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Trustees and Technology[1]

Recognizing its many benefits, community college board members regularly employ technology to engage in college business. Technology can make board members' work easier while increasing transparency and supporting community involvement. However, such use by public officials raises legal and practical concerns that board members must be prepared to address.

Technology Issued to Board Members

May a community college issue to board members a laptop, cell phone, or other technological device or an email account or other communication method to conduct college business?

Yes. A community college may issue to board members, or otherwise provide them access to, any number of technological resources so that board members may review documents or conduct other college business. If the college chooses to do so, the board should adopt a policy addressing board member use of technology. TASB Community College Services provides policy subscribers recommended policy language at TASB Policy BBI(LOCAL).

Board members should also sign an acceptable use agreement that addresses both security and safety concerns, such as password protection as well as appropriate conduct while using technology resources. The agreement should also prohibit the violation of others' intellectual property rights, including trademarks and copyrights, as detailed in TASB Policies CT(LEGAL) and (LOCAL). The agreement should also prohibit the release of confidential information, such as student records protected by the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g.

[1] An electronic version of this document is available on TASB College eLaw at tasb.org/services/community-college-services/resources/tasb-college-elaw/documents/trustees-and-technology.pdf.

Can a board member use college-issued technology for personal reasons?

TASB Policy BBI(LOCAL) permits limited personal use of community college resources. Such use must not impose a tangible cost on the college or unduly burden college technology resources.

Personal use of community college services, including the college's broadband, raises two significant legal issues. The first is whether personal use of these services creates a gift of public funds. A state agency asked the Texas Ethics Commission whether the agency could permit its employees to make personal use of email and Internet connections. The agency asked whether the personal use would be a gift of public funds under the Texas Constitution or misuse of state property under the Texas Penal Code. The commission concluded that reasonable and incidental use of government property does not constitute misuse, as long as the personal use does not result in direct costs or impede government functions. The commission warned, however, that government property should not be used for private commercial purposes. Tex. Ethics Comm'n Op. No. 372 (1997).

The second issue is whether personal use of community college equipment or services is taxable income to a trustee. Under Internal Revenue Code section 3401(c), an officer of a political subdivision is treated like an employee, and communications equipment, like a laptop and Internet service, is considered a taxable fringe benefit. 26 C.F.R. § 1.61-2(d)(1); Internal Revenue Manual § 4.23.5.15(3). As a result, absent an exception, trustees are obligated to pay income tax on the fair market value of their personal use of college technology equipment and services. This is problematic as state law that prohibits trustees from receiving compensation for their board service. Tex. Educ. Code § 130.082(d).

The *de minimis fringe* exception, however, provides a safe harbor for personal use that is so small as to make accounting for it unreasonable. For example, an occasional phone call or email on college equipment will not be taxable income to a trustee. Therefore, only significant personal use of college equipment, including a laptop, will be taxable as income. Internal Revenue Manual § 4.23.5.15.2(5).

Can a board member seek reimbursement for use of a personal cell phone for college business?

In accordance with community college policy, a board member may be able to seek reimbursement for college-related calls made on a personal cell phone. Tex. Educ. Code § 130.082(d).

A board member should not use a cell phone in a way that increases the risk of disclosing confidential information of the college. Unauthorized access, use, or disclosure of confidential college information may trigger notification requirements under law. See more below at **Security of Mobile Devices.**

May a community college monitor the use of college-owned technology issued to board members?

Yes, to comply with the Digital Millennium Copyright Act and to ensure that the college's system is being used properly, a community college must monitor the use of college technology resources by board members. See TASB Policies BBI(LOCAL) and CT.

May a board member be held responsible for the theft, loss, or damage of a community college-issued technology device?

Yes. No law restricts a community college from requiring a board member to reimburse the college for the theft, loss, or damage of a college-issued device. The board may adopt a policy or guidelines requiring reimbursement.

Additionally, the board member may be liable for damage or destruction of college technology, if that damage or destruction is the result of an intentional wrongful act or a negligent act. A community college board member may be liable for theft or deterioration of college technology due to the board member's failure to exercise reasonable care in keeping the technology safe or maintained. Tex. Gov't Code § 403.275.

Electronic Communications Among Board Members

Texas Open Meetings Act

The purpose of the Texas Open Meetings Act (OMA) is to ensure the public's access to meetings of governmental bodies so "that the public has the opportunity to be informed concerning the transactions of public business." *Toyah Indep. Sch. Dist. v. Pecos-Barstow Indep. Sch. Dist.*, 466 S.W.2d 377, 380 (Tex. Civ. App.—San Antonio 1971, no writ). The OMA provides that meetings of governmental bodies, including community college boards, must be open to the public except for expressly authorized executive sessions. Tex. Gov't Code §§ 551.001(3)(E), .002. The OMA also provides that the public must be given notice of the time, place, and subject matter of meetings of governmental bodies. Tex. Gov't Code § 551.041.

A *meeting* includes "a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action." Tex. Gov't Code § 551.001(4)(A). *Deliberation* means a verbal or written exchange between a quorum of the board, or between a quorum of a board and another person, regarding an issue within the board's jurisdiction. Tex. Gov't Code § 551.001(2). If there is deliberation of public business among a quorum of the board, a meeting will occur, even if it is unintentional. A quorum of a governmental body cannot engage in informal discussion of public business but must discuss those issues in compliance with the OMA. *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299 (Tex. 1990).

Is it legal for a board member to email, text message, instant message, or otherwise contact the remainder of the board to discuss college business outside of public meetings?

No, a board member cannot contact a quorum of the board outside of a properly posted meeting unless the board member uses an official online message board as described below. Email and other written communications, including text messages, are generally not excepted from the OMA. An illegal meeting can occur if a quorum deliberates college business outside of a posted

meeting, even if the quorum does not meet at one time or place. *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App.—San Antonio 1985, no writ); Tex. Att'y Gen. LO-95-055 (1995). As a result, a board member should avoid involving a quorum of the board in an email thread or other electronic conversation outside of a public meeting. This can occur when a board member emails the entire board, copies the rest of the board on correspondence, or engages in a chain of electronic communications that add up to a quorum deliberating college business. *See* Tex. Att'y Gen. Op. No. GA-326 (2005) (concluding that a member of a governmental body could commit a criminal violation of the OMA if the member had successive communications about college business with a quorum of the governing body outside of a posted meeting).

What if one board member sends a message to the rest of the board and no one replies?

Both a court and the Texas attorney general have defined *deliberation* to include a one-way communication spoken by one member of a governmental body and heard by the rest of a quorum. *See*, *e.g.*, *Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n*, 2 S.W.3d 459 (Tex. App.—San Antonio 1999, pet. denied) and Tex. Att'y Gen. Op. No. JC-203 (2000) (both holding that a governmental body failed to comply with the OMA when a quorum of the body was present at a public meeting of another entity and one member of governmental body discussed public business in front of the rest of the quorum). If a quorum of a college board is together and one member of the quorum talks about college business, a meeting has occurred, even if none of the other trustees respond. A back-and-forth discussion is not required for a deliberation under the OMA.

