Trustees and Technology

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Trustees and Technology

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Technology can facilitate a board member's work with the school district, increase transparency, and support community involvement. However, a board member's role as an elected official can add limitations or legal obligations on technology use. This article provides a brief overview of common legal issues that impact a board member's technology use to help members take advantage of benefits while minimizing the drawbacks.

Technology Issued to Board Members

1. Can a district issue laptops, cell phones, other technological devices, or email accounts or other communication methods to board members?

Yes. Generally, district funds may be used for purposes deemed necessary in the conduct of school schools. Tex. Educ. Code § 45.105. A district may choose to issue to board members, or otherwise provide them access to, any number of technological resources so that board members can review documents or conduct other district business. If the district chooses to do so, the board should adopt a policy addressing board member use of technology. TASB provides recommended policy language at TASB Model Policy BBI(LOCAL).

Board members should also sign an acceptable use agreement. The TASB Policy Services' Regulations Resource Manual provides a model acceptable use agreement at Policy CQ(EXHIBIT). The TASB model addresses several concerns:

- security and safety, such as password protection and appropriate conduct while using technology resources;
- violation intellectual property rights, such as trademarks and copyrights, as detailed in TASB Policy CY(LEGAL) and Model Policy (LOCAL); and
- disclosure of confidential information, including student records protected by the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g.

2. Can a board member use district-issued technology for personal reasons?

Only to the extent authorized by board policy. The Texas Constitution generally prohibits the expenditure of public funds for private purposes. Tex. Const. art. III, § 52(a). However, the Texas Supreme Court provides a three-part test for the expenditure of public funds that, if met, would not violate this prohibition. Thus, a school board may approve a public

expenditure that satisfies this three-part test: (1) an expenditure's predominant purpose must accomplish a public purpose of the district, not to benefit private parties; (2) the district retains sufficient control over the expenditure to ensure that the public purpose is accomplished; and (3) the district receives a return benefit. *See* Tex. Att'y Gen. Op. No. KP-0204 (citing 3-part test established by *Tex. Mun. League Intergov'tl Risk Pool*, 74 S.W.3d 377, approving district's use of school funds to participate in school scholarship program).

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

3. Can a board member seek reimbursement for use of a personal cell phone for school business?

In accordance with district policy, a board member may be able to seek reimbursement for school-related calls made on a personal cell phone. For more answers to trustee reimbursement questions, see TASB Legal Services' *Board Member Reimbursements*.

4. Can the use of district-owned technology issued to board members be monitored?

Yes, districts may monitor the use of district technology resources by board members to comply with legal requirements, such as filtering or blocking certain content under the Children's Internet Protection Act, and to generally ensure that the district's system is being used properly. See TASB Model Policy BBI.

5. Can a board member be held responsible for the theft, loss, or damage of a district-issued technology device?

Yes. Unlike the case of employees and students, no law restricts a district from requiring a board member to reimburse the district for the theft, loss, or damage of a district-issued device. The board may adopt a policy or guidelines requiring reimbursement from board members.

Electronic Communications among Board Members

Texas Open Meetings Act

The Texas Open Meetings Act (OMA) requires meetings of governmental bodies, including school boards, to be open to the public except for expressly authorized closed sessions, and with advanced notice. Tex. Gov't Code §§ 551.001(3)(E), .002, .041. The term *meeting* is specifically defined by the OMA. *See* Tex. Gov't Code §§ 551.001(4) (defining *meeting*), .001(2) (defining *deliberation*). Because a *meeting* of the board can involve either a verbal or a written

exchange, electronic communications by board members presents risk of violating the OMA, even if violation is unintentional.

For more information about the OMA, see TASB Legal Services' eSource at Board Meetings.

1. **May a board member email, text message, instant message, or otherwise send electronic communications to the rest of the board to discuss school business outside of public meetings?**

   No, unless the board members are using an official online message board as described below. Electronic communications, including email, texts, IM, and online Internet posts, are generally not excepted from the OMA. An illegal meeting can occur if a quorum deliberates school business outside of a posted meeting, even if the quorum does not meet at one time or place or in person. *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App.—San Antonio 1985, no writ); Tex. Att'y Gen. Op. No. GA-0896 (2011); Tex. Att'y Gen. LO-95-055 (1995).

2. **May a board member send a message to the rest of the board if no one replies?**

   No. Both a court and the 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-0203 (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). In other words, if a quorum of a school board is together and one member of the quorum talks about school 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.

