Senate Committee on Open Government

Interim Report to the 83rd Legislature

December 2012

Senator Rodney Ellis
Chair

Senator Wendy Davis
Vice Chair
Senator Kevin Eltife
Senator Florence Shapiro
Senator Jeff Wentworth

The Texas Senate
Open Government Committee

January 7, 2013

The Honorable David Dewhurst
Lieutenant Governor of the State of Texas
Members of the Texas Senate
Texas State Capitol
Austin, Texas 78701

Dear Governor Dewhurst and Members of the Texas Senate:

The Senate Committee on Open Government is pleased to submit its interim report for consideration by the 83rd Texas Legislature.

Respectfully submitted,

Senator Rodney Ellis, Chair

Senator Wendy Davis, Vice Chair

Senator Kevin Eltife

Senator Florence Shapiro

Senator Jeff Wentworth

Acknowledgements

The Senate Committee on Open Government and the Committee Chairman would like to recognize everyone who assisted with this report for their hard work and cooperation.

The Committee Chairman also would like to acknowledge the valuable assistance and expertise of everyone who took the time to testify, submit written reports, or otherwise assist in the interim study.

The Committee Chairman extends a special thanks to the Open Government staff for their hard work in developing this report.

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Interim Charges

- Evaluate the need for revisions to the Public Information Act to address changes in the performance of public functions and make recommendations for changes. Specifically, consider the following:
    - the use of new technologies and future technological advances as relates to the creation of public information;
    - the extent to which the Public Information Act impacts third-party contractors with state and local government;
    - the need to codify or clarify existing Attorney General Opinions.

- Examine the effectiveness of security measures used to protect electronic information held by state agencies and make recommendations for enhancing security, if needed.

- Review record retention policies for state and local governments and make recommendations for improvements to record retention schedules and policies, including e-mail retention and archiving requirements. Consider the benefits and disadvantages of creating a uniform record retention policy.

- Study ways to define and address frivolous and/or overly-burdensome open records requests. Include an analysis of appropriate cost recovery by governmental entities for expenses and time related to responding to requests, while ensuring the public has adequate access to public information.

- Monitor the implementation of legislation addressed by the Senate Select Committee on Open Government, 82nd Legislature, Regular and Called Sessions, and make recommendations for any legislation needed to improve, enhance, and/or complete implementation.

Executive Summary of Recommendations

Interim Charge 1: Revisions to the Public Information Act

1. The Committee recommends the Legislature consider codifying existing Attorney General Opinions related to the use of technology and official business conducted on personal accounts in order to provide clarity and guidance regarding the Public Information Act.

2. The Committee recommends the Legislature continue to monitor the extent to which the Public Information Act impacts third-party contractors with state and local government.

Interim Charge 2: Cybersecurity

1. The Committee recommends the Legislature examine whether expanding the Department of Information Resources' legislative authority would be an appropriate and cost-effective means of reducing the number of data breaches.

2. The Committee recommends the Legislature continue to monitor the threat to Texas' cypersecurity, particularly as it relates to confidential data held by state agencies.

Interim Charge 3: Records Retention

1. The Committee recommends the Legislature study the feasibility of creating a repository for preserving electronic records at the Texas State Library and Archives Commission.

2. The Committee recommends the Legislature task the Texas State Library and Archives Commission and the Department of Information Resources to work together to assist state agencies and local governments with identifying archival technology and assist with migration.

3. The Committee recommends the Legislature continue to study the issues surrounding social media, email, public access to government records and records retention.

Interim Charge 4: Overly-Burdensome Open Records Requests

1. The Committee recommends governmental bodies consider reviewing their open records requests to assess what content is frequently requested and currently not available on-line and consider posting these documents on-line to reduce requests.

2. The Committee recommends the Legislature continue to study and monitor issues and pending litigation surrounding open records requests.

Senate Government Organization Committee Interim Charge #1

Charge

Evaluate the need for revisions to the Public Information Act to address changes in the performance of public functions and make recommendations for changes. Specifically, consider the following:

- the use of new technologies and future technological advances as relates to the creation of public information;
- the extent to which the Public Information Act impacts third-party contractors with state and local government;
- the need to codify or clarify existing Attorney General Opinions.

