



Texas Association of School Boards

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Texas Public Information Act: Duties of Temporary Custodians

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Senate Bill 944 (SB 944) from the 86th Texas Legislature amended the Texas Public Information Act (PIA) to explicitly affirm the public nature of government information stored on privately-owned devices, including adding responsibilities for both public information officers as well as temporary custodians of public information. This article answers commonly asked questions about how the PIA applies to school district information in the personal possession of board members and employees.

For a primer on the PIA, see TASB Legal Services' [Texas Public Information Act—Basic Principles of the PIA](#).

1. How did SB 944 amend the PIA?

In 2019, SB 944 made several notable changes:

- Creating the term *temporary custodian* to describe any current or former public official or employee of a governmental body, including a school district, who holds on a private device information subject to the PIA that has not yet been provided to the body's public information officer (PIO).
- Requiring a district's PIO who has received an information request and who reasonably believes a temporary custodian personally possesses responsive information—without which the PIO cannot comply with the PIA—to make reasonable efforts to obtain that information; and
- Requiring a temporary custodian to provide requested information within 10 calendar days of the PIO's request, or else face employment discipline, criminal penalties, and/or other legal consequences.

2. Did the public's access to district information stored on private devices change?

No. An extensive line of attorney general opinions states that information located on private devices, including personal or handwritten notes, in the possession of an individual board member is within the reach of the PIA. Tex. Att'y Gen. ORD Nos. 635 (1995), 626 (1994), 450 (1986), 425 (1985), 120 (1976). A Texas court of appeals agreed with these opinions in finding that copies of correspondence related to a county commissioner's official capacity and located on personal email accounts must be

disclosed because the correspondence was necessarily connected with the transaction of the county's official business. *Adkisson v. Paxton*, 459 S.W.3d 761 (Tex. App.—Austin 2015, no pet.). The PIA now reflects these opinions and decisions.

3. Did SB 944 subject new types of information to public disclosure?

No. The definition of *public information* under the PIA still makes any district information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business, located on any device, subject to public access. Tex. Gov't Code § 552.002. The definition of a *local government record* under the Local Government Record Act (LGRA) still requires districts to retain, for the purpose of records retention, any information-recording medium that captures information created or received by a board member or district employee pursuant to law or in the transaction of public business, regardless of form or restriction on public access under state laws. Tex. Loc. Gov't Code § 201.003(8).

4. Do former or current employees or board members have ownership rights to district information?

No. The PIA explicitly declares that current or former public officials and employees do not have, by virtue of their current or former position, a personal or property right to information in connection with official business created or received while acting in an official capacity and located on privately-owned devices. Tex. Gov't Code § 552.233(a). *See also* Tex. Loc. Gov't Code § 201.005 (providing that all local government records created or received in the transaction of official business, or for which public funds were spent to maintain or produce, are public property, and that an officer or employee of a public entity does not have a personal or property right to a local government record merely by virtue of having created or maintained the record).

5. Which district employees or board members become temporary custodians?

The PIA defines a *temporary custodian* as **any** current or former officer or employee of a governmental body who, in the transaction of official business, creates or receives *public information* that the officer or employee has not provided to the governmental body's PIO or the PIO's agent. Tex. Gov't Code § 552.003(7).

6. What constitutes public information under the PIA?

Public information is defined to include any district information that is written, produced, collected, assembled, or maintained in connection with the transaction of official business and located on any device. Tex. Gov't Code § 552.002(a)-(a-2).

7. What must a temporary custodian do with district information on a privately-owned device?

A current or former board member or employee holding a district's *public information* on a privately-owned device must either:

- Forward or transfer the information to the school district or district server to be preserved as required by the PIA, or
- Preserve the information in its original form in a backup or archive and on the privately-owned device in accordance with required retention periods.

Tex. Gov't Code § 552.004(b).

8. What does the PIA require a district's PIO to obtain from a temporary custodian?

A district's PIO must now make reasonable efforts to obtain *public information* from a temporary custodian if:

- the information has been requested from the district;
- the PIO is aware of facts sufficient to warrant a reasonable belief that the temporary custodian has possession, custody, or control of the information;
- the PIO is unable to comply with the duties imposed by the PIA without obtaining the information from the temporary custodian; and
- the temporary custodian has not provided the information to the PIO or the PIO's agent.

