



AG wants FOI training for officials

Attorney General Greg Abbott will ask the Legislature to require that all public officials be trained by the Attorney General's Office on open government laws. In addition, he told the State Conference of the FOIFT that he will ask for nine more full-time employees in his Open Records Division.

The attorney general was one of 15 who spoke or appeared on panels at the State Conference in Austin. There were panels on the federal medical privacy law, Internet access to court records, the drive for recorded votes in the Legislature and private rights under the Public Information Act.

General Abbott said for this year his office will have issued about 11,500 open records decisions, marking the fifth consecutive year the increase has been at least 20 percent. This is in addition to about 10,000 phone calls to the AG's hotline.

"There is no sign that the increasing demand is going to abate," he said. That is why he is asking in his budget request for the nine new positions. He called it "a crushing workload."

The new litigator in his office, Brandy Byrd, in less than a year has handled 140 cases.

"Enforcement can lead to compliance," the attorney general said, "but education leads to even stronger compliance."

That is why he is asking that all public officials be briefed on the open government laws. Such training would be costly, he said, but, "The cost of ignoring the rules is even higher."

Abbott was asked about secrecy in the investment of large public funds, such as the Texas Growth Fund. "UTIMCO (an agency that invests public funds) has informed me that a line needs to be drawn," in regard to what information on investments is made public. "I agree. The line should be drawn—in favor of openness."

Asked what investments his effort to open the records would cover, Abbott said: "Let me paraphrase

what some others have said. We intend to leave no investments behind."

In the panel discussion of HIPAA, the federal medical privacy law, Lubbock City Attorney Anita Burgess and Gary McLaren, attorney for the *Lubbock Avalanche-Journal* and an FOIFT board member, talked about the cooperative effort that resulted in Attorney General Abbott's ruling.

Avalanche-Journal Editor Randy Sanders said before the ruling that police could not say if they were conducting a murder investigation because that would reveal that the victim was dead, which under HIPAA would be private medical information.

On recorded votes, Linda Camin of the League of Women Voters of Texas said requiring recorded votes in the Legislature was "a slam dunk" issue for the League, which endorsed the issue without its usual long study to reach consensus. "You can't keep them accountable unless you know how they voted," she said.

Republican State Rep. Peggy Hamric, however, said she thinks the legislative procedure now is open. Any one member of the Legislature can ask for a recorded vote, she said. Also, each recorded vote costs about \$100. With the session limited to 140 days, she said, the time required for recorded votes would be a problem. With a long local and uncontested calendar and the hundreds of amendments to the appropriations bill, the number of votes that would have to be recorded would be too cumbersome.

Norman Moore, chief clerk of the Arizona House of Representatives, said 80 percent of the 99 legislative bodies in the U.S. require recorded votes on final passage of bills.

On the privacy panel, attorney David Donaldson said when a private company holds county records, the county owns the information and the company should be governed by the same limitations as the government agency.



Project tackles campus crime

By Joel White
FOIFT President

The Freedom of Information Foundation is working with journalism departments throughout the state to teach journalism students the practical aspects of the public information laws. Students participating in the Light of Day project will use the state Public Information Act as well as the federal Clery Act, which requires post-secondary schools to report criminal activity, to obtain information about campus crime.

The project will involve journalism departments at the University of Texas at Austin, the University of Houston, Texas A&M University, Texas Tech University, Southern Methodist University, the University of Texas at Tyler, Texas Christian University, the University of North Texas and Texas State University-San Marcos.

Reporting on campus crime historically has been troublesome. After all, universities have compelling incentives to minimize reporting of the number of crimes, particularly violent crimes, on their campuses. All universities want to project an image of being a safe place for young adults.

A university's report of a high number of sexual assaults and other violent crimes is unlikely to inspire parents to send their children (or their donations) there. Underreporting of campus crime has therefore been a widespread problem.

In an attempt to address that problem, Congress passed the "Crime Awareness and Campus Security Act," together with a series of amendments intended to expand reporting requirements and close loopholes.