Background

The Texas Public Information Act (Act) was originally adopted in 1973 by the 63rd Legislature in V.T.C.S article 6252-17a. In 1993, the Act was repealed and replaced by the Public Information Act in the Texas Government Code, Chapter 552.

The Chapter was intended to "be liberally constructed in favor of granting a request for information."[1] The preamble to the Act outlines the construction of the policy:

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, 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. The provisions of this chapter shall be liberally construed to implement this policy.

All "governmental [bodies]"[2] are subject to the Act including:

i. a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;
ii. a county commissioners court in the state;
iii. a municipal governing body in the state;
iv. a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;
v. a school board district board of trustees;
vi. a county board of school trustees;

[1] Texas Government Code Chapter 552, Section 552.001
[2] Texas Government Code Chapter 552, Section 552.003(1)(A)

vii. a county board of education;
viii. the governing board of a special district;
ix. the governing body of a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code;
x. a local workforce development board created under Section 2308.253;
xi. a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and
xii. the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds.

State and local executive and legislative branches are included, while the judiciary is excluded from the definition of a governmental body and is instead governed by the Texas Rules of Judicial Administration, Rule 12.

Currently the Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) provides that "public information" consists of information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

i. by a governmental body; or
ii. for a governmental body and the governmental body owns the information or has a right of access to it.

Section 552.002(b) outlines the media on which public information can be recorded, and Section 552.002(c) notes the general types of media that are subject to the Act including a book, paper letter, document, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map, drawing, a voice, data, or video representation held in computer memory.

Texas law provides a unique role to the Attorney General where the governmental body has to ask the Attorney General first before redacting information. The burden lies with the agency to prove that the information is not subject to the Act.

During the 82nd Legislative Session, Senator Kirk Watson filed Senate Bill 1571. The Committee Substitute of the bill provided a definition of public function as a:

A. function performed or administered by:
   i. a governmental body; or
   ii. an elected or appointed public official of the state or any political subdivision of the state;
B. function that is, wholly or partly, supported with public funds, only to the extent it is directly supported by public funds; and
C. function that has been delegated to a nongovernmental entity pursuant to a contract to which a governmental body is a party.

The Committee Substitute also provided a definition of "public funds" as "funds of the state or of a governmental subdivision of the state, including funds received by a governmental body from the federal government or received as a result of intergovernmental transfers." This bill passed the Senate Committee on Open Government but did not pass the Senate.

Discussion

New Technology

Transparency and accountability are important factors in governing. Legislators in 1973 realized the value of providing the public with access to information surrounding governmental business. Since the Public Information Act was originally enacted in 1973 and codified in the Government Code, there have been vast changes to the way business is conducted. The advances in technology over the last few decades have added additional venues and ease to governing, but they have also added a layer of complexity to interpreting the Public Information Act.

In testimony to the Committee, the Attorney General's Office noted that existing opinions address the issue of new technology and public business being conducted on private accounts, as the Act defines public information by content of information as opposed to the media with which it is transmitted.

A governmental body may not circumvent the applicability of the Act by conducting official public business in a private medium. Open Records Decision No. 635 at 12, 425, 2. Virtually all the information in the governmental body's physical possession constitutes public information and thus is subject to the Act. Open Records Decisions No. 549 at 4 (1990), No. 514 (1988).

As noted in testimony from the Attorney General's Office and the 2012 Public Information Handbook, personal notes and emails on personal email accounts may be subject to Act. The following opinions and letter rulings clarify the issue:

- Open Records Decision No. 120 (1976) concluded that faculty member's written evaluations of doctoral students' qualifying exams are subject to the Act.
- Open Records Decision No. 450 (1986) concluded that handwritten notes taken by an appraiser while observing teacher's classroom performance are subject to the Act.
- Open Records Decision No. 626 (1994) concluded that handwritten notes taken during an oral interview by Texas Department of Public Safety promotion board members are subject to the Act.
- Open Records Decision No. 635 (1995) concluded that a public official's or employee's appointment calendar, including personal appointment entries, may be subject to the Act.
- Open Records Letter Nos. 2005-06753 (2005) concluded that the Mayor of Kemah's correspondence maintained on his private business or personnel email accounts are subject to the Act when the information relates to official business.
- Open Records Letter Nos. 2003-1890 (2003) concluded that city officials' personal cellular, personal office, home telephone records, and email correspondence on personal email accounts, are subject the Act to the extent that the information relates to the transaction of official city business.