Tex. Gov't Code § 552.203(4).

9. How may a PIO comply with duties imposed by the PIA without obtaining requested information from the temporary custodian?

In many instances, the information that an employee or board member receives or creates in connection with district business may not actually be located on the privately-owned device. Instead, the individual is using a software application or program that is installed on the personal device, but the transactions are located on a server elsewhere. If that software, program, or application is controlled by the district, the information may be accessible by the district's PIO without additional effort or involvement by the employee or board member. For example, a member who is accessing emails sent to a school district email address through an application (e.g., Microsoft Outlook) is only conducting business through that application and would not need to transfer separately that same information to the district. Likewise, an employee communicating with parents using a text messaging application (e.g., GroupMe or Remind) or a virtual

classroom application (e.g., Canvas or Class Dojo) is not holding text messages on the privately-owned device itself but on a server to which the district will have access. Most districts have a policy informing employees and board members that use of district's email or other district technology is not considered private. TASB Model Policies BBI(LOCAL) and CQ(LOCAL).

On the other hand, an individual's personal cell phone's original text messaging or notetaking applications, for example, may be storing information on the actual device or on a personal storage account serviced by a non-district provider. Additionally, an individual who has downloaded district information onto a personal device but deleted original copies from a district-owned server or account will still be responsible for the original copies of district information. In these instances, the PIO will not be able to comply with the duties imposed by the PIA and must make reasonable efforts to obtain the information from the temporary custodian as described above. Tex. Gov't Code § 552.203.

10. How must a temporary custodian respond to a request from the district's PIO for information in the custodian's possession?

A temporary custodian with possession, custody, or control of information subject to the PIA must surrender or return the information to the district within 10 calendar days of a PIO's request. Tex. Gov't Code § 552.233(b).

11. What if a temporary custodian does not surrender requested information on a private device?

If a temporary custodian does not return or surrender requested information, then the custodian must preserve information as required by the PIA and other laws governing the preservation and retention of local government records, including Government Code Chapter 441 and Local Government Code Title 6. Tex. Gov't Code § 552.004(b), (c).

12. How does a temporary custodian's failure to provide requested information affect the district's obligations under the PIA?

Under Subchapter G of the PIA, a district that wishes to withhold from public disclosure responsive information to a written request for information must usually, in a timely manner, ask for a decision from the attorney general about whether requested information is excepted under the PIA. Tex. Gov't Code § 552.301. For the purpose of calculating timelines related to making such a request to the attorney general, the district is considered to receive a request for information on the date a temporary custodian surrenders or returns information to the district. Tex. Gov't Code § 552.233(d).

13. Is there a difference between public information under the PIA and local government records under the LGRA?

Yes. Although the two definitions function similarly on application, the two laws exist for different purposes. The LGRA focuses on regulating the time period for retention of government records and the PIA focuses on regulating how a member of the public may access government information. Generally, a *local government record* is always considered information subject to public disclosure under the PIA, but not all *public information* necessarily becomes a government record required to be retained under the LGRA. For example, extra identical copies of documents created for convenience or notes created for personal convenience are not considered *records* under the LGRA but are considered *information* subject to disclosure under the PIA. Tex. Loc. Gov't Code § 201.003(8). TASB Legal Services recommends that board members and employees seek legal counsel to ensure compliance with the legal requirements as to preserving public information and retaining local government records.

14. How may a temporary custodian transfer or surrender information on a privately-owned device to the district?

The PIA does not specify exactly how the transfer or surrender of information from a privately-owned device must occur, leaving some flexibility for a district to determine the best method of compliance. When determining how to proceed, districts should consider all relevant factors, including:

- The size of staff and student bodies, the volume of information generated, and the amount of information not already located on district-controlled servers;
- The frequency of litigation and legal restrictions on information held by the district;
- Whether information contains highly confidential or sensitive information, and whether physical transfer of original files is preferred over transfer by email;
- Whether information is involved in pending litigation, as special rules of procedure and evidence may apply;
- Whether the volume of information is so large that transferring by email or taking individual screenshots is not feasible or practical;
- Whether some methods of transfer may destroy or render inaccessible the original content;
- Whether metadata or other digital data associated with the requested information is being requested, in which case the method or manner of transferring information may determine compliance; or
- Whether it is effective to train an end user to manually sort personally held district information or to rely on a technology solution.

