Open At Your Own Risk: Considerations for Public Access to Legislative Information

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What law applies?

- § 305.027, Texas Government Code
  "Legislative advertising" means a communication that supports, opposes, or proposes legislation and that:
  (1) in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast by radio or television; or
  (2) appears in a pamphlet, circular, flyer, billboard or other sign, bumper sticker, button, or similar form of written communication.
- Very few opinions that interpret this statute
- Requires disclosure
- Class A misdemeanor

Can’t we be friends?

- Florida Supreme Court Judicial Ethics Advisory Committee Opinion Number 2009-20
  The Committee believes that listing lawyers who may appear before the judge as “friends” on a judge’s social networking page reasonably conveys to others the impression that these lawyer “friends” are in a special position to influence the judge.
  - “Fan” ["Like"] okay.
  - Contributing to judicial campaign also okay.

Hearing from constituents

Fishing

Capital City Tattler:
"Dear Representative Leghorn:
"Under the Texas public information law, please provide me with a copy of all communications received or sent by your office for the period beginning at midnight on August 12 and ending at 5pm on August 13."
  - Letters
  - Phone messages
  - Email
  - Legislative drafts prepared by agency attorneys
  - Tweets
  - Facebook posts
  - Instant messages
  - Cloud drive documents
  - Etc.

Fishing

Immediate messages: dozens
Fishing

Instant messages: dozens

Fishing

Emails: hundreds

Fishing

Dozens of other documents:

Fishing

What gets disclosed?
• Text message establishing evidence of a bribe?
  • Citizens have a right under the Texas Constitution to petition their legislators for redress!
• Text message from mistress?
  • Purely personal communication!
• Floor amendment making a controversial legislative proposal?
  • Deliberative process!
• Attorney-client?
  • Special confidentiality provisions!
• General question, followed by poignant, if slightly embarrassing, honesty?
  • PUBLIC INFORMATION MUST BE DISCLOSED AS SOON AS POSSIBLE.

Fishing

Meanwhile
• Office staff time.
• Attorney consultation time.
• Attorney briefing time.
• Submission to reviewing authority.
• Frustration from requesting entity.

Fishing

Incentives
• Don’t write anything down
• Invasive requests to interfere with work
• Retaliation
• Noncompliance
  • Public information law
  • State record archival requirements
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Kathy Gill of the Moderate Voice blog:

“In my experience (I've done web work since 1993 or so), pages like this one are automatically generated from a database file. In other words, a person doesn't code the page.

“In order to change something like this, someone has to change the database. And things like votes and official times, they're often (usually?) automatically generated also.

“In other words, changes like this are deliberate.”

Cited not fewer than 168 times:
- Gawker
- ABC News
- International Business Times
- Democratic Underground
- Travis County District Attorney announces investigation
- Abusive telephone calls
- Dozens of public information requests
Noise

- No impact on process.
- No insight provided.
- Not one vote changed.
- Not one changed mind.

So What Should We Do?

Legislatures may wish to consider:

- Do we educate ourselves and our staffs sufficiently about applicable laws and rules?
- Is the law appropriate for the kind of work we do?
- Is this worth the administrative burden?
- Do we provide sufficient context to allow the public to understand legislative information?
- Do contemplated government transparency proposals make government better?
  - Constituent input or provocation?
  - Substance or show?
  - Transparency or voyeurism?

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