The Attorney General's Office is currently litigating two cases on this issue. One deals with text messages sent during a City Council meeting. A citizen asked for the text messages and the Attorney General's ruling noted that they are subject to the Act, while the City believes that the text messages are not.

A second case was noted that involved private emails dealing with public business. A County believes that these emails are not subject to the Act, while the Attorney General believes they apply.

Testimony provided to the Committee noted that taxpayer dollars are paying to litigate these cases from both the Attorney General's Office and the governmental bodies seeking to keep information private.

Third Party Contractors

As governments move to reduce costs and improve efficiencies, the private sector is often utilized to accomplish this. When the Act was written, governmental functions were performed for the most part by governmental entities. Today, there is a more frequent reliance on the private sector.

As such, the Act does not explicitly address this issue, but the Attorney General's Office has in a number of opinions. The Attorney General has noted that simply receiving public funds does not make a private entity a "governmental body" under the Act.

The Attorney General Office has relied heavily on the analysis used by the Fifth Circuit Court of Appeals in *Kneeland*.[3]

In *Kneeland,* it noted an entity receiving public funds is treated as a governmental body under the Act:

1. unless the private entity's relationship with the government "imposes a specific and definite obligation to provide a measurable amount of services in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser;"
2. if the private entity's relationship with the government "indicates a common purpose or objective or creates an agency-type relationship between two;" or
3. if the private entity's relationship with the government "requires the private entity to provide services traditionally provided by governmental bodies."

Testimony taken during the Committee hearing noted that requests for public information from a third party contractor are evaluated on a case by case basis according to the *Kneeland* standards.

In various opinions and open records decisions the Attorney General has ruled that information supported by public funds is subject to the Act even if the entity performing the function is private:

[3] Texas Attorney General Opinion – GA-0603 (2008), Texas Attorney General Opinion – OR2012-11220, Texas Attorney General Opinion – OR2001-4849,Texas Attorney General Letter Opinion –LO-97-017 (1997).

- Attorney General Opinion JM-821 (1987) – a volunteer fire department receiving general support from a fire prevention district.
- Open Records Decision No.621 (1993) – the Arlington Chamber of Commerce and the Arlington Economic Development Foundation, through which the chamber of commerce receives support of public funds.
- Open Records Decision No. 602 (1992) – the portion of Dallas Museum of Art that is supported by public funds.
- Open Records Decision No. 601 (1992) – the El Paso Housing Finance Corporation established pursuant to Chapter 394 of the Local Government Code and supported by public funds.
- Open Records Decision No. 273 (1981) – a search advisory committee that was established by a board of regents to recommend candidates for University president and that expended public funds.
- Open Records Decision 228 (1979) – a private, non-profit corporation, with the purpose of promoting the interests of the area, that received general support from the city
- Open Records Decision 201, 195 (1978) – entities officially designated as community action agencies under the federal Economic Opportunity Act of 1964 and supported by funds of the state or a political subdivision.

Other states have clarified that third-party contractors are subject to their state's Public Information Act. In Connecticut, only contracts that exceed $2.5 million, if the contractor is performing a governmental function, are explicitly subject to their Freedom of Information Act. Minnesota goes further and makes all government data whether in a contractors hands or not, subject to release under their Data Practice Act.

Conclusion

Consistency is needed between the Attorney General Opinions and the current statute. Codifying existing Attorney General Opinions relating to the use of technology and private emails accounts for public business will provide clarity and guidance in the Public Information Act, which will hopefully reduce costs to the state for litigating and interpreting issues with the statute. The issue of third party contractors provides greater complexity that may benefit from continued analysis on a case by case basis by the Attorney General's Office.

Summary of Recommendations

The Committee recommends the Legislature consider codifying existing Attorney General Opinions related to the use of technology and official business conducted on a personal account in order to provide clarity and guidance regarding the Public Information Act.

The Committee recommends the Legislature continue to monitor the extent to which the Public Information Act impacts third-party contractors with state and local government.

Senate Open Government Committee Interim Charge #2

Charge

Examine the effectiveness of security measures used to protect electronic information held by state agencies and make recommendations for enhancing security, if needed.