3. **May a board member contact less than a quorum of the board through electronic communications?**

   This also presents some risk. A single message sent by one board member to less than a quorum of the board does not technically violate the OMA; however, a string of electronic messages may constitute a *walking quorum*. If the board member knew that the time of communicating that the exchange would involve a quorum and deliberation, as defined by the OMA, the member may risk an offense. *See* Tex. Gov't Code § 551.143 (defining Prohibited Series of Communications offense).

4. Is there a special exception for communications by board presidents?

No.

5. How can board members keep each other informed 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, members should keep in mind that the OMA carries both civil and criminal penalties. Additionally, the attorney general believes the commissioner of education may penalize boards for violating the Education Code, which requires school boards to make open meetings records available to the public. Tex. Att'y Gen. Op. No. KP-0254 (2019); *see also* Tex. Educ. Code § 11.0621 (requiring the minutes or tape recording of an open meeting to be accessible to the public in accordance with the OMA).

Therefore, a board member should handle community concerns presented to them outside of public meetings with care. When concerns are sent to a member via email, the solution that presents the least legal risk is for the member simply to forward the email to the administration—not the rest of the board. Or, the member may request an agenda item to discuss the concern with the rest of the board during a properly posted meeting. 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, such as routine email updates from the superintendent. A superintendent should take extreme care, however, not to inadvertently facilitate walking quorums by acting as an intermediary between board members, such as forwarding emails or text messages or sharing opinions amongst members. See more below at **Electronic Communications between the Board and Administration**.

6. How may board members use an official online message board to communicate with each other?

An exception to the OMA limitations on electronic board communications is for a school board to create an official message board for deliberation, but not final action, on school business. A message board would allow board members to engage in some electronic communications with each other, but might introduce new risks or frustrations for the board.

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.

A school board may create only one official online message board, which the board must own or control and which must be prominently displayed on the district's main website. The message board cannot be more than "one click away" from the main page of the website.

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.

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 district for at least six years. Message board communications are public information and must be disclosed in accordance with the Public Information Act (PIA). Tex. Gov't Code § 551.006.

As available technology continues to evolve, districts who wish to implement an online message board should consult their school attorney prior to use.

7. Does the OMA interfere with freedom of speech?

No. Although the OMA restricts the time, place, and manner of board members' communications about school business, the OMA is not an unconstitutional restraint on the 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).

8. May board members use electronic communications to talk privately to each other *during* a board meeting?

This is not recommended. Private exchanges that are *unrelated* to school business won't be subject to the PIA. Tex. Att'y Gen. ORD-635 (1995). However, the public perception that board members are attempting to conduct official business in secret is undesirable. Many boards are adopting a "no cell phone" policy for board meetings.

Electronic Communications between the Board and Administration

1. Can the superintendent send electronic communications to board members?

The superintendent and other district staff are not members of a governmental body and are not technically subject to the OMA. Thus, the superintendent and other district staff may use email to communicate with the board, even the whole board at one time, about school business. However, superintendents and others who are not on the board should exercise caution not to facilitate an open meetings violation on the part of board members—for example, sending a group text or email to board members who can then "reply to all" other members. Superintendents and other district staff should also avoid serving as a messenger of opinions between board members or forwarding communications from one member to another.

The attorney general has concluded that even someone who is not on the board can be charged with violating the OMA and, conversely, that a board member could violate the OMA by using third persons as intermediaries to hold an illegal closed meeting or to meet in numbers less than a quorum. Any person can be charged with a criminal violation of the OMA under the Texas Penal Code if the person acts with intent to aid or assist a board member who knowingly acts to violate the OMA. Tex. Penal Code § 7.02; Tex. Att'y Gen. Op. No. JC-0307 (2000).

2. Can the superintendent send electronic communications to poll the board?

A final action, decision, or vote of the school 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, superintendents may wish to seek board members' input on matters that are ultimately administrative decisions. To avoid allegations, however, such activities should be done sparingly.

For more frequently asked questions and answers about the OMA, see TASB Legal Services' eSource at Board Meetings.

Electronic Records and the Public Information Act

When board members create information in the transaction of school business in their official capacities, they are creating information that may be subject to preservation and possible public access under the Texas Public Information Act (PIA).

