public Safety (driver's license information) and the Texas Department of Transportation (title and registration information).

In the course of the legislative process, two amendments were added to the original language of Senate Bill 1069. The first amendment related to access to accident report information and was intended to address the problem of unsolicited contact from professionals offering their services in response to the accident. This amendment contained the same language found in House Bill 399. House Bill 399 passed the legislature, but was vetoed by Governor Bush. The second amendment related to publishing driver's license information on the Internet.

Governor Bush signed Senate Bill 1069 into law on June 20, 1998, apparently not realizing that the vetoed language of House Bill 399 had been amended into Section 13 the bill.

The Texas Daily Newspaper Association and The Texas Press Association (the associations) have filed a lawsuit to invalidate Senate Bill 1069, claiming a number of constitutional violations. Additionally, four states have sought to have the FDPPA ruled unconstitutional because it exceeds the scope of Congress' authority.

B. ANALYSIS OF THE FEDERAL DRIVER'S PRIVACY PROTECTION ACT

The FDPPA prohibits a state department of motor vehicles from knowingly disclosing or making available personal information about any individual obtained by the department in connection with a motor vehicle record. The prohibition, however, is not absolute.

The FDPPA sets forth specific exceptions to the prohibition. The act specifically allows personal information to be released if the motor vehicle department provides in a clear and conspicuous manner on forms relating to motor vehicle records that personal information collected by the department may be disclosed to any business or person, and provides on such forms an opportunity to prohibit such disclosures. This is what is known as the "opt-out" provision of the law.

This provides the licensee an opportunity to keep his or her personal information private simply by checking a box on the application for a driver's license or any other motor vehicle-related form stating that their information shall not be released. If the licensee does not indicate on the department form that he or she wishes to prohibit such disclosures, the agency may release the information.

The law sets out additional permissible uses of personal information from motor vehicle records, such as: for safety and theft-related requests, a governmental agency carrying out its duties, use in the normal course of business by a legitimate business to verify the accuracy of personal information submitted by the individuals to the business, certain statistical research activities, providing notice to the owner of towed or impounded vehicles, use in conjunction with a civil, criminal, administrative or arbitral proceeding in any court or government agency or before any self-regulatory body, use by an insurer in connection with claims investigation activities, antifraud activities, rating or underwriting, use by a licensed private investigator for a purpose permitted, use by an employer to obtain or verify information relating to the holder of a commercial license, use for the operation of private toll transportation facilities, use for bulk distribution of surveys, and for any other use in response to an individual's records that gives the agency permission to release the information.

The FDPPA allows any other use of the information specifically authorized under the law of the State, if such use is related to the operation of a motor vehicle or public safety.

A state department of motor vehicles that does not comply with the act is subject to a civil penalty imposed by the United States Attorney General not to exceed $5,000 a day. The act also provides for a criminal fine and creates a civil cause of action for the individual to whom the information pertains allowing for actual damages, punitive damages, reasonable attorney's fees, and other equitable relief as the court determines to be appropriate.

The federal law specifically states, as does Texas Senate Bill 1069, that the definition of personal information does not include information relating to vehicular accidents, driving violations, and driver's status.

C. CONSTITUTIONALITY OF THE FEDERAL DRIVER'S PRIVACY PROTECTION ACT

To date, four states, Oklahoma, South Carolina, Alabama, and Wisconsin, have attacked the constitutionality of the FDPPA. All four states have challenged the act as a violation of the Tenth Amendment in excess of the scope of Congress' authority under the Commerce Clause. The Tenth Amendment of the United States Constitution provides that, "[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." U.S.C.A. Const. Tenth Amendment. Thus, if something does not come within any authority specifically granted to the Congress in the Constitution, it is reserved to the states. The Congress has been specifically granted the power to regulate interstate commerce and such regulation may encompass intrastate activities that have a significant effect upon interstate commerce. U.S.C.A. Const. art. 1 sec. 8, cl. 3. Although the Congress may regulate an intrastate activity directly through its authority under the Commerce Clause, it may not force or direct a state to regulate the activity, to do so would be in contravention of the Tenth Amendment.

In *Oklahoma v. The United States*, 994 F.Supp. 1358 (W.D. Okla. 1997), *Condon v. Reno*, 972 F.Supp. 977 (D.S.C. 1997), and *Travis v. Reno*, 1998 WL 307749 (W.D. Wis. 1998), the courts found in favor of the states, granting them injunctive relief and holding that the FDPPA did in fact violate the Tenth Amendment by directing a state to impose a federal regulatory scheme and granted

them injunctive relief. Only one district court, in *Pryor v. Reno,* 998 F.Supp. 1317 (M.D. Alabama 1998), has found that the FDPPA is a valid exercise of Congress' Commerce Clause authority and, therefore, not in violation of the Tenth Amendment. The distinction made in these two lines of cases, one upholding the FDPPA and the other striking it as unconstitutional, is whether the FDPPA regulates motor vehicles directly, or whether it directs the states to regulate in a particular manner. If Congress is regulating motor vehicle information directly, Congress need only establish a sufficient connection and affect on interstate commerce and the regulation would be authorized under the Commerce Clause. If the latter is found to be the situation, though, and Congress is in reality directing the states to regulate an activity in a particular manner, they have exceeded their powers under the Commerce Clause and have violated the Tenth Amendment.

1) OKLAHOMA, SOUTH CAROLINA AND WISCONSIN CASES

In Oklahoma, South Carolina, and Wisconsin, the district courts have held that the FDPPA is not a direct regulation of an activity, as would be permissible under the Commerce Clause if that activity affected interstate commerce, but rather the Act is a directive to the states to regulate an activity in a particular manner. *Oklahoma,* 994 F.Supp. 1358; *Condon,* 972 F.Supp. 977; *Travis* 1998 WL 307749. The states made, and the courts accepted, the argument that Congress has exceeded its authority and thereby violated the Tenth Amendment in enacting the FDPPA because the Act mandates that the state invoke a federal regulatory scheme in regard to the state's own records. "Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Condon,* 972 F.Supp. at 983.

These courts have noted as well that Congress does have the authority under the Commerce Clause to offer the states a choice of regulating according to a federal standard with respect to an intrastate activity that substantially affects interstate commerce, or to have federal regulations imposed. This is not forcing a state to impose and administer a federal regulatory scheme, rather, it allows states to impose their own regulations based upon a federal standard. This is not what is occurring with the FDPPA. The FDPPA forces a state to impose a federal

regulation and the states are not given an option, but are faced with a fine if they do not impose such regulations. *Oklahoma,* 994 F.Supp. at 1362.

2) ALABAMA CASE

The counter point is presented in *Pryor v. Reno,* where the court held that the FDPPA does not violate the Tenth Amendment of the United States Constitution because it was enacted under the authority granted to Congress by the Commerce Clause. *Pryor*, 998 F.Supp. 1317 (M.D. Ala. 1998). In making this point, the court viewed the FDPPA not as a directive to regulate but rather as a direct regulation of the personal motor vehicle records held by each state. *Id.* Because they found this to be a direct regulation of a commercial activity, the court then went on to make the argument that the intrastate release of such information is used for direct marketing purposes on a national scale, and therefore, affects interstate commerce. *Id.*

The court reasoned that so long as Congress has a rational basis for concluding that a regulated activity, viewed in the aggregate, sufficiently affects interstate commerce, it is valid under the Commerce Clause. *Id.* at 1326. The state argued that their release of the information does not amount to "commerce" because they only charge a nominal fee to cover the release of administration costs in connection with disclosure. *Id.* The court, however, pointed to congressional testimony regarding the wide scope of national trade in the motor vehicle information and that once released by the state, personal motor vehicle information is used in direct marketing or resold to other companies. *Id.* Based upon that testimony, the court held that the regulation of motor vehicle records is necessary for the regulation of interstate commerce, and that Congress had a rational basis for concluding that the regulation of motor vehicle records substantially affects interstate commerce. *Id.*

The court's argument that the activity substantially affects interstate commerce and could therefore be regulated is misplaced. Indeed, the release of motor vehicle records for national marketing programs affects interstate commerce and Congress has the power to regulate such an activity. However, the law must *directly* regulate an activity and not be merely a mandate to the states to regulate in a particular manner. Therefore, although the court accurately points out that the activity being regulated has an affect on interstate commerce, they are misguided in their analysis because the FDPPA is not such a direct regulation of a commercial activity, but rather a commandeering of the states' legislative and administrative

process in violation of the Tenth Amendment. This has been the holding of every other district court which has passed upon this question. However, because there has been some disagreement among the district courts as to the constitutionality of the FDPPA, the issue is far from decided. The question is one which is ripe for appellate review.

D. ANALYSIS OF TEXAS SB 1069

Texas Senate Bill 1069 implements the mandates of the FDPPA. The state law is very similar to the federal law and was, as filed, identical to a model bill drafted by the American Association of Motor Vehicle Administrators and the Council of State Governments Committee on Suggested State Legislation.

The bill's stated purpose is to protect the interest of an individual's personal privacy by prohibiting the disclosure and use of "personal information" contained in motor vehicle records, except as authorized by the individual or the law.

The disclosure prohibition, however, is not absolute. The state law contains, in essence, the same list of "permissible uses" of personal information as the federal law, and contains the "opt-out provision" allowing the individual to choose between releasing the information or keeping it private.

"Personal information" under the Act would include identifying information such as photographs, social security numbers, names, addresses, telephone numbers, and medical or disability information. This section of the bill specifically states that personal information would not include information on vehicle accidents, driving or equipment-related violations, or driver's license or registration status.

This section was meant to ensure that accident report information would not be considered "personal information" under the law, and therefore would be attainable by requestors such as the media to report on accidents and related public safety issues. Section 13 of Senate Bill 1069, however, specifically prohibits the release of accident reports and related information unless specific information can be provided by the requestor.

1) THE "OPT OUT" PROVISION

Under Senate Bill 1069, if an individual does not choose to opt out of having his personal information released either individually or commercially, anyone may obtain that information for whatever reason. The personal information may be a name and address obtained from vehicle title and registration records from the Vehicle Titles and Registration Division of the Texas Department of Transportation, or it may include these things as well as date of birth and driver license number obtained from driver's license records.

If, however, the individual opts out by choosing to restrict the access to his personal information, a requestor may only obtain that information upon proving he is entitled to it under one of the enumerated permitted uses.

There are numerous permitted uses that may operate to make the opt out provision ineffective. Uses by a government agency in carrying out its functions or in connection with vehicle safety or theft are permitted. Use in the normal course of business by a legitimate business or agent if to verify the accuracy of personal information submitted by the individual, or to obtain current correct information is permitted. Use in conjunction with a civil, criminal, administrative, or arbitral proceeding in any court or government agency is permitted. Use in research or building statistical information if it is not used to contact any individual is permitted. Use by an insurer in connection with claims investigation activities, antifraud activities, rating or underwriting is permitted. Use in providing notice to an owner of a towed or impounded vehicle is permitted. Use by a licensed private investigator or security service for a permitted use under this section is permitted. Use by an employer to obtain or verify information relating to the holder of a commercial license is permitted. Use in connection with the operation of a private toll facility is permitted. Use for bulk distribution for surveys, marketing or solicitations if the information will be used solely for bulk distributions is permitted if such distributions, marketing or surveys will not be directed at any individual who has requested that the material not be directed at them is permitted. Use for any other purpose authorized by law that relates to the operation of motor vehicle or to public safety is permitted.

When an individual makes a request to restrict disclosure of personal information from a driver's license or an ID card through the Department of Public Safety, the opt out provision on the form allows him to restrict personal information from being released from a) persons and entities who do not qualify under state or federal law, b) for purposes of bulk distribution for surveys, marketing or solicitations, or c) to 'a' and 'b.' To "qualify under state or federal

law" the requestor need only show he is requesting the information for one of several permitted uses. If he can do that, he may obtain the information regardless of the fact that the subject of the information has opted out. The individual may, however, prevent use of his information for bulk distributions, surveys and solicitations by specifying that he does not wish it to be released for such a purpose. In that case, if the requestor cites bulk distribution, surveys or solicitation as his permitted use, the information may not be obtained.