Background

In the recent past, a number of state agencies have experienced data breaches that affected millions of Texans. One of these breaches involved highly confidential personal information that was publically accessible over the internet for over a year, while others were as simple as an employee mistakenly attaching a document with confidential information to an email. These and a number of other data breaches were due to human error.

In testimony before the House Committee on Public Health in April 2012, Angel Cruz, State Chief Information Security Officer with the Texas Department of Information Resources (DIR), testified that only 7 percent of the 139 reported health information breaches since 2009 involved hacking. The majority of health information security breaches involve human error, and this holds true across the board with other types of breaches.

According to Kevin Beaver, an Atlanta-based information security expert, high turnover rates and a heavy workload for members in an IT department can put an agency at an increased risk for data breach. Additionally, stolen or lost equipment is another common example of security breaches caused by human error. Laptops and disks are often misplaced, especially when more than one individual is responsible for the property. Other states have reported breaches where backup disks containing personal information were lost in transit by FedEx or another shipping service. Equipment left in a car can also be at an increased risk of theft, especially when it is visible to passers-by.

While some form of human error is the cause of the majority of data breaches, the threat of hackers and other forms of malicious attacks on state agency computer systems cannot be ignored. These attacks are especially worrisome because individuals or groups gaining access to information through these means typically intend to misuse the information they obtain for personal gain. Some hacker groups have a history of going after government agencies, especially law enforcement entities. DIR stops on average 75 million attacks on state systems every month. In this context, DIR defines an incident as any attempt to improperly access a state system, mostly through automated attacks coming in from the internet against state applications, servers, and web sites.

Discussion

In recognition of the growing threats to electronic information, the 82nd Texas Legislature passed Senate Bill 988, which authorized the creation of the Cybersecurity, Education, and Economic Development Council (Council). The Council was created to provide recommendations on ways to 1) improve the infrastructure of the state's cybersecurity operations

with existing resources and through partnerships between government, business, and institutions of higher education; and 2) examine specific actions to accelerate the growth of cybersecurity as an industry in the state.

In testimony provided to the Committee, the Council noted that all state agencies are required to maintain security best practices according to 1 Texas Administrative Code (TAC) § 202. According to the Council, "[w]hile collaborative efforts within the State would strengthen the overall security posture of state agencies; the Council recognized that state agency compliance with TAC § 202 requirements form a good foundation for ensuring basic protection of State of Texas information assets. Additionally, the Council identified the need to increase the number of cybersecurity practitioners throughout the State, not only to provide the expertise needed to grow cybersecurity investments in Texas, but also to protect the state's cyber assets."

In the Council's December 2012 report, it "focused on analyzing the cybersecurity economic development context, cybersecurity education capabilities, and cyber operations for the state's cyber infrastructure environment, both public and private." When examining the public aspect, it noted that "DIR has established a strong information security program for state agencies and is capable of taking on a greater leadership role in cybersecurity." The report argues that DIR's duties and powers should be strengthened and expanded, specifically noting:

> DIR's successes in recent years to develop and implement cybersecurity for state agencies must be capitalized upon and its role further developed to enable the continued growth of a comprehensive cybersecurity plan for the state's public infrastructure.
>
> To the extent that Texas legislation currently addresses the topic of cybersecurity at all, the focus is primarily on one of reaction to a cyber crime and potential punishments (Title 7 Texas Penal Code, Chapter 33 regarding Computer Crimes) rather than any focus on prevention or protection against malicious cyber activities.
>
> Despite best efforts, cyber crime and incidents will continue, and the need to respond remains. But just as important to the overall cybersecurity effort is identifying vulnerabilities and taking proactive measures before incidents occur. To that end, Texas Government Code sections regarding DIR's duties and powers should be reviewed and updated, and resources identified, in order to enhance DIR's efforts to lead implementation of state infrastructure improvement activities.

DIR provides statewide leadership and oversight for management of government information and communications technology. Part of their responsibilities include developing statewide security policies and best practices, maintaining a 24/7 security alert and response system, and providing training on security. For example, DIR manages the state's IT security program, which is responsible for the security of information and communications technology resources, including the physical and logistical security of the state's data systems and networks. As part of this program, DIR conducts technical security and risk assessments for agencies to identify vulnerabilities and suggests countermeasures to prevent intrusions or data loss. They also provide 24/7 external monitoring, alerting, and reporting of malicious traffic on agency systems.

