

Don't drone on me: Texas Privacy Act and drone-use regulations

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Texans have grown accustomed to the buzz of unmanned, remote controlled drones in recent years, but many are unaware that the use of flying drones¹ to conduct surveillance could result in thousands of dollars of fines and even criminal charges.

Texas passed the Texas Privacy Act to regulate drone use and protect privacy.

U.S. Supreme Court Justice Louis Brandeis first conceptualized privacy law over 120 years ago.² But privacy laws often struggle to keep pace with the blistering pace of technological advances, including the ubiquitous presence of cameras and a surge in personal drone use.

Understanding the Act may be particularly useful for Texas attorneys representing clients in property disputes, as parties may be tempted to use drones to surveil tangible or real property.

Not so in Texas, where lawmakers enacted a statute in 2013, dubbed the Texas Privacy Act (the "Act"),³ targeting the use of drones to intentionally conduct surveillance over certain airspaces, including over private property. The Act strictly regulates the use of drones in Texas and imposes hefty penalties for violations, including statutory damages of \$10,000 per violation, mandatory attorneys' fees, injunctive relief, and even criminal penalties.

Understanding the Act may be particularly useful for Texas attorneys representing clients in property disputes, as parties may be tempted to use drones to surveil tangible or real property.

The Act has teeth, including serious civil and criminal penalties for capturing or using drone images, but the Act is balanced by broad exemptions.

The Act's chief legislative sponsor stated the statute's intent was to "address concerns that ordinary Texans could use drones to spy on private property [and] that animal rights groups or

environmentalists could keep tabs on livestock ranches or oil pipelines."⁴

To address these concerns, the Act prohibits a person from using "an unmanned aircraft to capture an image of an individual or privately owned real property in [Texas] with the intent to conduct surveillance on the individual or property captured in the image."⁵

The Act does not define the meaning of the phrase "to conduct surveillance." As such, Texas courts are left to apply ordinary canons of construction to interpret the plain text of the phrase when interpreting and applying this statute.⁶

Importantly, the Act applies regardless of the UAV's launch and landing location: a drone operator can violate the Act even if they launch and land a drone from their own private property.

The Act imposes potent civil and criminal penalties for violations.

Notably, the statute imposes potent civil and criminal penalties for certain violations.⁷ First, the Act provides a civil enforcement mechanism that empowers an "owner or tenant of privately owned real property" to sue violators. Under the Act, Texas landowners can sue for:

- an injunction to stop the violations;
- recovery of a \$5,000 "civil penalty" for drone images captured "in a single episode";
- recovery of a civil penalty of "\$10,000 for the disclosure, display, distribution, or other use of any images captured "in a single episode" — notably, "each image ... in violation of this [sub]section **is a separate offense**";
- recovery of "actual damages if an individual disclosed, displayed, or distributed an image with malice"; and
- recovery of mandatory attorneys' fees to the prevailing party.⁸

Further, the Act contains criminal penalties for certain violations. Specifically, each image captured in violation of the Act is a Class C misdemeanor.⁹ In addition, the "disclosure, display, distribution, or other use of [such] image" is a Class B misdemeanor.¹⁰ These civil and criminal penalties create a robust regulatory framework to protect against the impermissible use of drones that could otherwise invade Texans' privacy.

The Act carves out broad categories of drone use exemptions.

The Texas Privacy Act balances its powerful prohibitions by exempting twenty-one different uses of drones to capture images. These exemptions include, among others:

- research at an institute of higher learning;
- certain electric or natural gas utility purposes;
- specified law enforcement purposes;
- use by a Texas licensed real estate broker in connection with selling property; and
- use by a registered professional land surveyor or professional engineer.¹¹

Nevertheless, these exemptions may give those using drones little comfort.

While the statute has some carveouts for commercial uses — such as certain activities by electric or natural gas utilities, telecommunications providers, or insurance underwriters — to the extent other businesses need to capture images with drones, they run the risk of falling within the statute’s purview.

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For example, surveyors or professional engineers may use drones for large construction projects only so long as no individuals are identifiable in the drone image.¹²

Significantly, the statute contains no exemptions for the press. Critics of the statute assert that its vague description of prohibited conduct negatively impacts “free speech, free press, law enforcement, prosecutors, and many legitimate businesses,” as UAV technology has allowed for safer and more affordable newsgathering, commercial filmmaking, and law enforcement activities.¹³

Despite these issues, the U.S. Court of Appeals for the Fifth Circuit in early 2024 declined to strike down the statute as unconstitutional, holding that the plaintiffs lacked standing to bring a challenge under the Due Process Clause and that the statute was not facially unconstitutional under the First Amendment.¹⁴

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The Texas Privacy Act carries important implications for attorneys and their clients. For instance, attorneys can obtain significant relief for landowners who are being harassed by drones flying over their land by filing lawsuits through the Act’s private cause of action.