1. **What records are subject to the PIA?**

   Public information is defined in the PIA generally to be any information that is created or maintained in connection with the transaction of official business. The PIA does not distinguish information subject to the PIA by its form, such as whether it is on paper or in electronic form. The PIA also does not distinguish information based on location, such as whether information is stored on a personally owned device or on a district-issued device. Rather, the PIA differentiates information based on whether the content meets the definition of *public information*. Tex. Gov't Code § 552.002; *see* Tex. Gov't Code §§ 552.002(a-1), .003(2-a) (defining information *in connection with the transaction of official business* as that created by, transmitted to, received by, or maintained by an officer or employee in an official capacity, pertaining to any matter over which the school board or district has authority, administrative duties, or advisory duties to official business).

2. **Are board members' electronic communications subject to public disclosure?**

   Potentially, yes. If electronic messages exist in connection with school district business, they are subject to public disclosure unless they fall within one of the PIA exceptions and the district has permission from the attorney general or under law to withhold the requested information from a requester. Tex. Gov't Code §§ 552.002, .301. S*ee*, e.g., Tex. Att'y Gen. OR2004-4363 (2004) (requiring release of emails between board members and the superintendent); 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 district business).

3. **Is every personal notation by a board member about school business, even those stored electronically, subject to public disclosure?**

   Yes. Personal notes created in a board member's official capacity about school business are included in the broad statutory definition of *public information* and are subject to the PIA if they exist at the time of a PIA request. 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).

   For information about records retention requirements, see TASB Legal Services' Records Management.

4. Are personal exchanges unrelated to the transaction of official district business subject to public disclosure?

No. Information of a personal nature not created or received in transaction of school business is not subject to disclosure under the PIA. This is true even when an email is written on a district account or equipment. For example, one school district received a request for all emails sent or received by a school employee on the employee's work computer. The attorney general allowed the requested information to be excepted from disclosure 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. *See* Tex. Att'y Gen. OR2000-4848 (2000) (citing *In re Grand Jury Proceedings*, 55 F.3d 1012 (5th Cir. 1995)). A board member should therefore keep the member's personal life and school business as separate as possible by consistently using separate email accounts for business, school, and private correspondence.

A board member's intent for notes to be private is not determinative. S*ee* Tex. Att'y Gen. ORD-626 (1994) (state agency promotion board member's notes taken during an interview are subject to the PIA because they were created in transacting the official business of evaluating applicants for employment even though it was within the members discretion whether to keep notes that were not required).

For more frequently asked questions and answers about the Public Information Act, see TASB Legal Services' eSource at Public Information.

Retaining Electronic Records

When board members create information in connection with school business, they are creating government records that may be subject to a legally required retention time period under the Texas Local Government Records Act (LGRA).

1. What is considered a record that requires retention?

Any school district record that meets the definition of a *local government record* is a record that requires retention by law. *Local government record* generally means any information recording medium created or received by a local government or any of its officers or employees pursuant to law or in the transaction of public business, regardless of physical form or characteristic and regardless of whether public access to it is legally open or restricted. Tex. Loc. Gov't Code § 201.003(8).

2. Must electronic communication be retained?

It depends on the content of the communication. Regardless of where located, electronic communications created or received by board members create government records that must be retained for the appropriate retention period. A member who possesses information subject to the PIA and that is held on a privately-owned device must either provide the information to the district or preserve the information in its original form in a backup or archive on the device for a time period compliant with any applicable rule or law governing destruction and other disposition of local government records or public information. Tex. Gov't Code § 552.004(b).

3. 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 board members or district employees 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 district, duplicates and convenience copies need not be retained.

Board members who receive electronic communications from citizens about school business on their personal devices or accounts should transfer the communication record to the appropriate district administrator for safekeeping. Once the records are safely in the hands of the district's custodian of records, the individual member may delete the duplicate copy. If a record is retained, even though it could have been destroyed under the district's records retention schedule, the record will be subject to a public information request unless a PIA exception applies. Records involved in litigation should not be deleted or destroyed without seeking advice from legal counsel.

For more frequently asked questions and answers about school district records management, see TASB Legal Services' eSource at Records Management.

Social Media Use by Board Members

Use of social media can introduce unique legal obligations and risks. Board members should take time to understand the technical functionalities of each platform or program, set the appropriate privacy settings, and develop a plan for interacting with others online.

