



AG rules that PIA trumps HIPAA

Provisions of the Health Insurance Portability and Accountability Act (HIPAA), the new federal health information privacy law, and local interpretations of the law, have allowed some hospitals, police and others to close records previously open in Texas.

However, Attorney General Greg Abbott gave at least a temporary reprieve from HIPAA Feb. 13 by ruling that the state's Public Information Act takes precedence over HIPAA, a most welcome development.

Appearing before the Board of Directors at the annual retreat in Dallas, the attorney general said that HIPAA has a provision that opens protected health information where disclosure is "required by law."

That law, he said, is the Texas Public Information Act.

"In Texas, government records are presumed open unless a specific exception applies," the attorney general said. "HIPAA is not an exception to the rule of openness in the state of Texas."

What this means, he said, is, "governmental bodies who've been using HIPAA as a shield just lost that protection."

Directors at the meeting cheered the ruling.

The U.S. Department of Health and Human Services could contest the interpretation. That department created the privacy regulations under the new law. Although Abbott's staff worked with the federal department's staff on the wording of the opinion, the attorney general said he would not be surprised if the ruling were challenged in court.

Foundation President Joel White said interpretations of HIPAA have included football coaches who believed they could not reveal player injuries, churches have had difficulties getting information about parishioners in the hospital and some law enforcement officers had stopped providing information about accident victims.

Abbott credited Katherine "Missy" Cary, chief of the Open Records Division, with finding the key to the opinion.

Section 164.512 of HIPAA, Subsection (a)(1) states: "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."

The Health and Human Services Office of Civil Rights had said that HIPAA did not overrule the federal FOI Act. The office said the rule was intended to avoid any obstruction to a covered entity's ability to comply with its existing legal obligations. The Texas AG said that his office believes that the Texas Public Information Act comes within the same provision.

Governmental bodies covered by HIPAA, however, must comply with the HIPAA rules when information is not requested under the Texas Public Information Act. The AG pointed out that Texas laws do protect much health information already.

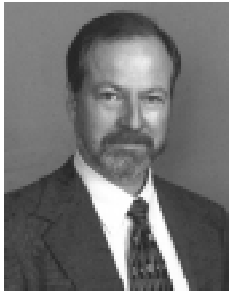
The request for an opinion that resulted in the AG's ruling asked several questions about what the Lubbock Police Department could release under HIPAA. But Abbott said police are not even covered by HIPAA.

Abbott hires FOI enforcer

Attorney General Greg Abbott has hired the first attorney ever put on the state payroll solely to prosecute open records violations.

Brandy Byrd, a former assistant county attorney in Williamson County, is starting to build relationship with county and district attorneys across the state.

See FOI Enforcer page five.



Foundation needs your support

By Joel White
FOIFT President

Since 1978, the Freedom of Information Foundation has been the only organization in Texas devoted exclusively to protecting the public's right to information about their government.

During the past 26 years, we have established educational programs such as Education for Freedom, which teaches the concepts and responsibilities of the First Amendment, and the First Amendment Institute, which provides graduate-level seminars on First Amendment freedoms and issues.

The Foundation also provides regularly scheduled open government seminars throughout the state for public officials and employees, teachers, journalists and other members of the public. The FOIFT Speakers Bureau provides speakers for classrooms and conferences throughout Texas.

In addition to education, the FOIFT provides services to the public, such as the FOIFT Hotline. The Hotline attorneys are knowledgeable and experienced volunteers who have helped thousands of Texans with questions about the public information and open meetings laws at no charge. The Foundation also publishes the Texas FOI Handbook and, of course, the FOI FOCUS. These publications are provided to journalists, educators and government officials and employees, and they provide important news and information on developments in open meetings and open records laws.

The Foundation works with the Legislature and the Office of the Attorney General to ensure that openness remains the law and that the open government laws are enforced. We track proposed bills on legislation that would affect open government. Members of the Foundation's board of directors testify frequently before the Legislature on open government issues and on proposed legislation.

We file dozens of legal briefs every year in the courts and in the attorney general's office. The issues that we address determine everything from whether a parent will have access to his own child's school records, to whether the Texas Senate may meet in secret to elect a new president and acting lieutenant governor.

We help agencies and courts draft rules and policies that implement the Public Information Act and the Open Meetings Act, and the principles contained in those laws.