If an individual wishes to have his name and address as it appears on his vehicle title and registration held by the Texas Department of Transportation withheld from individual or commercial release, he may make such a request and the information will not be released unless the requestor is specifically authorized by law to receive the information pursuant to a "permitted use." However, this permitted use includes use for bulk mail, surveys and solicitation if the individual has not specifically requested that the material not be directed to him. The opt out provision from the Texas Department of Transportation gives the option of restricting disclosure or personal information from 'individual requests', 'commercial requests', or 'both.' Whether or not opting out of 'commercial requests' will have the effect of preventing a requestor from obtaining information for bulk distribution, surveys or solicitation is unclear as the language here is not specific as it is on the Department of Public Safety form.

2) "SECTION 13" OF SB 1069/HB 399

In the Senate State Affairs Committee, a substitute to Senate Bill 1069 was adopted that contained the text of House Bill 399. This language is contained in Section 13 of the enrolled version of Senate Bill 1069. The purpose of the language was to expand a 1995 amendment to the Uniform Traffic Act.

In 1995, the Texas Legislature restricted access to accident reports to certain individuals and to those who could provide two out of three pieces of information: (1) the name of a person involved, (2) the location of the accident; and (3) the date of the accident. These amendments would have precluded the press from obtaining accident reports because reporters often did not have the requisite two out of three pieces of information needed to obtain the reports. The burden imposed by the 1995 amendments were, as a practical matter, relieved because other open records, such as dispatch logs, 9-1-1 tapes, and towing records, provided the requisite information needed for obtaining the accident reports. The press was able to continue reporting on vehicular accidents.

The House Bill 399 language expanded the 1995 restrictions on access to accident reports to include dispatch logs, 9-1-1 tapes, and towing records, and all other records that could be used to ascertain the date, specific location, or name of a person involved in an accident. House Bill 399 also required a person requesting accident information to provide: (1) the name of a person involved, *plus* either (2) the date or (3) the specific address, highway or street where the accident occurred.

House Bill 399 passed the 75th Legislature as a separate bill, but was vetoed by Governor Bush. In the veto proclamation, the Governor stated, that the bill is "overbroad and unduly restricts access to information of legitimate interest to the general public." Proclamation by the Governor of the State of Texas, 41-2686. The proclamation also stated that HB 1327 is narrowly tailored to address the objectives of HB 399 to prohibit barratry and solicitation of professional employment, including that by an attorney, chiropractor, physician, surgeon, private investigator, and other state-regulated health care professionals. *Id*. HB 1327 expanded the offense of barratry to include the aforementioned professionals. As previously stated, it appears Governor Bush signed the Senate Bill 1069 not realizing that the vetoed language of House Bill 399 had been amended into Section 13 the bill.

3) PUBLICATION OF PERSONAL INFORMATION ON THE INTERNET

Representative Ruth Jones McClendon added another amendment to Senate Bill 1069 on the House Floor. The McClendon Amendment prevents publishing or disclosing on the Internet personal information from a motor vehicle record unless the person to whom the information pertains has granted his or her consent. The amendment also prohibits an agency from providing a person with personal information from the agency's motor vehicle records, unless the person receiving the information agrees in writing that the person will not publish the information on the Internet.

E. RESULTING LITIGATION OVER TEXAS SB 1069

1) Plaintiffs' Original Petition

On August 6, 1997, the Texas Daily Newspaper Association (TDNA) and the Texas Press Association (TPA) filed suit in hopes of getting Section 13 of the law enjoined and, ultimately, declared unconstitutional. The defendants named in the Plaintiffs Original Petition are Chiefs of Police and Dan Morales in his official capacity as Attorney General of the State of Texas and as a representative of the class of all government officials who have custody and control over records with information related to vehicular accidents, dispatch logs, towing records and 911 records.

The associations' suit contends that although Section 13's intention is to curb excesses in professional solicitation of auto accident victims, the law's effect is to unnecessarily and unconstitutionally preclude public access to information that has traditionally been freely available to the public. The Plaintiff associations contend that Section 13 of SB 1069 violates three provisions of the Texas Constitution.

First, the associations argue that SB 1069 violates the "Single Purpose" Clause of Article 3, Section 35 of the Texas Constitution. The single purpose clause states that "(a) No bill shall contain more than one subject. (b) The rules of procedure of each house shall require that the subject of each bill be expressed in its title in a manner that gives the legislature and the public reasonable notice of that subject." Tex. Const. art. 3, sec. 35. The associations argue that Section 13 of SB 1069 was enacted to prevent lawyers, chiropractors, and other professionals from using public information to conduct direct mail marketing, while the remainder of the bill is directed at compliance with the Federal Drivers License Privacy Act. The flaw is confirmed by the failure to comply with the title clause in that the enactment's title only refers to 'personal information from motor vehicle records.' The enactment of Section 13 also violates the duty of the Legislature under Article 3, Section 30 of the Constitution not to change the purpose of legislation by amendment during the legislative session.

Secondly, the associations argue that Section 13 of Senate Bill 1069 violates the Free Speech and Press Provision in Article 1, Section 8 of the Texas Constitution by precluding core, non-commercial speech in an attempt to regulate professional direct commercial solicitation. The associations further argue that the

language is an unconstitutional prior restraint on speech because it precludes, beforehand, the reporting of newsworthy information rather than holding the publisher responsible after the fact. They also make the argument that the language of the provision is unconstitutionally overbroad and violates the Plaintiff's right to access to traditionally open governmental records.

Finally, the associations argue that Section 13 violates the Equal Protection Clause of the Texas Constitution by treating dissimilar placed parties equally. Tex. Const. art. 1, sec. 3. In other words, the associations argue that by treating them the same as requesters who would use the records for commercial solicitations is a violation of their rights. The argument of the associations is that the use of the records to report on accidents is a non-commercial and more highly protected form of speech than the use for commercial solicitation. They also argue a violation of the Due Process Clause by failing to offer a rational reason for shutting off Plaintiffs' access to information at issue while allowing others access to the information. Tex. Const. art. 1, sec. 13.

Plaintiffs' seek a temporary injunction enjoining the application of Section 13, arguing that the application of Section 13 would cause them irreparable harm in the ability to gather the news and report in a timely manner newsworthy information. Their argument is that any violation of freedom of the press, particularly that of prior restraint, is presumed to inflict irreparable harm. Plaintiffs also suggest that the balance of the hardships favors imposing a temporary injunction and maintaining the status quo.

In their prayer for relief, the Plaintiffs requested a hearing on their application for a temporary injunction to enjoin the terms of Section 13 of Senate Bill 1069 and requiring Defendants to continue to provide Plaintiffs and their members with access to dispatch logs, towing records, 911 records and other pertinent accident related information. On August 25, 1997, there was an initial hearing on the motion for temporary injunction.

2) Plaintiffs' First Supplemental Petition

On September 9, 1997, Plaintiffs filed a supplemental petition stating four additional grounds for relief. First, that Section 1 of Senate Bill 1069 is invalid and void because it is the result of an unconstitutional usurpation of state power by the federal government. Plaintiffs' First Supplemental Petition at 2. This so for several reasons. In the face of the FDPPA, the State of Texas and the Department

of Public Safety were required to implement policy in the face of a federal mandate. *Id*. The state did this in enacting Senate Bill 1069. This is an usurpation and coercion of state power in violation of the Tenth Amendment of the United States Constitution and not warranted by the Commerce Clause. *Id*. at 3.

The second additional ground for relief is the argument that restrictions on access to and use of public information imposed by Section 1 of Senate Bill 1069 are unconstitutional. *Id*. at 4. The arguments for violations of the Equal Protection and Due Process clauses from the Plaintiffs Original Petition are reiterated here.

Thirdly, Plaintiffs argue that arbitrary prohibition against Internet publication of public records imposed by Section 2 of Senate Bill 1069 is unconstitutional. *Id*. The Plaintiffs point out that the prohibition applies whether or not the person publishing the information obtained the information for a permissible purpose. *Id*. Because many of the Plaintiff newspapers have editions online, information that appears in the newsprint editions also appears in the on-line editions. *Id*. at 5. It would be prohibitively expensive for Plaintiffs to identify, segregate and delete from the on-line editions the information prohibited from Internet publication by Section 2 of SB 1069. *Id*. at 6. Specifically, the Internet publication ban violates the Commerce Clause of the Constitution and particularly the "Dormant Commerce Clause" which prohibits states from enacting laws which interfere with interstate commerce. *Id*. The Internet publication ban also violates free speech and press provisions of the Constitution and is an impermissible prior restraint. *Id*. Further, the ban impermissibly distinguishes between different modes of communication. *Id*.

Finally, Plaintiffs argue that, in the alternative, the court should enter a declaratory judgment that Sections 1 and 2 of Senate Bill 1069 do not apply to vehicular accident reports and other documents specifically covered by Section 13. *Id*. at 7. The law purports to prohibit any governmental agency from disclosing personal information about any person obtained by the agency in connection with a motor vehicle record. *Id*. "Personal information" is then defined and the law states that "the term does not include information on vehicle accidents, driving or equipment-related violations, or driver's license or registration status." *Id*. The Texas Department of Public Safety contends that these restrictions on the disclosure of motor vehicle records apply to vehicular accident reports as well. *Id*. The Plaintiffs argue that this interpretation is incorrect, urging that the restrictions

on personal information in motor vehicle records was not intended to apply to vehicular accident reports. *Id*. at 8. The information contained in a vehicular accident report is not obtained in "connection with a motor vehicle record" and is therefore not subject to the restrictions on disclosure. *Id*. at 9. The Plaintiffs thus ask the court to enter declaratory judgment that Sections 1 and 2 do not encompass vehicular accident reports and related documents information contained in vehicular accident reports, dispatch logs, towing records or other records identified in Section 13 of Senate Bill 1069.

On October 3, 1997, a temporary injunction was entered enjoining any enforcement of Section 13 of the bill, pending a hearing on the merits of a claim for a permanent injunction.

3) Letter Requesting Accident Reports

On October 2, 1997, the Texas Daily Newspaper Association (TDNA) and the Texas Press Association (TPA) sent a letter to the Texas Department of Public Safety (DPS) requesting specific accident reports. Their argument for release of the reports was based on two factors. First, that the reports could be released because there was a temporary injunction in place enjoining defendants from enforcing Section 13 of Senate Bill 1069. They also argued that the reports could be released under Section 1 of the Bill as that section specifically exempts information contained in accident reports.

The argument that Section 1 does not apply to accident reports was made in the following way. Section 1 of the bill restricts disclosure of personal information that is obtained by the agency (DPS) in connection with a motor vehicle record. By its very own terms, Section 1 does not include accident reports. In the definition on personal information, the bill states, "the term does not include information on vehicle accidents."

In contrast, Section 13 of the bill was enacted for the purpose of preventing accident reports from being released to attorneys and chiropractors soliciting clients. That section specifically states that the agency shall disclose accident reports only to a requestor who can provide the name of the person involved in the accident and either the date of the accident or the specific address or the highway or street on which the accident occurred. Under this section, the DPS is required to release the report to a person who can provide the requisite information. Thus,

if Section 1 is read to include accident reports, it is in direct conflict with Section 13 which deals specifically with accident reports.

The letter further argues that the legislative history shows that Section 1 was not enacted to deal with accident reports whereas Section 13 was specifically so enacted. Therefore, the reports requested should be released because Section 13 is temporarily enjoined and Section 1 does not encompass accident reports.

4) DPS Request for AG Opinion

The Department of Public Safety responded on October 6, 1997, by requesting an opinion from the Attorney General concerning the information request received by TDNPA and TPA. They argue that it is their interpretation that Section 1 of the bill applies to information contained in accident reports.

They argue that Section 1 prohibits disclosure of personal information from a motor vehicle record and a motor vehicle record is defined as a record that pertains to a motor vehicle operator's or driver's license permit. An accident report pertains to a driver's license because the report is basically derived from the contents of the information on the license. The position of the DPS is that they shall release information on accidents if that information does not identify the person involved. They hold further that the exception in the definition of personal information is for "information on vehicle accidents" and not a blanket exception for accident reports themselves.