In addition, DIR maintains secure communication portals and channels to provide information sharing among state agency information security officers.

DIR has also contracted with Gartner, a third party firm, to conduct in-depth reviews of the security vulnerabilities and weaknesses for state agencies. Agencies participate in this review voluntarily. This process is funded through DIR's telecommunications account, so there is no financial impediment for agencies that wish to participate.

DIR partners with the Department of Public Safety for response planning and management for cybersecurity events that may impact the state's critical infrastructure. They also work with the U.S. Department of Homeland Security's Multi-State Information Analysis and Coordination Center to conduct cyber exercises and improve the state's cyber plans. While prevention of security breaches is a main concern, it is important to ensure the state is ready to respond to breaches that do occur in order to minimize damage.

Conclusion

It is clear that human error plays a large role in the security breaches that various state agencies have experienced in the last several years. At the same time, the threat posed by hackers and other malicious actors cannot be overlooked. Technology is advancing so fast that it can be difficult for IT departments to keep up with the changes, increasing the risk of attack. In addition, human error may be minimized, but it cannot be eliminated. Therefore, state agencies need to focus on ways to discover mistakes as soon as possible and immediately respond when they are found.

Ensuring that each agency has adequate policies and procedures in place that are followed by each employee can help to mitigate some of these threats. Additional training can also help to make sure employees are following new standards as they are updated.

Summary Recommendations

The Committee recommends the Legislature examine whether expanding the Department of Information Resources' legislative authority would be an appropriate and cost-effective means of reducing the number of data breaches.

The Committee recommends the Legislature continue to monitor the threat to Texas' cypersecurity, particularly as it relates to confidential data held by state agencies.

Senate Open Government Committee Interim Charge # 3

Charge

Review record retention policies for state and local governments and make recommendations for improvements to record retention schedules and policies, including e-mail retention and archiving requirements. Consider the benefits and disadvantages of creating a uniform record retention policy.

Background

In written submitted testimony before the Committee, Director and Librarian of the Texas State Library and Archives Commission (Commission) Peggy Rudd explained the history and charge of the Commission:

> In 1947 both houses of the Texas Legislature voted unanimously to authorize the Texas Library and Historical Commission to "establish and maintain in the State Library a records administration division which…shall manage all public records of the State with the consent and cooperation of the heads of the various departments and institutions in charge of such records…" (Government Code, Chapter 441, Subchapter L; Administrative Code, Title 13, Chapter 6).
>
> In 1989 with the passage of the Local Government Records Act (Local Government Code, Title 6, Subtitle C; Government Code, Chapter 441, Subchapter J; Administrative Code, Title 13, Chapter 7), the Texas Legislature gave the Texas State Library and Archives Commission authority to support the preservation and effective management of local government records.

Chapter 441, Subchapter L of the Texas Government Code outlines broad and inclusive records management requirements for state agencies and requires that each agency:

- Establish a records management program on a continuing and active basis;
- Appoint a Records Management Officer (in lieu of the executive director assuming RMO duties);
- Develop a records retention schedule;
- Identify and protect vital records;
- Transfer archival records to the State Archives, with the exception of University systems and institutions of higher education; and
- Document the final disposition of records.

Under Texas State Library and Archives Commission rules, each state agency must determine which records are "state records" and list these records on a retention schedule. Records are managed by the substance of the records, not the record's media or type of tool or format used to capture the records. This would extend to social media, blogs, wikis, and email if they contain state records as they are simply tools to capture records. Existing law applies to all information

that meets the definition of a state record, meaning information necessary to document the agency's business. Compliance lies with each agency.

The Commission and the Department of Information Resources help state agencies and local governments follow state statutes regarding records retention and IT management of these records.