The FOIFT is dedicated to ensuring that the people's business is conducted in public. We believe, as James Madison said, that "knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives."

Our mission is made possible by our members. If you believe that the citizens of Texas have a right and a responsibility to be informed about the government they have created, please become a member. If you are one of the thousands of people who benefit directly from the Foundation's services, such as the FOIFT Hotline or FOI seminars, please consider the value of those services when you become a member or renew your membership.

Your membership at any level, from the \$25 Samuel Adams level to the \$1,000 Freedom level, will allow us to continue to keep the doors of our government open.

You can become a member, renew your membership, or make a donation by credit card at www.foift.org, or, of course, you can send your check to the Freedom of Information Foundation, 400 S. Record Street, Suite 240, Dallas, TX, 75202. The FOIFT is a non-profit 501(c)(3).

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Memberships are tax-deductible.


Friends of Rebecca L. Payne, who died on Feb. 16, have made a contribution to the Foundation in her memory. Payne worked on open records issues in Texas and was often a spokesperson for open records during her professional career.



The Dallas Morning News wins \$165,000 in legal fees

The Dallas Morning News will receive \$165,000 in reimbursement for legal fees from a Denton County taxing district after an open records dispute.

"This settlement should send a clear signal for other taxing districts and government bodies to follow the state's open records law," the *Morning News* said in a follow-up editorial. "The laws are there for a reason."

The settlement was among the largest announced settlements in a Texas open records case, the newspaper said.

Officials of the Denton County Fresh Water Supply District 1A had refused to release a document prepared by the district's law firm that questioned the district's election practices, the paper said.

Ranch hands on the water district's land were used to elect board supervisors for the district. A *Morning News* investigation in 2001 found that many such taxing districts were created with the approval of only a few eligible voters with ties to the developers.

The paper found that the

water district was charging developers for the district to annex their land and then spinning off the property into separate districts giving the developers unlimited authority to tax new homeowners.

"This wasn't about just a newspaper's determination to fight for an important document that was withheld from reporters," the *Morning News* editorial said. "It was about the public's right to know the complex inner workings of taxing districts that are spurring so much development in Texas."



"This settlement should send a clear signal for other taxing districts and government bodies to follow the state's open records law."

- The Dallas Morning News editorial



HIPAA causes problems for commissioners' request

Ector County commissioners ran into the Health Insurance Portability and Accountability Act (HIPAA) while trying to get information about the county's health insurance plan.

The commissioners authorized an investigation into the payment of claims for health services to a former commissioner's spouse. They asked Attorney General Greg Abbott's office if they could get medical insurance coverage information on the former commissioner and his wife.

They wanted to check on reports that the former commissioner and the head of the county's insurance department had agreed to a payment schedule so the former commissioner could make up 22 months of back premium payments.

The AG's Office said some state law applies, but HIPAA had all kinds of provisions that an AG's opinion could not address without a lot of fact-finding, which opinions don't do.

The opinion (GA-138) provided almost four single-spaced pages of information about how HIPAA applied to the county's situation.

Then, it suggested the county get the advice of counsel with intimate knowledge of the county's health insurance plan. Ector County might be classified as "a business associate" under HIPAA, the opinion stated.

Whether the HIPAA rules permit disclosure of the information to the commissioners "cannot be answered definitively without full investigation and resolution of fact questions beyond the scope of the opinion process," the AG's office said.

How the AG's new opinion that said HIPAA does not prevail over the Texas Public Information Act would affect that situation was not clear because it came after the Ector County opinion.

County clerks can charge for posting notices

County clerks have apparently found a new way to collect fees.

An attorney general's opinion in February said county clerks can charge governmental bodies for posting meetings notices on county bulletin boards.

The district attorney of Austin County in Bellville asked for the

opinion. The AG pointed out that the Legislature in 1969 amended the Open Meetings Act to require local political subdivisions to furnish meeting notices to the county clerk to post in the county courthouse. Another law says county clerks "shall charge reasonable fees for performing other duties prescribed or

authorized by statute for which a fee is not prescribed..."

Thus, the AG said, the county clerks can charge for posting the meetings notices. The clerks also wanted to charge a fee for retaining the notices, but the AG said there is no provision for that. (Opinion No. GA-0152)

Open government laws put to good use

Problems with open government are frequent enough, but positive results from the use of Texas open government law occur on a regular basis. Here are a few recent examples.