5) Second Amended Agreed Temporary Injunction

Upon learning of the DPS interpretation of Section 1 as applicable to accident reports, the plaintiffs moved to amend the temporary injunction restraining enforcement of Section 13 to include Section 1 as well. On October 24, 1997, the parties agreed and the judge imposed a temporary injunction from the application both Sections 1 and 13 of Senate Bill 1069. Defendants were enjoined from enforcing Section 13 of Senate Bill 1069 as well as Section 1 or 2 of the bill to motor vehicle accident reports, dispatch logs, towing records, 911 records, or any other record that includes information subject to the restrictions contained in Section 13 of the bill. A notice of pendency of a class action and a class certification were also filed at this time.

6) Agreed Order Extending Second Amended Temporary Injunction

On August 13, 1998, the court entered an agreed order recognizing that the parties had agreed to a temporary injunction in an order entered by the court on October 24, 1997. The temporary injunction is extended until February 15, 1999, at which time a trial on the merits of Plaintiffs' application for a permanent injunction will be held.

IV. JUDICIAL RECORDS

A. JUDICIAL EXCEPTION TO THE PUBLIC INFORMATION ACT

The Texas Open Records Act provides, "a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer." TEX GOV'T CODE §552.221. The Act further provides that "governmental body does not include the judiciary." *Id*. at § 552.003(B).

Although judicial records were not specifically delineated in the Committee charges, the issue was especially timely in light of recent events. Attorney General Morales' Open Records Decision 657 held the exception did not apply to administrative records of the judiciary. A Texas Supreme Court Per Curiam Opinion then responded by holding that the language in the Public Information Act is a "blanket exception," applying to administrative and core judicial records alike.

The issue addressed by Open Records Decision 657 and the Supreme Court per curiam opinion is whether §552.003(B) provides the judiciary total exemption from the Act, thus preventing the agent of the court holding the judicial records from releasing the information in response to a public information request.

1) Open Records Decision No. 657

ORD-657 was prompted by a request for the telephone billing records of the Texas Supreme Court. The issue was whether the Supreme Court billing records are subject to public disclosure under the Texas Public Information Act.

The Attorney General concluded that while the Public Information Act does exempt the judiciary, the exemption applies only to those records that relate to the exercise of judicial powers. The Attorney General opined, therefore, that records relating to the expenditure of public funds pertaining to the routine administration of the court are not exempt, and are subject to the Public Information Act. In this "functional analysis" approach, the Attorney General ruled that the *type* of judicial record being requested should be the primary factor in deciding whether the information is subject to the Act, rather than applying a blanket exception to the judicial branch. The Attorney General wrote, "we do not believe the Legislature intended to remove from public scrutiny the type of administrative records at issue in this request. Specifically, the records regarding the expenditure of public funds or which directly implicate the fiduciary responsibilities of public employees should be subject to the required public disclosure pursuant to the Open Records Act." ORD-657 at 3.

The opinion focused on the meaning of 'judiciary' when used by the Legislature to exempt an entity funded in whole or in part by the public from the Open Records Act. The opinion found no legislative history discussing exactly what was meant by the term 'judiciary,' so the Attorney General turned to case law and prior Open Records Decisions interpreting the judicial exemption. In *Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.-San Antonio, no writ), the court held that "analysis of the judiciary exemption should focus on the governmental body itself and the kind of information requested." This case was also relied upon in prior Open Records Decision 572 (1990) in determining that the type of record requested was paramount to a determination of whether or not it was to be exempted.

The opinion goes further to point out that the term 'judiciary' does not apply to all records held by entities with judicial power. It applies only to records which relate to the exercise of judicial powers. Judicial powers are "the powers to hear facts, to decide issues of fact made by the pleadings, to decide questions of law involved, to render and enter judgment on the facts in accordance with the law as determined by the court, and to execute judgment or sentence." *Holmes v. Morales*, 924 S.W.2d 920,923 (Tex. 1996). To fall within the judiciary exception,

the document must contain information that directly pertains to the exercise of judicial powers. *Id.*

In making this ruling, however, the Attorney General overruled Attorney General Opinion JM-446 (1986) and Open Records Decision No. 535 (1989) to the extent that they conflicted with ORD-657. Open Records Decision No. 535 stated that the contract for computer assisted research entered into by the Texas Court of Criminal Appeals was exempted from disclosure under the act pursuant to the judicial exception. Directly on point, Attorney General Opinion JM-446 ruled that telephone records of the Supreme Court, as records of the judiciary, are not subject to the Act.

2) Texas Supreme Court Opinion

The Texas Supreme Court responded with a per curiam opinion. Acknowledging that Attorney General opinions are not binding on the courts, the Texas Supreme Court argued that Open Records Decision 657 was incorrect and a misstatement of the law. The Supreme Court held the exception carved out for the judiciary was absolute, and therefore, even administrative records such as telephone bills, could be properly withheld from public disclosure under the Open Records Act.

The court pointed out six fundamental flaws with the Open Records Decision. First is the fact that ORD-657 flatly contradicts the plain language of the Act. The Act neither authorizes information held by the judiciary to be withheld nor does it require disclosure, it simply exempts the judiciary from any application of the Act whatsoever.

Secondly, the court points out that ORD-657 does not claim the judiciary is a 'governmental body' for purposes of the statute. In order for the Act to apply to any entity, that entity must be a governmental body. The opinion of the Attorney General fails to make this critical classification.

Thirdly, the court argues that the basis of the rationale of ORD-657, mainly that court administration does not relate to the exercise of judicial power, is contradictory to the Constitution. In particular, Article V, Section 31 of the Texas Constitution states that "[T]he Supreme Court is responsible for the efficient administration of the judicial branch." Administrative tasks are a core function of the judicial powers exercised by the Supreme Court.

Fourth, the court opines that ORD-657 is in conflict with the opinions of every Attorney General since the passage of the Act, inclusive of several opinions by Attorney General Dan Morales himself. Morales explicitly overruled an opinion by Attorney General Jim Mattox which held that phone records were records of the judiciary for purposes of the Act and were thus not required to be disclosed. Mattox wrote in JM-446, "[O]nce it is has been determined that records sought are records of the judiciary, the Open Records Act does not apply." The court also cites an opinion by Morales in which he stated, "the judiciary is not a governmental body for purposes of the Act." Tex. Att'y Gen. ILR OR-94-069 (1994). Another Morales opinion stated, "we note initially that the Open Records Act does not apply to the Judiciary." Attorney General Dan Morales Opinion No. DM-166 (1992). Thus, not only is ORD-657 in conflict with opinions of other Attorneys General, it contradicts opinions out of Morales' very own administration.

The court argued that a fifth flaw in the reasoning of ORD-657 is that it goes contrary to the legislative intent in exempting the judiciary from the Open Records Act. The court points out that if the legislature believed that Attorneys General for several decades had been misconstruing the Act in giving a blanket exception to all judicial records, they would have amended the Act to reflect and make clear the true intent. The Act has not been amended to make clear that some records are excluded and others are not. Thus, it is quite clear, in the opinion of the court, that the legislature intended a blanket exception for the judiciary, whatever the nature of the records sought.

Finally, the court argues that the construction given to the Act by ORD-657 would simply be unworkable. The law mandates that statutory provisions should not be construed so as to lead to absurd results, if a more reasonable construction or interpretation is available. *Cramer v. Shepherd*, 167 S.W.2d 147 (1942). ORD-657 states that some judicial records are subject to the Act, and a determination shall be made by the Attorney General as to what will be exempt. Because Attorney General opinions are not binding on the courts, why should a court be required to obtain an opinion it has no duty to follow? Even so, a court is not authorized to request an Attorney General opinion, only a 'governmental body' may make such a request. In the context of the test as laid out in *Cramer,* the court argued this is an absurd result.

In summary, the Texas Supreme Court argues that the Morales opinion is contradictory both to the plain language of the Act, and other opinions by preceding Attorneys General.

B. THE INCEPTION OF THE JUDICIAL RECORDS RULE: THE AUSTIN HEARING

A majority of the testimony received at the Austin meeting pertained to Judicial Records. Attorney General Morales and Chief Justice Phillips attended the meeting as invited testimony to answer the Committee's questions regarding the differences of their opinions on judicial records. Attorney General Morales reiterated the argument as set out on ORD 657. Chief Justice Phillips, in essence, repeated the arguments contained in the Supreme Court's per curiam opinion.

Chief Justice Phillips stated that as a judge, it is his job to use judicial restraint and simply interpret the law, not to write the law. As the court interprets the current statute, the judicial branch exception is a "blanket exception" that applies to all records of the judiciary. Justice Phillips also clearly stated that if it is the Legislature's will, however, to amend the language to require disclosure of the administrative records of the judiciary, then he would, pursuant to his duties as a judge, interpret the law as amended.

In response to the Austin meeting, the Senate Committee on Public Information invited comment on the appropriate method for handling of judicial records in light of the exception in the Public Information Act. The Supreme Court replied in a letter from Chief Justice Phillips that public access should be governed by Supreme Court Rule based on recommendations of the Texas Judicial Council.

The court believes it has authority to promulgate its own rule under the Texas Constitution which requires that the Supreme Court "shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice," Tex. Const. art. V, sec. 31(a). This allows the court to formulate a comprehensive policy for requesting and obtaining court records.

Justice Phillips also pointed out that the Council has been directed by the Legislature to "receive and consider advice from judges, public officials, members of the bar and citizens concerning remedies for faults in the administration of justice." TEX. GOV'T CODE §71.032.

The Texas Judicial Council is composed of Chief Justice Phillips as chairman, Judge McCormick as vice-chairman, twelve other judges from all levels of the judiciary, four members of the Legislature appointed by the Lieutenant Governor and Speaker, and six lawyers and lay persons appointed by the Lieutenant Governor. *Id*. at 71.012.

The Texas Judicial Council held public hearings around the state to receive input on how the Council should draft a proposed rule to submit to the Texas Supreme Court for their consideration. The Judicial Council held meetings and made a number of revisions to the proposed rule throughout their hearing process. The Council adopted the proposed rule on June 25, 1998, and the Supreme Court is scheduled to consider the rule for final adoption on October 6, 1998.

C. Texas Judicial Council Proposed Rule for Public Access to Judicial Records

The Council argues that their proposed rule is designed to increase public access to judicial records through a procedure that is efficient, cost effective, and fair to all parties. The proposed rule has been the subject of public comment in eight hearings held around the state and published on the internet to obtain input from members of the media, freedom of information groups, court "watchdog" organizations and other public interest groups. The final draft will include suggestions from the general public and many of these groups.

The rule establishes a presumption that all judicial records are open to the public and exemptions from disclosure are only provided to protect judicial work product, security, and privacy interests. A judge may only deny access to records in specific instances and a party who has been denied access may appeal that denial to a special Committee of judges. Legal remedies, such as a writ of mandamus are provided to parties in addition to the administrative remedies.

The rule consists of nine principle sections. The first section sets out the policy that government functions best when the public is informed and creates the presumption that all judicial records are open to the public.

Section 2 defines the terms to be used in the rule. Of interest is the definition of 'court record' as "a document of any nature that is created, produced, or filed in connection with any matter before the court."

The third section deals with the applicability of the rule. It states that the rule does not apply to any record or other information relating to an arrest or search warrant governed by rules of civil, criminal, or appellate procedure or common law, court order or another provision of law. The rule also does not apply to a record or information to which access is governed by Chapter 552 of the Government Code or another statute.

The fourth section deals with right of access to judicial records and states that judicial records are open to the general public during regular business hours. It states further that the rule does not require a judicial agency to create or retain a record for a specific period of time and is not required to release records to individuals who are imprisoned. A custodial judge is also not required to allow inspection of a book or record if the book or record is commercially available to the public.

The fifth section exempts from disclosure judicial work product and drafts, security plans, personnel information if requested by someone other than the employee that is the subject of the file, home address and family information, information that relates to applicants for employment or volunteer services, and internal administration of the court if the materials have not been circulated outside the court or disclosed to a member of the public and require confidentiality to protect a compelling governmental interest. Also exempted are court law library information that links a patron's name with the material requested or borrowed by that patron, and information made confidential under other law.