In addition, the attorney general and at least one court have concluded that a verbal exchange is not limited to in-person communications. *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App.—San Antonio 1985, no writ) (upholding an injunction restraining members of a governmental body from telephoning each other individually to ascertain how each would vote on certain issues prior to board meetings); Tex. Att'y Gen. LO-95-055 (1995) (expressing concern that telephone conversations can violate OMA). The attorney general has also indicated that the OMA can be violated even when a quorum has not gathered in a single location. *See*, *e.g.*, Tex. Att'y Gen. Op. Nos. GA-896 (2011) (expressing concern over email communications), JC-307 (2000) (concluding that written communications between board members outside of a public meeting can constitute illegal deliberation), DM-95 (1992) (expressing concern over board members signing a joint statement outside of a convened open meeting).

When the legal authorities determining that one-way communications can be deliberation and the legal authorities determining that electronic and telephonic communications can also be deliberation are considered together, the result is a significant restriction on the use of email and other electronic communications among a quorum of the board. Theoretically a single email from one member to a quorum of the board could violate the OMA.

What if a board member contacts less than a quorum of the board through electronic communications?

A single message sent by one board member to less than a quorum of the board does not violate the OMA; however, a string of electronic messages may constitute a *walking quorum*. A *walking quorum* occurs when members of a governmental body deliberately hold serial meetings of less

than a quorum outside of a public meeting and then ratify the decisions made in private at a subsequent public meeting in an attempt to circumvent the OMA. *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (W.D. Tex. 2001).

In 2011, the Bandera County River Authority and Groundwater District president asked the attorney general about several electronic *walking quorum* scenarios, including an email distributed among a quorum of the board; an email sent to less than a quorum of the board and copied to the water district's general manager, who was unaware of whether the email was sent to other board members; and a message sent by a board member to an internet-based group whose membership was unknown to the water district. The attorney general declined to resolve factual issues presented by the president but concluded that certain electronic communications could constitute a deliberation and a meeting under the OMA. Tex. Att'y Gen. Op. No. GA-896 (2011). Although electronic communications, like text and email messages, are useful tools for many community college communications, including communications from the administration to board members, electronic messages should not be used to conduct deliberations among a quorum of the board.

How may board members keep each other informed about what they have heard or learned between meetings?

Board members may find it frustrating that their good faith efforts to keep each other in the loop could be problematic under the OMA. But, as discussed above, the attorney general believes that the OMA can be violated even when a quorum has not gathered in a single location. The purpose and spirit of the OMA and the penalties for deliberate evasion of the OMA should be considered when a board member is deciding whether a particular situation qualifies as a meeting.

Board members should work together to reach an understanding about how to handle the community concerns presented to them outside of public meetings. When these concerns are sent to a board member via email, the solution that presents the least legal risk is for the board member simply to forward the email to the administration. If that solution does not satisfy the board's interest in staying informed between meetings about community concerns, the board could ask the administration to keep the entire board informed about issues as they arise. A permissible avenue for on-going communication between the administration and the board would be routine email updates from the college's chief executive officer (CEO) to the board. The college CEO should take extreme care, however, not to inadvertently facilitate walking quorums by acting as an intermediary between trustees, such as forwarding emails or text messages or sharing opinions amongst board members. See more below at **Electronic Communications Between the Board and Administration**.

Can a community college avoid potential OMA violations by establishing an official online message board for board communications?

A message board would resolve the OMA concerns but might introduce new risks or frustrations for the board.

An exception to the OMA limitations on electronic board communications is the option for a community college board to create an official message board for deliberation, but not final action, on college business. Texas Government Code section 551.006 provides an exception to the OMA for a communication or exchange of information between members of a governmental body about public business if: (1) the communication is in writing; (2) the writing is posted to an online message board or similar Internet application that is viewable and searchable by the public; and (3) the communication is displayed in real time and displayed on the online message board or similar Internet application for no less than 30 days after the communication is first posted. Tex. Gov't Code § 551.006(a).

A community college board may create only one official online message board, which the board must own or control and which must be prominently displayed on the college's main website. The message board cannot be more than "one click away" from the main page of the website. Tex. Gov't Code § 551.006(b).

The online message board or similar Internet application may be used only by members of the governmental body or staff members of the governmental body who have received specific authorization from a member of the governmental body. If a staff member posts a communication to the online message board, the name and title of the staff member must be posted along with the communication. Tex. Gov't Code § 551.006(c).

Communications on the message board must remain posted for at least 30 days; after 30 days, the communications may be removed but must be maintained by the community college for at least six years. Message board communications are public information and must be disclosed in accordance with the Texas Public Information Act (PIA). Tex. Gov't Code § 551.006(d).

What are the consequences of conducting an illegal meeting through electronic communications?

An individual who believes an OMA violation either may occur or that it has occurred may sue for a court order to stop or prevent the threatened violation. The attorney general may also bring an action by mandamus or injunction. Any action taken by the board deemed to violate the OMA would be voidable by a court. Tex. Gov't Code §§ 551.141-.142.

In some circumstances, board members may also subject themselves to criminal penalties for conducting or conspiring to conduct improper meetings. Specifically, Texas Government Code section 551.143 provides that a member of a governmental body commits an offense if the member or group of members knowingly engages outside of an authorized meeting in at least one communication among a series of communications concerning an issue within the governmental body's jurisdiction. The members engaging in the individual communications must constitute less than a quorum but the member must know at the time of the individual communication that the series of communications involves or will involve a quorum and will constitute a deliberation once a quorum becomes involved. The offense is a misdemeanor punishable by a fine of $100 to $500, imprisonment for one to six months, or both. Tex. Gov't Code § 551.143(b).

In addition, Texas Government Code section 551.144 provides that a member of a governmental body commits an offense if a closed meeting is not permitted under the OMA and the member knowingly calls, aids in calling or organizing, or participates in the closed meeting. The offense is a misdemeanor punishable by a fine of $100 to $500, imprisonment for one to six months, or both. Tex. Gov't Code § 551.144(b). *See, e.g.*, *Martinez v. State*, 879 S.W.2d 54 (Tex. Crim. App. 1994) (en banc) (upholding validity of information which charged county commissioners with violating OMA by failing to comply with procedural prerequisites for holding closed session).

Both offenses would be grounds for removal from office, as well. The conviction of a public officer by a petit jury for any felony or for a misdemeanor involving official misconduct operates as an immediate removal from office of that officer. *Official misconduct* means an intentional or knowing legal violation committed by a public servant while acting in that person's official capacity as a public servant. The definition of *public servant* includes a board member of a community college. Tex. Code Crim. Proc. art. 3.04.

Do the OMA restrictions violate board members' freedom of speech?

Although the OMA restricts the time, place, and manner of board members' communications about college business, the OMA is not an unconstitutional restraint on college officials' right to free speech. After several Texas city council members sued the attorney general and the State of Texas alleging that the criminal provisions of the OMA were vague, overbroad, and infringed on public officials' First Amendment free speech rights, the Fifth Circuit Court of Appeals concluded that the OMA's restrictions on deliberation of public business were content and viewpoint neutral and justified by the need to encourage transparency, prevent fraud, and foster trust in government. The fact that the regulation was imposed only on public officials, rather than all citizens, was a natural reflection of the purpose of the regulation. The First Amendment does not protect the right of public officials to discuss public business in private. *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012).

What about board members using email, text, IM, or other messages to talk privately during a board meeting?