Use of the open government laws and some negotiation allowed Title Data of Houston to scan about 750,000 pages of deed records in Galveston County.

James P. Sibley, president of Title Data and FOIFT director, sent a letter Dec. 18, 2003, to County Clerk Mary Ann Daigle requesting permission to scan, in her office and during normal business hours, her paper volumes containing copies of deeds filed from 1965 to 1980. The county clerk referred the request to the county's legal department. Myrna Reingold of the legal department drafted reasonable rules for the scanning, which Sibley agreed to. The project was completed.

The Dallas Morning News used open records requests to examine more than 1,000 pages of memos, e-mails and other internal communications from Dallas Independent School District Superintendent Mike Moses to the school board. The result was a story showing the public how well the superintendent communicates with the board, something that had been a problem with past superintendents.

The city of Round Rock settled a lawsuit by the *Austin American-Statesman* by agreeing not to take final votes in closed-door executive sessions, as the paper believes they did Dec. 19, 2002, in making a formal, binding decision to name Jim Nuse as city manager during a closed meeting.

City officials maintain they did not illegally make a final decision because the final binding vote was done in public. However, Mayor Nyle Maxwell read a statement in which he said the city is committed to open government.

"The city acknowledges that the use of paper ballots and oral polls may create an appearance of a violation of the Open Meeting laws...With the counsel of the city attorney, the City Council will not take a final action, decision or vote while in executive session, whether by paper ballot or otherwise."

City Council member Alan McGraw said: "They're not shying away from their contention that we did something wrong, and we're not shying away from saying that we didn't."

The city secretary in Palestine gave a presentation on the Open Meetings Act to the Palestine Convention and Visitors Bureau Board in February. The presentation was put on the board's agenda after it was brought to the attention of the city manager and the board president that the board violated the Open Meetings Act during a Jan.

22 meeting. The board discussed "old business" items that were not on the agenda.

The board president asked if any member had any items they wanted to discuss. Several items were discussed that weren't on the posted agenda.

A question posed by a citizen led to the city of Duncanville suing the attorney general over an opinion that said the mayor's journal was a public record.

The citizen alleged that the mayor met privately with property owners at his home amid a controversy. He filed an open records request seeking, among other things, the mayor's journal.

The city asked for an AG opinion and the AG's office said it was a public record. The city is suing, contending, among other things, that the journal is related to possible litigation. The AG's opinion said the city was not a party to the possible litigation.

After the *Del Rio News-Herald* filed an open records request for information from police about a criminal case that reportedly resulted in the seizure of currency, the acting police chief announced that he had asked for an investigation by the Texas Rangers into the disappearance of \$9,000 from the police department's evidence room. However, the city asked for an AG's opinion on the release of the records.

The *Austin American-Statesman* ran a series of articles on the use of force by Austin police using the PIA to request information, including police reports, statistics and electronic databases, on every use of force report from 1998 to May 2003. Reporters analyzed a database of 6,447 reports, which included 4,701 people who were targets of force and 4,280 incidents of the use of force.

Policy and operational changes were made by the Smith County Commissioners Court after questions were raised about the county's handling of surplus federal government property.

The *Tyler Morning Telegraph* said in an editorial that the changes resulted in "some county operations that basically have been shrouded from public view for many years have been uncovered for all to see."

Commissioners decided that every contract with the county would be reviewed. Under that policy, competitive bids were taken last October on the collection of overdue property taxes. The result was the awarding of the contract to a new firm for the first time in 20 years.



The changes resulted in "some county operations that basically have been shrouded from public view for many years have been uncovered for all to see."

- Tyler Morning Telegraph editorial





From the AG. . .

By Greg Abbott

In my commitment to open government, I created a new prosecutor position at the Office of the Attorney General. This prosecutor's duties will be in civil enforcement of the Public Information Act (the "PIA"), Chapter 552 of the Texas Government Code, and in assisting Texas prosecutors in investigating and prosecuting PIA criminal violations.

As Texas citizens have become more educated about open government and their rights under the PIA, the number of complaints stemming from requests for information to governmental bodies has steadily grown.

Texas prosecutors have a range of statutory responsibilities under the PIA and other laws governing access to public information, and sometimes can be in a difficult position when having to enforce them.