The Texas State Library and Archives Commission (TSLAC), charged with assisting local governments (including school districts) in complying with the state’s records retention laws, suggests that temporary custodian either immediately forward records on a personal device to a government device or account or limit use of a personal device or account for only transitory information (as defined in the district’s records control schedules). TSLAC, Erica Wilson-Lang, [FAQ: How Does S.B. 944 Affect Us?](#), The Texas Record (September 6, 2019).

TSLAC suggests other options:

- Prohibiting the creation of school district records by using a personal device;
- Requiring the end user to capture personal communications by taking a screenshot with the device;
- With consent of the owner, configuring a privately-owned device to automatically capture into a district-directed repository any flagged messages that have been sent and received on the device;
- Using a vendor to capture information on private storage devices; and
- Requiring employees and board members to use district-issued devices.

See TSLAC, Erica Wilson-Lang, [FAQ: So text messages can be records—how do we capture and retain them?](#), The Texas Record (Apr. 27, 2018) (suggesting methods of capturing text messages for retention purposes).

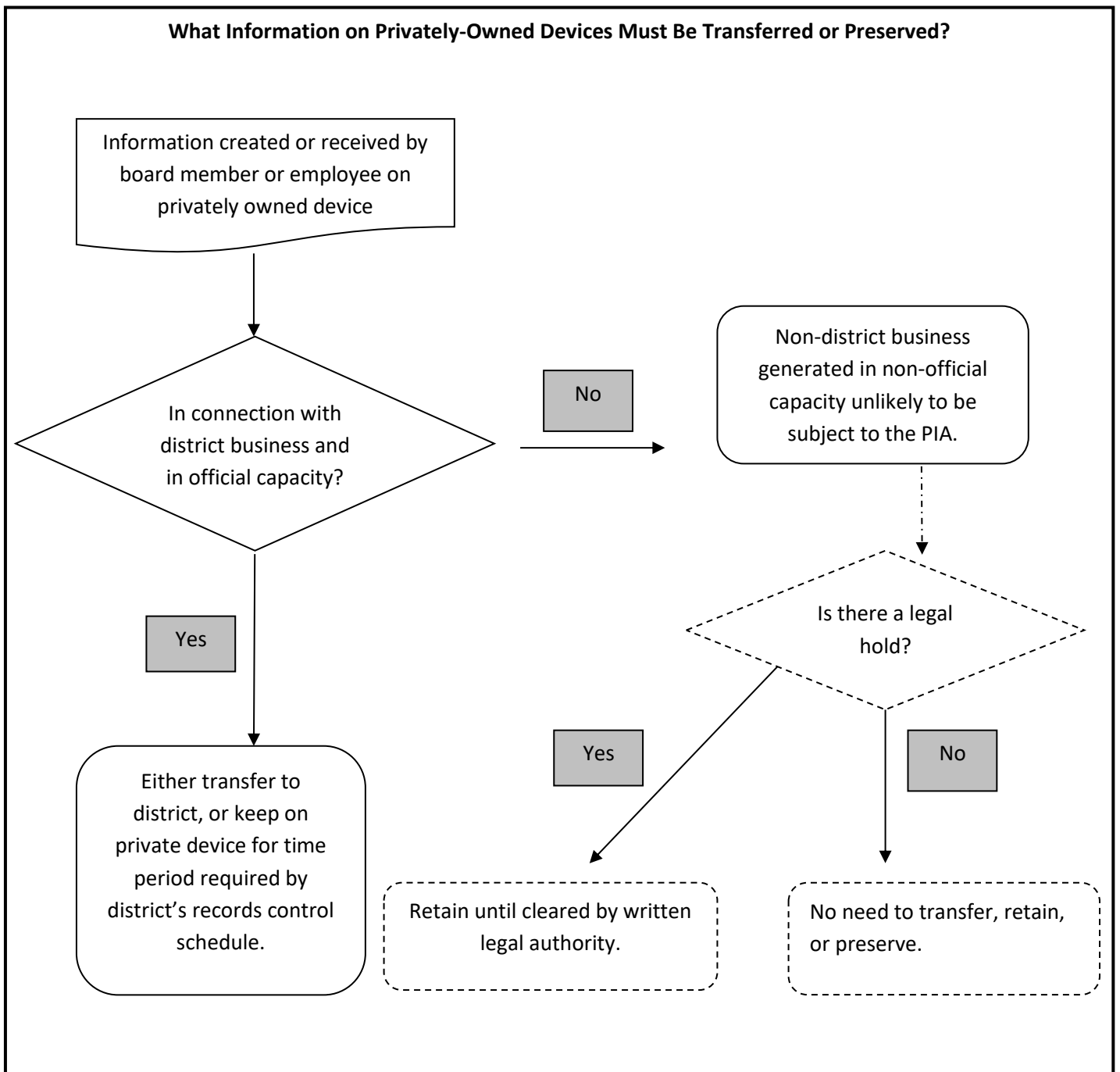
Unfortunately, each method will have pros and cons, and the challenges and needs of each district will vary. TASB Legal Services recommends that a district’s PIO and records management officer consult with the district’s technology director and school attorney to ensure that the district’s procedures for transferring information held by temporary custodians fit the needs of the district.