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

1. What are the pros and cons of using social media to discuss school business?

Like all citizens, individual board members may voice their opinions about matters of public concern, whether that occurs in a formal letter to the editor or an informal social media post. The federal Fifth Circuit Court of Appeals with jurisdiction over Texas emphasizes that "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wilson v. Houston Comm. Coll. System*, No. 19-20237, 2020 WL 1682780 (5th Cir. Apr. 7, 2020) (quoting *Rangra v. Brown*, 566 F.3d 515, 524 (5th Cir.), *dismissed en banc*, 584 F.3d 206 (5th Cir. 2009)).

In fact, "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 at 518. However, because the board acts only as "a body corporate," many school boards have a board operating procedure that appoints the board president as a spokesperson. Other board members are free to speak publicly about school matters, 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 school business. *See*, e.g., *Garnier v. Poway Unified Sch. Dist.*, 17-CV-2215-W (JLB), 2019 WL 4736208, (S.D. Cal., Sept. 26, 2019) (finding constitutional violations by two school board members who 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 Legal Services' *Social Media Guidelines for School Board Members*.

2. May a board member post on a personal social media page summaries of open meeting discussions?

Nothing in law or policy specifically prohibits this action. Remember, however, that an individual member's board meetings notes do not carry the weight of an official summary of board discussion or action. 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. It's also possible that such postings will be subject to public disclosure or retention rules. Furthermore, the board member code of ethics requires each member to respect the majority decision as the decision of the board. TASB Model Policy BBF(LOCAL). And, board operating procedures typically designate the board president as the spokesperson for official board positions. TASB Model Policy BBE(LOCAL).

Best practice may be to point readers to the district's official website or officially posted minute and recordings online, if they are posted online, or refer readers to contact the district's administration to request official minutes and recordings.

3. May a board member post personal notes on a personal social media page regarding closed session discussions?

Not without risking unintended consequences. Revealing closed meeting deliberations undermines the purpose of conducting closed sessions and may violate the board's own code of ethics. A board's decision to invoke a legal exception under the OMA to go into closed session is a board decision, and an individual member's contradictory actions breaches the member's obligation to the rest of the board. See TASB Model Policy BBF(LOCAL). In addition, a board member may owe a common law fiduciary duty to act primarily in the interest of the district, including protecting its confidential information and competitive advantages. A person who knowingly discloses a certified agenda or recording of a closed meeting to the public, without lawful authority, commits a Class B misdemeanor subject to jail time and fines. Tex. Gov't Code § 551.146; Tex. Penal Code § 12.22. Considering how carefully closed meeting records are guarded, board members should avoid creating or sharing separate records of closed meeting proceedings, such as handwritten or electronic notes. To be safe, a board should either prohibit notetaking in closed sessions or seal the notes along with the official certified agenda or audio recording.

4. What additional risks arise from sharing confidential board business?

Seeking feedback on social media regarding school 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 content of closed meeting deliberations. Tex. Att'y Gen. Op. No. JM-1071 (1989). However, other statutes or duties may limit what a member of the governmental body may say publicly. 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 member who stumbles across and repeats false information about another person, or even a "half-truth" that cannot be verified, can be subject to a defamation claim if the statement tends to harm another person, for instance, by damaging the person's reputation. *Defamation* is defined by 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. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *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). 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). A person may also bring a cause of action for libel under Texas Civil Practice and Remedies Code chapter 73.

Perhaps worse, 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

When communicating with the public outside of a board meeting, board members should be mindful of limitations on individual authority.

1. 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 member may have to explain why the member cannot take action individually. The school board operates as a body corporate, which means no single board member may act alone. Tex. Educ. Code § 11.051. 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 district and keeps the board from having to hear every community complaint. TASB Model Policy BBE(LOCAL), at Referring Complaints. See also TASB Model Policy BBF(LOCAL) ("I will make no personal promise or take private action that may compromise my performance or my responsibilities."). At the same time, it preserves a member's future ability to participate in an unbiased, neutral manner at a later stage of the dispute.

2. May a board member preview a community complaint?

Yes, but doing so may inappropriately bias the individual member and risk appearance of partiality. An individual board member presented with a community complaint outside of a board meeting should try to remain neutral about the merits of the complaint. If the member is unable to ignore information received outside of a board meeting, the 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 viewed 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 member 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.

3. Is forwarding a communication from a community member to other board members considered a *deliberation*?

It depends. If a board member also expresses personal views in a message copied to the entire board, the individual member has potentially caused a deliberation among a quorum of the board. Even if the individual member only forwards the message to fewer than a quorum of the board, the member may risk creating "walking quorum" conduct prohibited by the OMA. *See* Tex. Gov't Code § 511.143 (Prohibited Series of Communications). Best practice is to forward messages to the superintendent or designees without copying other board members.