The sixth section addresses procedures for access to judicial records. A request to inspect or copy information must be made in writing and access must be given if the record is available in a convenient public area within a reasonable time not to exceed the 20th business day after the date the custodial judge receives the request. The request must include sufficient information to reasonably identify the information that is being sought. The requestor need not come to the courthouse to receive the information, it may be mailed to him. A custodial judge is prohibited from inquiring into the purpose of the request, and the charge for copying the record may be reduced or waived by the custodial judge.

The seventh sections deals with costs of copying judicial records. The cost of a judicial record should be the actual cost not to exceed 125% of the amount

prescribed by the General Services Commission. A person who is overcharged may appeal under Section 9.

The eighth section speaks to the denial of access to judicial records. A custodial judge may deny a request only if he determines the record to be exempt or that compliance would substantially and unreasonably impede the routine operation of the court. The requestor must be informed of the denial in writing within a reasonable time not to exceed the 10th business day after the date the judge receives the request and such notice must include the reason for the denial, inform the person that he is entitled to an appeal, and include the address of the Administrative Director of the Office of Court Administration.

The ninth and final section addresses relief from denial of a request. A person who is denied access may file a petition for review that must include a copy of the denial and may include any supporting facts, arguments, or authorities the petitioner deems relevant and may also contain a request for expedited review. The petition must be filed no later than 30 days after the date notice of denial was received. The denying judge shall be notified of the petition, and a special committee will be formed to hear the petition. The denying judge may submit a written response including relevant facts and authorities. Not later than 60 days after receipt of a valid petition, the committee shall review and determine if disclosure is necessary and issue a signed decision. The decision shall grant in whole or in part the request or sustain the denial, and must state the reasons for the decision. The petitioner must be notified of the decision and although the decision is not appealable, it does not preclude other legal remedies.

D. Responses to the Proposed Judicial Records Rule

The Committee received written and verbal testimony making several comments on the proposed judicial rule. Several different concerns have been expressed.

The first of which is the fact that judges are given lenient treatment for violations of the rule. Whereas other officials are subject to criminal sanctions for violation of the Public Information Act, judges are subject only to discipline for professional misconduct. Some commentators want criminal penalties established by legislation creating a single standard for all government officials in Texas.

A second is the desire to see the same recovery procedures instituted for requestors who are overcharged by the judiciary as are in place for those overcharged under the Public Information Act. Specifically, recovery of treble damages, attorneys' fees and litigation costs for mandamus actions.

Other concerns expressed in testimony to the Committee are that there be an allowance for discretionary disclosure of records which have been exempted, and a statement making clear that information is available to all persons and that all requests will receive uniform treatment. A system for widely reporting the decisions of the special committee, and an instruction giving precedential weight to those decisions has been suggested. The inadequacies of the 20-day deadline for responses to requests and the 30-day deadline for the filing of an appeal have also been mentioned in testimony.

A final concern has been over the $1.00 per page copying charge in State District and County Courts and the fact that it is thought to be excessive. The problem with the high costs is that they are seen as the most effective way of denying access to public records, and thus the feeling is that the costs should be more in line with General Services Commission Guidelines. If the clerk's office is allowed to charge more than a judge's office or county offices, a judge reluctant to release his records will effectively drive up the requestor's costs by sending the records over to the clerk's office. There is also concern over any proposals to charge the public for Internet access to records. Such charges have been proposed in order to make computer upgrades pay for themselves.

Other testimony received by the Committee has been incorporated into the current draft of the proposed rule. Those suggestions which have been incorporated include, a strong policy statement in favor of records disclosure and a prohibition on inquiry into the purpose of the request.

V. ALTERNATIVE DISPUTE RESOLUTION ISSUES

A. Background

The Public Information Act currently allows a governmental body to withhold from public inspection any information relating to pending or anticipated litigation involving a governmental body. The litigation exception states that information is exempt from disclosure if it is information, "relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political

subdivision is or may be a party or to which an officer or employee of the state or political subdivision, as a consequence of the person's office or employment, is or may be a party." TEX. GOV'T CODE 552.103. The litigation exception was intended to prevent use of the Public Information Act to avoid the rules of discovery in litigation. In addition to information relating to litigation, Section 552.101 of the Act exempts from disclosure information that has been made confidential by law, either constitutional, statutory or by judicial decision.

The issue becomes complicated when Section 154.073 of the Texas Civil Practices and Remedies Code is used in conjunction with 552.101 of the Act to argue a document is confidential. The Code states in pertinent part, "[E]xcept as provided in subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against any participant in any judicial or administrative proceeding." TEX. CIV. PRAC. & REM. CODE 154.073(a). "Any record made at an alternative dispute resolution procedure is confidential." *Id*. at (b). Thus, the argument made by governmental bodies who do not wish to release settlement or other ADR information is that because ADR proceedings are made confidential by the Civil Practices and Remedies Code, the documents from those proceedings are exempted from the required disclosure of the Public Information Act through the operation of 552.101, including final agreements.

B. OR97-2600 (November 25, 1997)

In a request for an opinion on whether or not a settlement agreement entered into by the City of Bellaire was required to be disclosed, the City made the argument that a non-disclosure statement in the agreement controlled. The Attorney General, in an informal letter ruling, found that unless a court order has made a settlement agreement confidential, the settlement agreement is subject to disclosure under the Public Information Act. A court order would operate to exempt the agreement from disclosure through the operation of Section 552.107 of the Act which provides that information is exempt if "it is information that the attorney general or attorney of a political subdivision is prohibited from disclosing because of a duty to a client under the Texas Rules of Civil or Criminal Procedure or the Texas Rules of Disciplinary Procedure." The City had no authority to withhold the agreement based solely on the non-disclosure provision in the absence of a court ruling otherwise or an attorney-client privilege.

The City also made the argument that the settlement agreement could be withheld based on 552.101 of the Act in conjunction with the provision of the Civil Practices and Remedies Code concerning ADR records cited above. The Attorney General stated that there was no evidence that the settlement agreement was a record of an ADR proceeding to be afforded confidentiality protection. An argument for confidentiality based on 552.103, the litigation exception, also failed. The litigation exception applies only so long as litigation is ongoing or anticipated. In this situation, the litigation had ceased, there was a settlement, thus, the exception could not be applied to prevent release of the settlement agreement.

C. OR98-0302 (January 30,1998)

The City of Bellaire asked the Attorney General to reconsider OR97-2600 and made further arguments that the requested settlement agreement arose out of an alternative dispute resolution proceeding. This decision therefore concluded that because the documents arose out of such a proceeding, they were made confidential by 154.073 of the Civil Practices and Remedies Code. This in conjunction with the section of the Act exempting any records made confidential by other law was enough for the Attorney General to conclude that the settlement agreement was not a public record under the Public Information Act. The decision overruled OR97-2600 to the extent it conflicted with this opinion. However, this opinion, like OR97-2600, is an informal letter opinion rather than a published decision and not meant to apply to situations other than the present facts.

D. OR98-0781 (March 23, 1998)

The City of Mineola made a request to again determine the confidentiality of a settlement agreement entered into by the City. The informal letter ruling held that if the court had issued an order making the agreement confidential, 552.107 would work to exempt the agreement from required disclosure under the Open Records Act. However, the agreement in question contained only a non-disclosure clause agreed to by the parties. The Attorney General stated that normally, a settlement agreement that is not made confidential by court order will be open to the public. The fact that the agreement contained a non-disclosure provision did not make it confidential where disclosure is required by the Public Information Act.

E. ORD-658 (July 1, 1998)

In ORD-658, Attorney General Dan Morales considered whether the Public Information Act required release of a governmental entity's mediated final settlement agreement. In that decision, the Attorney General overruled Open Records Letter No. 98-0302 which held that a mediated settlement agreement is not a public record based on 154.073 of the Civil Practices and Remedies Code in conjunction with 552.101 of the Public Information Act.

The decision stated that making a record of an ADR proceeding confidential under the Code did not evidence a clear intent on the part of the Legislature to protect from public disclosure mediated final settlement agreements of a governmental body. The opinion further points out that the Legislature intended to distinguish confidential ADR records from final settlement agreements reached during a mediation. The decision states that this distinction is manifest in the ADR Act which clearly does not contemplate that a written agreement disposing of the dispute falls into the category of a record made at an ADR proceeding with the confidentiality afforded ADR communications and records. This argument is based on the portion of the ADR Act at 154.071 of the Civil Practices and Remedies Code which makes a final negotiated settlement agreement enforceable in the same manner as any other written contract, thus not the same as any record made at an ADR proceeding.

Therefore, the use of an ADR proceeding should not cause any final agreements involving a state agency to be kept from the public. Confidentiality of the final settlement is not necessary to maintain the integrity of the mediation process.

A second issue was raised in the same opinion regarding a settlement agreement reached in connection with an appeal of an employee suspended by the city as to whether or not the settlement agreement would be exempted under 552.103 of the Act which states that information relating to litigation is exempt from disclosure. A two prong test is used to establish when 552.103 may apply, first that litigation be pending or anticipated, and second that the information at issue be related to the litigation. The decision here held that only a portion of the requested information related to the litigation and therefore, only that portion could legitimately be withheld.

Section 552.107 of the Act may also be implicated where the information is protected by attorney-client privilege, this being a 'duty owed to the client.' This

decision held that because the settlement agreement was signed by the opposing party, the City could not have intended it to be between only they and their lawyers, and therefore, the attorney-client privilege did not apply. The agreement could not then be made confidential through the application of 552.107 of the Act.

VI. PUBLIC HEARING SUMMARIES

A. AUSTIN HEARING

The Senate Interim Committee on Public Information held its first public hearing in Austin in Room E1.012 of the Capitol Extension on October 9, 1997. Approximately two hundred citizens attended the hearing and twenty-two witnesses presented testimony to the Committee. As the first order of business the Committee unanimously adopted the Committee rules and Chairman Wentworth gave a brief overview of the charges.

Invited testimony began with Supreme Court Chief Justice Tom Phillips and Attorney General Dan Morales giving their respective sides on the judicial records issue to the Committee. Chief Justice Phillips relayed the Supreme Court's feelings that the openness of judicial records was a legislative call. General Morales asserted that the open records exemption for the judiciary in statute is less than absolute. Further discussion of this issue can be found elsewhere in this report. (See Section V-Judicial Records).

A large part of the testimony received at this hearing involved the judicial records issue. The Committee received suggestions for a Judicial Records Act. As outlined for the Committee, the Act would standardize copy costs, mandate on-line access to certain court documents, address open meetings requirements, confirm existing laws on the sealing of court records, and create an independent review process for disputes involving judicial records.

Dolph Tillotson, editor and publisher of the Galveston County Daily News, testified about the effect Senate Bill 1069 was having on media's ability to access motor vehicle records. He gave a brief background of the bill and brought the Committee up to speed on the status of the lawsuit the Texas Daily Newspaper Association (TDNA) and the Texas Press Association (TPA) filed against the Department of Public Safety (DPS). He made a point to say that neither the DPS

nor the Attorney General is the "bad guy" in this situation, but that he perceives the bill to be a problem for both the DPS and the news media in the state.

Tillotson mentioned that on October 2, 1997, the TDNA and the TPA had filed an open records request with the AG's office regarding several motor vehicle accidents. In his testimony he expressed hope that the AG would look into the matter and render a quick opinion that would clarify the situation. As of September 30, 1998, the Attorney General had not rendered an opinion in this case.

To finalize his testimony, Tillotson stated that he thought the Federal Driver's Privacy Protection Act is unconstitutional, and suggested that any statutory changes that affect access to records be made in the Public Information Act.

Reggie James of Consumer's Union highlighted several issues regarding pubic information, both positive and negative, in his testimony and made several recommendations to the Committee. He praised the Attorney General's Open Record Hotline and the legislation passed during the 74th Legislative Session, HB 1718, which expanded the open records law to account for rapid changes in technology and the growing number of mediums public information can be disseminated in. James outlined for the Committee several issues he felt were problematic regarding open records, including access to judicial records, privatization of governmental services and the subsequent closing of public records, delays in access to records, enforcement of the Public Information Act, the cost of records, and records closed by statutes other than the Public Information Act.