The Commission states the following on retention schedules:

> A uniform retention policy exists now in the Texas State Records Retention Schedule, which has been adopted as an administrative rule. The retention schedule indicates the minimum length of time listed records series must be retained by a state agency before destruction or archival preservation. This is a general schedule for state agencies that contains common records of all state agencies and sets minimum retention requirements. In addition, state agencies add their own retention series to their schedule to account for agency specific or program records. (See Government Code, Section 441.185, Records Retention Schedules and Government Code, Section 441.182(c) (2), State Records Management Program.)
>
> There are 12 local government records retention schedules for different offices and functions that set minimum retention requirements. Local governments may compile their own retention schedules as long as the schedules meet the minimum retention requirements. (See Local Government Code, Section 203.002(3), Duties and Responsibilities of Elected County Officers as Records Management Officers and Local Government Code, Section 203.023(3) (a), Duties of Records Management Officers.)

The Records Management Interagency Coordinating Council (RMICC) was established in the 74th Legislature to study and make recommendations for best practices pertaining to records management. RMICC submitted their biennial report to the Legislature on October 2012, which includes an analysis of the issues surrounding preservation of electronic records including electronic mail (email).

Discussion

Records management for governmental entities is an important and essential function of government. Not only must records be maintained for the vital purpose of transparency and openness in government, but records must also be reliably maintained for posterity and to protect the rights of constituents. These interests must be preserved while agencies and local governments deal with the issues facing the practicality of records retention such as changing technology, storage space (digital or otherwise), cost, and the burden on staff that may already be spread thin.

Technology presents both complications and opportunities pertaining to ease of records retention. Technologies that satisfy the needs of an agency or local government one day, may be obsolete the next. With increasing access to multiple mobile personal computers such as laptops, smart phones, and tablets, government records can be created whenever and wherever.

According to the RMICC report, "this often leads to inadequate control over the creation and maintenance of electronic records. We have to help the hoarders who never sort or manage their records, as well as those who delete everything without regard to records series, retention periods, documentation or archival needs."

Email is increasingly the primary method for interagency, cross agency, and local government communications. The volume of electronic records and redundancy of those records created by email further complicates records retention. However, governmental entities and the public have a keen interest in preserving these records. According to the RMICC report:

> Failure to manage email effectively places at risk the integrity, security and survival of organizational records. For example:
>
> - Managers and employees frequently use email to announce decisions, document processes and even store archival information, either from habit or lack of alternatives. In such situations, an organization is just one server-crash away from losing vital data.
>
> - An estimated 80 percent of an organization's intellectual property (or other sensitive information) goes through its email server. The absence of non-secured monitoring and disposition of electronic messages exposes an entity's key assets to theft or unauthorized viewing.
>
> Also, it's very important to preserve metadata (such as sender, recipients, time and date) to prove the validity of each email as legal evidence.

Furthermore, the lack of structure for email retention costs the state money. Again, according to the RMICC report:

> It has been estimated that 90 percent of all email records on employees' computers are convenience copies or transitory messages - the result of human reluctance to delete data even when its purpose has been fulfilled. This creates higher incremental costs that can add up to significant amounts. For example, one Texas state agency found it had been spending $126 per employee per month to store emails on servers; if the same is true of other state organizations, the potential for savings is obvious.
>
> Ineffective email management lowers productivity, causing employees to spend an average of 182 hours per year looking for lost e-files, according to one estimate. For a state agency with 1,000 employees, the hypothetical price of such searches would exceed $1.4 million per year, based on an average compensation rate of $28.06 per hour. But perhaps a larger cost is the consumption of agency time better spent on customer service and core functions.

The records retention guidelines developed by the Commission do not seem to be overly burdensome to or costly to local governments. The City of Houston submitted testimony at the Committee's November 26 hearing to that effect. However, the Commission did note that it

would be difficult to develop a uniform retention policy across agencies and local governments because the needs and functions widely differ.

Conclusion

The efficiency and integrity of records retention must rely on technology, but the ever evolving nature of technology presents certain challenges. The challenge of evolving technology must take into consideration cost effectiveness, minimization of risk of obsolescence, ease of migration, and preservation of record integrity.

The increasing access to multiple mobile personal computers creates the potential for the creation of government records whenever and wherever. Because public employees are increasingly solely responsible for records retention, clearer guidance is needed to help public employees identify records that warrant retention and a process by which those records must be retained. This is especially true for government records maintained in electronic format.

Because the needs and functions of various state agencies and local governments are different, it would be difficult to create a uniform records retention schedule. Current guidelines are helpful, but periodic review of agency and local government policies would be beneficial to ensure compliance.