The county attorney and the district attorney are governmental bodies themselves, and are subject to the PIA. At the same time, many prosecutor's offices are the statutory attorney for the county and are responsible for advising other county governmental bodies on PIA legal issues. The prosecutor is also responsible for civil and criminal enforcement of the PIA. Due to the specialized nature of this law, I want to share my office's resources and expertise in this area of the law with local prosecutors.

I have chosen Brandy Byrd to assist Texas prosecutors. Byrd has extensive experience in local prosecution and has served as a prosecutor in both Williamson and Dallas counties. Byrd can provide prosecutors with assistance on any level they may need with a PIA investigation, ranging from technical assistance with provisions and application of the PIA, to assistance with building a case for trial, to assistance at trial, or to appointment as a special prosecutor to handle the prosecution.

To assist in education and enforcement of the PIA, this office publishes the Public Information Handbook, a section of the agency's web site is dedicated to open record issues, a hotline to answer questions and provide general guidance is maintained, and I created an Education and Enforcement Section within the Open Records Division, devoted to educating governmental bodies on the PIA and enforcing the law to achieve compliance.

Although Byrd's position is new to the agency, the Attorney General's Office has previously partnered with local prosecutors to prosecute PIA violations. Angela Goodwin, an assistant attorney general, served as an assistant district attorney by appointment in Llano County for District Attorney Sam Oatman. From this effort, the first known governmental official was convicted for violating the PIA.

Byrd is committed to helping prosecutors around the state to ensure "the principle that government is the servant and not the master of the people."

Please contact Byrd at brandy.byrd@oag.state.tx.us, by phone at (512) 936-6736, by facsimile (512) 481-1992 or by mail at The Attorney General's Office, Open Records Division MC-14, P.O. Box 12548, Austin, TX. 78711-0548. For assistance from the agency hotline or to request a copy of our handbook, please call (877) 673-6839. The handbook is also online at www.oag.state.tx.us.



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*-Attorney General
Greg Abbott*



FOI enforcer hired in Attorney General's Office

Continued from page one

"Her only job in the Office of the Attorney General will be to prosecute open government act violations," the attorney general said at the FOIFT winter retreat in Dallas.

Byrd will work with local prosecutors to assist with cases involving open government violations or, at the local officials' request, pursue prosecution herself, the AG said.

"With Byrd's hiring and other additions to the Open Records Division, Abbott is staking out new territory when it comes to ensuring that citizens, journalists and others aren't blocked from looking at public documents," the *Austin American-Statesman* reported.

Katherine "Missy" Cary, chief of the Open Records Division, said, "General Abbott is really committed to the enforcement part."

After the superintendent of the Llano Independent School District was found guilty of a crime last August, attitudes toward obeying the law have changed, Abbott said. Cary said the number of complaints and inquiries the division receives has grown to about 10,000 per year.

Abbott said the enforcement powers will enable the division to "aggressively work with prosecutors around the state to ensure that we're going to have more criminal prosecutions when there is noncompliance."

Attempt to link scores to teachers fails

A Dallas County jury decided April 1 that releasing student test scores might violate federal privacy laws about student records.

Education activist Russell Fish was trying to link teachers to their students' test scores. The result ended more than six years of legal wrangling between the Dallas Independent School District and Fish, according to *The Dallas Morning News*.

Fish filed an open records request in October 1997 for 11 years of student scores on the Iowa Test of Basic Skills. He asked the district to mask student names with random numbers.

Fish said he never intended to link individual students to their specific test scores.

The district said he could have the records for

\$2,000. He refused to pay and filed suit in February 1998.

"DISD knows which teachers are effective and which ones aren't. We just thought parents should get the information," he told the newspaper.

Fish said he wanted to create a Web site that ranked teachers by how well their students perform on tests.

The jury was persuaded that someone might combine the information with student directory information and link the scores to the individual students' names.

In an editorial, the *Morning News* said this was information the public deserved to know, "and a school district that emphasizes teacher performance and believes in greater accountability should be glad to hand it over."

Clayton Trotter, Fish's attorney, said Fish would "deeply consider" filing an appeal.



"DISD knows which teachers are effective and which ones aren't. We just thought parents should get the information,"

— Russell Fish, education activist



Authors denied access to prison inmates

FOIFT directors voted late last year to object to a new state policy barring book authors from interviewing inmates in the Texas Department of Criminal Justice.