James spent an extended part of his testimony talking about reconsiderations, the practice by governmental entities of asking the Attorney General to reconsider the opinion that was rendered in a ruling. He pointed out that there is no provision in the law for reconsiderations, and stated that if the Attorney General says a record should be released, then it should be, no questions asked. He went further to say that if the record isn't released, there needs to be a mandamus action taken against the governmental entity. (see Appendix D)

The recommendations he made to the Committee included creating an open records impact statement that would explicitly mark any legislation that affects the status of open records, civil penalties for agencies that are not complying with the

Act, and putting the cost-burden of segregating confidential records on the owner/holder of the information.

Hadassah Schloss, Open Records Administrator for the General Services Commission, gave the Committee an overview of HB 1718.

B. SAN ANTONIO HEARING

The Committee held its next public hearing in San Antonio at the San Antonio Central Library Auditorium, 600 Soledad Plaza, on December 2, 1997. Approximately sixty-five people attended the public hearing and fifteen witnesses signed up to testify.

Senate Bill 1069, along with its proponents and opponents, were the center of the testimony gathered at the San Antonio hearing. Tom Stephenson, Senior Vice President of Operations and Administration at the *San Antonio Express News*, lead off testimony on the bill that limits public access to motor vehicle records. He testified on behalf of both daily and weekly newspapers in the region, as well as the TPA and the TDNA. Stephenson began his remarks by giving an update on a lawsuit filed by the newspaper industry through the aforementioned associations which challenges certain portions of SB 1069. A hearing was set for Friday, December 4, at which time they were anticipating that the injunction barring the effect of certain portions of SB 1069 would become permanent.

Mr. Stephenson also presented the Committee with a recommendation to establish a clause that would mandate a notice in all proposed legislation of possible open government infringement. He described it as something similar to a fiscal note that is attached to a bill, where any legislation seeking to alter the Public Information Act would make reference to it by name or chapter.

On the flip side of that issue, Frank J. Garza, acting City Attorney for the City of San Antonio, praised SB 1069 as a means of relieving long lines at police department windows for accident reports. In reference to the lawsuit involving SB 1069, Garza stated that if the law was not allowed to stand, he would suggest an amendment to the Public Information Act to allow municipalities to charge for personnel costs incurred in processing requests for public information. In his testimony, Garza stated that in the early 1990's a “combination of factors, including amendments to the attorney disciplinary rules and changes in the worker’s compensation system created a huge demand for accident reports,” which has given

rise to a new business involving the sale of accident report information to medical providers, insurance companies, lawyers and other interested groups. These new information service providers apparently set up shop in the lobby of the police department and ask for large numbers of accident reports, while using portable copy and fax machines to circumvent the copy cost that is allowed by the state.

State Representative Ruth Jones McClendon also testified before the Committee regarding SB 1069. She drafted the amendment to SB 1069 that would prohibit state agencies from selling personal information from motor vehicle records unless the buyer agrees not to publish the information on the internet or prohibits another person to do so. Representative McClendon had been contacted in the last days of the 75th Legislative Session by a constituent who's name and address appeared on an internet site after being sold by the Department of Public Safety (DPS) to a company called Public Link Corporation. The woman had paid a fee and filled out a form for DPS that was supposed to suppress her address from all inquiries but those by law enforcement officials. The woman had recently moved to Texas from Colorado and had taken these extraordinary measures to keep her ex-husband, who had repeatedly tried to kill her and her children, from locating her.

To round out the majority of the remaining testimony, Reggie James from Consumer's Union outlined for the Committee three major concerns his organization has pinpointed regarding the Public Information Act. Mr. James characterized these concerns as relating to areas of the Public Information Act that are clear and properly interpreted by the Attorney General (AG), but which are continually used by state agencies to withhold information or at least to delay compliance with the law.

The first issue Mr. James referred to was the number of reconsiderations that seem to be automatically requested by state agencies when the AG's office instructs them to release the information in question. James suggests this could be curtailed by having the AG file a mandamus, especially if the information is obviously open. The second point of contention James presented as clear by law but not in practice is that of trade secret and confidential business information. According to James, the Attorney General has used federal interpretations of the Freedom of Information Act to interpret the Texas Act. The Texas Act specifically creates a presumption of openness where the Federal Act does not and he expressed concern that Attorney General's opinions regarding trade secrets do not follow the spirit of the Texas Public Information Act. Consumers' Union was

doing further research into this subject. The third concern presented was in regard to the litigation exception in the Act. According to James, many governmental agencies are routinely sending public information requests for an AG opinion if the information might even be vaguely related to litigation. He did not have a specific recommendation on how to curtail these perceived abuses, but did suggest that a general remedy was greater enforcement. Senator Shapleigh asked James how the enforcement clause in the law could be made stronger to make agencies more responsive. James suggested that adding a lesser civil offense to the existing criminal offense would encourage people to pursue enforcement more often. He added that allowing attorney's fees for a person who has to resort to legal processes to enforce the Act is also an appropriate measure.

C. EL PASO HEARING

The El Paso public hearing was held in the El Paso City Council Chamber at 10:00 a.m. on Wednesday, January 21, 1998. The Committee heard testimony from seventeen registered witnesses.

Testimony began with Elaine Hengen, Assistant City Attorney for the City of El Paso, relaying to the members of the Committee the large amount of time city staff spends in processing open records requests. Her testimony focused mainly on the availability of accident reports and circumvention of the Act. Ms. Hengen asserted that the city does not engage in the practice of purposefully withholding records, but with the myriad of statutes that affect open records, in some cases, determining whether the document may be released or not takes an extended period of time. She also stated that the police department often receives complaints from people who have been involved in an accident about being solicited for chiropractic care and legal services.

Jose Rodriguez, County Attorney for El Paso County, had several recommendations for the Committee. He stated that governmental entities should "consciously promote the dissemination of public information and in particular maximize the availability of public information over the Internet". He delineated three specific recommendations which included the creation of public information advocates to assist citizens with open records requests, requiring governmental entities to compile, publish, and make available online indices describing standard reports, records, and other materials that are available to the public, and finally, to create a commission to identify information to be made available online.

Denise Davis, Director of the Texas Judicial Council, gave an update to the Committee regarding the progress of the Texas Judicial Council's Committee on Open Records. At the time of this hearing the judicial committee was discussing how to approach the rule language and doing research into how other states address the issue.

The Committee received a large amount of testimony regarding information dissemination over the Internet while in El Paso. Suggestions included standardizing formats that state agencies and other governmental agencies use on their web sites, as well as making public information more accessible by encouraging Internet access to low-income and disadvantaged citizens. A representative from the Department of Information Resources, Ed Serna, gave the Committee an update on the Statewide Strategic Plan for Information Resources published in 1995 and again in 1997. One of the main stated goals in this publication is that state agencies start providing information electronically to the citizenry in the least common denominator, meaning in the most common application. In regards to standardizing the Internet presence by state agencies, Mr. Serna stated that the department is not making that a priority because each state agency has different constituencies and different goals to be reached through building a website.

Finally, Francis Wever, President of the El Paso Federation of Teachers and Support Personnel, testified and provided documentation to the Committee regarding her organization's struggle to obtain travel and financial documents from the El Paso School District. In the course of questioning after her testimony, Chairman Wentworth pointed out language in the last paragraph of the Attorney General's Opinion regarding her open records request. It stated: "We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records." The Chair made the observation that this "standard boiler plate language" may be the reason governmental entities feel obliged to seek an AG's opinion with an open records request, even if it is nearly identical to one the AG has made a standard letter ruling on previously.

The Committee also heard testimony from several citizens about their own struggles to obtain public information from governmental entities.

D. HOUSTON HEARING

The Committee met in Houston on Thursday, March 19, 1998, at the George R. Brown Convention Center. Testimony was concentrated in the areas of motor vehicle records, search warrant affidavits, commercialization of public information, and the rule language being drafted by the Texas Judicial Council regarding open court records. Approximately seventy-five members of the public attended the hearing and twelve people testified before the Committee.

Tony Pederson commenced invited testimony by giving the Committee an update on the lawsuit filed regarding SB 1069. Moving on to the privatization issue, he stated that taxpayers should be able to "see the public dollar in the private sector." He then stated that commercial users should not be differentiated from other users when requesting and receiving public information. Pederson also addressed the Holmes vs. Morales case and stated that there needs to be more public accountability to the investigatory powers of the District Attorney's office. He continued by stating that there is a problem with the holders of the information deciding the flow of information to the public. Mr. Pederson echoed the recommendation of his counterparts at previous hearings, requesting the creation of a public information impact statement.

The City of Houston testified in favor of differentiating commercial users of public information from private citizens. The assistant city attorney testifying on Houston's behalf stated that the city sees the open records laws as a benefit for the taxpayers to enable them to see how their tax dollars are being spent, not as a tool for profit-seeking companies. Senator Whitmire countered those remarks by stating that many of these companies that use public information in their day to day business benefit private citizens with employment and by adding to the economy of the area.

The Committee heard testimony from Judge Mike Wood, Chairman of the Texas Judicial Council Committee on Court Records, as well. Judge Wood gave the Committee an update on the progress of the rule language being drafted by the judicial committee regarding court records. The most recent draft of the rule language at the time of the Houston meeting included a provision allowing the judiciary to deny a request for information if it was deemed to be harassment. Senator Whitmire pointed out that this language created a protection for the judiciary that other elected officials do not enjoy. Chairman Wentworth cautioned

Judge Wood against including the provision, also, stating that determining which requests are truly harassment would be difficult.

The Internet service provider for the Fifth District Court of Appeals, Charles Matz, testified regarding the court's presence on the Internet and how it has cut down on personnel time dedicated to fulfilling open records requests. The Fifth Court of Appeals has its own website where the public can access for free any court record that is available from the clerk's office. According to a survey submitted by Mr. Matz, users of the website have cut down their visits to the clerk's office by about 90%.

Paul R. Scott of the Society of Southwest Archivists testified to the Committee that the Texas Public Information Act does not provide for a publications fee that is customary for archivists, manuscript librarians, and records managers to collect. Publication fees are collected whenever a photo or a map is used to illustrate a book or a magazine. Mr. Scott asserted that not collecting this fee could be perceived as unfair competition by private enterprise. He conjectured that the omission was unintentional and recommended that the Committee amend the Public Information Act to allow for the collection of this publication fee.

The Committee also heard testimony from Ed Wendt, editor of *The Forward Times*, the largest African-American-owned newspaper in Texas. Mr. Wendt cautioned the Committee about making newspapers an elitist group by creating a provision in the Public Information Act that would give the media access to information that private citizens and businesses do not have. Chairman Wentworth assured Wendt that this was not the Committee's intent. Wendt continued his testimony by asking the Committee to consider striking an amendment that was added to the Public Information Act during the last legislative session. This amendment added Section 552.127 to the Government Code which excepts from disclosure information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program. Wendt asserted that this exception greatly inhibits the public's right to know who owns and operates these businesses.

The Committee heard recommendations from several additional witnesses. Those recommendations included keeping search warrant affidavits closed until indictment (which is currently in statute) and having mandatory open records training for public servants in all governmental entities.

E. TYLER HEARING

The Committee met Wednesday, April 29, 1998, at the Tyler Sheraton Hotel, at 11:00 a.m. The Committee heard testimony from a large number of private citizens and local government officials from the Tyler area. In all, twenty people signed up to testify and the Committee heard testimony from seventeen.

The issues covered at this hearing ranged from the need for enforcement of the Public Information Act to the suggestion that governmental entities be required to post public information guidelines.

Several witnesses testified to the Committee that the means of enforcement need to be strengthened. One recommendation was to create a lesser penalty than the current criminal charge so that District and County Attorneys may be more willing to pursue prosecution. To date there is only one instance of criminal prosecution under the provisions of the Public Information Act. Witnesses who testified to having extreme difficulty in obtaining records from the elected officials in their town also asked the Committee to consider providing an alternative means of prosecution other than the county attorney, and suggested a non-political entity.