15. How does a temporary custodian know what should be transferred or preserved in a personal device?

Information on a personal device will generally be subject to transfer or preservation if the information exists in connection with transacting district business and was created in the temporary custodian’s official capacity. Conversely, if information is sent or received in the temporary custodian’s personal capacity, such as a parent or community position, and does not relate to transacting district business, then the information is likely not required to be transferred or preserved. In either case, the custodian may not destroy any information that is subject to unresolved litigation, claim, negotiation, audit,

public information request, administrative review, or other legal action. TSLAC's *Local Government Retention Schedules*; see also Tex. Loc. Gov't Code § 202.002 (pending litigation and open records requests). This prohibition is commonly called a "legal hold" because the retention period for a record must be suspended or frozen until the matter has been resolved. After a hold ends, the retention period for that record may continue.

This sorting process is shown in the following flow chart:



The chart below shows examples of information that may exist on a privately-owned device and whether it may be subject to disclosure under the PIA or retention under the LGRA:

Written communications that may exist on privately-owned devices	Example	In connection with transaction of district business?	In official capacity as employee or board member?	Transfer to the district or preserve on device under the PIA?	If not transferred to district, retain as local government record under the LGRA?
Concerning family, community, or social events in personal capacity.	A district employee texts other employees to invite them to a birthday party.	No.	No.	No.	No.
Concerning district business but created or received in personal capacity.	An employee with a student in the district notifies a teacher the child will be absent.	Yes.	No.	No.	No.
Not concerning district business but created or received in official capacity as elected official.	A superintendent is asked to speak at a college commencement ceremony about public service.	No.	Yes.	No.	No.
Concerning district business and created or received in official capacity.	From the example above, the teacher receives message from coworker about the student's absence.	Yes.	Yes.	Yes.	Yes.
Concerning general administration of district operations, such as notifications to board members.	<ul style="list-style-type: none"> • Agenda setting • Cancelling or rescheduling meetings • Information about citizen concerns • Developing incidents in the district • School closures due to severe weather • Travel planning 	Yes.	Yes.	Yes.	Yes.

Written communications that may exist on privately-owned devices	Example	In connection with transaction of district business?	In official capacity as employee or board member?	Transfer to the district or preserve on device under the PIA?	If not transferred to district, retain as local government record under the LGRA?
Concerning routine or transitory district matters that do not document essential district functions.	<ul style="list-style-type: none"> • Meeting logistics • Meeting reminders • Information that duplicates existing district documents 	Yes.	Yes.	Yes.	Yes.
Transactions that are unclear in nature or need more information.	An employee emails another employee to ask about the new teacher pay raise.	Depends on whether an exchange is connected to district business.	Depends on the scope of official responsibilities of the employee or board member.		
	The above email is from an employee preparing the draft budget sent to the chief financial officer.	Yes.	Yes.	Yes.	Yes.
	The above email is from a teacher to another teacher due to personal curiosity.	No.	No.	No.	No.

