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To: Jessica Schleifer
Director, Senate Committee on Open Government

From: Maud Beelman
Deputy Managing Editor, *The Dallas Morning News*
Board Member, Freedom of Information Foundation of Texas

Date: November 21, 2012

Re: Written testimony on "burdensome/frivolous" open records requests

Dear Ms. Schleifer:

We appreciate this opportunity to share with the Open Government Committee our views and concerns about Interim Charge 4: "Overly-Burdensome/Frivolous Open Records Requests: 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."

Inherent in the charge are several false assumptions that we would like to help clarify.

- ☒ "Overly burdensome" and "frivolous" are highly subjective terms. We hear them used quite often by public officials and agencies when they do not want to release information that belongs to the taxpaying public - even when they have been ordered to do so by the Attorney General. We have seen an alarming increase in recent years of instances in which public agencies require a public information request for routine media questions, including those involving matter-of-record answers and those that fall under already established case law or letter rulings. The same agencies that complain about the volume of TPIA requests demand a TPIA be filed for each and every question or query for information.
- ☒ The claim that such "burdensome" requests cost taxpayer money is also unfounded. Public agencies are allowed under the law to charge us for all personnel costs involved in responding to TPIA requests. They are allowed to add on a percentage overhead charge, as well as actual costs for copying records or preparing data for public release. These charges are estimated and agreed upon *prior* to any work being done. The law already provides for the costs associated with most TPIA requests, and certainly the large ones, to be passed on to the requestor and paid in advance.
- ☒ In the last three years, alone, *The Dallas Morning News* has spent about $100,000 to obtain public records and data so as to help our readers be informed and active citizens. That amount does not include what we have had to spend on legal fees when public agencies - sometimes in violation of established case law and AG rulings - refuse to comply with the TPIA.
- ☒ We agree that some of these public agencies are needlessly spending taxpayer dollars related to public information requests. But we believe it is because of their own unwillingness to abide by the law or their decision to draw out a request process to extreme lengths in hopes of exhausting the time and resources of the requestor. Since the Texas Supreme Court ruling in 2010 that allowed public bodies to "reset" the timetable on TPIA requests by asking for "clarifications," we've seen a marked increase in the number of government entities that routinely ask for a clarification at the 10-day mark, even when the request is clearly worded

under any normal understanding of the English language. This tactic drives up everyone's costs.

- It also has been our experience that 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. If the AG rules in favor of public release of information, we increasingly see public bodies then suing the AG rather than releasing the public information.
- For example, the Dallas County Hospital District (i.e., Parkland Memorial Hospital) and the University of Texas System (representing itself and UT Southwestern Medical Center) have filed 12 lawsuits against the attorney general since 2010 to block the release of information to *The News,* such as public audits, settlement agreements and material already shared with third parties - all information clearly established as public - and have strongly resisted three others brought by *The News.* [Please see attachment.]
- Many of these lawsuits are based on a smorgasbord of claims whose applicability stretches credulity, such as the broad use of the medical committee/peer review privilege to matters having nothing to do with actual patient care. We have never requested patient-identifying information.
- Our views on these matters are supported by research. A recent study by the nonprofit Center for Public Integrity 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 secret."
- Despite the hundreds of thousands of dollars that we have spent fighting for the public's right to know, and the tens of thousands of dollars we pay these agencies annually for the records that they *are* willing to release, there is still very basic information we've been unable to attain for our readers.
- For example, when we asked UT Southwestern Medical Center for a copy of its check register, similar to what the state Comptroller regularly posts online, its attorney told us that fulfilling the request would cost us "in the six figures." We fought that estimate, which was obviously inflated and raises serious questions about agencies' abilities to accurately estimate their costs. But after more than six months of backing-and-forthing, the lowest cost estimate we could get from UTSW (a price that the AG's office upheld) was $2,884.60. Despite pledges of transparency by UT System and its schools, we still haven't been able to tell our readers much about how a major local institution is spending taxpayer dollars.
- We agree there should be a study of the abuses of the TPIA. We believe those are the result of exorbitant costs and extreme delays, in some cases both, that are occurring with alarming regularity as a result of officials and agencies seeking to operate outside the public's oversight.
- We also believe the committee should give great weight to the public good that stems from transparency. Openness enables citizens to help each other improve the quality of their government.
- For example, it was only through the TPIA that we were able to obtain records and data showing that patients were dying needlessly at Dallas County's big safety net hospital, or that the state and federal governments were losing millions of dollars to Medicare and Medicaid fraud.
- We obtained hospital discharge data from the Texas Department of State Health Services, spent $15,000 on software to analyze it, and $85,000 in staff time to research and report the story. Tax dollars covered no share of this cost, but all citizens benefited from publication of the state's first comprehensive report card on patient safety in Texas hospitals.