For example, the law was amended in 1998 to force universities to report crimes on city streets on college campuses, and to report all criminal complaints, proven or not. School officials are now required to survey entities other than campus police, such as rape crisis centers and local police, to report criminal complaints that were not reported to campus police.

The law is now known as the Clery Act provides for fines of up to \$25,000 for each reporting violation. Repeated violators may lose all federal funding. Because the law applies to colleges and universities that participate in student financial aid programs, it covers both public and private institutions of higher learning.

Although the Clery Act applies to private schools, it makes less information public than most state open records laws, including the Texas Public Information Act. For example, the Clery Act requires schools to provide three types of information: a daily campus crime log, an annual statistical report and reports of crimes that present an ongoing threat to the campus community.

There is arguably too much discretion given to campus officials in what they must include in such reports, and there have been many examples of abuse of that discretion.

For example, a student who recently complained that she had been drugged and sexually assaulted was reported simply as being ill. The Act also allows schools to withhold information if disclosure would jeopardize the confidentiality of the victim or interfere with an ongoing investigation.

However, because the Texas Public Information Act does not generally apply to private universities, the Clery Act may be the only way to obtain crime reports from those institutions. The issue is unclear because, although the Texas Public Information Act does not apply to privately funded schools, it may apply to private school police departments. That question has not yet been answered in Texas.

The FOI Foundation's Light of Day Project, as it has been named, may answer that question. Courts in other jurisdictions have split on the issue.

In Texas, there is some authority that private agencies that serve traditionally public functions, such as volunteer fire departments, may be subject to the Public Information Act. And in other states, such as Virginia, the open records laws have been amended to make it clear that college police departments are subject to state's open records laws.

As a matter of policy, there is no reason to exempt private university police departments from the Public Information Act's requirement of mandatory disclosure of crime on campus. Crime is as much of a legitimate concern to students and their parents at private universities as at public ones.

Moreover, the argument that government agencies that perform a traditionally public function should be subject to the state's open government laws is particularly compelling in the case of police departments. Police powers are both sweeping and among the most fundamental of government powers, and should not be bestowed on "private" police departments without a system of public oversight that traditionally goes along with them.

Fundamentally, secrecy about campus crime is unfair and dangerous to the people universities and university police departments should be protecting. Students may be able to take precautions against violent crime, but they are not likely to do so if those crimes are unreported. This is equally true whether the school is publicly or privately funded.



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Madison award honors Pulitzer winner

The Freedom of Information Foundation of Texas presents the James Madison Award to a person whose appreciation and respect for the First Amendment and open government have been demonstrated by exemplary actions, words and deeds.

Few of those previously honored have met those standards to the degree achieved by the recipient honored by the Foundation in Austin Oct. 1.

Howard Swindle was an investigative reporter and editor for *The Dallas Morning News*. He and his special projects team won three Pulitzer Prizes. His stories and projects uncovered racial discrimination in public housing, police brutality and savings and loan scandals.

Swindle died June 9 after a five-year battle with cancer. He was 58.

"For Howard Swindle, freedom of information was not merely an abstract ideal," said Paul Watler, a director and past president of the Foundation. "It was something he gave life and breath to every day by the outstanding journalism he practiced. Howard showed that open government laws could be used to expose wrongdoing and protect citizen rights."



Foundation President Joel White and Ashley Swindle.

Swindle's daughter, Ashley Swindle, accepted the award for him posthumously.

He had been a director of the Foundation and continually worked on behalf of freedom of information and the FOIFT.

Swindle was a reporter and editor at *The Dallas Morning News* for more than 20 years and a graduate of the University of North Texas.

In 1992 *The Morning News* won the Pulitzer Prize for investigative reporting for a series of stories edited and directed by Swindle called "Abuse of Power." The team used open records laws to do the series about cases in which citizens alleged abuse by law enforcement officers.

Other stories by Swindle documented violations of the open records act by many governmental bodies withholding basic information such as budgets and salaries.

Swindle was known for mentoring young reporters and teaching them how to use FOI laws in coverage of public issues.