If any of the above examples are subject to pending legal action, a temporary custodian should consult a school attorney prior to deletion.

16. What is considered a backup or archive?

The PIA does not detail what constitutes “a backup or archive” on a privately-owned device. Some options for preserving a text message on a cell phone, for example, include storing information in a phone’s memory or memory card, downloading it to an external drive or file, or saving (“backing up”) on a remote (cloud) storage location

offered by a reputable service provider. The PIA does not require a governmental body to pay for the temporary custodian to preserve information in the original form in a backup or archive on the privately-owned device.

17. How long must a temporary custodian preserve district information on privately-owned devices?

A district can determine the time that information not in use by the district will be preserved under the PIA, subject to applicable rules or laws governing the destruction and other disposition of the local government record or public information. Tex. Gov't Code § 552.004. Information that meets the definition of a *local government record* may be destroyed only after meeting the minimum retention period established by the district's records control schedule in accordance with law if there is no pending legal hold. Most districts adopt records control schedules that meet the minimum time periods established in schedules published by TSLAC, available on TSLAC's [Local Government Retention Schedules Website](#). (Although rare, a district may also adopt its own time periods that meet or exceed TSLAC's schedules.) A district that adopts TSLAC's schedules may rely on the retention time periods provided by the schedules available on TSLAC's Website. Records falling under multiple categories on the schedules should be retained for the longest retention period applicable.

18. If a temporary custodian possesses information subject to a public information request or legal hold, must the information be returned or preserved?

Yes, information subject to a public information request or legal hold, it should be forwarded or preserved even if the information could have been legally destroyed at an earlier time. If information is not destroyed when authorized under the district's records control schedule, the information may not be destroyed after receiving a request for the information or being notified of a legal hold on the information. In addition, if a temporary custodian has failed to preserve or retain the record, or destroys a record prior to the expiration of the record's retention period, the custodian risks violating both the LGRA *and* the PIA.

19. May a district require an employee or board member to submit a personal device to be searched?

Probably not. The PIA allows a PIO, under certain circumstances, to make reasonable efforts to obtain information from a temporary custodian. However, requiring an individual to physically turn over a personal device without consent for the purpose of unrestricted searches may implicate the constitutional rights of a temporary custodian and may not be reasonable.

On the other hand, if a district provides a district-owned account or application for board members and employees to use to conduct district business, establishes a policy to require district technology users to use district-owned services and accounts to conduct district business, and notifies each user of district services and accounts that information contained in that service or account has no reasonable expectation of privacy, then there is no reason why a district may not conduct searches of district-owned accounts and devices. See TASB Model Policy CQ(LOCAL).

20. What might sample procedures for a district temporary custodian include?

Many districts are notifying employees and board members about their obligations under the PIA at the time of employment or assuming official duties, as well as at the time of separation. A district's protocols for preserving district information should communicate the following to employees and board members:

- Definitions of *temporary custodian* and *public information* under the PIA.
- Declaration that all information created or received by a temporary custodian in connection with district business and in the temporary custodian's official capacity, wherever the information is located, belongs to the district.
- Requirement that employees and board members conduct district business using district-approved or district-owned services, software, and accounts, regardless of whether business is conducted on a privately-owned or district-issued device.
- Requirement that, if an employee or board member uses privately-owned devices to conduct district business, the employee or board member must:
 - (1) Allow installation of district-controlled applications that segregate district business from personal business so that the district may access district information,
 - (2) On a regular basis (or upon separation from employment or service), transfer district business from personal devices onto a district server or an external drive to submit to the district; and/or
 - (3) Preserve any district information or records that the district cannot access in accordance with applicable laws.
- Statement that employees and board members who continue to conduct district business on personal devices, applications, and accounts may be disciplined or be subject to criminal liability under the PIA, the LGRA, or other laws for any legal violations related to preserving public information or retaining local government records.

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/services/legal-services/tasb-school-law-esource/community/documents/duties-of-temporary-custodians.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoolawesource.tasb.org.

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