

The following are excerpts from pp. 14-17 of the Texas Attorney General's 2022 Public Information Act Handbook ([https://texasattorneygeneral.gov/publicinfo\\_hb.pdf](https://texasattorneygeneral.gov/publicinfo_hb.pdf)):

### **Personal Notes and E-mail in Personal Accounts or Devices**

A few early decisions of the attorney general found certain personal notes of public employees were not “information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business.”<sup>46</sup> Thus, such personal notes were not considered subject to the Public Information Act.<sup>47</sup> Governmental bodies are advised to use caution in relying on early open records decisions that address “personal notes.”

More recent decisions have concluded personal notes are not necessarily excluded from the definition of “public information” and may be subject to the Act.<sup>48</sup> The characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an individual, rather than a governmental body, or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information.<sup>49</sup>

If information was made, transmitted, maintained, or received in connection with a governmental body's official business, the mere fact that the governmental body does not possess the information does not take the information outside the scope of the Act.<sup>50</sup> In *Adkisson v. Paxton*, the court of appeals considered a request for correspondence related to a county commissioner's official capacity from his personal and county e-mail accounts. The court concluded the information in the commissioner's official-capacity e-mails is necessarily connected with the transaction of the county's official business, and the county owns the information regardless of whether the information is created or received in a personal e-mail account or an official county e-mail account. Thus, the court held the requested information is “public information” subject to the Act. This case construes a prior version section 552.002 of the Act, which the 83rd Legislature amended, along with section 552.003, in 2013.<sup>51</sup>

The amended definition of “public information” in section 552.002(a-2) now specifically includes:

**any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.**

Section 552.002(a-1) further defines “information . . . in connection with the transaction of official business” as:

**information . . . created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.**

Adopting the attorney general's long-standing interpretation, the definition of “public information” now takes into account the use of electronic devices and cellular phones by public employees and officials in the transaction of official business. The Act does not distinguish between personal or employer-issued devices, but rather focuses on the nature of the communication or document. If the information was created, transmitted, received, or maintained in connection with the transaction of “official business,” meaning, “any matter over which a governmental body has any authority, administrative duties, or advisory duties[,]” the information constitutes public information subject to disclosure under the Act.<sup>52</sup>

There are no cases or formal decisions applying these amendments to section 552.002 or section 552.003.

### **Information Held by a Temporary Custodian**

The Public Information Act can also apply to information on a privately owned device of a current or former governmental body employee or official. Section 552.203(4) of the Government Code requires each governmental body's officer for public information to make reasonable efforts to obtain public information from a temporary custodian. Section 552.003(7) of the Government Code defines “temporary custodian” as a current or former

governmental employee or official who maintains public information that has not been provided to a governmental body's officer for public information or the officer's agent. Pursuant to section 552.203(4) of the Government Code, a governmental body's public information officer is required to obtain information from a temporary custodian if:

- (A) the information has been requested from the governmental body;**
- (B) the officer for public information is aware of facts sufficient to warrant a reasonable belief that the temporary custodian has possession, custody, or control of the information;**
- (C) the officer for public information is unable to comply with the duties imposed by this chapter without obtaining the information from the temporary custodian; and**
- (D) the temporary custodian has not provided the information to the officer for public information or the officer's agent.**

Section 552.233(a) states a current or former officer or employee of a governmental body does not have a personal or property right to public information created or received while acting in an official capacity. Section 552.233(b) provides that a temporary custodian with possession, custody, or control of public information shall surrender the information to the governmental body no later than the 10th business day after the governmental body requests it from the temporary custodian. Furthermore, pursuant to section 552.233(c), a temporary custodian's failure to surrender or return the information would be grounds for disciplinary action by the temporary custodian's employer or any other applicable penalties provided by the Act or other law.

---

43 Open Records Decision No. 581 at 6 (1990) (overruling in part Open Records Decision No. 401 (1983), which had suggested implied exception to required public disclosure applied to requested computer programs); *see also* Attorney General Opinion DM-41 (1991) (formatting codes are not "information" subject to Act).

44 Gov't Code § 552.002(d).

45 Health & Safety Code § 181.006.

46 Open Records Decision No. 77 (1975) (quoting statutory predecessor to Gov't Code § 552.021).

47 *See* Open Records Decision No. 116 (1975) (portions of desk calendar kept by governor's aide comprising notes of private activities and aide's notes made solely for his own informational purposes are not public information); *see also* Open Records Decision No. 145 (1976) (handwritten notes on university president's calendar are not public information).

48 *See, e.g.*, Open Records Decision Nos. 635 (1995) (public official's or employee's appointment calendar, including personal entries, may be subject to Act), 626 (1994) (handwritten notes taken during oral interview by Texas Department of Public Safety promotion board members are subject to Act), 450 (1986) (handwritten notes taken by appraiser while observing teacher's classroom performance are subject to Act), 120 (1976) (faculty members' written evaluations of doctoral student's qualifying exam are subject to Act).

49 *See* Open Records Decision No. 635 at 3-4 (1995) (information does not fall outside definition of "public information" in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)).

50 *See* Open Records Decision No. 635 at 6-8 (1995) (information maintained on privately-owned medium and actually used in connection with transaction of official business would be subject to Act).

51 *Adkisson v. Paxton*, 459 S.W.3d 761 (Tex. App.—Austin 2015, no pet.).

52 Gov't Code § 552.003 (2-a).