Board members' private notes, whether handwritten or electronic, made during the course of a public meeting and pertaining to public business are official records. Therefore, they are subject to public disclosure under the Texas Public Information Act (PIA) and may raise issues under the. Tex. Gov't Code § 552.021; *see* Tex. Att'y Gen. ORD No. 626 (1994) (concluding the PIA applied to a state agency promotion board member's notes taken during an interview because the notes were created while transacting official business though notetaking was not required). Private exchanges that are unrelated to community college business made by board members during a board meeting are not subject to the PIA or OMA; however, the public perception that board members are attempting to conduct official business in secret may still result undesirable consequences. *See* Tex. Att'y Gen. ORD No. 635 (1995) (concluding the PIA is not applicable to personal information unrelated to official business).

Could a concerned citizen or a reporter file a PIA request for emails, text messages, and other electronic communications sent between board members to determine if an OMA violation has occurred?

Yes, as explained below, electronic records involving official college business are subject to the PIA. If the records were required to be retained but cannot be recovered, the board members could be accused of destroying public information. The concerned citizen might be able to access community college or even personal device records to demonstrate that calls were made or texts were sent.

For more frequently asked questions and answers about the OMA and PIA, see TASB College eLaw at Governance.

Electronic Communications Between the Board and Administration

May the college CEO use email to communicate with board members?

The college chief executive officer (CEO) is not a member of the community college board and is therefore technically not subject to the OMA. As a result, the college CEO and other members of the administration may use email to communicate with the board, even the whole board at one time, about college business. The college CEO and others who are not on the board should exercise caution, however, not to use email in a way that facilitates an open meetings violation on the part of board members—for example, a situation where a board member replies to all other board members after receiving an email from a member of the administration. A college CEO should, for example, also avoid serving as a messenger of opinions between board members or forwarding communications from one board member to another.

The attorney general has concluded that a person who is not on the board can be charged with violating Texas Government Code section 551.143, for engaging in communications in violation of the OMA, and Texas Government Code section 551.144, for knowingly participating in an illegal closed meeting. A nonmember can be charged with a criminal violation of these statutes only if the person acts with intent to aid or assist a board member who knowingly acts to violate the OMA. Tex. Att'y Gen. Op. No. JC-307 (2000). Consequently, staff members who communicate regularly with board members should avoid serving as a go between by sharing board members' thoughts and opinions with other board members outside of public meetings.

Can the college CEO use email or other electronic communications to poll the board?

A final action, decision, or vote of the community college board may be made only in an open meeting. Tex. Gov't Code § 551.102. Consequently, polling among board members regarding matters of board business is prohibited. However, from time to time, the college CEO may wish to seek board members' input on matters that are ultimately administrative decisions. Separate correspondence between the college CEO and individual board members that in no way facilitates deliberation among the board does not technically violate the OMA. To avoid being accused of attempting to circumvent the OMA, the college CEO and other employees should avoid forwarding or otherwise sharing board members' thoughts with one another outside of public meetings.

Retaining Electronic Records

Texas Local Government Records Act

What is a community college record subject to the Act?

Local government record means "any document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium, or other information recording medium, regardless of physical form or characteristic and regardless of whether public access to it is open or restricted under the laws of the state, created or received by a local government or any of its officers or employees pursuant to law, including an ordinance, or in the transaction of public business." Tex. Loc. Gov't Code § 201.003(8).

What college records must be retained under the Act?

Community college records are subject to the Texas Local Government Records Act. Colleges must preserve college records in compliance with the college's records retention plan adopted in accordance with the Act. Tex. Loc. Gov't Code title 6, subtitle C; see TASB Policies CIA and BBI.

Records retention schedules are adopted by the community college to set out the length of time that the college will keep records before destroying them. Tex. Loc. Gov't Code § 203.041(a)(1). The Texas State Library and Archives Commission (TSLAC) has promulgated a series of records retention schedules. Four of the schedules apply to the colleges:

- **Local Schedule EL:** Records of Elections and Voter Registration.
- **Local Schedule GR:** Records Common to All Local Governments.
- **Local Schedule JC:** Records of Public Junior Colleges.
- **Local Schedule TX:** Records of Property Taxation.

These records retention schedules group records into categories or classes based on the content, not the medium of the record, and assign different retention periods to each category. For example:

- **Policy and Procedure Documentation:** Documents that establish and define college policies and procedures should be stored for *at least five years*.
- **Administrative Correspondence, Internal Memoranda, and Subject Files:** Records pertaining to or arising from the development, formulation, planning, or implementation of college policy or programs should be stored for *at least four years*.
- **General Correspondence, Internal Memoranda, and Subject Files:** Correspondence pertaining to or arising from the regular and routine administration or operation of the college should be retained for *at least two years*.
- **Routine Correspondence, Internal Memoranda, and Subject Files:** Correspondence and internal memoranda involving routine matters should be retained only as long as they are administratively valuable. *Once the correspondence is no longer needed, it can be destroyed*.

If the record is directly linked to more than one category, then the longer retention period applies.

Note, postings on a community college's official online message board are the one exception to the general rule that the retention period is dictated only by the content of the record and not the medium. Texas Government Code 551.006 requires that the postings be maintained for at least six years simply because they were posted on the message board. Tex. Gov't Code § 551.006(d). The college may be required to maintain the record for a longer period if the content places the record in a category of the college's records retention schedule with a retention period longer than six years.

A community college may rely on the state schedules or may adopt its own local schedule; however, retention periods established in a local schedule may not be less than those prescribed in a records retention schedule issued by the commission or in a federal or state law, regulation, or rule of court. Tex. Loc. Gov't Code § 203.042(b). A college must notify TSLAC at least 10 days before destroying a local government record not on a TSLAC records retention schedule. Tex. Gov't Code § 441.169.

Does an email, text message, or other electronic communication have to be retained under the Act?

Yes, but the length of time depends on the content of the communication. Official records must be retained for the appropriate retention period. Unfortunately, no one retention period applies to all electronic messages. Email, text messages, and other types of electronic records are the media in which the record is stored, not a type of record. An electronic message must be retained for a length of time determined by the category of record (i.e., the content contained in that individual email message). The determination of which category of record is contained in an electronic communication must be made on a case-by-case basis. If the contents of the electronic communication fall in more than one category in the records retention schedule and are not severable, the combined record must be retained for the length of time of the component with the longest retention period.

The retention of electronic communications in their many forms can be complicated. A community college should consider establishing a protocol for retaining communications to comply with the records retention laws.

Is it necessary to retain duplicate copies and transmittal emails and other electronic communications?

No, extra identical copies of documents created only for convenience by officers or employees of the local government are not records that must be retained. Tex. Loc. Gov't Code § 201.003(8)(A). As long as an official copy of a record is maintained somewhere within the community college, duplicates and transitory information, such as an email forwarding a record, need not be retained.

Board members who receive electronic communications from citizens about college business should forward them to the appropriate administrator for safekeeping. Once the records are safely in the hands of the community college's custodian of records, the individual board member may delete the duplicate copy. If a record is retained, even though it could have been destroyed under the college's records retention schedule, the record will be subject to a public information request unless a PIA exception applies.

Electronic communications among board members in the transaction of college business are also records subject to retention in accordance with the community college's records retention schedule.