4. Is correspondence sent from a community member to an individual board member a district record?

Yes, if the message was created or received by a district officer or employee in an official capacity in the transaction of public business, then the message is a record subject to records retention rules. *See* Tex. Loc. Gov't Code § 201.003(8) (defining *local government record*).

5. Is correspondence sent from a community member subject to disclosure under the PIA?

Yes. All written communications among board members and between board members and other are potentially public records. *See*, e.g., Tex. Att'y Gen. OR2003-0951 (2003) (finding that communications between board members that relate solely to district business, a grievance filed against the board president, is subject to release under the PIA). However, contents of the communications may contain confidential information. Thus, as determined by law or the Texas attorney general in written rulings, all or part of a communication from a community member may be withheld from the public only if a proper PIA exception applies. 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 district. Members should *not* forward or release emails elsewhere.

6. What caution should be exercised prior to posting to an official online message board?

School 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 parents, 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. Depending on the subject of the citizen's email, contents of the email may be confidential for other reasons as well.

Protection of Confidential Records

1. How will board members know which of their communications may be disclosed to the public?

In practice, board members should presume their communications are subject to public disclosure but not independently act to make disclosures themselves. They should consult the superintendent or school attorney for specific guidance.

Depending on its content, many district records are made expressly confidential by law. Various federal and state laws protect information such as a third party's proprietary information, medical or mental health data, sensitive security or safety information, personally identifiable information, and more. For example, the Family Educational Rights and Privacy Act (FERPA) creates a legal presumption for confidentiality of education records unless there is a legal exception. 20 U.S.C. 1232g; 34 C.F.R. § 99. Conversely, other laws require districts to make certain district records public, such as publications, forms, and policies. For example, the Texas Public Information Act (PIA) creates a legal presumption for public access to governmental information unless there is a legal restriction. Tex. Gov't Code ch. 552.

2. Can a board member share district records with just a few personal friends who have been sworn to secrecy?

No. The PIA provides that 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. Also, 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 risk additional penalties.

For more information about the PIA, see TASB Legal Services' Public Information.

3. **What right of access do *former* board members have to confidential district records?**

   None. Former board members have no further authority to retain or access confidential district records. After leaving the board, former members may not review records of closed meetings, even those from the meetings they attended. Tex. Att'y Gen. Op. No. JC-0120 (1999). Board members who resign or otherwise exit from the school board should be reminded, in writing, of the need to: first (1) return any records, written or electronic, to the district if there is reason to believe that the member holds the sole copy of a record subject to records retention requirements; and then (2) to destroy (i.e., delete or shred) any duplicative or convenience copies of confidential records or information remaining in the member's possession. Requests from former board members should generally be treated like a public information request unless the member has a special right of access under law.

   For more information about a current board member's access to district information, see TASB Legal Services' *Board Member Access to School District Records*.

Security of Mobile Devices

1. **Should a board member using a personal cell phone for school business be worried about security of data on the phone?**

   Yes, confidential district data stored or transmitted on personal cell phones or other personal mobile devices, including electronic communications, creates legal risks. Electronic data must be protected just as diligently as records stored in physical district offices. Unsecured devices should not be left sitting out around the home, office, or in public. At minimum, password protection should be used on all mobile devices that transmit school data. If a breach of sensitive personal data is suspected, officials should immediately make a report to the school district. Breach reporting and notification may be required to avoid costly consequences. *See*, e.g., Tex. Bus. and Comm. Code ch. 521 (unauthorized use of identifying information); Tex. Educ. Code § 11.175 (school district breach of system security notification).

   For more information about school cybersecurity and breach notification requirements, see TASB Legal Services' eSource for District Technology.

2. **May a board member use a personal device to record the public portion of an open board meeting?**

   Yes, anyone in attendance can record the public portion of a school 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 may create a district record subject to both record retention rules and public disclosure under the PIA.

3. **May a board member use a personal 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.).

4. **May a board member privately record a conversation with another individual?**

   No, unless the recorded parties have consented. While it is not a criminal offense in Texas to record a conversation if the recording party is a party to the recorded conversation, engaging in deceptive practices and making secret recordings may violate other laws or the privacy rights of the nonconsensual person. Tex. Penal Code § 16.02; 18 U.S.C. § 2511. Secret recordings have traditionally presented more legal challenges than perceived value. Best practice is to notify and seek consent of all parties before recording a conversation.