Further, if a party to ongoing litigation violates the Act, the aggrieved party can bring counterclaims that may dramatically impact the strategic landscape in the lawsuit.

For instance, if an opposing party uses drones to conduct surveillance to obtain evidence, a lawyer could file a counterclaim to obtain injunctive relief to stop the drones from flying. And, when such images are distributed, disclosed, or otherwise used — which could include images in emails, texts, social media posts, court filings, etc. — the attorney can obtain damages of \$10,000 for each such image.

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Statutory damages can quickly balloon, and the Act’s powerful enforcement tools provide a path to potent relief. Imagine the implications if an opposing party discloses 50 unlawfully captured drone images, and suddenly you have a counterclaim for half a million dollars, injunctive relief, mandatory attorneys’ fees, and the option to ask prosecutors to bring criminal charges.

The Act may also make otherwise privileged communications and materials discoverable.

Based on the statute’s language, individuals may violate the Act by simply sending drone-captured images or video to their attorney. Depending on the circumstances, a court could find that such a client “possesses, discloses, displays, distributes, or otherwise use[s] images” captured in violation of the Act.¹⁵

And because the statute carries criminal penalties, the crime-fraud exception to attorney-client privilege may make those communications discoverable. As a result, an attorney could compel production of otherwise privileged communications between a client and attorney involving the use of drones in a way criminalized by the Act.¹⁶

A court could also sanction an attorney for participating in a client’s violation. Attorneys should therefore ensure that their clients do not use drones to take videos or photographs of another person’s property during litigation.

The long-term implications of the Texas Privacy Act remain unclear.

The long-term impact of this 2013 statute will remain unclear until Texas courts hear and decide more disputes interpreting the Act’s provisions. No court has yet interpreted the Act’s language, but a lawsuit challenging the constitutionality of the Act is ongoing, with a petition for a writ of certiorari pending before the United States Supreme Court.¹⁷

Barring a decision overturning this statute, attorneys and their clients should be aware of its strong privacy protections and the robust penalties imposed for violations. In the interim, Texas has a clear message for those who would use this new UAV technology to surveil Texas citizens: don't drone on me.

Notes:

¹ Drones are commonly referred to as "unmanned aerial systems," "unmanned aerial vehicles," or "UAVs" for short. *See, e.g.*, 14 C.F.R. § 107.3.

² Louis Brandeis & Samuel D. Warren II, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

³ Tex. Gov't Code §§ 423.001-423.009.

⁴ Tiffany Dowell, *Drones & Privacy (Part II): Texas Use of Unmanned Aircraft Statute*, Texas A&M AgriLife Extension Service, Jan. 25, 2016.

⁵ Tex. Gov't Code § 423.003 (emphasis added); Tex. Gov't Code § 423.001 ("[I]magine' means any capturing of sound waves, thermal, infrared, ultraviolet, visible light, or other electromagnetic waves, odor, or other conditions existing on or about real property in this state or an individual located on that property.').

⁶ *See, e.g., Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999) ("[I]t is cardinal law in Texas that a court construes a statute, first, by looking to the plain and common meaning of the statute's words. If the meaning of the statutory language is unambiguous, we adopt, with few exceptions, the interpretation

supported by the plain meaning of the provision's words and terms.") (citation and quotation omitted).

⁷ The Act also includes specific sections that regulate the use of drones near critical infrastructure (Tex. Gov't Code § 423.0045) and sports venues (Tex. Gov't Code § 423.0046) that are beyond the scope of this article.

⁸ *Id.* §§ 423.004(c), 423.006.

⁹ *Id.*

¹⁰ *Id.* § 423.004.

¹¹ *Id.* § 423.002.

¹² Tex. Gov't Code §§ 423.002 (a)(19)-(20).

¹³ Tex. H. Rsch. Org., 83d Legis. Sess., Bill Analysis of HB 912 (2013), <https://bit.ly/3YycCBM>.

¹⁴ *Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 782 (5th Cir. 2024).

¹⁵ Tex. Gov't Code § 423.004.

¹⁶ The Act specifically states that violating images may be "used as evidence to prove a violation of this chapter and is subject to discovery, subpoena, or other means of legal compulsion for that purpose." Tex. Gov't Code § 423.005.

¹⁷ Petition for Writ of Certiorari, *Nat'l Press Photographers Ass'n v. McCraw* (No. 23-1105).

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