The award was presented at the John Henry Faulk Awards Luncheon Oct. 1, a part of the 2004 Bernard and Audre Rapoport FOI State Conference.



"For Howard Swindle, freedom of information was not merely an abstract ideal. It was something he gave life and breath to every day by the outstanding journalism he practiced."

-Paul Watler, FOIFT past president



AG's interpretation closes some autopsies

An amendment to the Texas Code of Criminal Procedure that open government advocates say was intended to limit access to autopsy photographs and X-rays is being increasingly used by law enforcement agencies to withhold the entire autopsy report.

Autopsy reports had been expressly public since 1965 under the Texas Code of Criminal Procedure, which stated that autopsy reports "shall be public records." The attorney general consistently ruled that this language made release of autopsy reports mandatory, and subject to no exceptions. Attorney general rulings had also held that autopsy photographs were part of the report, and were therefore also expressly public.

In response to concerns regarding publication of autopsy photographs, Sen. Jeff Wentworth introduced a bill to amend the law.

The amendment was intended to restrict the release of autopsy photos and X-rays, but still provided for release of these items if the person died in custody. The amendment also changed the "shall be public records" wording to "shall be subject to required disclosure in accordance with the Public Information Act."

After the effective date of the amendment in September of 1999, the attorney general ruled no less than 15 times that the revised wording also made disclosure of autopsy reports mandatory. However, in a letter ruling of Feb. 22, 2002, the AG accepted the argument of Travis County that the revised language made the autopsy reports subject to applicable exceptions, including the law enforcement exception, and the AG has since generally upheld a claim of the law enforcement exception whenever raised. Harris County began asserting such claims in March.

The Houston Chronicle requested the report of the autopsy performed on Hiji Harrison, who was shot and killed May 16 by a Harris County sheriff's deputy. Harris County requested an attorney general's opinion, claiming the law enforcement exception. On July 27, the AG issued a letter ruling upholding the claim.

The Chronicle filed suit on August 23 in Harris County District Court seeking release of the autopsy report and for a judicial declaration that autopsy reports are expressly public pursuant to section 11, article 49.25 of the Texas Code of Criminal Procedure.



From the AG. . .

By Greg Abbott

The Office of Attorney General strives to create a culture of compliance for governmental bodies regarding the Public Information Act.

I have charged the Open Records Division of my office with the task of educating requestors on their rights under the Act.

Requestors, who are most often citizens and journalists, play a key role in keeping us informed.

Below I will discuss the process we suggest following if a requestor believes that a governmental body has violated the Act and wants our assistance.

1. Pre-complaint: If a requestor believes that a governmental body has not responded to a request for information as required by the Act, we ask that they contact the governmental body directly first. This is to ascertain whether the request was received and, if so, the manner in which the governmental body intends to respond to the request.

We can all agree that inadvertent oversight or error should be remedied with minimal delay. Contact with the governmental body also assists the requestor in determining whether filing a formal complaint will be necessary.

Should questions arise at this stage, please contact the Open Government Hotline at (512) 478-6736 or toll-free at 1-(877) 673-6839.

2. OAG formal complaint: The individual who submitted the written request for information under the Act may file a complaint with my office alleging violation(s) of the Act.

Written complaints may be filed by facsimile or by regular mail and should include a copy of the original request for information and copies of any correspondence received from the governmental body.

A brief description of the concern, including the name of the governmental body and the name and daytime telephone number of the requestor, is also needed.

Please note that if the complaint is regarding the

costs that were either estimated or charged by the governmental body, by law, the requestor must contact Hadassah Schloss and file a complaint with the Texas Building and Procurement Commission at (512) 475-2497.

3. Intervention: Both verbal and written communications are utilized in our efforts to educate the governmental body regarding their obligations under the Act.

The vast majority of complaints received by my office are resolved informally.

In fulfilling these functions and ensuring that governmental bodies comply with the Public Information Act, however, we cannot act as a requestor's attorney. By law, my office may not represent private citizens in legal disputes.

4. Resolution: Resolution from a complaint staff standpoint is achieved when the governmental body releases the requested information or requests a ruling from my office. Additionally, if a governmental body represents to my office that it has no responsive information or that all responsive information has been released to the requestor, we, unless provided proof otherwise, accept that representation.