Can a board member be penalized for the failure to retain records under the Act?

Yes. A board member commits an Class A misdemeanor if the member knowingly or intentionally destroys or distributes a local government record in violation of the record retention laws or by intentionally failing to deliver records to a successor in office as provided by law. Tex. Loc. Gov't Code § 202.008.

Additionally, the Texas Penal Code makes it a criminal offense for a person to tamper with a governmental record, for example, by intentionally destroying, concealing, removing, or otherwise impairing the verity, legibility, or availability of a governmental record, unless the person is authorized by law to do so. Tex. Penal Code § 37.10.

PIA

Does the PIA include record retention requirements?

The PIA has traditionally only addressed the disclosure of public information, as described below. However, in 2019, the Texas Legislature amended the PIA to add records retention requirements that operate in addition to those found in the Texas Local Government Records Act.

Do the PIA records retention requirements apply to board members?

The PIA records retention requirements apply to board members who are considered temporary custodians. *Temporary custodian* is defined as a current or former officer or employee of a governmental body, including a community college board of trustees, who creates or receives public information in the transaction of official business that has not been provided to the governmental body's public information officer or the officer's agent. Tex. Gov't Code § 552.003(7).

What college records must be retained under the PIA?

Public information, as defined by the PIA, that is maintained by a current or former board member on the board member's cell phone, laptop, or other privately owned device must be forwarded or transferred to the community college to be preserved. Alternatively, the board member must preserve the information in its original form in a backup or archive on the privately owned device for a time designated in college policies and procedures. Tex. Gov't Code § 552.004(b). These requirements are in addition to those found in the Texas Local Government Records Act.

The public information officer must make reasonable efforts to obtain public information from a temporary custodian if the community college receives a PIA request and the temporary custodian has not provided the information prior. The temporary custodian must surrender or return public information to the community college no later than 10 days after receiving a request for its return. Tex. Gov't Code §§ 552.203, .233(b).

Electronic Records and Public Information

What records are subject to the PIA?

Public information is defined in the Texas Public Information Act (PIA) to be information that is "written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- by a governmental body;
- for a governmental body and the governmental body owns the information; has a right of access to the information; or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body."

Tex. Gov't Code § 552.002(a).

Official business is defined as any matter over which a governmental body has any authority, administrative duties, or advisory duties. Tex. Gov't Code § 552.003(2-a). Information is in connection with the transaction of official business if the information is 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. Tex. Gov't Code § 552.002(a-1).

Public information can be in any form, such as paper, film, magnetic/optical/solid state or other devices that can store an electrical signal, tape, Mylar, and any physical material on which information may be recorded, including linen, silk, and vellum. It may be in the form of a book, paper, letter, document, email, Internet posting, text message, instant message, other electronic communication, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map, drawing, or a voice/data/video representation held in computer memory. Tex. Gov't Code § 552.002. Public information includes any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business. Tex. Gov't Code § 552.002(a-2).

What records must be made public?

All information maintained by a community college is presumed open to the public. To withhold information, the college must show that the information is confidential or excepted from disclosure under one of the statutory provisions. Tex. Gov't Code §§ 552.002, .021-.022. Examples of statutory exceptions include:

- Information confidential under the constitution, by statute, or by judicial decision. Tex. Gov't Code § 552.101.

- Personnel information included in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Tex. Gov't Code § 552.102.
- Information that, if released, would give advantage to a competitor or bidder. Tex. Gov't Code § 552.104.
- Attorney-client communication with the college's attorney or court order of nondisclosure. Tex. Gov't Code § 552.107.
- Private communications of an elected office holder. Tex. Gov't Code § 552.109.
- Agency memoranda as discussed below. Tex. Gov't Code § 552.111.
- Student records. Tex. Gov't Code § 552.114.
- Audit working papers. Tex. Gov't Code § 552.116.
- Certain employees and former employees' addresses, telephone numbers, and family information. Tex. Gov't Code § 552.117; *see* Tex. Gov't Code § 552.024 (election of confidentiality required).
- Employees' social security numbers. Tex. Gov't Code § 552.147(a-1).
- Names of applicants for college CEO, except finalists. Tex. Gov't Code § 552.123.
- Crime victim information. Tex. Gov't Code § 552.132.
- Names of former or current employees or students in a college who have furnished reports of potential criminal violations. Tex. Gov't Code § 552.135.
- Computer security and infrastructure information. Tex. Gov't Code § 552.139.
- Information that would subject an employee or board member to a substantial threat of physical harm under the specific circumstances pertaining to the employee or board member. Tex. Gov't Code § 552.152.

If the community college wishes to withhold requested information or believes it is not permitted to release such information, the college's public information officer must request an opinion from the attorney general unless the attorney general has made a previous determination regarding the records at issue. If the college does not request an opinion from the attorney general, the information is generally presumed to be public unless there is a legally compelling reason to withhold the information from disclosure. Tex. Gov't Code § 552.301.

Information made confidential by law, however, may not be released. See more below at **Protection of Confidential Information.**

Are board member emails, text messages, and other electronic communications subject to public information requests?

Yes, electronic messages related to college business, like messages in any other form or format, are subject to production unless they fall within one of the PIA exceptions. In 2013, the PIA was amended to clarify that communications by community college officials stored on any device may meet the definition of *public information* if they are in connection with official business. Tex. Gov't Code § 552.002. Even before this change in the statute, the attorney general has consistently

concluded that correspondence sent to and from a board member's personal email accounts, and maintained on the board member's personal computer at home is public information subject to the PIA if it relates to college business. *See* Tex. Att'y Gen. OR2003-0951 (2003) (concluding, under statutory predecessor, that emails sent from personal email addresses on home computers and private time may still be public information if they relate to official business).

Are internal memos, sent as emails and other electronic communications, an exception to the PIA?

Only to the extent the communications are related to the formulation of community college policy. The PIA includes an agency memorandum exception that protects certain internal college communications from disclosure if the documents would not be available by law to a party in litigation with the college. Tex. Gov't Code § 552.111. The exception applies only to protect the deliberative process privilege, however. The Texas Supreme Court limits application of the agency memoranda exception to records that discuss the formulation of college policy. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000). The purpose of withholding advice, opinions, or recommendations under this exception is to encourage frank and open discussion within the college with respect to policy matters. The exception does not apply to factual information that serves as part of the deliberative process. *Arlington Indep. Sch. Dist. v. Tex. Att'y Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.).

Is every personal notation by a community college official about college business, even those stored electronically, subject to public disclosure?

Yes. Under the Texas Local Government Code, "notes, journals, diaries, and similar documents created by an officer or employee of the local government for the officer's or employee's personal convenience" are not local government records. Tex. Loc. Gov't Code § 201.003(8)(B).

However, personal notes are not necessarily excluded from the broad statutory definition of *public information*, and the community college may be required by the PIA to disclose the information. Tex. Gov't Code § 552.002; *see*, *e.g.*, Tex. Att'y Gen. ORD-635 (1995) (personal entries on public official's calendar may be subject to PIA), ORD-626 (1994) (handwritten notes taken during oral interview were subject to PIA), ORD-450 (1986) (handwritten notes taken by appraiser while observing teacher's classroom performance were subject to PIA).

Therefore, personal notes made by a community college official about college business for the official's personal convenience do not have to be retained as described above; however, if they are, they may be subject to a PIA request.