- ☒ One might argue that we are fulfilling an obligation more appropriately belonging to the hospital profession. But healthcare remains a relatively secret operation, and our ability to inform Texans about the quality of their healthcare choices has been utterly dependent on the access to information afforded by the Texas Public Information Act.
- ☒ Beyond healthcare, the state's public records act has helped us help Texans hold their government accountable in other ways. We have used the TPIA to obtain information that revealed serious problems in the state's ETF and CPRIT programs, the state's Teachers' Retirement System and other pension funds, the Texas Youth Commission and many others. [Please see attached.] Indeed, the TPIA records we obtained in looking at the TRS's use of placement agents - who act as brokers between private investment firms and public pension agencies - revealed the need for reforming parts of the TPIA that restricts the amount of information the public can get about the system's investments.

We hope you'll agree that the above summary and the attached details argue for even greater protection of the public's right to information under the TPIA. Spurious designations, such as "overly burdensome" and "frivolous", would restrict the public's right to know and undermine the principles of a government by the people and for the people.

Thank you for your time and attention.

	TDMN TPIA cases involving Parkland Memorial Hospital and UT Southwestern Medical Center			
	Case	**Request**	**Govt agency response**	**TPIA implications**
1	Dallas County Hospital District (Parkland) v. Greg Abbot	The DMN requested information regarding a now-confirmed DOJ investigation into Medicare billing fraud.	Among other things, Parkland requested an attorney general ruling and blocked out so much of the copy of its brief to DMN that the AG found it had violated its duty to provide a copy. Parkland has sued the attorney general and lost on summary judgment on this point.	Parkland and other governmental bodies are abusing their right under the Act to redact information from their briefs if it would reveal the underlying information and blacking out entire sections of the copy to the requestor -- making it impossible for the requestor to respond. The attorney general has found this is a violation with the resulting presumption that the information is subject to release. In this case, Parkland argued that the attorney general does not have the power to enforce the statute against it (and by implication any governmental body).
2	Dallas County Hospital District (Parkland) v. Greg Abbot	For demand and claim letters Parkland has received since Jan. 1, 2000.	Parkland claimed the information could be withheld under litigation exception, settlement negotiation confidentiality, medical records confidentiality and right of privacy. However, the information had been sent to them by the person Parkland claimed raised the exception -- they already had it. The attorney general required most of the information was to be released. The issue was tried on summary judgment and Parkland lost.	Parkland and other governmental bodies are seeking to withhold information under litigation exceptions and confidentiality statutes even when the opposing party had sent the information.
3	DMN/Dunklin v UT System	Request for personnel files of 15 UTSW employees.	UTSW claimed standard personnel information could be withheld under litigation exception.	The litigation exception is supposed to be temporary and limited, but in practice is being applied to as broad a swath as possible. In fact, there is no reason why the fact a case is filed should impede the release of otherwise non-confidential information.
4	DMN/Lathrop, Dunklin v UT System	Request for the UTSW PLANet and Legal Tracking databases and their records layouts.	UTSW claims the information is confidential but also refuses to release the record layout describing the information, claiming that it is not public information.	UT System's argument that a database record layout is not public information is a troubling development within TPIA letter rulings because such layouts are key to understanding the contents of databases.