5. Enforcement: In the event that a governmental body does not accept our suggestions for informal resolution, formal enforcement action may become necessary. Enforcement is at my discretion. Our primary enforcement authority is filing suit to force the disclosure of public information. The Act gives local prosecuting authorities jurisdiction to evaluate possible criminal violations. In instances where a criminal violation is found by the local prosecuting authority, my office is available to assist with the prosecution.

As the Education and Enforcement Section of the Open Records Division continues to assist governmental bodies in understanding their obligations under the Act, I fully expect a decrease in the incidence of non-compliance and associated complaints.

As always, I invite you to visit our website at www.oag.state.tx.us and click on Open Government for additional resources and information to assist you.



As the Education and Enforcement Section of the Open Records Division continues to assist governmental bodies in understanding their obligations under the Act, I fully expect a decrease in the incidence of non-compliance and associated complaints.

*– Attorney General
Greg Abbott*



Now Accepting Applications for 2005

The Freedom of Information Foundation of Texas is accepting applications for its First Amendment Institute's Class of 2005. With the challenges all Americans face today, it is more important than ever to appreciate and protect the First Amendment. Be a part of a select group of individuals who gain a deeper understanding of the First Amendment and its implications for our democracy. For more information about this program see our Web site at www.foift.org or call us at (214)977-6658.



Report addresses electronic court records

A committee of the Texas Judicial Council has recommended rules that would allow some court records to be placed on the Internet, but that some other records should be available electronically only through a subscriber system requiring users to register and get a login and password. Some other records should not be available on the Internet, the panel said.

The Committee on Public Access to Court Records also recommended that the Judicial Council appoint a committee to make recommendations on what case records or proceedings should be closed, both at the courthouse and on the Internet.

The Judicial Council also should appoint an oversight committee to review the electronic availability of court records, the report said. "The committee should monitor and track public access, public safety and judicial accountability," the committee recommended.

Four members of the committee discussed the recommendations at the Oct. 1 State Conference of the Freedom of Information Foundation of Texas in Austin. They were former Chief Justice of the Texas Supreme Court Tom Phillips; Elizabeth Kilgo, director of the Texas Judicial Council; Judge Polly Jackson Spencer of the Bexar County Probate Court No. 1; Dianne Wilson, Fort Bend County clerk; and Wanda Garner Cash, editor and publisher of *The Baytown Sun* and a director of the FOIFT.

Cash's position throughout the study was that whatever records are public at the courthouse should be public on the Internet. Wilson took the same position.

In its recommendations, the committee said the Supreme Court should require that a Sensitive Data Form be completed for each case file, whether a paper file or electronic. The form would help prevent identity theft by limiting access to personal information such as Social Security numbers, drivers license numbers and bank account, credit card and other PIN numbers as well as the

addresses and phone numbers of crime victims.

If a reference to sensitive data were required, only the last four numbers of a Social Security number would be used. In the case of a minor, only the child's initials would be used. A date of birth would be referred to only by month and year. The form would not be public.

For remote access, only court-created records, such as indexes, calendars, dockets, the register of actions, judgments and orders would be available. Access to records other than those created by the court would be through the subscriber system, which was described as a means of thwarting "midnight snoopers."

Some records would not be available by remote access, including medical and psychiatric records, pretrial or presentence investigation reports, defendant stipulations and income tax returns.

Case records filed as part of any Family Code case other than court-created case records should be excluded from remote access.

The recommendations will go to the Texas Supreme Court, which could amend the Rules of Civil Procedure. One goal of the committee was to get the recommendations out by the start of the legislative session in January. The Legislature might also consider legislation on the subject, Phillips said. If the Supreme Court adopts rules, the Legislature might not consider legislation.

"The concept still is that the courts should be open," former Justice Phillips said in the panel discussion.

"We will be dealing with this for several years before we get to the point of identifying the types of information that will be available," Judge Spencer said.