What if the records have been deleted when the community college receives a PIA request?

Deleted Before the PIA Request: Even if the messages were technically records that should have been retained, they may have been deleted. In this situation, community college officials may be subject to penalties for failing to adequately retain public records as described above at **Retaining Electronic Records.**

Deleted After the PIA Request: The PIA criminalizes the destruction, alteration or concealment of public records. Texas Government Code section 552.351 provides that the willful destruction, mutilation, removal without permission, or alteration of public records is a misdemeanor punishable by confinement in a county jail for a minimum of three days and a maximum of three months, a fine of a minimum of $25.00 and a maximum of $4,000, or both confinement and the fine. Tex. Gov't Code § 552.351(a)-(b); *see also* Tex. Penal Code § 37.10 (tampering with governmental record). Office of the Tex. Att'y Gen., *2020 Public Information Act Handbook* (2020),

Failure to Produce Public Information: If the community college fails to comply with a request for information under the PIA, a requestor or the attorney general may compel compliance through court action. Tex. Gov't Code §§ 552.321(a), .3215(b). Attorney's fees may be assessed. Tex. Gov't Code § 552.323(a). In addition, the public information officer, or his agent, commits a misdemeanor offense if, with criminal negligence, the person fails or refuses to give access to, or to permit or provide copying of, public information to a requestor as provided by the PIA. Tex. Gov't Code § 552.353(a)-(b).

Are emails and other electronic communications that are not related to the transaction of official college business subject to public disclosure?

No. The attorney general has concluded that email correspondence of a personal nature is not public information subject to disclosure under the PIA. This is true even when the email is written on a community college account or college equipment.

For example, a school district received a request for all emails sent or received by a school employee on the employee's work computer. The school district argued that certain items were not public information subject to disclosure, and the attorney general agreed because the content was personal in nature and had no connection with the transaction of school business. The attorney general looked to the following factors to determine whether the material was personal in nature: (1) who prepared the document, (2) the nature of its contents, (3) its purpose or use, (4) who possessed it, (5) who had access to it, (6) whether the district required its preparation, and (7) whether it was necessary to or in the furtherance of school business. Tex. Att'y Gen. OR2000-4848 (2000).

A board member should therefore keep the member's personal life and college business as separate as possible. A board member should maintain separate email accounts for business, college, and private correspondence. *See* Tex. Att'y Gen. OR2001-4560 (2001) (permitting officials' home email addresses to be withheld under Texas Government Code section 552.024). *But see Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (2016) (requiring disclosure of personal email addresses of city officials that were used to communicate city business).

Social Networking by Board Members

What are the pros and cons of board members using social media to talk about college business?

Like all citizens, individual board members may voice their opinions publicly, whether that occurs in a formal letter to the editor or an informal Facebook status. In the words of the Fifth Circuit

Court of Appeals, "The First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general." *Rangra v. Brown*, 566 F.3d 515, 518 (5th Cir. 2009). Nevertheless, some important practical considerations should guide board members. Because the board acts only as a body corporate, many community college boards have a board operating procedure that appoints the board president as a spokesperson—other board members are free to speak to the press or on their own social networking forums, but should clarify that their statements reflect their own views, not necessarily the official position of the board.

Additionally, the purpose of social media use differs widely; therefore, while a board member may intend for the member's posted information on social media to be personal or informal, the public may perceive the communication as official college business. *See*, *e.g.*, *Garnier v. Poway Unified Sch. Dist.*, No. 17-CV-2215-W(JLB) (S.D. Cal. May 24, 2018) (allowing constitutional complaints against board members to proceed after members blocked citizens from posting critical messages about school matters on alleged personal Facebook pages maintained by the members about official school business).

For suggested guidelines for board members using social media in their role as public officials, see TASB Community College Services' *Social Media Guidelines for Community College Board Members*.

Open Meetings

If a quorum of the board sees what one board member posts online about college business, is that an improper meeting under the OMA?

Yes, if it constitutes a *walking quorum*. The attorney general specifically declined to resolve this factual issue as a hypothetical, but did respond that the OMA applies to a verbal exchange among a quorum of a governmental body, and the OMA does not provide that the exchange must be in person or that members of a governmental body must be physically present to constitute a quorum. Consequently, certain electronic communications may constitute a *walking quorum* violation of the OMA, as discussed above. Tex. Att'y Gen. Op. No. GA-896 (2011).

To communicate online among a quorum of the board and designated staff without violating the OMA, a community college board may use an official online message board created in accordance with Texas Government Code section 551.006. The message board must be an official message board owned or controlled by the board, and only the board and designated staff may post. Tex. Gov't Code § 551.006. Consequently, the OMA exception for an online message board does not extend to an individual college board member's personal social media platforms.

Records Retention

Do college-related online posts have to be archived?

Maybe. Community college records must be retained according to the college's records retention schedule. See TASB Policy CIA. Board members are required to retain electronic records, whether created or maintained using the college's technology resources or using personal technology resources, in accordance with the college's record management program. See TASB Policy BBI. No attorney general opinion or court case gives board members guidance in determining whether

online posts on social media—such as blogs, microblogs, and social networking pages—are community college records subject to retention. Relying on the definitions of *local government record* and *public information*, as set out above, social media content may either:

(1) not create a college record;

(2) create a college record that is not required to be retained; or

(3) create a college record that requires retention.

According to TSLAC, key issues to consider when determining whether or not an online posting is a community college record required to be retained include:

- Whether or not the post was made using community college equipment or cellular or Internet service;
- Whether or not the post was used in the transaction of official business or provided evidence of important official action;
- Whether or not the online post is a unique record that does not exist elsewhere in a different record or format; and
- Whether or not it fits into the college's definition of a social media record, if such a record title has been locally created by the community college.

Texas State Library and Archives Comm., FAQ: When is Social Media a Record?, Megan Carey (Mar. 17, 2016).

If the content of the online post creates a community college record as characterized above, then it must be retained according to the records retention schedule. An online post is not a separate category of records in a records retention schedule; instead, the post would have to be archived according to the content.

Generally speaking, posts about community college business by trustees need to be retained if the content goes beyond simply sharing existing college content, such as a link to the college website; routine correspondence, such as a reminder of the date, time, and location of the next board meeting; or brief informational summaries of public board action taken at an open meeting. Practically, a board member may preserve social media posts by printing the screen or saving it as an image or static file and the sending the files to the administration for retention.

Due Process

Why are board members advised to avoid posting online about upcoming board issues?

In addition to avoiding illegal meetings in violation of the OMA, board members should not make postings online about upcoming board actions to avoid bias. When a grievance, contract appeal, or other dispute is presented to a community college board, the dispute is presented with the understanding that the board will sit as a neutral tribunal to hear and resolve the matter. The concept of due process calls for the board to serve as an impartial decision maker. Generally, a

board member is presumed to be impartial absent specific evidence of bias. In some cases, however, evidence of board member bias can be used to overturn a board decision. *See, e.g.*, *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047 (5th Cir. 1997) (overturning an employee's termination when the record showed that four members of the governing body harbored bias against the superintendent).

Social media postings by a board member expressing an opinion on pending matters may be considered evidence of bias or prejudgment on the issue. This evidence of bias may be used to exclude the individual board member or call into question the validity of board action if the biased board member casts a deciding vote.