Smith County Commissioner Sharon Emmert testified that many counties are lagging behind in regards to the use of technology. She stated that putting records on the Internet could greatly reduce copy costs for citizens as well as personnel costs for governmental entities. Chairman Wentworth noted that counties are not fond of unfunded mandates handed down from the state, but agreed that the greater use of technology can assist in making records more accessible.

Joe Ed Bunton, representing Common Cause, recommended as part of his testimony that the judicial exception be taken out of the Public Information Act and that *Holmes v. Morales* should be reversed, making search warrant affidavits open to the public even when an indictment has not been granted.

Diana Rawlins from Corsicana, Texas, gave the Committee several useful suggestions. She stated that city procedures often confuse the general public and are not a true representation of what is available under the Public Information Act. She suggested that governmental entities be required to post the state's public information rules and that a fine should be assessed for those that do not. She also

stated that the cost for copies in many rural municipalities is too high for low-income citizens and should be lowered in statute.

Nelson Clyde, III, publisher of the *Tyler Morning Telegraph* and Jim Giametta, Executive Editor of the *Telegraph* also testified before the Committee. They gave an update on the SB 1069 lawsuit and briefly reiterated testimony given at previous meetings regarding privatization, commercial users, and the search warrant affidavit issue. Jim Giametta expanded his testimony to insist that confidential agreements where government business is concerned are wrong no matter what method the agreement was reached through. He also stated that AG opinions that are sought in situations where the law is clear are unnecessary and should be curtailed. He did not have a specific recommendation for the Committee, but suggested that the Attorney General's practice of responding with a letter ruling rather than a open records decision (ORD) in many open records cases may be encouraging the situation.

Hadassah Schloss from the General Services Commission (GSC) rounded out public testimony by reiterating and giving comments on several of the recommendations made to the Committee during testimony. She stated that requiring governmental entities to post public information guidelines is a good idea. She also asked that the GSC have the ability to audit a governmental entity's public information procedures. Several city officials and employees requested during their testimony that cities be able to charge for personnel costs in cases of large requests for information when the requestor only wants to inspect the records. Currently, a governmental entity can only charge for the cost of copies. Mrs. Schloss stated that she has received many complaints regarding the inability to charge personnel costs in inspection-only cases and suggested that a formula be devised, such as: if the request for records takes more than 5 hours to complete and the records are contained in 5 or more boxes, an entity may charge for personnel costs. Jim Giametta asked in his testimony that the clause that waives fees for businesses "acting in the public interest" be clarified. Mrs. Schloss suggested parameters be set for governmental entities to use when determining who is acting in such a manner. She also suggested that the law should allow one governmental body to waive any fees when fulfilling a request for another governmental entity.

Finally, Mrs. Schloss suggested that the definition of "separate building" be clarified in Section 552.261 of the Public Information Act. It states that a governmental agency cannot charge personnel costs for retrieving information if the request consists of less than 50 pages unless the documents are contained in

separate buildings. Mrs. Schloss contends that in many cases, a governmental body may just have the records across the street or in another building in the same office complex. All of these instances qualify as "separate buildings", but retrieving documents from them would not involve the type of work personnel charges are supposed to compensate for.

F. HARLINGEN HEARING

The Committee met Tuesday, May, 19, 1998 in Harlingen at Texas State Technological College in the Eddie Lucio, Jr., Health Science Technology Building, at 10:30 a.m. The Committee heard testimony from five witnesses at this hearing.

Lyle DeBolt, publisher of the *Valley Morning Star* newspaper, gave testimony to the Committee regarding commercial users of public information, privatization of governmental services and the search warrant affidavit issue. He stated that nothing had changed in the status of the lawsuit regarding SB 1069 since the last public hearing in Tyler.

Brenda Lee Huerta testified before the Committee about the importance public information is to the media, especially in an area where the primary language is Spanish. As a reporter with two Spanish speaking radio stations, Ms. Huerta says that many of their listeners rely on the information the radio stations disseminate to keep them up to date on the business the governments around them are conducting. She stated that several of the municipalities in the area work very closely with the stations to keep them informed of public hearings and open meetings occurring in the area. She did relay a story of one municipality, though, that asked her to stop announcing their public hearings on the air because too many people were attending. Ms. Huerta gave several examples to the Committee of problems with county and local governments, as well as words of praise for many police departments in the area.

Jim Scheopner, Harlingen Chief of Police, testified before the Committee regarding police reports. He stated that some information should not be disclosed to the public in order to protect the privacy of citizens, namely when they have been involved in an accident. He stated that his office has received complaints from people who have been contacted by chiropractors and lawyers offices after being involved in an accident. He also stated that he has received complaints from people whose homes had recently been burglarized and who started receiving

phone calls from burglar alarm companies trying to sell their services. In regards to being contacted by a burglar alarm service, Senator Wentworth stated that some people might consider that the "free enterprise capitalistic way of doing things" and not necessarily harassment. Senator Carona added that he, however, agreed with Chief Scheopner and believes that not all information should be open to everyone and that he is concerned about the harassment issue.

Kevin Pagan, Assistant City Attorney for the City of McAllen also testified regarding police reports. He recommended that the Committee clarify Section 552.108(a) exception not apply to cases not disposed of by any other means than deferred adjudication or conviction. He added that the ability to narrow the scope of a request has been a great help.

Hadassah Schloss testified briefly and reiterated her Tyler testimony to say that cities should be able to charge for large requests when a person only wants to view the records.

G. FORT WORTH HEARING

The Committee met Thursday, June 11, 1998, in the Fort Worth City Council Chamber at 10:35 a.m. Twenty-two witnesses testified before the Committee.

Jeremy Halbreich, president and general manager of the *Dallas Morning News,* testified before the Committee on SB 1069 and the motor vehicle record issue. He stated that the TPNA and the TPA consider the Federal Driver's Privacy Protection Act unconstitutional and would like the Attorney General to challenge it as so. He also stated he thought SB 1069 should be repealed. There were no new developments on the lawsuit at the time of this hearing.

The Committee also heard testimony on the judicial records issue. Judge Mike Wood testified before the Committee again and reviewed the latest draft of the rule language with the Committee members. He expressed that the Texas Judicial Council Committee he chairs on the judicial records issue is having difficulty in finding a "response deadline" that shows dedication to providing records and at the same time takes into consideration individual judges' schedules. He also stated that the judicial records committee was trying to make the cost of records as "user-friendly" as possible. Judge Wood reviewed the appellate process with the Committee as well, stating that his committee decided to recommend the

utilization of a board of administrative regional judges to hear appeals to the judiciary's open records decisions. Administrative regional judges meet regularly every month already and are not appointed within the judiciary, but by the governor. He also stated that he has no objection to including a specific statement that a right of mandamus exists, even though he feels it is not necessary. According to Judge Wood, a violation of the rule will subject a judge to sanctions under the Code of Judicial Conduct rather than the criminal charge that the Public Information Act provides.

The Committee received testimony regarding the privatization of governmental services from Dr. Charles Davis, a professor at Southern Methodist University. Dr. Davis stated that within the last couple of years contracting with private vendors has spread to more intrinsic, fundamental government functions and recommended that the Committee subject private contractors to the same level of scrutiny as public entities.

Dr. Davis also told the Committee that the approach other states are taking in regards to electronic record access is on the wrong track. He stated that most of them are approaching electronic access to records by "mimicking paper-based record systems", and that is not the best way to set up a system. A representative from Dallas County outlined for the Committee the county's efforts at putting records online. She said the county has a 900-dial up service that provides access to records the district and county clerks hold, as well as information about elections and PACs, and that the county is exploring the use of a website. She continued by recommending the Committee explore allowing local governments to provide information electronically. According to Tarrant County's district clerk, the county also has a fee-based online access system, but he said he would not put any records online until he was convinced it was a safe medium to use.

Frank Sturzl and Susan Horton of the Texas Municipal League testified that there is a difference between access to a record and a copy of a record. According to the testimony, taxpayers pay for the former, but not the latter. Susan Horton also addressed the allegations that governmental entities, including municipalities, abuse the right to ask for an Attorney General opinion in public information requests. She stated that the decision whether a document is open or not is not always clearly laid out in law. Since it can be a crime to *not* release information and it can be a crime to *release* certain information, people whose decision it is are usually very cautious. She went on to say that people often threaten to sue municipalities if they release information about them. Chairman Wentworth

challenged that statement by saying that if the law is clear, the threat of a lawsuit should not deter an entity from abiding by the law promptly. He stated: "The public entity needs to make a decision to release the record based on the law and not based on concern of embarrassment, or for example, trying to protect school board members, or because they just think they paid the football coach too much money and they don't want the public to know."

The Committee also heard concerns from several witnesses regarding the openness of records produced out of alternative dispute resolution (ADR) proceedings. Paul Watler, an attorney with Jenkens and Gilchrist, stated that ADR is a good process and its use should be encouraged. But, cities and school districts are sealing the agreements from public with the approval of courts and the Attorney General. He gave the Committee several examples of such activities. He recommended the Committee close the loophole in statute that is allowing these entities to keep mediated settlements closed and confidential. Andrew Bowman, program director at the University of Texas Law School Center for Public Policy Dispute Resolution testified to the Committee that perhaps the best way to close that loophole is to expand the scope of the Alternative Dispute Resolution for State Agencies Act, Government Code, Chapter 2008, to include all governmental entities.

Laura McGee brought to the Committee's attention a bill that was passed during the 75th Legislative Session that amended state records laws. Senate Bill 454 amends the definitions of "state record", "county record", and "local government record" to specifically exclude any records associated with an alternative dispute resolution process that involved state personnel or personnel from any political subdivision in the state. Ms. McGee stated: "If there is not an obligation to keep those records, there is not access to those records, despite however it turns out as far as rulings with confidentiality come into play."

Mark Dempsey, Assistant City Attorney for the City of Garland, testified to the Committee regarding requests for voluminous amounts of information from the American Driver's Association. He characterized the requests as being pure harassment as they ask for hundreds of thousands of documents for inspection only. Section 552.261 of the Public Information Act does not allow for governmental entities to charge a requestor for inspection of a document, no matter how large the request or how much personnel time it takes to compile the request. One request, Dempsey stated, would have required the City of Garland to produce

3,000 file boxes from storage. He requested that some manner of relief be allowed governmental entities from producing these records at no charge.

A representative from the American Driver's Association also testified before the Committee. He praised the Public Information Act as an instrument that is working in his favor. Senator Carona stated that what he perceived the American Driver's Association to be doing was pure harassment and that he would like to see this type of activity by organizations stopped.

Witnesses also testified on several other issues. One witness urged the legislature to help local governments make the connection between records management and accessibility for public information purposes. A representative from the City of Fort Worth provided the Committee with a copy of a report the city had done regarding their records management project designed to improve its management and use of information. A recommendation was also made to narrow the scope of the litigation exception in the Public Information Act. According to the witness, an exception with such a broad scope coupled with our litigious society guarantees that practically anything could relate to anticipated or pending litigation. A representative from the Dallas Genealogical Society stated that Section 552.115 of the PIA concerning access to old vital statistics records is not being followed uniformly by government records custodians. She suggested the guideline be clarified and a copy be sent to all county and city record custodians.

H. AMARILLO HEARING

The Committee met on Tuesday, July 7, 1998, in the Visiting Court Room of the Potter County Courthouse, Amarillo, at 1:00 p.m. Twenty-two people testified before the Committee.

Mitchell Pearlman, Executive Director of the Connecticut Freedom of Information Commission, started invited testimony by giving a brief overview of the Commission's structure and objectives. The Connecticut Freedom of Information Commission administers and enforces the state of Connecticut's freedom of information laws as an independent government oversight agency. As part of the effort to ensure independence, members are appointed by the governor and the commission's budget is sent directly to the legislature for approval. Mr. Pearlman stated that, "it is critical to avoid having the Attorney General's office act as the freedom of information law enforcer, as counsel to the freedom of information agency...there would be an unacceptable conflict of interest were the

Attorney General to represent both a freedom of information agency and a state agency named as a party respondent in a contested matter." In Connecticut, state law mandates the Commission's legal counsel to represent the Commission's interests in any litigation.