Cyber-harassment of School Officials

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

   When it violates the terms of use. Each webpage that permits interactivity by enabling users to make comments, post questions, cast a vote, or other interactions, should have guidelines for its users in what are commonly referred to as Terms of Use. If the district creates its own webpage and permits the public to interact, the district should establish its own terms of use.

   Many districts or individual board members rely on third-party platforms, however, 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 school business. The terms of use of third-party websites will vary from site to site. For example, Facebook specifies that only an authorized individual may administer a page for an entity or public figure and prohibits personal terms of use for individual pages that conflict with Facebook's terms. Facebook, for example, also requires the public official pages to display the following 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].*" Terms may prohibit certain content or conduct, such as violence and criminal behavior; illegal harassment, sexual exploitation, self-injury, suicide; privacy and image right violations; spam and misrepresentation; and more. For common examples, see Facebook's Terms and Policies and Government Terms, and Twitter's Rules and Policies.

Like all social media platforms, however, Facebook and Twitter regularly update their rules to keep pace with rapidly evolving technology and corresponding social norms. TASB Legal Services recommends that school officials who use non-District social media platforms to engage with constituents regularly review that third-party platform's terms of use and understand the rights and obligations of users on such platforms prior to use.

2. Is a school district or board member liable for improper content posted by a user on its page?

Not unless the school official has personally acted to publish or repeat the content. Federal law provides districts and district officials some protection from liability for such behavior by third party users. The DMCA, 17 U.S.C. section 512, protects service providers from liability for copyright infringement by users. In addition, the Communications Decency Act of 1996 (CDA), 47 U.S.C. section 230, protects service providers or users (district, board, or employees) from being treated as a speaker or publisher of information provided by another information content provider (a person posting information to the district's or board member's page). The only exception from this protection is if a service provider or user acted with intent to promote or facilitate prostitution. Section 230 of 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 school district and school officials from claims like defamation. Tex. Civ. Prac. & Rem. Code § 101.051. If school 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. School officials may lose these protections, however, by reposting harmful content.

3. What are spoofing, pharming, and phishing? Are these activities legal?

In the context of Internet security, there are many terms (that rapidly change) 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 can be used for the purpose of online harassment. These activities are illegal in Texas if they are done for the purpose of harming, defrauding, or intimidating another person. *See* Tex. Penal Code § 33.07(a)-(c) (criminalizing online impersonation).

4. How should a board member who is a victim of online harassment 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 of the website where the content is posted.
- Contact the website. Cyber harassment may violate the website's terms of service. If so, the website will take action to remove the offending content.
- 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 school district. If school technology or someone in the school community (such as a student or employee) was involved, the district will take appropriate action.

Responding to Individual Board Members' Online Conduct

1. How can a school board respond if one of its members has gone astray?

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

If a 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 district's school attorney.
- Discussion in closed session between the offending member and the full board.
- If private conversations have not been effective, the board could seek the assistance of the school district's attorney to express in writing concerns about specific policy violations.
- If all possible private interventions have not been effective, board members may make public statements to distance themselves from the acts or statements of another board member.

While board members each have a protected First Amendment right to express their views on matters of public concern – including views about the acts or statements of a fellow board member – a board that is considering a formal reprimand, censure, or sanction against an individual member of the board should exercise caution and consult a school attorney. The Fifth Circuit Court of Appeals has determined that the censure of a community college board member may have violated his civil rights. After the board member was censured and threatened with further sanctions by the rest of the board for actions the board deemed contrary to the interests of the community college (including suing the college), the board member amended his pending lawsuit to include a Section 1983 claim that the censure violated his First Amendment right to free speech and Fourteenth Amendment right to equal protection. The board member sought an injunction preventing the board from enforcing the censure, $10,000 in damages for mental anguish, $10,000 in punitive damages, and reasonable attorney fees. The Fifth Circuit considered the public official's allegation of censure in retaliation for speaking out about a matter of public concern sufficient to establish an injury under Fifth Circuit precedent. In addition, the court noted that the U.S. Supreme Court has recognized that a First Amendment violation creating a reputational injury is enough to establish harm for a plaintiff to have standing. *Wilson v. Houston Comm. Coll. System*, No. 19-20237, 2020 WL 1682780 (5th Cir. Apr. 7, 2020).

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Governance/documents/trustees-and-technology.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoollawesource.tasb.org.

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