

Testimony for

**The Senate Committee on Open Government**

Charge 1: Evaluate the need for revisions to the Public Information Act to address changes in the performance of public functions and make recommendations for changes

November 26, 2012

**Terri Burke**

**Executive Director of ACLU of Texas**

**And representing The Freedom of Information Foundation of Texas**

We appreciate this opportunity to speak to you today about the effect privatization of government functions has on Texans' ability to access information about the work of their government.

In short, privatization of functions previously handled by government agencies may lead to important efficiencies but we cannot lose sight of the need for transparency. Too often privatizing government functions has led to the removal of information from the public record.

Most state public information acts were drafted when government functions were performed by identifiable government agencies. In the nearly 40 years since the passage of the Texas Public Information Act, as you know, the trend has been for government to outsource or "contract out" services to private entities. In our state we have seen the privatization of prisons, information technology and highway construction and maintenance to name some of the largest contracts.

We are told privatization drives down costs and incentivizes performance. But how do we know that? Because these entities are not "governmental bodies," and the information they possess is not "owned" or "maintained" by a governmental body, it most often falls outside the purview of the PIA.

Although a researcher may be able to locate the amount of funds paid or granted to a particular private entity, it is extremely difficult to determine the cost-effectiveness of those tax dollars. And thus citizens, legislators or researchers may have no way to measure whether the public is receiving a fair or competitive return from tax dollars.

Public watchdog groups and individuals attempting to research issues affecting public health and safety, violations of individual rights or other acts against the public interest are denied access to crucial information.

Let me give you one very real example: A school district contracts out its bus services. A parent wants to know more about the performance of the driver who carries her child to school and about the maintenance of the buses. It is not unusual for that type of information to be protected by terms of a contract.

When ruling on a request for public information, the Attorney General's office is supposed to be guided by the provisions of the PIA. However, in the case of a privatized function, the AG's office looks to the contract between the state and the private entity to determine what information may be released. This in essence permits state agencies and private entities to "contract out" of the PIA. In other words, privatization permits the circumvention of the intent of the law.

The Committee asked that we address the need to codify or clarify existing AG opinions as well as talk about the use of new technologies and future technological advances as relates to the creation of public information.

First, some background. The AG issues relatively few formal opinions, that is, "open records decisions" these days. AG Cornyn issued only 18 during his three years in office and AG Abbott has issued only nine since taking office in 2003. By contrast, the AG's office now issues hundreds or even

thousands of informal “letter rulings” every year. AG Abbott has issued approximately 12,000 letter rulings.

We would ask that any “clarification” of existing AG opinions or letter rulings should start from the premise found in the preamble to the Texas Public Information Act that the people are the masters of the government and that the Act should be liberally construed in favor of access to public information. Further, any clarification or codification should take into account the profound information technology changes that have occurred over the past couple of decades.

Not only is information from private vendors unreachable, so potentially is information of government agencies if it is stored offsite on privately owned or maintained servers.

So, how do you address these issues? During the last legislative session we supported Sen. Watson’s bill, SB1571 (and the committee substitute) which would have amended the definitions of “Public Information” and “Public Function” in Chapter 552 of the Government Code.

Let be more specific:

Because there is no coherent judicial doctrine on open records issues – that is, courts can be unpredictable – the surest way to protect the rights of the public to privatized information is to strengthen our open records law in a couple of key ways.

Expand the definition of Public Information to cover the most expansive range of information: any information used to develop or execute public policy or business is subject to public disclosure, regardless of the medium, method or technology by which the information is created, transmitted or stored and regardless of whether public or private computers or devices are used by public officials.

Specifically define “Public Function.” Courts across the country have held that “public function” means any entity that performs duties traditionally performed by the government. In other words, when a private vendor becomes the functional equivalent of a state agency, it is subject to the open records laws. A number of state legislatures have addressed this issue with amendments to their PIAs.

Decrease or tighten the exemptions allowed. Among allowable exemptions is the broad term “trade secrets” and “proprietary information” – we need definitions that clearly delineate contractor information that truly merits exemption and information that can and should be made public. (For example, Connecticut and Minnesota have enacted provisions in their laws that require including contracts what information can and will be made public.)

In short, privatization will continue to construct barriers to the public’s right and need to understand the workings of its government. The ramifications of that are enormous. I’ll leave you with one small example. And I apologize if you are already aware of this: A National Elections Studies polling report found that in 1964, only 29% of people agreed with the statement that, “government is run by a few big interests.” Forty years later, in 2004, after decades of privatization, nearly 70% agreed with that statement. When citizens perceive that public functions operate outside of public scrutiny and free from accountability, they become cynical and their trust in government is eroded.