Wilson pointed out the savings to counties if court records were available electronically and reduce the number of people coming to the clerks' offices.

The committee held six public hearings over eight months working on the recommendations.



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Attorney General's HIPAA ruling challenged in court

Attorney General Greg Abbott's opinion that the Texas Public Information Act supercedes the federal medical privacy act is under attack.

Two state agencies have sued the AG over his interpretation of HIPAA, the Health Insurance Portability and Accountability Act.

The lawsuits have stalled some requests for information under the Texas Public Information Act, according to The Associated Press.

The agencies contend that some of the information

the attorney general has said is public is private under HIPAA. The Texas Department of Mental Health and Mental Retardation filed four of the suits. The Department of Human Services filed two others.

MHMR has delayed the release of information about assaults at state mental facilities to the *Austin American-Statesman*. The agency filed one lawsuit after a reporter for KDFW-TV in Dallas-Fort Worth asked for statistics related to sexual assaults at state mental hospitals.

FOI Briefs

Two members of the State Board of Education agreed to attend courses on the Open Meetings Act in exchange for the dismissal of misdemeanor charges that accused them and four others of violating state open-meetings laws, according to a story in *The Dallas Morning News*.

The six were accused of conspiring to circumvent the law and holding a closed meeting at a lunch in August 2000.

The American Civil Liberties Union (ACLU) is suing in an attempt to force voting system examiners to hold their meetings in public.

The examiners study voting technology, such as electronic voting machines, and recommend which ones should be certified for use in Texas, according to The Associated Press.

The suit says the secretary of state routinely approves the examiners' recommendations, but the examiners have rejected attempts by the public to observe their meetings.

"Texans deserve secure, eligible voting machines, and they deserve to see that the officials charged with certifying those machines are conducting a rigorous evaluation to ensure the systems are secure and effective," Adina Levin of the ACLU said.

The New **Diana** school district paid \$233,960 to outgoing Superintendent Dan Noll to end his nine-year relationship with the district, the *Longview News-Journal* reported.

Noll's salary was \$85,050 a year. The paper said the reason he resigned was not made public. The paper used the Public Information Act to learn which board members voted which way on accepting the resignation.

A feud over alleged violations of the Open Meetings Act by **Hall County** Commissioners Court apparently has been resolved, the *Amarillo Globe-News* reported.

Commissioners participated in mediation and discussion with the district attorney in Memphis, Texas, about open meetings law and the way commissioners can avoid running afoul of regulations.

County Judge Jack Martin and several commissioners clashed over several issues. Accusations led to an investigation by a Texas Ranger. They also led to the filing of a civil action by three commissioners against Judge Martin and another commissioner. The petition asked the court to allow the plaintiffs to secure testimony in advance of an expected lawsuit. The parties got together and agreed to go to mediation.

"I think it was successful," District Attorney Stuart Messer said. "However, if there are violations by anyone of open meetings law, now that we've had the discussion making sure everyone's very informed of the law, any kind of prosecution would now be much stronger."

The attorney general ruled in favor of the *Burleson County Tribune* that electric rate data from a public utility is a public record and subject to disclosure.

The **City of Bastrop** asked for the opinion after the newspaper requested its charge per kilowatt hour for a story comparing rates.

The city cited a section of the PIA that says commercial or financial information is exempt if disclosure would cause substantial competitive harm. Disclosure "would enable competitors to ascertain information regarding the City of Bastrop's business strategy, agreements with third parties and elements of the city's rate calculations that are proprietary in nature."

The AG said a governmental body cannot overrule the PIA through an agreement or contract. "The obligation of a governmental body...cannot be compromised simply by its decision to enter into a contract."

The **Brownsville Herald** had to file a federal Freedom of Information Act request to get the results of a plea agreement involving a prominent grocery chain manager.

The newspaper says a federal judge may have improperly barred a newspaper intern from the arraignment. Before the hearing, the judge ordered the courtroom cleared of anyone not involved in the case and the intern was escorted from the courtroom.

Jim Harrington, director of the Texas Civil Rights project, said the reporter had the right to stay. The First Amendment gives the media the same access to courtrooms as the public.

