

Legal Q&A

By **Amber McKeon-Mueller**, TML Assistant General Counsel

Q. What is an electronic signature?

A. An “electronic signature” is defined in Texas law as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” Tex. Bus. & Com. Code § 322.002(8).

Q. What is an electronic record?

A. An “electronic record” is defined in Texas law as “a record created, generated, sent, communicated, received, or stored by electronic means.” *Id.* § 322.002(7).

Q. What laws govern electronic signatures?

A. The Uniform Electronic Transaction Act (UETA), Business and Commerce Code, Chapter 322, is the Texas law that governs the use of electronic signatures. The Electronic Signatures in Global and National Commerce (ESIGN), 15 U.S. Code Chapter 96, is the federal law that governs electronic signatures.

When dealing with electronic signatures in Texas, cities should look to the UETA. This is because the Texas Legislature adopted UETA in its entirety from the model laws. 15 U.S.C. § 7002. Therefore, UETA in Texas is not preempted by ESIGN.

Q. What is the difference between an electronic signature and a digital signature?

A. As explained above, an electronic signature is an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. In other words, an electronic signature could be made by simply clicking a box.

A “digital signature” is a type of electronic signature that provides higher levels of security and universal acceptance than many of the ways to complete an electronic signature. A “digital signature” means an electronic identifier intended by the person using it to have the same force and effect as the use of a manual signature. Gov. Code § 2054.060(e)(1). In other words, it is considered a manual signature. Therefore, it requires more than an electronic signature. A digital signature is created by cryptographic means involving the use of two mathematically related keys (i.e., a public and private key pair, often referred to as Public Key Infrastructure or PKI).

Both an electronic signature and a digital signature require the intent of a person to sign the electronic record.

Q. What types of agreements can be signed with electronic signatures?

A. Unless excluded in the UETA, parties can sign most agreements electronically. Lease agreements and any contract for the sale of an item can be signed electronically. Bus. & Com. Code, Chapters 2 and 2A. If a law requires a signature, an electronic signature satisfies the law unless the UETA excludes the transaction. Bus. & Comm. Code § 322.007(d).

The UETA specifically excludes certain types of transactions from using electronic signatures. Bus. & Comm. Code § 322.003(b). Items that cannot be signed electronically include wills, negotiable instruments (i.e., checks), bank deposits and collections, letters of credit, fund transfers, documents of title, and investment securities. *Id.*

A city wishing to use an electronic signature for a transaction other than a lease or sale of an item should consult with its city attorney regarding the appropriateness of an electronic signature.

Q. Can another party force a city to use an electronic signature if it does not want to use one?

A. No. Both parties to a transaction have to agree to conduct their business by electronic means. Bus. & Comm. Code § 322.005(b). Because the parties agree to conduct one transaction by electronic means does not necessarily extend to future transactions. *Id.* § 322.005(c). The parties may refuse to conduct other transactions by electronic means. *Id.*

Q. How can a city send an electronic record to another party?

A. If a city has agreed to conduct a transaction by electronic means, the requirement to provide, send, or deliver information in writing is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt. *Id.* § 322.008(a). In other words, the city and other parties need to ensure they have compatible programs to view the electronic records.

Q. Do cities still need to retain electronic records with electronic signatures like they would other records?

A. Yes. If a law or retention schedule requires the retention of the record, the electronic record must be retained in a way that accurately reflects the information in the record in its final form as an electronic record and remains accessible for later reference. *Id.* § 322.012(a)(1)-(2). The record may be maintained by a person other than the city so long as it meets those requirements. *Id.* § 322.012(c).

Q. What should city officials consider when deciding whether or not to use an electronic signature?

A. City officials should decide whether to use an electronic signature and the type of electronic signature based on: (1) the risk of the transaction; (2) the effectiveness of the electronic

signature method to be used; and (3) the cost of available alternatives like a user ID and password versus a biometric or encryption-based signature method. When analyzing the risk of the transaction, cities should evaluate the need for information at a later point, the value of the transaction, the relationship between the parties, and the risk of intrusion.

Additionally, cities should maintain documents with electronic signatures in a secure manner that protects the documents from destruction or unauthorized alteration. A digital signature can only be used in a written electronic communication sent to a city if the digital signature complies with the city's adopted rules governing digital signatures. The city should look to the Department of Information Resources' rules governing the state's use of digital signatures for guidance in adopting its own rules. Gov. Code § 2054.060(b). Along those lines, cities should adopt a written policy for the creation, use, management, and preservation of records that contain electronic signatures. City staff should be trained in the implementation of the written policy.