Mr. Pearlman gave the Committee a few statistics regarding the work of the commission. He stated, for example:

- Individual citizens bring 70% of cases to the commission, 15% are brought
- by organizations, and 15% by news media.
- In fewer than 10% of these cases, the people bringing the complaints are represented by legal counsel.
- The commission has a "ombudsman-like" program which acts in a mediation function. Parties do not have to go through a hearing process if they can reach resolution through mediation.
- The commission's staff attorneys act as assistant Attorneys General and defend the decision of the Commission in court if it is appealed.
- The commission has the power to fine a public official $1000.00 for a violation of the law without reasonable grounds.

Chairman Wentworth asked Mr. Pearlman the average time it takes in Connecticut for a person to receive a decision through the commission. He stated that the worst-case scenario is six weeks if it must go to formal adjudication.

Mr. Pearlman had three recommendations for the Committee. First, he stated that transplanting the structure of the Connecticut Freedom of Information Foundation into Texas might not work because of the huge demographic and geographic differences between the two states. Second, he urged the Committee to keep the open records laws simple, so they are understandable and accessible to the average citizen. Finally, he stated that whatever entity serves as the public information advocate in Texas, it should be politically independent; not only to avoid conflicts of interest, but to build credibility and therefore trust in the eyes of the people.

Several witnesses testified on the judicial records issue. First, Denise Davis, Director of the Texas Judicial Council, was invited to give testimony to the Committee on the latest draft of the rule language regarding the openness of court records being promulgated by the Texas Judicial Council Committee on Court Records. Ms. Davis stated the final rule language is anticipated to be finalized by

early fall. Chairman Wentworth questioned Ms. Davis about the removal of the preamble and she stated when drafting the rule she felt the presumption of openness is clearly stated in the rule, but she said that when the final draft goes to the Supreme Court, she would recommend they look into restoring the preamble. He then asked her why the Judicial Records Committee had proposed in the final draft to hold judges to a less strict standard in terms of criminal sanctions if they overcharge or don't provide it in a timely fashion. Ms. Davis replied that the "general thrust of providing a criminal penalty is make sure that people who have a responsibility to provide public access do so, and understand that there is a punishment for that." She continued by stating that for a judge, going before the judicial conduct commission invokes that understanding.

Walt Borges from Court Watch also testified before the Committee on the court records issue. He stated that the Judicial Council version of the rule language is not satisfactory and his organization is hopeful the Supreme Court does more for openness in regards to the rule. He stated that the rule language creates a dual standard for the judiciary by not providing for a criminal penalty, provides a weak policy statement with the removal of the preamble, does not repeal statutes that allow clerks to charge $1.00 per page although it adopts GSC cost guidelines, and allows 20 days for compliance with a request which is too long.

Borges conceded that multi-district judges may need more time to comply, but suggested that a separate, looser standard by applied in those cases, rather than across the board. Chairman Wentworth pointed out, also, that the courts cannot repeal a state law through rule language, that only the legislature can repeal a law. Borges outlined for the Committee three things the Legislature can do regarding court records which include establishing criminal penalties for judges that do not comply with the Act, providing for treble damages and cost of recovery during the appeal process, repealing the statute that allows clerks to charge $1.00 per page.

Chairman Wentworth stated that the district and county clerks have testified before the Legislature that maintaining their records, many of which are over 100 years old, is very costly.

Mr. Borges concluded his testimony by stating that internet access to court records would improve the public's access to court records and remedy many of the problems experienced by those requesting documents. But he stressed this access should come from a taxpayer-funded improvement rather than a user-funded improvement.

Cindy Groomer, District Clerk of Potter County, and Jean Ann Stratton, District Clerk of Lubbock County, testified before the Committee about issues district and county clerks face regarding open records access. Cindy Groomer began the testimony by stating that district judges and judges at the trial court level are in possession of very few judicial records. She said the bulk of the records lie within the office of the clerk and fall under the responsibility of district clerk as records manager. Within the County and District Clerk's Association, she continued, members have broken down requests into four general categories. Those categories are: personal requests, including those by general citizens, litigants, parties to a suit; attorney requests; those made by reporters and media; those made by "information miners" who gather information to service a client or customer base.

Ms. Groomer characterized the requests made in the fourth category as creating an unmanageable, liability-prone issue for clerks across the state." She requested that any additional measures the state is considering for clerks be coupled with the appropriate time and money to comply.

Ms. Stratton outlined three recommendations for the Committee. First, to allow county clerks to continue to recover the cost of production from requesters, to allow clerks to limit request completion to a reasonable time limit, and mandate that clerks are indemnified for misuse of any information they disseminate.

Hadassah Schloss attended the hearing and outlined three main problems she perceived both for her office and for the governmental entities she comes in contact with. She said the main problem she has as the GSC Open Records Administrator is granting exemptions and resolving complaints. She stated that, for example, it is very hard from Austin to tell someone in Amarillo how long it should take to do a specific job since she does not know the exact situation in Amarillo.

A third problem Mrs. Schloss outlined for the Committee, the inability to charge for personnel costs, had also been discussed in Fort Worth. The final issue Mrs. Schloss brought to the Committee is the need to lower the threshold for smaller governmental bodies that allows them to ask for a deposit. Current law allows a governmental body to ask for a deposit when the copy charges of a request total more than $100. She stated that for many smaller entities, the dollar limit needed to require a deposit may need to be lowered, because smaller entities are more effected by non-payment of smaller amounts. Senator Wentworth offered a

statute authorizing governmental bodies to pursue these in small claims court, but Mrs. Schloss seemed to think that a trip to small claims court would be too much trouble for a unpaid bill for copies in the amount of $75.00.

Kathleen Ballanfant, a newspaper publisher from Houston, testified to the Committee about her struggle to get records from the City of Bellaire which resulted in the Attorney General's finally overturning an earlier opinion and opening settlement agreements involving governmental entities arrived at through mediation. She stated that by July, when the AG made his final ruling that reversed an earlier ruling and required the records to be released, ten months had passed since the original request. She asked the Committee to recommend legislation to mandate a quicker response to open records requests. Senator Carona suggested a remedy that would statutorily reduce the timetable and "mandate with some appropriate sanction a quicker response."

Chris Shields, representing the Texas Economic Development Council, and Lew Mellenkamp, also representing the Council, testified before the Committee regarding the current status of the Public Information Act in regards to economic development information. Today, according to Mr. Shields, the Public Information Act does not allow Texas city governments or other economic development efforts funded by tax dollars to protect information gathered from business prospects during the economic development process. An Attorney General's Opinion, issued in 1993, made this change and now businesses will not provide economic development entities with proprietary or confidential information because once it goes into the economic development council's possession, what once was private becomes public information. He stated that this hinders a community's ability to make good cost/benefit decisions and sound financial judgements about the viability of a prospective business.

Shields recommended that a new exception be added to the Public Information Act in Section 552, Subchapter C, which would permit economic development entities to receive proprietary information without it being subject to the Act. He assured the Committee that the recommended change would in no way affect the disclosure to the public terms and conditions of incentive arrangements with companies.

VII. SUMMARY AND RECOMMENDATIONS

A. OVERSIGHT OF SB 1069 (Motor Vehicle Information and Accident Reports)– Commercial Enterprise, Privacy Interest, Developments in Federal Laws, Technology and Internet Issues

Texas Senate Bill 1069, as filed during the 75th Legislature, simply implements the mandate of the Federal Driver's Privacy Protection Act (FDPPA). The Federal Act and the state law both include an opt-out provision that attempts to strike a balance between privacy interests and access to public information.

It is important to note, however, that the Federal Act has been challenged as a violation of the 10th Amendment to the United States Constitution. Even though the FDPPA probably exceeds Congressional power under the Commerce Clause, the Texas Legislature has enacted its own version of Act that would remain in effect even if the Federal law is deemed unconstitutional.

The state law contains two provisions that go beyond the federal law's content that have proved to be troublesome to advocates of open government and First Amendment rights. First, Section 13 of Texas Senate Bill 1069 cuts off access to accident reports, in clear contravention of Section 2 of the bill that states that information found in accident reports does not constitute "personal information" as defined in the Act.

Secondly, an amendment to Senate Bill 1069 prevents publishing or disclosing, on the Internet, personal information from a motor vehicle record unless the subject of the information has granted his consent. The amendment also prohibits an agency from providing a person with personal information from the agency's motor vehicle records, unless the person receiving the information agrees in writing that the person will not publish the information on the Internet.

By striking Section 13 of the bill, many inconsistencies will be eliminated. In the opinion of the Committee, the clear language of Section 2, in the absence of Section 13, means that information contained in accident reports is not considered "personal information" under the Act. Therefore, requestors can continue to access accident reports in the same manner as prior to the passage of Section 13 of Senate Bill 1069. If Section 13 of the bill is stricken, online newspapers publishing information contained in accident reports should not encounter any problems, as

the information contained in the accident reports will no longer be considered personal information under the Act.

The purpose of Section 13, to reduce or eliminate unwanted solicitation, is achieved by House Bill 1327 of the 75th Legislature. House Bill 1327 is more narrowly tailored and achieves the same goal in a less restrictive manner.

Additionally, the definition of "consent" in Section 2 of the bill regarding the publishing or posting of "personal information" on the Internet, needs statutory clarification. By clarifying that not opting out equates to consent, personal information pertaining to individuals that have not opted out and which is found in accident reports will be able to be released on the Internet. Thus, all a person need do before publishing personal information on the Internet obtained from motor vehicle records is to determine whether the subject of the information has opted out. If a person has opted out, keeping his information private, it cannot be published on the Internet. If the information is that contained in an accident report, however, it is not considered personal information and will be able to be published regardless of whether the subject of the information has opted out.

In addition to lawfully obtaining information contained in an accident report, it is also important to recognize that even if an individual has opted out, his personal information can still be obtained under one of the permissible uses allowed by law. The problem here is with resale or reuse of information originally obtained by consent (a person who has not opted out) or through one of the permissible uses. Although the original requestor of the information may have lawfully obtained the information under one of several permissible uses, the person to whom he is selling may not have.

Recommendations:

The Legislature should strike Section 13 of Senate Bill 1069, thus ensuring that all requestors have access to all information contained in accident reports and that such information may lawfully be posted on the Internet.

The Legislature should clarify that not opting out equates to consent for purposes of publication of personal information on the Internet.

The Legislature should clarify, regarding resale or reuse of personal information legally obtained, that the purchaser of such information must

either be using the information for a permissible use, as defined in the statute, or must verify that consent was originally given by the subject of the information in the form of not opting out before such purchaser may lawfully use the purchased information.

B. JUDICIAL RECORDS

Although there was a legitimate debate as to whether or not the Legislature intended judicial records to be completely exempted from disclosure under the Public Information Act, it has become clear to the Committee throughout the deliberation process that the time for a Judicial Records Rule is now.

The Judicial Council and the Texas Supreme Court have made the first attempt at drafting a rule defining disclosure requirements regarding "non-core," administrative judicial records. The Judicial Council has submitted a version of the proposed rule to the Public Information Committee. However, a final and possibly different version will be submitted to the Texas Supreme Court for consideration and adoption at a later date.

Although the Committee heard testimony specifically recommending that the Public Information Act's criminal provisions apply to judges that violate the Judicial Records Rule, the Committee feels a system of accountability can be established in the rule, if properly drafted. The State Commission on Judicial Conduct is charged with policing the conduct of judges and is authorized to sanction certain misconduct of its members.

The Legislature, in creating this body, and the citizens of Texas, in ratifying its creation, have agreed that the Commission is the appropriate manner in which to address certain misconduct by judges. It is vital, however, that specific authority be given to the Commission to sanction judges violating that rule, and that authority should be stated in clear and unequivocal language in the rule itself.

Sanctions by the Commission, furthermore, *could* likely be a greater deterrent to judges than would the possibility of criminal sanctions under the Public Information Act. As the Committee testimony illustrated, county and district attorneys have not actively pursued prosecution for violations of the Public Information Act. The established system of sanctions by the Commission, therefore, should be given an opportunity to work in conjunction with a proposed

judicial records rule containing clear language addressing disciplinary action against judges who violate the rule.