Summary Recommendations

The Committee recommends the Legislature study the feasibility of creating a repository for preserving electronic records at the Texas State Library and Archives Commission.

The Committee recommends the Legislature task the Texas State Library and Archives Commission and the Department of Information Resources to work together to assist state agencies and local governments with identifying archival technology and assist with migration.

The Committee recommends the Legislature continue to study the issues surrounding social media, email, public access to government records and records retention.

Senate Government Organization Committee Interim Charge #4

Charge

Study ways to define and address frivolous and/or overly-burdensome open records requests. Include an analysis of appropriate cost recovery by governmental entities for expenses and time related to responding to requests, while ensuring the public has adequate access to public information.

Background

The Texas Public Information Act (Act) does not currently define "frivolous" or "overly-burdensome" open records requests. In fact, Section 552.222 of the Texas Government Code prohibits "the officer for public information and the officer's agent" from asking why the requestor wants the information.

Cost recovery is addressed in the Texas Government Code, Section 552.261 through 552.275, and notes that entities can charge for reproducing public information including costs of materials, labor, and overhead.

These charges must be calculated according to the rules and method of calculation provided by the Attorney General. For 50 or fewer pages of paper records, the charge is limited to the charge for each photocopy and cannot include the cost of materials, labor, or overheard, unless the information is in two or more separate buildings that are not connected or a remote storage facility. If a request for public information will result in costs exceeding $40, the governmental body is required to provide the requestor with an itemized statement of charges. The estimate must also include an alternative way to view the information, if it is less expensive.

A local governmental body has the ability to charge up to 25 percent more than what is established in the cost rules by the Attorney General, if needed. A governmental body may also submit a written request for an exemption from all or part of the cost rules adopted by the Attorney General. The Attorney General has 90 days to make a determination regarding the request.

Requestors can ask to inspect public information without a charge, unless they request a copy of the information. Governmental bodies can charge for the cost of editing confidential information from the material prior to inspection. They can also charge for the personnel costs for making the information available for inspections, if the public information is older than five years or fills more than six archival boxes and will require more than five hours to assemble. For governmental bodies with fewer than 16 full time employees, they can charge for inspection if the information is older than three years or fills more than three archival boxes and requires more than two hours to assemble.

In 2007, House Bill 2564 by Representative Kelly Hancock and sponsored by Senator Jeff Wentworth added Section 552.275 to the Act. This section allows government bodies the ability to charge for requests that require a large amount of time to compile. A governmental body may

establish a reasonable limit on the amount of time that personnel are required to spend on producing public information for inspection or duplication by a requestor without recovering its cost attributable to that personnel time. A time limit may not be less than 36 hours for a requestor during a 12 month period corresponding to the fiscal year of the government body. Public officials and journalists are exempt, as well as legal service organizations. This section does not prohibit a governmental body from providing a copy of public information without charging a reduced or waived fee.

Corsicana and Kemah City Councils, as well as Fort Bend and Comal County, have passed ordinances establishing this provision.

Discussion

From invited and witness testimony taken at the hearing, over-burdensome and frivolous requests do occur, but the vast majority of requestors utilize the law for its intended purpose. The actions of a few do disrupt and provide unnecessary work for governmental bodies.

The Attorney General's Office testified regarding the current cost statute and noted that there are mechanisms to allow for recovering costs. Local entities can charge 25 percent more than what is established through rule and can also set time limits for frequent requestors, which cannot be less than 36 hours, after which full cost recovery is possible, but the governmental body must establish the limits.

Local entities that testified did not mention taking advantage of Section 552.275 of the Act, which may remedy the issues noted with frequent requestors once the time limit has been met.

- The City of Houston's written testimony noted that "frivolous and/or extraordinarily burdensome requests are motivated by party politics, election season, and former employees with axes to grind and the hobby horse with retaliatory strategies[4]." The issue with said request is that the current statute does not consider the staffing, time and money associated with the City's fiduciary duty to redact certain types of private information when processing a "burdensome" request. One such example outlined was a group that made a single request for everything in the Mayor's office from January 2004 through 2009. After 6 months, using three attorneys and four paralegals and spending $180,000 the requestor withdrew the request without paying.