Crowd-Sourcing Official Decision Making

May a board member ask the member's online "friends" how to vote on a matter of college business?

No. Soliciting input from the community may be a valuable function of social media; however, yielding decision making authority on matters of public business to social networks violates local policy, board ethics, and, in some instances, the law.

Such actions also violate the purpose of the OMA, which requires board deliberation to take place in public meetings and any final action, decision, or vote to be made in an open meeting. Tex. Gov't Code § 551.102. Moreover, on matters for which the board is supposed to sit as an impartial tribunal, soliciting "votes" from the public or a social network violates principles of due process. When the community college board is asked to judge a matter following a hearing on the merits, board members are admonished to base their decisions solely on the evidence and arguments presented through the hearing process. Consideration of outside influences is evidence of bias that may taint the entire proceeding.

Additionally, creating surveys to collect public input or creating online polls that document public comment on matters related to college business likely create public records that require retention in accordance with records retention requirements and that are subject to disclosure under the PIA.

May a board member post notes regarding open session discussions?

Nothing in law or policy specifically prohibits this action. However, board operating procedures typically designate the board president as the spokesperson for official board positions. See TASB Policy BBE(LOCAL). An individual member's board meetings notes do not carry the weight of an official summary of board discussion or action.

Final board-adopted minutes are the official record of a community college board meeting. The OMA requires a governmental body to either keep minutes or record its open meetings. Tex. Gov't Code § 551.021(a). The minutes must state the subject matter of each deliberation and indicate each vote, order, decision, or other action taken. Tex. Gov't Code § 551.021(b). The minutes and recordings of an open meeting are public records and must be made available for public inspection and copying on request. Tex. Gov't Code § 551.022. See TASB Policy BD(LOCAL).

As a practical matter, posting personal meeting notes or summaries online about open meeting discussions may create additional documentation that can lead to unforeseeable or unintended consequences, such as contradictory, inconsistent, or confusing information. Best practice may be to point readers to the community college's official website or officially posted minute and recordings online, if they are posted online, or refer readers to contact the college's administration to request official minutes and recordings.

May a board member post notes regarding closed session discussions?

Not without risking civil and criminal penalties.

A board must keep either a certified agenda or an official audio recording as the official record of each closed meeting, except for a governmental body's private consultation with its attorney as permitted under Texas Government Code section 551.071. Tex. Gov't Code § 551.103(a). The official record provides a method of verifying in court proceedings that the board complied with the requirements of the OMA. Tex. Gov't Code §§ 551.103-.104; Tex. Att'y Gen. Op. No. JM-840 (1988). An official record of a closed meeting is available for public inspection and copying only under a court order. Tex. Gov't Code § 551.104(c); Tex. Att'y Gen. Op. No. JM-995 (1988); Tex. Att'y Gen. ORD-330 (1982). A person who knowingly discloses an official record of a closed meeting to a member of the public, without lawful authority, commits a Class B misdemeanor. Tex. Gov't Code § 551.146. The penalty is a fine not to exceed $2,000, jail confinement not to exceed 180 days, or both. Tex. Penal Code § 12.22.

A set of handwritten or electronic notes memorializing the content of closed session deliberations could be considered the equivalent of an official record and be considered confidential by law. If so, disclosing the notes would be a criminal offense. Tex. Gov't Code § 551.146. To be safe, the board should either prohibit note taking in closed session or seal the notes along with the official certified agenda or audio recording.

What additional risks are presented by sharing confidential board business within social networks?

Depending on matter at hand, seeking feedback regarding community college board matters may breach confidentiality, violate individuals' privacy rights, or expose the board member to personal liability for defamation. The OMA does not provide for criminal sanctions if a person present in a closed meeting reveals the substance of closed meeting deliberations. Tex. Att'y Gen. Op. No. JM-1071 (1989). Other statutes or duties, however, may limit what a member of the governmental body may say publicly. Community college board members do not have immunity or free speech protection for words that breach a duty of confidentiality or defame another person.

Even a well-meaning board member who stumbles across and repeats false information about another person can be subject to a defamation claim. If the board member repeats a false rumor, or even a half-truth that cannot be verified, the board member's repetition of the unverified information can constitute defamation if the statement tends to harm another person, for instance, by damaging the person's reputation. *Defamation* is defined by the common law as a false statement about another person that is shared with a third party without a legal excuse and that

damages the other person's reputation or exposes the person to public hatred, contempt, ridicule, or financial injury. *Fiber Sys. Int'l., Inc. v. Roehrs*, 470 F.3d 1150 (5th Cir. 2006); *Einhorn v. LaChance*, 823 S.W.2d 405 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j). Defamation may be communicated orally, known as *slander*, or in writing, referred to as *libel*. *Robertson v. Southwestern Bell Yellow Pages, Inc.*, 190 S.W.3d 899 (Tex. App.—Dallas 2006, no pet.). A person may also bring a cause of action for libel under Texas Civil Practice and Remedies Code chapter 73.

In addition, someone harmed by a disclosure could sue a board member for invasion of privacy if the member publicizes information about the complainant's private life in a way that is highly offensive without a legitimate public concern.

A board member who reveals closed meeting deliberations is also breaching the member's obligation to the rest of the board. Revealing deliberations undermines the purpose of conducting closed sessions and may violate the board's own code of ethics. In addition, a board member may owe a common law fiduciary duty to act primarily in the interest of the community college, including protecting its confidential information and competitive advantages.

Further, a board member's intentional use of confidential information obtained by means of the member's official office under some circumstances may subject the member to allegations of misuse of official information, which is a criminal offense. Tex. Penal Code § 39.06.

Electronic Communications with the Public

Governance

What is the board member's obligation upon receiving an electronic communication from a member of the public?

When a community member with a concern approaches a board member, the board member may have to explain why the member cannot simply fix the problem. The community college board operates as a body corporate, which means no single board member may act alone. *Buchele v. Woods*, 528 S.W.2d 95 (Tex. App.—Tyler 1975, no writ). In most situations, a community member's concern should be handled by an appropriate administrator, not the board. This preserves the chain of command in the college and keeps the board from having to hear every community complaint. See TASB Policy BBE(LOCAL). At the same time, it preserves a board member's future ability to participate in an unbiased, neutral manner at a later stage of the dispute.

Could reviewing a communication regarding a community complaint inappropriately bias the board member?

An individual board member presented with a community complaint outside of a board meeting should make an effort to remain neutral about the merits of the complaint. For the reasons discussed above, if the board member is unable to ignore information received outside of a board meeting, the board member should consider abstaining from participation if the grievance comes before the board.

Reviewing evidence in support of a complaint before the rest of the board has been presented with the evidence as part of a board proceeding, such as a grievance or personnel hearing, is arguably not undue bias, assuming the whole board will eventually see the evidence before making its official decision. Nevertheless, an individual board member who has doubts about the propriety of submitted evidence or other written or digital information may certainly choose to refrain from examining the evidence before it has been reviewed by the administration in the context of an official investigation. In some cases, delaying review of evidence or witness testimony can reduce allegations of bias or interference with due process.

Open Meetings

Is forwarding an email from a community member to other board members considered a deliberation?

