Senate Government Organization Committee

September 27, 2010

Remarks for Texas Association of Broadcasters

My name is Paul Watler. I am a lawyer in private practice in Dallas with the law firm of Jackson Walker LLP. I am appearing today in behalf of the Texas Association of Broadcasters. Our firm has had the privilege for nearly 20 years to serve as general counsel for TAB. The association represents over the air radio and television broadcasters across Texas. TAB has more than 1,000 member stations from every media market in Texas – not to mention serving every Texas house and senate district in the Lone Star State.

Texas broadcasters believe there are numerous opportunities to increase transparency in government operations. I greatly appreciate the opportunity to appear before the Committee today to offer recommendations from Texas broadcasters for enhancing public access to government.

In examining how to increase governmental transparency and enhance public access to government, it is useful to take a brief look back at the history of open government laws in Texas

In 1973, the Legislature enacted the Texas Open Records Act -- which is now known as the Public Information Act.. That historic act made government transparency and public access to government the law of the land. It is worth recalling that the Public Information Act proclaims that:

"It is the policy of this state that each person is entitled . . . at all times to complete information about the affairs of government and the official acts of public officials and employees.

"The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

To that end, the open records act was structured to provide that "all information collected, assembled or maintained by a governmental body" is public information available for inspection unless specifically excepted by law. The law makes this presumption because the people are sovereign and the people have a right to know what the government is doing in their names.

Today, nearly 40 years after the Open Records Act first became law, the policy of government transparency and public access to government is in peril on a number of fronts. Many of the current shortcomings of the TPIA can be traced to advancements in technology. Obviously, the Dirty 30 reform legislature which passed the TORA did not anticipate the development of the internet, email, or social networking. It is paradoxically that in the high tech era when communication has never been easier, faster or more prolific, there are more and more impediments to fulfilling the promise of government transparency expressed in TORA.

Here is a short-list of four fixes that are needed to restore and protect transparency. Obviously, a comprehensive list would be much longer, but in the interest of time. I wanted to outline for you these four concerns.

1. Standardized retention policy for electronic communications.

Currently, there is a lack of a standard e-mail retention policy for state and local government. Some agencies keep it three days….some three years.

The Legislature should enact simple, standardized records retention for state and local governmental bodies.

Doing so would eliminate the scenario we have seen recur far too often in recent yeas including in the office of the governor. That is, governmental officials imposing a retention policy of their own choosing. Far too often, the period chosen to retain email is 7 days. This make its virtually impossible for the public to have effective access to government. A state-wide standardized policy that requires all electronic information to be retained for a period of at least 90-180 days will facilitate governmental transparency.

2. Clarification that information used or transmitted in conducting public business is public information regardless of whether it is created or transmitted on government or private computers, networks or devices.

The Act defines public information to presume that all information created or held by governmental bodies or officials is subject to the TPIA. The Act states:

> "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body; or
>
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Unfortunately, many elected public officials have taken the official position in court filings and opinion articles that this definition does not reach email or text messages that they may send on personal computers or blackberries that are used to conduct official business. Yet, if the exact same message was sent from a device owned by the governmental body and passed through a government email server, there would be no doubt that it was public. There is no rationale basis for this distinction and it defeats public confidence in transparent government.

The law should be clarified that public information is public information. We cannot permit a gaping loophole to the PIA that allows public officials to conduct all manner of public business with no public transparency or oversight, as long as it never passes through a government computer server.

The Attorney General has consistently held that public business conducted on private devices should be public. However, some governmental bodies and officials are asking the courts to rule to the contrary. Let's continue the Legislature's obvious foresight in passing the Act and presuming openness, and bring the law into the 21st century. It's really no different than conducting public business through snail mail, which has long been held to be public information.

3. Public policy that private contractors performing governmental functions are subject to the same public disclosure laws as governmental bodies.

This is becoming a growing area of concern as more governmental bodies turn over once strictly governmental functions to private companies. If a governmental function – such as operating a prison or a youth detention facility -- is being performed by a private contractor, that contractor should be subject to the PIA just as the state agency would be if it had retained the function.

4. Reforms to improve and expedite the open records opinion process of the attorney general.

The attorney general opinion process is becoming a choke point in the free flow of information to the public. The AG does an excellent job in processing opinion requests and the office has shown its dedication to protecting open government. However, even the speediest opinions take weeks and more complex opinions can take months. Government officials know

this and those that want to slow the release of public information can easily invoke the process to obtain delay.

The Legislature should enact a mechanism to improve the process.

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