- The City of Irving Secretary's written testimony highlighted an abusive requestor who exploits the Act to the detriment of taxpayers. In her testimony she highlights a single requestor whom submitted: 398 requests, or 40 percent of the total number of request in FY 2007-08; 320 requests or 38 percent of total request in FY 2008-09; and 331 requests for 28 percent of total request in FY 2009-10 submitted in Irving. Also mentioned in her testimony was time that the City of Irving is unable to charge for, such as the full time for

[4] The hobby horse with retaliatory strategies means a requestor would make a request and if the City didn't immediately release the information so they could get an AG's Opinion the requestor would immediately file a request for the personnel file of the attorney who prepared the opinion request.

document retrieval, reading through documents before redaction, drafting a request for an Attorney General Opinion, and responding to the open records requests via certified mail.

Senate Bill (S.B.) 669 filed by Senator Jeff Wentworth during the 82nd Legislative Session also sought to further address the issue of over-burdensome or frivolous requests. The bill passed out of the Senate Select Committee on Open Government, the full Senate, the House Committee on State Affairs, and was sent to House Calendars. S.B. 669 allowed public information requests to be fulfilled by citing where the information is available on-line. It also allowed governmental bodies to obtain actual costs, to be defined by the Attorney General, for the records if the requestor had submitted seven or more request within the last 31 days, including modification to an existing requested. If the government body requires payment for actual costs for public information; the government body must provide the requestor with a written estimate. The press is exempt from this bill, but non-profits that may be interested in government transparency would not be exempt.

During the hearing, witnesses noted that overly burdensome and frivolous were highly subjective terms. They also asserted that in their experience some public agencies are now routinely appealing virtually all open records requests to the Attorney General, even when letter rulings and case law create a clear precedent for release of the information. The testimony quoted a study by the Center for Public Integrity which found that among the state's biggest cities, Dallas and several of its suburbs had "the highest rate of requests to Texas Attorney General Greg Abbott last year to keep government information a secret."

Other States and Government Bodies

Governmental entities outside of Texas have passed laws to define and address over-burdensome and frivolous requests for public information.

- In 2010, Hawaii enacted S.B. 2937, which exempts disclosure of government records in response to duplicate requests from a single requestor.
- Arkansas' and Delaware's statutes allow the governmental entity to deny the request for information. A requestor would then have to bring suit to release the information. The court may award attorney fees and costs to a successful plaintiff of any action brought under this section. The court may award attorney fees and costs to a successful defendant, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment.
- Pennsylvania law (P.S. Sec. 67.506) permits an agency to deny a public information request for repeated requests for the same information that place an unreasonable burden on the agency.
- The United Kingdom provides that public authorities are not obligated to comply with a "vexatious request" or repeat requests for similar information. The request for information focusing not on the person making the request but on the type and manner of information requests (Section 14(1) of the Freedom of Information Act). The Ministry of Justice considers a request vexatious if it seeks information of a frivolous nature, is likely to cause distress or irritation without justification, or is aimed at disrupting the work of the public authority or harassing authority employees.
- In Connecticut any person denied the right to inspect or copy documents under the Freedom of Information Act can file an appeal to their Commission. The Commission

can fine a person between $20 and $1,000 if it believes a groundless and frivolous complaint to harass an agency was filed (CGS § 1-206). A public agency can ask a court for an injunction to prohibit the requestor from bringing any further appeals to the Commission if it finds that doing so would create an injustice or constitute an abuse of the Commission's administrative process. If the court orders the injunction and the requestor files another appeal violating it, the agency can seek further injunctive relief as well as damages and costs (CGS § 1-241).

Conclusion

When it comes to over-burdensome and frivolous requests, the actions of a few individuals can disrupt governmental functions. The current statute provides avenues for governmental entities to recoup some of the cost, as laid out by the Attorney General's office, for filling the request for information. While there is no simple solution, the Legislature should continue to study and monitor the issue of over-burdensome requests.

Summary of Recommendations

The Committee recommends that governmental bodies consider reviewing their open records requests to assess what content is frequently requested and currently not available on-line and consider posting these documents on-line to reduce requests.

The Committee recommends that the Legislature continue to monitor the issues and pending litigation surrounding open records requests.