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TO: Senate Committee on Open Government

SUBJECT: Written Testimony for Hearing on November 26, 2012

Please accept the following comments for your hearing on open government, particularly as it relates to records management.

Witness Professional Background

In 1973 I was the Administrative Assistant to the House sponsor of the Open Records Act (now the Texas Public Information Act). I also have a background in government operating under the auspices of the TPIA and the Texas Open Meetings Act, having been Associate Deputy Comptroller under Bob Bullock, Travis County Tax Collector, and Travis County Judge. I have practiced law in Austin since 2001 handling a lot of open government issues, and I serve as a volunteer "hotline" attorney for the Texas Freedom of Information Foundation.

Records Management – The Critical Foundation of Open Records

Records management—the retention and retrieval of public records—is the bedrock of public information. If a poor job is done of records management, the public will not have prompt and efficient access to information they need to understand and control their government.

Just in the last couple of decades, changes in technology have had an earthquake-type of effect on how public records are created, when they are created, how they are stored, how they can be retrieved, and how they can be destroyed. Decades ago, a public record was almost always created inside a government building, on government equipment, and most likely during normal working hours. Public records were stored only on government computers or file cabinets inside the security of a government building.

Technology should make public information more readily and easily available, but that has not occurred near as much as it should have. Technology has created an opportunity—one that I believe is taken advantage of routinely—for every government employee or official to conduct the public's business in secret. This is because laptops, iPhones, thumb-drives, and remote access have dramatically changed how and when public records are created. Add to this list, the opportunity for government officials to create Facebook and Twitter accounts on which to discuss public business that could have restricted access, and you can see how technology can be used to conceal public records. First, it no longer matters that the government's computers are inside government buildings, because the records in those computers can be sent anywhere, or

created on those computers remotely with internet links, or copies of entire files can be downloaded to a thumb-drive and walked out. Second, like the rest of society, now public officials and employees can conduct public business—and create public records—almost anytime (not just during normal work hours), anywhere, and using their own personal electronic equipment. And because of the ease with which public records can be created now, versus the past, more public records are created, particularly correspondence records. That's a good thing for a democracy and for better government—improved communication, sharing information and thinking among government employees and officials—leaving a trail that the public can follow to better understand how things happen in their government.

But under these circumstances, security of public records—to prevent the unauthorized release, deletion, or hiding of public records—is, as a practical matter, in the hands of *each* government employee or official or creates or can access or control the electronic record. The only thing standing between each and every government employee or official and the general public regarding public records are 3 powerful buttons on a keyboard, "Save," "Send," or "Delete."

Due to myopic concerns for computer storage space, I.T. directors often encourage deletion of electronic records and are not careful to backup records so some employee doesn't delete the only copy of a government record. Last year, an employee at the City of Austin deleted over 800 pages of correspondence about government business, and Austin had not provided a backup for that correspondence and had no system of checking to make sure a individual employee was not destroying the only copy of those records. I don't believe this is an isolated condition.

The public's thirst for information from all levels of government is at an all-time high. But instead of governments approaching public access to large volumes of public records with an attitude of humble devotion to the public's right to records, we see governments ignoring such a duty and a failure to use technology to make public access easier, quicker, and more efficient. Instead of retaining and filing electronic information to it can be efficiently and quickly retrieved upon request, we see government officials who bellyache to the Legislature about how much trouble and expense they are going to satisfy open records requests.

We need the Legislature to the turn the tables on these officials, and tell them to start paying closer attention to how they create, collect, assemble, and maintain their records and to do so in anticipation that those records need to be found and made public efficiently. You should tell these government employees and officials to put more of their information---particularly records for which they get a lot of requests---on their websites. The Legislature should put an end to tactic by governments who do a lousy job of maintaining and organizing electronic records and then charge enormous staff-time fees under the TPIA to find and disclose records that should have been promptly retrievable.

Based on my experience in government and as an open-government attorney, here are some suggestions:

1. Amend the state and local records retention statutes (Tex. Gov't Code Ch. 441 and Tex. Local Gov't Code Ch. 201) to make sure that a "public record" is defined in a way so that records of official business received or created by government officials and employees using their own electronic equipment and their own email addresses are public records.

2. Make it a criminal offense for a government official or employee to retain public records on their own electronic equipment or their own email address without copying or forwarding those records into the government records management system.

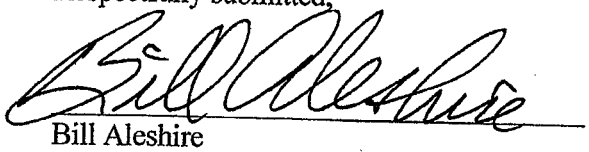
3. Add to the definition of "public information" in the TPIA (Section 552.002(a)) to include any "public record" (as defined by the records retention statutes) so that there is no gap between what constitutes a public record and what constitutes public information subject to disclosure under the terms of the TPIA.

4. Under the TPIA, give, to a requestor of "public information," a cause of action for mandamus against any government employee or official who possesses a "public record" to require that employee or official to turn over the public record to the governmental body, so the TPIA standards for disclosure can then be applied to the requested information. [Note, there is not private cause of action under the Local (or state) Government Records Act (like there is under the TPIA and TOMA) to enforce the records retention laws).

5. Amend the TPIA section 552.323 on attorney fees, to provide that reasonable attorney fees will be awarded where a governmental body provides the requested information after being sued under the Act. Currently, some governmental bodies provide the public information only after being sued, and then claim the lawsuit is moot, thereby denying the plaintiff/requestor an opportunity to "substantially prevail" and obtain a final judgment in the case. To stop this abuse of process, attorney fees should be awarded if the governmental body waits more than 30 days after being sued to disclose the public information.

I thank you for this opportunity to share these thoughts with the Committee.

Respectfully submitted,



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