5	DMN/Dunklin v UT System	Request for information regarding billing practices that had been already exchanged with the DOJ, HHS and the AG's Medicare Fraud Unit.	The UT System redacted its entire argument from briefs to the AG.	Sealing and gag orders entered by courts are increasingly being relied upon by governmental bodies to claim information in their own files is subject to withholding.
6	Dallas County Hospital District (Parkland) v. Greg Abbot	Request for emails and other records regarding the June 2010 CMS inspection that found deficiencies in Parkland's patient grievance process; problems in its OB-GYN service; deaths reported to the medical examiner's office.	This lawsuit challenges, in a single petition, three separate AG rulings in favor of public release of information. The AG ruled (1) Parkland must release emails sent to the chair of its board regarding a CMS inspection (rejecting peer review confidentiality), (2) must release records regarding employee grievances and low morale (rejecting hospital committee confidentiality), and (3) must release reports of death to the medical examiner (holding these are not medical records)	Involves important issues regarding the applicability of the Texas Open Meetings Act to the Parkland Board of Managers and shows the overuse of the medical committee/peer review committee confidentiality and medical records confidentiality. In addition, combining different letter rulings in a single petition makes appeal of attorney general rulings procedurally more difficult in trial court and adds to delay.
7	Dallas County Hospital District (Parkland) v. Greg Abbot	Records documenting the amount of time/money spent by Parkland on legal matters related to the death of Irene Arancibia.	The amount of money was released, but the AG also ruled that descriptions of work done on attorney fee statements must also be released. The AG has informed us that this case has been settled by allowing Parkland to withhold all additional information; to be dismissed Dec. 2012.	The fee statements contain information showing what governmental bodies paid their attorneys to do. Excessive claims of attorney-client communications and work product to withhold descriptions of work on fee statements substantially reduces oversight capabilities on what governmental bodies are actually paying for (esp. when they are claiming how high their rates are).
8	Dallas County Hospital District (Parkland) v. Greg Abbot	Copies of APOWW reports on patient elopements, injuries, assaults and deaths filed with the Parkland police dept.	The attorney general required Parkland to release "basic information" regarding regarding these incidents and rejected Parkland's claim that its police records could be withheld as medical records. Parkland's lawsuit challenges DMN's request for basic information from any offense report prepared by the hospital police district involving allegations of assault and other crimes by hospital employees.	Parkland's petition is unclear as to the basis for challenging the Attorney General decision. But it is essentially arguing that medical record confidentiality can allow it to withhold basic information from police records that would otherwise have to be released. Parkland's persistent attempts to extend the reach of medical record confidentiality to areas where it does not apply is a big part of the costs and delay, and simple non-production of information, in these cases.
9	Dallas County Hospital District (Parkland) v. Greg Abbot	Reports or correspondence generated by hospital staff and rape crisis center regarding certain unemployment claims.	Parkland challenged two different letter rulings in the same lawsuit. The attorney general required Parkland (1) to release "claim information" regarding an unemployment claim and four pages of law enforcement records, and (2) found Parkland's claims of medical records confidentiality and common law privacy did not apply to certain personnel records.	Again, Parkland's petition is unclear as to the specific basis for challenging the Attorney General decisions, but it is again using claims of medical record confidentiality to withhold information that does not appear in medical records and, where it does, does not identify the patients.