Yes, in certain circumstances. If a board member expresses views in a message copied to all board members, a board member has potentially initiated a deliberation among a quorum of the board. However, if the board member sends the message to the college CEO without copying the board, no violation will occur.

Note, community college boards that create an official online message board in accordance with Texas Government Code section 551.006 should exercise great caution not to forward or post confidential information from students, employees, or other citizens on the message board. Communications on the message board will be immediately visible to the public and must remain posted for a period of at least 30 days. As explained below, a board member who receives an email from a concerned citizen and forwards the email to the message board could violate the PIA by exposing the citizen's email address without permission. Tex. Gov't Code § 552.137. Depending on the subject of the citizen's email, the content of the email may be confidential for other reasons as well.

For more frequently asked questions and answers about the Open Meetings Act, see TASB College eLaw at Governance.

Public Records

Is an electronic communication from a community member to an individual board member a college record?

Yes, if the message was created or received by the community college or its officers or employees in the transaction of public business. Tex. Loc. Gov't Code § 201.003(8).

Is an email or other electronic communication from a community member subject to the PIA?

The email is potentially a record, but all or part of it may be nonpublic or confidential. All written communications between board members and between board members and community members are potentially public records subject to disclosure under Texas' public information laws. *See*, *e.g.*, Tex. Att'y Gen. OR2003-0951 (2003) (finding that communications between school board members that related solely to district business, a grievance filed against the board president, was subject to release under the PIA). An email may be withheld from the public only if confidential or a proper PIA exception applies.

The PIA provides that an email address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under the PIA unless one of the enumerated exceptions apply. Tex. Gov't Code § 552.137. The email address may not be released unless the citizen affirmatively consents to the release. Consequently, board members who receive electronic communications from citizens should follow board policy and send the email or other communication through proper channels inside the community college. Board members should *not* forward or release emails elsewhere.

Protection of Confidential Records

What records may not be disclosed to the public?

Confidential records may not be disclosed. Confidential records are records that not only fall within a PIA exception to public release but are also made expressly confidential by law.

In its discretion, a governmental body may release information protected under PIA exceptions when the information is not deemed confidential by law. Tex. Gov't Code § 552.007. *Dominguez v. Gilbert*, 48 S.W.3d 789 (Tex. App.—Austin 2001, no pet.). Once a governmental body releases non-confidential information to one member of the public, then the governmental body must release the information to all members of the public who request it. Tex. Gov't Code § 552.007.

However, a person commits an offense if the person distributes information considered confidential by law. Tex. Gov't Code § 552.352. Tex. Att'y Gen. ORD-490 (1988).

Releasing confidential information protected by other laws may also result in additional civil and criminal penalties provided under those laws.

Who decides whether a college record is public, nonpublic, or confidential?

Whether to release community college records to the public or seek an attorney general ruling, as needed, to withhold the records as nonpublic or confidential, and seek an attorney general ruling, as needed, is primarily a matter for the college's public information officer or if necessary, the governmental body (i.e., the board as an entity) to decide in consultation with the college's attorney.

Individual board members should not act independently to release records that have not been previously published by the college.

What right of access do former board members have to confidential college records?

Former board members have no further authority to retain or access confidential community college records than that granted to other members of the public. For example, after leaving the board, former board members may not review records of closed meetings, even those from the meetings they attended. Tex. Att'y Gen. Op. No. JC-120 (1999). Board members who resign or otherwise exit from the community college board should be reminded, preferably in writing, of

the need to return any records, written or electronic, to the college if the board member has reason to believe that the member is retaining the sole copy of a record subject to records retention requirements and then destroy (i.e., delete or shred) any confidential records remaining in the board member's possession.

Requests from former board members should generally be treated like a public information request unless the board member has a special right of access to specific information requested, such as personal information about the member.

Security of Mobile Devices

Should a board member using a personal cell phone for college business be concerned about the security of data on the phone?

Yes, confidential communications and any confidential community college data stored or transmitted on personal cell phones or other mobile devices need to be protected just as diligently as records stored in college offices. Community college board members and employees should exercise caution about discussing college business in public settings. College officials should also avoid leaving unsecured devices sitting out around the home, office, or in public. Officials should also consider using the password protection function on cell phones and other mobile devices that transmit college data.

Use of mobile devices for college business should comply with the college's information security plan. If a breach of sensitive personal data is suspected, officials should immediately make a report to the college. Breach notification may be required in compliance with the law to avoid costly consequences. *See*, *e.g.*, Tex. Bus. Comm. Code ch. 521 (data breach notification). See also TASB Policy CS.

May I use my cell phone or other device to record the public portion of an open board meeting?

Yes, anyone in attendance can record the public portion of a community college board meeting. The board may make reasonable rules about the location of recording equipment and the manner of recording. Tex. Gov't Code § 551.023.

Note, however, as previously discussed, any recording made by a board member in the member's official capacity and in connection with college business may create a college record subject to both records retention rules and public disclosure under the PIA.

May a board member use a personal cell phone or other device to record the closed session portion of a board meeting?

No. Neither board members nor other individuals may make a personal recording of a closed meeting if the majority of the board objects. *Zamora v. Edgewood Indep. Sch. Dist*., 592 S.W.2d 649 (Tex. Civ. App.—Beaumont 1979, writ ref'd. n.r.e.). A certified agenda or official recording

must be made of all closed meeting proceedings. These records are sealed, and a person commits a misdemeanor offense if, without authority, the person knowingly discloses the official record of a lawfully closed meeting. Tex. Gov't Code § 551.146.

May a board member use a personal cell phone or other device to record a conversation with a board member, administrator, or citizen?

Not without consent. If no party to the conversation is aware of and consents to the recording, recording a conversation is a felony offense under federal and state wiretap laws. 18 U.S.C. § 2510; Tex. Penal Code § 16.02. Technically, if the person making the recording is a party to the conversation, then one party to the conversation is aware of and has consented to the recording. Engaging in deceptive practices and making secret recordings, however, may violate other laws or the privacy rights of the other person. Best practice is to notify and seek consent of all parties before recording a conversation.

Cyberharassment of Community College Officials

When can the individual or entity that maintains a webpage remove an inaccurate or harassing post from the page?

When it violates the website's terms of use. Each webpage that permits interactivity by enabling users to make comments, post questions, cast a vote, or other interactions, should have a terms of use policy. If the community college creates its own webpage and permits this functionality, the college should establish its own terms of use policy. For more information on community college websites and accessibility requirements, see TASB College eLaw.

Many community colleges or individual board members rely on existing platforms, like Facebook or Twitter, to enhance their connection with the community. Many citizens and board members also interact on newspaper websites in the comments section following articles about college business. The terms of use will vary from site to site and will likely change often as law and regulation attempt to keep pace with rapidly evolving technology and corresponding social norms.

Facebook's Terms and Policies, including its Community Standards, contain many examples of terms of use. Terms related to public figures, for instance, state that only an authorized individual may administer a page for an entity or public figure. Facebook users may not establish terms for their pages that conflict with Facebook policies. Special legal provisions on venue, conflict of laws, and indemnity apply to Facebook use by local government officials acting in their official capacity. Such pages require a disclaimer: "If you have an official website, your Page must contain, in a prominent location: *If you are looking for more information about [Government Entity], please visit [website URL].*" See Facebook Terms and Policies and Facebook Government Terms.