The **City of Forest Hill** in Tarrant County agreed to pay former City Manager David Vestal \$350,000 to settle a complaint that he was fired illegally.

Vestal claimed the City Council violated the Open Meetings Act June 8 when he was fired, according to the *Fort Worth Star-Telegram*.

Cedar Park Mayor Bob Young resigned less than 12 hours before a special City Council meeting to discuss whether he violated the city's charter. Williamson County District Attorney John Bradley said alleged violations under review by his office arose in an investigation into the City Council, which in March might have violated the open meetings law, a story in the *Austin American-Statesman* said.



"The obligation of a governmental body...cannot be compromised simply by its decision to enter into a contract."

-Attorney General
Greg Abbott



TCU students conduct FOI survey

“Ever wonder whether your favorite restaurant is really clean?”

“Whether there’s crime occurring in your neighborhood that you don’t know about?”

“Whether the local high school is overzealously suspending students for minor dress code violations?”

Thus the *Fort Worth Star-Telegram* began a report on the findings of TCU journalism students in a media law course taught by *Star-Telegram* Editorial Board member Linda P. Campbell.

The students asked various agencies for public information, and results were reported from 26 entities.

The students used the Internet, visited government offices and talked to public records custodians.

“Generally, they found officials to be cooperative, though some agencies required jumps through several hoops,” the paper said.

A student who examined restaurant inspection reports changed her dining habits. (The Fort Worth Public Health Department was among the most attentive and efficient, the paper said.) Another who sought information about disciplinary actions against police officers was amazed at what was available.

The *Star-Telegram* printed the

26 reports, each of which included the agency, the agency’s response, what the documents showed and observations by the students as to how easy or difficult it was to get the information.

The *Star-Telegram* educational effort included an editorial explaining the law and giving information about how to use the law. It also listed the Web sites for the attorney general and the Texas State Library for the text of the law.

“Being a watchdog is a civic duty and makes for better government,” the editorial said. “Every freedom-loving person should try it.”



Partial funding for this issue of the FOI FOCUS was provided by the AT&T Foundation.



Perry transferred salaries to meet cuts

Using a public information request, *The Dallas Morning News* published a story saying Gov. Rick Perry made some of the promised cuts in his budget by transferring the salaries of two maids, a cook and a porter at the Governor’s Mansion to the budget of the Texas Building and Procurement Commission.

The governor last year ordered state agencies to cut their budgets 7 percent. He promised he would lead the way by cutting his own budget 14 percent.

In addition, the governor transferred the salaries of five other staff members to the commission. Those staff members handle mail, purchasing and information systems for the governor.

All the people involved are still assigned to the

governor, the newspaper reported.

Press Secretary Kathy Walt said the workers were moved for greater efficiency and because the Procurement Commission is in charge of the upkeep of the Governor’s Mansion.

She agreed that the transfers were included in the 14 percent cuts the governor made.

Democrat Rep. Jim Dunnam, who leads the House Democratic Caucus, said the transfers appeared to be a way to publicly posture about how painless savings could be achieved, while state agencies were being asked to cut important services.

“I think it’s more of the same that he says one thing and does another,” Rep. Dunnam said.

Victims’ names may be withheld in some cases

Attorney General Greg Abbott has issued an opinion that the names of crime victims can be withheld when the name of the victim appears in both the criminal judgment (the sentence) and a victim impact statement.

A criminal judgment, in the AG’s definition, is “a court’s written declaration of a defendant’s conviction or acquittal, and is entered of record.”

In 2003, the Legislature added a section to the Public Information Act making confidential some information in a victim impact statement.

That information included the name, Social Security number, address and telephone number of the crime

victim. It also closed any information that would tend to identify the victim.

The statute would fail in its purpose if information that was confidential in the victim impact statement could be obtained from the judgment, the opinion stated.

“When the victim’s name, address or other identifying information appears both in the judgment and a victim impact statement, Section 552.1325 of the Government Code makes such information in the judgment confidential and not subject to disclosure under the Public Information Act,” the attorney general concluded.



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