TDCJ rules allow "news media" to interview inmates. For years requests for access by authors were evaluated on a case-by-case basis.

But, under a new implementation of their rules last year, all interview requests by authors —

defined as non-news-media by TDCJ — were automatically rejected.

The change was reported in newspapers around the state. Lawyers for FOIFT filed an open records request with TDCJ for documents related to the rule. And, the ACLU also weighed in, objecting to the policy.

In February, according to the *Houston Press*, TDCJ general counsel Carl Reynolds allowed authors Kathryn Casey ("A Warrant to Kill: A

True Story of Obsession, Lies and a Killer Cop") and Suzy Spencer ("Wages of Sin") to interview prisoners.

But, the newspaper reported, he's making no promises about other writers who don't have a daily, weekly or monthly deadline.

Joe Larsen, a Houston media lawyer and FOIFT board member, said the Foundation will consider at a future board meeting whether to push for a formal rule ensuring authors' access.

TML joins in sponsoring Open Government seminars

An Open Government Seminar was sponsored by the FOIFT April 2 in Dallas with participation by the Texas Municipal League for the first time.

The Attorney General's Office, the TML and the Foundation collaborated on the day-long seminar on access to public information and open meetings in Texas. Presenters were Michael Pearle from the AG's office and Hadassah Schloss of the Texas Building and Procurement

Commission, the agency that handles complaints about charges for records.

The seminar was for the general public, government employees, elected officials and media representatives.

The next Open Government 2004 seminar will be held June 4 from 9:00 am to 5:00 pm in the Rio Grande Valley. The seminar will be held in the Harlingen Cultural Arts Center located at 576 '76 Drive, Harlingen, 78550.

Presenters will include representatives from the AG's Office, FOIFT, TBPC and TML.

The cost for the seminars is \$20. An additional seminar is being planned for Midland.

"The Foundation is very encouraged to have TML, in addition to the AG's Office, as a partner in these seminars," said Katherine Garner, executive director of the Foundation. "We want to work with other organizations like it to educate everyone about the laws."

How well do you know FOI?

Think you know FOI? Try this quiz. (Answers below)

1. Which U.S. president signed the Freedom of Information Act?
2. How many exemptions allow withholding of information under the Freedom of Information Act?
3. What significant change was made to the Freedom of Information Act in 1996?
4. What significant change was made to the Freedom of Information Act in 2002?
5. Which federal agency is the clearinghouse for federal FOI matters?
6. How long does a federal agency have to respond to an FOI request?
7. Which divisions of the government are covered by the Freedom of Information Act?
8. Which exemption allows agencies to withhold information for national security reasons?
9. What law allows individuals access to information about themselves?
10. Which federal agency receives the most requests each year?

Courtesy of Jennifer LaFleur, *The Dallas Morning News*



Pictured are: (left) Bryan Erickson, news director at KTRH radio in Houston & Texas AP Broadcasters chairman; David Donaldson, partner at Graves, Doughtry, Hearon & Moody, PC; and Chip Mahaney, managing editor at KDFW-TV in Dallas-Fort Worth, also an RTNDA representative.

Need a speaker?

FOIFT Director David Donaldson spoke at the Texas Associated Press Broadcasters/Radio Television News Directors Association conference on Sat., April 3, in Corpus Christi, TX.

Need a speaker for a meeting, workshop or conference? The Foundation can help.

We have FOI attorneys and media professionals who volunteer their time as a public service.

Contact the FOI's Speakers' Bureau by e-mailing your request to foift@foift.org or call us 214-977-6658.

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



FOI Quiz Answers

1. Lyndon B. Johnson (March 16, 1966)
2. Nine
3. The electronic Freedom of Information Act of 1996. (Changed the law to include electronic information. It added a multi-track processing system and extended the time period for responding, among other things.)
4. The Intelligence Authorization Act. (In effect, this new statutory language in the FOIA now precludes any covered intelligence agency from disclosing records in response to any FOIA request that is made by any foreign government or international governmental organization.)
5. The U.S. Department of Justice. (Also acceptable as an answer: Agencies handle their own FOI matters. The Justice Department administers guidelines and statistical reports relating to FOIA for all agencies.)
6. 20 business days
7. Federal agencies in the Executive Branch.
8. Exemption No. 1
9. The Privacy Act
10. The Department of Veterans Affairs



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