In its Community Standards, Facebook prohibits various safety-related content, such as:

- Violence and criminal behavior
- Harassment, sexual exploitation, self-injury, suicide

- Privacy and image right violations
- Objectionable content, such as hate speech and graphic violence
- Spam and misrepresentation

Facebook states its bullying policies do not apply to public figures because they want to allow discourse, which often includes critical discussion of people who are featured in the news or who have a large public audience; however, Facebook reserves the right to remove content about public figures that violates other policies, including hate speech or credible threats. *See* Facebook Community Standards.

Although Twitter rules were once more open ended, their policies have evolved, like Facebook, to identify and limit conduct under categories such as abusive behavior, spam, and unlawful activities. Twitter policies also address hateful conduct, child sexual exploitation, copyright and trademark, impersonation, and sharing intimate media without consent. See Twitter Rules and Policies.

Like all social media platforms, however, Facebook and Twitter regularly update their rules and policies. Community college officials who use non-college social media platforms to engage with constituents about college business to regularly review that third-party platform's terms of use and understand the rights and obligations of users on such platforms prior to official use.

When the college or a college official acting in the individual's official capacity administers a webpage, is the official liable for improper content posted by a user on the page?

Not unless the community college official has personally acted to publish or repeat the content. Federal law provides colleges and college officials some protection from liability for such behavior by third party users. The Digital Millennium Copyright Act, 17 U.S.C. § 512, protects service providers from liability for copyright infringement by users. In addition, the Communications Decency Act of 1996 (CDA), 47 U.S.C. § 230, protects service providers or users from being treated as a speaker or publisher of information provided by another information content provider (a person posting information to the college's or board member's page) unless the providers or users act with intent to promote or facilitate prostitution. The CDA also protects service providers and users from liability for restricting in good faith access to information that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable or providing others the means to restrict that material. These federal protections are in addition to state law immunities that protect the college and college officials from claims like defamation. Tex. Civ. Prac. & Rem. Code § 101.051. As long as college officials act in good faith and in accordance with appropriate policies, they will have immunity from claims that third-party content posted on their site was harmful. College officials may lose these protections, however, if an official republishes, retweets, or otherwise repeats harmful content.

If a college or college official acting in the individual's official capacity wants to remove offensive content from a webpage, does removing a post violate the First Amendment?

Probably not, as long as notice of the standards or guidelines for acceptable content have been clearly published beforehand and the content is not removed because of the viewpoint it expresses. Litigation in this area is still active; therefore, a board member or community college

employee wishing to remove a comment from a college's or trustee's official webpage should consult the college's attorney. In administering an official webpage, college officials will want to apply the terms of use consistently to avoid claims of viewpoint discrimination. Posts that do not rise to the level of harassment or personal attacks, but simply criticize the college or its policies should generally be allowed to stand. Posts should not be removed unless they violate the webpage terms of use or other viewpoint-neutral standards. *See*, *e.g.*, *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747 (5th Cir. 2010) (upholding viewpoint-neutral limits on speaker during public comment at a board meeting).

Sometimes, however, the line between personal conduct and official conduct can be hard to separate; therefore, board members should exercise care when maintaining personal websites that are created to communicate with the public about official community college matters.

Typical community college policies regarding distribution of non-college literature contain restrictions on content that may be instructive in the online context. Local policies often prohibit the distribution of materials that:

- Are obscene
- Violate the intellectual property rights, privacy rights, or other rights of another person
- Contain defamatory statements
- Advocate imminent lawless or disruptive action and are likely to incite or produce such action
- Constitute prohibited harassment
- Would result in material and substantial interference with college activities or the rights of others

See TASB Policies FLA and GD.

Finally, community college officials considering removing content from an official webpage should consider the impact on the public's trust or confidence in the college. If a post is removed just because it offers a criticism of college policies or programs, members of the public may feel that the college has something to hide. A better approach may be to leave the critical post in place and respond with the college's own comment. To paraphrase U.S. Supreme Court Justice Louis Brandeis, the solution to false or offensive speech is education, through more speech. *Whitney v. Ca.*, 274 U.S. 357 (1927) (J. Brandeis, concurring).

What are* spoofing, pharming*, and* phishing*? Are they legal?

In the context of Internet security, there are many to describe threatening online practices intended to obtain personal information for nefarious purposes. *Spoofing* describes impersonating another person online without consent, including making an email appear to come from someone who is not the actual sender. *Phishing* or *spear-phishing* generally refer to the use

of deceptive communications by bad actors attempting to gain personal or confidential information from the recipient. Redirecting a website's traffic to another fake website in order to collect personal information is called *pharming*. All such activities are illegal in Texas if they are done for the purpose of harming, defrauding, or intimidating another person.

The Texas Penal Code details the offense of online impersonation. A person commits online impersonation if the person uses the name or persona of another person to create a Webpage on or post or send messages on or through a social networking site, like Facebook or Twitter, or another Website that is not an email program or message board. The person must act without the other person's consent and with the intent to harm, defraud, intimidate or threaten any person. This version of the offense is a felony of the third degree. Tex. Penal Code § 33.07(a), (c).

A person also commits the offense of online impersonation if a person sends an electronic communication, like an email or text message, referencing a person's identifying information, including the person's domain name or phone number, without that person's consent, with the intent to cause the communication's recipient to reasonably believe the referenced person sent or authorized the communication, and with the intent to defraud any person. This version of the offense is a Class A misdemeanor, unless the person intended a response from emergency personnel, at which time it becomes a felony of the third degree. Tex. Penal Code § 33.07(b)-(c).

If a college board member is a victim of online harassment, how should the board member respond?

As soon as possible, take the following actions:

- Preserve the evidence. The most reliable means of preserving electronic evidence is by printing the screen and recording the date and time. Save the URL address as well by copying and pasting the link to the website where the content is posted.
- Contact the website. Cyberharassment may violate the website's terms of use. If so, the website will take action to remove the offending content in accordance with those terms.
- Contact law enforcement if there is reason to believe a crime was committed. Contact local law enforcement first. Complaints may also be filed with the Internet Crime Complaint Center (IC3), a collaboration between the FBI and the National White Collar Crime Center.
- Inform the college. If college technology or someone in the college community, such as a student or employee, was involved, the college will take appropriate action.

Responding to Individual Board Members' Online Conduct

How may a college board respond if one of its members has misused technology?

Under most circumstances, inadvertent or accidental misuse use of technology by individual board members can be cured by ensuring that board members receive regular continuing education and that local boards collaborate to develop and review sound board operating procedures.

In the event a board member's actions deliberately violate local policy or board operating procedures, the rest of the board may consider addressing the concerns by taking the following steps:

- A private conversation between the offending member and the board president or other appropriate individual.
- A confidential conversation between the offending member and the board and the college's attorney.
- Discussion in closed session between the offending member and the full board.
- If private conversations have not been effective, the board could authorize a written private reprimand citing the specific policy violations.
- If all possible private interventions have not been effective, the board could publicly censure the offending board member.

If there is reason to believe that a board member has violated the law, the community college may make a report to law enforcement.

For more information on community college law topics,
visit TASB Community College eLaw online at colleges.tasb.org/elaw.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the college's own attorney in order to apply these legal principles to specific fact situations.