



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 7, 1997

The Honorable Kenny Marchant  
State Representative, District 99  
1452 Halsey Way, Suite 102  
Carrollton, Texas 75007

Open Records Decision No. 654

Re: Whether a request for public information made to a governmental body through a computerized bulletin board system is a "written request for information" for purposes of chapter 552 of the Government Code and related questions (ORQ-10)

Dear Representative Marchant:

You have asked several questions concerning the applicability of chapter 552 of the Government Code to a computerized bulletin board system created and maintained by a governmental body.<sup>1</sup> You have specifically asked whether a governmental body is required to produce public information in response to requests for information that are sent generally to a public response mailbox of the bulletin board system or that are specifically directed to electronic mailboxes of individual employees and officials of the governmental body. In considering this question, it may be helpful to review the access procedures and requirements of chapter 552.

Chapter 552 generally provides that governmental bodies must make public information accessible. Section 552.221(a) provides that a public information officer "shall promptly produce public information for inspection, duplication, or both on application by any person" to the public information officer. Information that cannot be produced within ten days after a request for the information must be provided within a reasonable time period. See Gov't Code § 552.221(d) (public information officer must "set a date and hour within

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<sup>1</sup>You have also asked certain questions concerning retention of information. Questions concerning records retention may be directed to the Texas State Library and Archives Commission.

a reasonable time when the information will be available”). Public information must be made available, at a minimum, during a governmental body’s normal business hours. Gov’t Code § 552.021.

Generally, if a governmental body seeks to withhold information from disclosure, it must assert arguments against disclosure and seek a decision from this office within ten days of receiving the request.<sup>2</sup> Various provisions of chapter 552 discuss a governmental body’s responsibility either to provide information to a requestor or to timely raise exceptions to disclosure and seek a decision from this office in response to a “written” request for information. Gov’t Code §§ 552.301 (upon receiving “a written request for information” governmental body must timely seek decision from attorney general to withhold information), 552.302 (“information requested in writing is presumed to be public” if governmental body fails to timely seek decision). This office has previously said that a governmental body is required to provide information in response to a “written” request. Open Records Decision No. 304 (1982) at 2. Chapter 552 itself does not define what constitutes a written request and whether an electronic mail request is a written request.<sup>3</sup>

We note that some state jurisdictions, like Texas, recognize that work-related electronic mail is information that may be subject to public disclosure. *See Fla. Op. Att’y Gen. 34 (1996)* (electronic mail made or received in connection with transaction of official business is public record as defined by Fla. Stat. Ann. § 119.011(1) (1996)); *Maryland Op. Att’y Gen. 016 (1996)* (electronic mail related to conduct of public business is subject to Maryland Public Information Act). Other states’ public information statutes generally do not appear to require an entity to respond to requests for information sent via electronic mail.<sup>4</sup> *But see Mich. Comp. Laws § 15.235* (“written” request for information includes electronic mail request).

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<sup>2</sup>In certain situations, there are criminal penalties for failure to provide public information. Section 552.353(a) states that “[a]n officer for public information, or the officer’s agent, commits an offense if, with criminal negligence, the officer or the officer’s agent fails or refuses to give access to, or to permit or provide copying of, public information to a requestor as provided by this chapter.”

<sup>3</sup>We note that, by contrast, chapter 552 specifically details what types of information may be subject to disclosure. Section 552.002 of the Government Code provides that the media on which public information is recorded includes “a magnetic, optical, or solid state device that can store an electronic signal” and that “a voice, data, or video representation held in computer memory” can contain public information.

<sup>4</sup>*See, e.g., 5 Ill. Comp. Stat. Ann. § 140/3 (1996); Ky. Rev. Stat § 61.872(2) (1997); N. Y. Pub. Off. § 89(3) (1997); Md. Code Ann., State Gov’t § 10-614 (1996); Conn. Gen. Stat. § 1-15 (1996)* (requiring written requests for information). *But see Fla. Stat. Ann. § 119.07(1)(a) (1996)* (custodian “shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision” but written request not required).

The Freedom of Information Act (“FOIA”) 5 U.S.C. § 552, which provides for public access to certain information held by federal agencies, also recognizes that work-related electronic mail is information that may be subject to public disclosure.<sup>5</sup> However, it does not mandate that all federal agencies respond to electronic mail requests. The two basic requirements for a FOIA request are that the request must (1) reasonably describe the records sought, and (2) be made in accordance with an agency’s published access procedures. 5 U.S.C. § 552(a)(3). Thus, while a federal agency may, by its procedures, choose to respond to a request for information sent by electronic mail, it is not required to do so.<sup>6</sup>

The Seventy-fourth Legislature added certain provisions concerning public access to information maintained in an electronic format. *See, e.g.*, Gov’t Code § 552.231 (concerning requests that require programming). Section 552.272(d) of the Government Code encourages governmental bodies to make public information widely accessible “through electronic access through a computer network or by other means.” Members of the public may be provided copies of information either on paper or an electronic medium, such as on diskette. Gov’t Code § 552.228. Because chapter 552 encourages a governmental body to make public information available through a variety of media, a governmental body could certainly choose to provide information in response to an electronic mail request. Gov’t Code §§ 552.007 (chapter 552 does not prohibit voluntary disclosure of non-confidential information), 552.272(d) (governmental bodies encouraged to make public information available through electronic access). However, a request for information sent to a governmental body via electronic mail is not the type of written request that triggers the requirement to seek a decision from this office within ten days of receiving a written request. Gov’t Code §§ 552.301, .302 (failure to timely seek decision results in presumption information at issue is public).

We note that the legislature could have chosen to define a “written request” to include requests made via electronic mail, given that the definition of “public information” includes information held in computer memory. However, absent such legislative action, we conclude that a governmental body is not required to seek a decision from this office if

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<sup>5</sup>The Electronic Freedom of Information Amendments of 1996, which amended section 552 of title 5, were approved October 2, 1996. The amendments provide that information subject to FOIA “includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.” 5 U.S.C. § 552(f)(2). Federal agencies are also directed to provide requested information “in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” *Id.* at § 552(a)(3)(B).

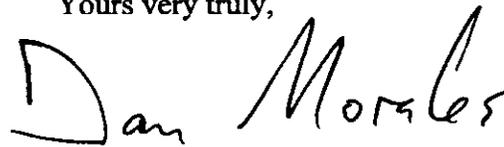
<sup>6</sup>Thus, while the United States Justice Department does not have a formal policy concerning electronic mail requests, a representative of that agency indicated that some divisions choose to accept and respond to electronic mail requests.

it chooses to not release information in response to an electronic mail inquiry. Also, a governmental body's failure to respond to an electronic mail inquiry does not result in the presumption that information is public. However, if a governmental body chooses not to provide information in response to an electronic inquiry, the governmental body should advise the requestor to submit a written request for the information.

### S U M M A R Y

The legislature could have chosen to define a "written request" to include requests made via electronic mail, given that the definition of "public information" includes information held in computer memory. However, absent such legislative action, a governmental body is not required to respond to a request for information sent to a governmental body's electronic bulletin board system or otherwise sent by electronic mail to an official or employee of a governmental body. The governmental body should advise the requestor to submit a written request for the information.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive style with a large, looped initial "D".

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