It is the desire of the Committee that the Supreme Court promulgate a rule that has clear and effective enforcement authority. The Supreme Court and the Commission on Judicial Conduct should remain mindful that the Legislature can, and will if necessary, legislatively address issues of non-enforcement or lax enforcement in the future.

The Committee's analysis has been predicated on the most current rule in its possession. Based upon these facts the Committee makes the following recommendations:

Recommendations:

The Legislature should let the Judicial Records Rule, if adopted without substantive changes that would diminish the accessibility of judicial records, stand. The committee, however, recommends one addition to the Judicial Records Rule. The Committee recommends that the Judicial Records Rule and the Code of Judicial Conduct contain language clearly stating that the State Commission on Judicial Conduct shall have the ability to take disciplinary action against judges who violate the rule.

The Legislature should make conforming changes to the Public Information Act to reflect the adoption of the Judicial Records Rule as adopted by the Texas Supreme Court.

C. HARASSMENT

The Committee received testimony from a number of governmental entities that the law requiring records be made available for public inspection has been used as a tool of harassment. The harassment can occur in several ways. A requestor might ask that public information be made available for inspection, while having no intention of actually viewing the records. As testimony in the Fort Worth meeting illustrated, a request may be made for ulterior motives, only to be withdrawn when the motive has been realized.

The goal of unfettered access to public records should be balanced with the reality that some requestors make voluminous requests solely for the purpose of harassment.

Recommendation:

The Legislature should allow governmental entities to charge for personnel costs incurred in assembling public records for inspection if the following tests are met:

1) it takes 5 or more hours to prepare the information, and
2) the information is:
    a) more than 5 years of age, or
    b) contained in 10 or more fully utilized archival boxes.

The personnel costs shall be promulgated by the General Services Commission.

D. COMMERCIAL ENTERPRISE

The Committee received testimony from a number of governmental entities that "data miners," or commercial operations that make public information requests for the sole purpose of turning such information into proprietary gain, take up an inordinate amount of the entities' time. Those entities have asked the Committee for legislative permission to charge such commercial requestors a higher fee for access to public information.

Allowing such differential treatment violates the public policy principles of the Public Information Act. In large part, the Act only achieves its goals in an equitable environment. Allowing the custodians of public records to inquire into the purpose of the requestor results in a slippery slope that this Committee is not willing to create. Furthermore, many commercial requestors take otherwise useless, raw data and manipulate it into information that ultimately benefits the economy and its citizens.

Recommendation:

The legislature should make no changes regarding the prohibition against governmental entities inquiring into the purpose of a request for public information.

E. CIRCUMVENTION/DELAYS/ENFORCEMENT

The Committee received testimony that governmental bodies have an arsenal of techniques to delay production of public documents. Many requests for public information are time sensitive, therefore, records delayed are often records denied. A solution to many of the problems encountered by witnesses that testified before the Committee is simply better enforcement of current law.

The Committee received testimony that district and county attorneys have been reticent to pursue alleged violators of the Public Information Act, possibly due to the fact that a violation of the Act is a criminal offense, with higher standards for prosecution.

Recommendation:

The Legislature should create a civil penalty to supplement the current criminal penalty so that District and County Attorneys may be more willing to pursue prosecution.

The Committee also received testimony that although not specifically allowed for under the Public Information Act, governmental entities have routinely requested "reconsiderations" of Attorney General decisions. These "reconsiderations" have lengthened the amount of time it takes requestors to obtain public information.

Recommendation:

The Legislature should clarify that reconsiderations of an Attorney General's opinion are not allowed under the Public Information Act, and that if a governmental entity wants to appeal the decision of the Attorney

General, it would be required to seek judicial relief as provided for in Subchapter H of the Act.

Currently, the Act allows the Attorney General to make a "previous determination" that a record is exempted from the Act, yet the Attorney General is not allowed to make such a "previous determination" that a record should be subject to the disclosure requirements of the Public Information Act. In the spirit of openness, "previous determinations" should be allowed under the Act for both exempt records and those which have been clearly determined to be public.

Recommendation:

The Legislature should give the AG authority to issue a "previous determination" to denote that certain information is subject to disclosure in the same manner in which the AG has been given authority to issue previous determinations that information is exempt from disclosure.

The Committee has been advised that in practice, the litigation exception in the Act as it now exists is so broad that it almost "swallows the rule." Governmental bodies are withholding information that only vaguely relates to litigation in order to take advantage of the litigation exception to the Act and therefore circumvent its requirements. This needs to be balanced with the public policy goal of the exception which is to prevent the use of the Public Information Act's disclosure requirements from being used in circumvention of the requirements of the discovery rules. Section 552.022 of the Act attempts to create a "laundry list" of types of information that are not subject to any exceptions. This section has a laudable goal that needs to be clarified. A potential remedy of the over breadth of the litigation exception could be remedied by clarifying the section regarding the classification of information exempted from disclosure in the Act.

Recommendation:

The Legislature should clarify that the items listed in Section 552.022 of the Public Information Act are not subject to any of the Act's exceptions.

The Committee has also received substantial, unfortunate testimony that a number of employees of governmental entities simply do not have an adequate grasp and understanding of the basics of the Public Information Act. The public

also may not have an understanding of their rights under the Act. The public and employees of governmental entities need a tool of reference which provides basic information on the Act in places where open records requests are routinely made.

Recommendations:

The Legislature should require governmental entities to post basic state public information laws in a manner in which they will be visible to those making a request for public information and impose a fine for failure to do so. The General Services Commission shall be charged with drafting and designing the content and form of such poster.

The Legislature should grant the General Services Commission the ability to audit a governmental entity's public information procedures.

The Committee heard testimony from the editor of the *Forward Times*, the largest African-American owned newspaper in Texas. The Committee was asked to strike the section of the Act which excepts from disclosure information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state or federal certification program. The testimony illustrated that this exception greatly inhibits the public's right to know who owns and operates these businesses.

Recommendation:

The Legislature should amend the section of the Public Information Act that excepts from disclosure information submitted in connection with an application for certification as a historically underutilized or disadvantaged business to ensure the public's right to know who owns and operates these businesses.

In response to complaints regarding delays in the production of public information, the legislature can simply statutorily reduce the amount of time the Attorney General has to issue opinions and Open Records Decisions. The committee acknowledges that there are costs associated with this option, but feels that reductions in delays experienced in obtaining public information are worthy of the cost.

Recommendation:

The Legislature should mandate a quicker response to governmental bodies' requests for Open Records Opinions and Decisions. The Legislature should shorten the period in which the AG must issue its opinions from 60 working days to 45 working days, and also shorten the extension period from 20 working days to 10 working days.

F. COSTS

The General Services Commission (GSC) administers Chapter 552, Subchapter F, Government Code, titled "Charges for Providing Copies of Public Information". In that capacity, the General Services Commission promulgates rules relating to charges for copies made by governmental entities, determines the applicability of exemptions related to copy costs, and investigates and makes determinations on complaints of overcharges for copies. Additionally, the GSC conducts a biennial study of state agencies' procedures and charges for copies of public information. The study also includes data on cities, counties and school districts.

The testimony received by the Committee from the GSC and the general public indicated general satisfaction with the current GSC rules and copy cost guidelines. Some minor changes, however, were recommended.

Recommendation:

The Legislature should allow one governmental body to waive any fees when fulfilling a request for another governmental entity.

The threshold amount for requiring a deposit on copy costs is currently $100. This deposit protects the governmental entity should the situation arise where a requestor asks that documents be copied, the agency copies them, and the requestor never shows up to pay for the copies. The governmental entity then must absorb the cost. If the agency is a small one, that $100 threshold may be too high. If small agencies are forced to absorb the cost for a $50 copy job several times, that could have just as significant of an impact on them as the $100 absorption would on a much larger agency over time.

Recommendation:

The Legislature should lower the threshold for smaller governmental bodies that allows them to ask for a deposit.

It has been pointed out the Public Information Act does not provide for a fee that is usually customary for archivists and specialized records managers to collect. Not collecting such fees could be perceived as unfair competition by private enterprise.

Recommendation:

The Legislature shall amend Section 552.270 of the Public Information Act by adding:

(c) A governmental body may impose and collect a publication fee for the right to reproduce photographs, rare books, maps, manuscripts, oral histories, organizational records of a non-governmental entity, that were not created or maintained in the conduct of official business of a governmental body.

Under current law, governmental entities are permitted to charge for personnel costs, even if the records requested are less than 50 pages, if the records that are the subject of the request are located in a "separate building" or in "remote storage." The Committee has received testimony that requestors have been charged personnel time to retrieve documents that, although technically may be in separate buildings, the distance or the effort expended to retrieve the documents does not equate to leaving the building.

Recommendation:

The Legislature should clarify the definition of "separate building" in Section 552.261 of the Public Information Act.

G. TECHNOLOGY/ACCESS AND AVAILABILITY

The Committee received repeated testimony from governmental bodies that responding to open records requests takes an inordinate amount of staff time and resources. The Committee also received testimony from governmental bodies that placing much of this information online has cut down significantly on personnel time dedicated to fulfilling open records requests.

Testimony received by the Committee revealed that there are definable types and classifications of open records requests. Placing such information on the Internet could greatly reduce staff time required to search for the information. The Committee, therefore, makes the following recommendations.

Recommendations:

The Legislature should amend the statutory charge to the Open Records Steering Committee to determine the appropriate types of information that all governmental bodies should make available to the public online and on the Internet.

The Legislature should require state agencies to track the nature of public information requests.

The Legislature should use the Sunset Process to assist state agencies in making the connection between records management and accessibility for public information purposes.

The Legislature should institute a coordinated budget mechanism for all state governmental bodies that would assist the legislature in monitoring capital expenditures made in furtherance of placing public information in electronic mediums to allow greater accessibility of that information.

The Legislature should encourage the Texas Department of Economic Development to allow online filing of applications and other related documents.

The Legislature should, where possible, appropriate to agencies funds from the budget surplus to be used for capital expenditures of computer technology and website development for placement of public information on the Internet, thereby reducing staff resources devoted to open records requests and eliminating the "human gatekeeper" problem.

H. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

The state law surrounding the public disclosure requirement of the Public Information Act is unsettled. There have been a number of Open Records Decisions and Opinions interpreting the litigation exception in conjunction with Section 154.073 of the Civil Practices and Remedies Code.

The decisions and the opinions of the Attorney General have been inexplicably inconsistent and require a legislative remedy. Sound public policy and common sense dictates that the public know and understand how their tax dollars are being spent.

Recommendations:

The Legislature should clarify existing law to ensure that final settlement agreements pursuant to Alternative Dispute Resolution procedures are public information.

I. ECONOMIC DEVELOPMENT ISSUES

Currently , information gathered by city governments or other economic development efforts from business prospects during the economic development process is not protected under the Public Information Act. An Attorney General's Opinion, issued in 1993, made this change and now businesses refuse to provide economic development entities with proprietary or confidential information because when it goes into the economic development council's possession, what once was private becomes public information. This could hinder a community's ability to make good cost/benefit decisions and sound financial judgements about the viability of a prospective business. The recommended change should not,

however, affect the disclosure to the public the terms and conditions of incentive arrangements of companies.

Recommendation:

The Legislature should ensure that proprietary information of companies seeking economic incentives be protected while simultaneously ensuring that any direct or indirect expenditure of taxpayer funds remains public information.

J. OPEN RECORDS IMPACT STATEMENT

Many open government advocates expressed concern to the Committee that it has become increasingly more difficult to keep up with the onslaught of legislation aimed at reducing the public's ability to access public information and to monitor deliberations of governmental entities. House and Senate rules currently mandate that legislation that impacts certain areas of the law carry impact statements. These impact statements serve the purpose of placing the public on notice that the proposed legislation affects these important areas of the law.

Recommendation:

The Senate and House Rules should be amended to require that an open government impact statement be included in committee reports of legislation that will have any affect on open government issues.

K. INTERNET ACCESSIBILITY OF COMMITTEE REPORT

Recommendation:

The Committee recommends that the adopted version of this report be placed on the Senate Internet Website.