Q. Should a city adopt an ordinance or policy to use electronic signatures?

A. While it is not legally required to have a policy in place for a mayor to sign ordinances, it is a good idea. A city will want to consider which city officials are authorized to use electronic signatures, the means for electronically signing documents, and the types of documents on which a city can use electronic signatures.

In order to authenticate a written electronic communication with an electronic signature transmitted to or from a city, a city must adopt rules. Tex. Gov't Code § 2054.060(b). In adopting those rules, the council should consider the Department of Information Resources' rules and shall make the city's rules consistent with DIR's rules. *Id.* DIR's rules are in [Title 1, Chapter 213 of the Texas Administrative Code](#).

City officials should consult with their city attorney in drafting any ordinance or policy regarding electronic signatures.

Q. Can a city use a contract that is an electronic record or has an electronic signature as evidence in court?

A. Probably yes. Evidence of a record or signature may not be excluded in a legal proceeding solely because it is in electronic form. *Id.* § 43.013. A court could use other considerations to exclude an electronic record or document with an electronic signature. Cities should consult their local legal counsel for advice on whether signed electronic records are useable or trustworthy for a particular legal purpose or in a legal proceeding.

Q. Does sending an email become an electronic signature for the purposes of the UETA?

A. Maybe. When the parties have agreed to conduct some business electronically, courts have varied on whether sending an email creates an agreement with an electronic signature. For example, the Fort Worth appellate court has declined to find that a signature in an email was an electronic signature. *Cunningham v. Zurich Am. Ins. Co.*, 352 S.W.3d 519, 529–30 (Tex. App.—Fort Worth 2011, pet. denied). In contrast, the First Court of Appeals found that the name in the

“from” field of an e-mail was an electronic signature. *Khoury v. Tomlinson*, 518 S.W.3d 568, 579 (Tex. App.—Houston [1st Dist.] 2017, no pet.). City officials should consult with their local legal counsel on the best practices for negotiating the terms of a contract or lease that will be signed with an electronic signature or will be an electronic record.

Q. Can a city use an electronic signature for a document that needs to be notarized?

A. Yes, but the notary must be an “Online Notary Public.” 1 Tex. Admin. Code § 87.4. The notary public must attach or include all the other information required to be included in a way that is logically associated with the signature. Bus. & Com. Code § 322.011.

The online notary public must comply with the procedures in 1 Tex. Admin. Code § 87.41. “[F]or an online notarization, the principal for whom the notarization is being performed appears by an interactive two-way audio and video communication that meets the online notarization requirements as provided by Subchapter C, Chapter 406 of the Government Code” and the administrative code. 1 Tex. Admin. Code § 87.41.

Specifically, Government Code § 406.108 provides that the Online Notary Public must maintain a record that includes detailed information about the transaction. Additionally, the online notary public should maintain a backup record of the electronic record and take steps to ensure its integrity. *Id.* § 406.108(b)(1)-(3).

Q. Can a city use an electronic signature for the mayor to sign or the city secretary to attest an ordinance?

A. Yes. Business and Commerce Code § 322.007(d) provides, “If a law requires a signature, an electronic signature satisfies the law.”

Texas law requires the mayor to sign ordinances he or she approves. Tex. Loc. Gov’t Code § 52.003(a). Texas law also requires the city secretary to attest ordinances in the code of ordinances. *Id.* § 52.006. Because Texas law requires it, a mayor or city secretary may use an electronic signature on ordinances.

Q. What types of programs work for electronic signatures?

A. Several different technologies, such as Personal Identification Number (PIN), digital signatures, smart cards, and biometrics can be used as electronic signatures. The Department of Information Resources keeps a list of Digital Signatures and Public Key Infrastructure (PKI) Approved Service Providers for use by state agencies. The list can be accessed online at <http://bit.ly/2KTFHnF>.

Adobe Acrobat allows for the creation of a signature in the program and for an individual to electronically sign documents. Examples of electronic signature platforms that are password protected are DocuSign, SignRequest, PandaDoc, and SignNow. Platforms for biometric identifiers include Veridium and Cursor Insight. The amount of security needed for the particular document is a consideration for which platform to use.