	TDMN TPIA cases involving Parkland Memorial Hospital and UT Southwestern Medical Center			
	Case	**Request**	**Govt agency response**	**TPIA implications**
10	Dallas County Hospital District (Parkland) v. Greg Abbot	Request for information regarding Parkland employee allegedly involved in psych ER problems.	The attorney general ruled that Parkland's claim of litigation exception, rejected Parkland's contention that complaints against Brown could be withheld as medical committee records because these were generated in the ordinary course of business. In addition,and rejected Parkland's claims of medical records and law enforcement exception.	Again, Parkland's petition is unclear as to the specific basis for challenging the Attorney General decisions, but it again using claims of medical record confidentiality to withhold information that does not appear in medical records and, where it does. In addition, Parkland persistently attempts to claim medical committee/peer review committee confidentiality for records generated in the ordinary course of business.
11	Dallas County Hospital District (Parkland) v. Greg Abbot	Request for personnel information regarding several employees of Parkland psych ER.	Parkland has challenged eight different attorney general letter rulings in a single lawsuit. The attorney general required release of a wide range of documents, including disciplinary documents and police reports.	Suing the attorney general to block the effect of the letter rulings is a simple matter and can almost be done in a cookie cutter fashion. None of the language in Parkland's amended petition actually states what Parkland specifically disagrees with regarding the requirement to release basic information from police reports and documentation. The hyper-aggressive approach of many governmental bodies to withhold information is the true source of many of the costs claimed by governmental bodies in respoding to requests and has exponentially increased the costs absorbed by requestors.
12	Dallas County Hospital District (Parkland) v. Greg Abbot	Request for personnel information regarding a former hospital psych ER tech.	Responsive records apparently include 11 different incident reports, which the AG ordered released, rejecting Parkland's claims of privacy and medical record confidentiality and requiring release of the basic information on these reports.	Medical record confidentiality is doubtless an important goal. However, it is easily used as a scare tactic by governmental bodies (and the medical community generally) to avoid scrutiny of information that are not medical records to begin with or that do not identify any patient, even if the information is derived from medical records. Governmental bodies are utilizing broadly written confidentiality statutes to conceal inefficiencies and potential wrongdoing.
13	Dallas County Hospital District (Parkland) v. Greg Abbot	Request for information related to 15 sexual abuse investigations.	The attorney general required Parkland to release basic information, rejecting Parkland's claims of privacy and medical record confidentiality and requiring release of the basic information on these reports.	In addition to the medical records confidentiality and privacy claims through which Parkland seeks to withhold basic information, even though rejected by the attorney general, Parkland also claims that the perpetrator listed on an incident report need not be released as "basic information" unless that person is formally taken into custody.
14	Dallas County Hospital District (Parkland) v. Greg Abbot	Requests for copies of the analysis and action plan prepared for Parkland by federally mandated safety monitors Alvarez & Marsal.	Even though prepared by outside consultants hired by command of CMS, Parkland claims the analysis and plan are products of its own medical committee. In addition, although the reports do not contain any personally identifying information, Parkland argues the reports should be withheld in their entirety as medical records. The attorney general rejected Parkland's claims in their entirety.	These reports are generated by consultants hired by order of the county/federal government, and paid for by Dallas County taxpayers. Parkland's claims here, and lawsuit against the attorney general, exemplify the way governmental bodies are gaming the procedures under the Act. There are simply no identifiable patients in the reports, and Parkland is protecting its legal argument to claim medical record confidentiality applies to any record derived from a medical record. Even more egregious is Parkland's claim that this outside consultant in an internal medical/peer review committee. It is these types of tactics that raise the cost of public information for all involved.
15	UT System (UTSW) v. AG	Request for emails involving UTSW officials and the Master Services Agreement that governs physician services at Parkland.	Lawsuit challenges a letter ruling that found UTSW had not fully complied with requirements of requesting an attorney general letter ruling and rejecting Parkland's argument that certain information relates to its "policymaking."	Proper compliance with the Act is fundamental to allow the office of attorney general to properly do its job. The "deliberative process privilege" -- which protects policymaking discussions, is one of the most abused and overused exceptions in the Act. Although the Texas Supreme Court has limited this exception to policymaking discussions, Parkland and virtually all governmental bodies consistently use the exceptions to claim draft documents and administrative matters. Here, the attorney general found that much of the material Parkland sought to withhold was general administrative matters and purely factual information. With the lawsuit, of course, it still has not been released.