5 Big Updates To Texas Government Transparency Laws

By **Wesley Lewis and Laura Prather** (June 6, 2019)

Wesley Lewis

The 86th session of the Texas Legislature certainly was a productive one for government transparency advocates across the state. While the Legislature's marquee property tax and education reform measures occupied much of the media spotlight this session, the Legislature also passed several significant pieces of legislation intended to improve government transparency and accountability.

These bills will provide Texans with greater access to information regarding the functioning of their government, including increased transparency regarding how the state spends taxpayer money, and they will result in stronger, more robust open government laws in Texas.

Laura Prather

S.B. 943: Contracting Transparency

Sen. Kirk Watson, D-Austin, and Rep. Giovanni Capriglione, R-Southlake, worked with stakeholder groups across the political spectrum to pass legislation aimed at improving transparency regarding government contracting. S.B. 943 principally addressed issues created by the 2015 Texas Supreme Court case, Boeing Co. v. Paxton,[1] which significantly limited public access to information about government contracting under the Texas Public Information Act. S.B. 943 addressed the decision by ensuring greater access to information regarding how government entities spend taxpayer money, while acknowledging private entities' legitimate needs to protect their trade secrets and proprietary information.

The Texas Supreme Court's decision in Boeing greatly expanded a previously minor exception to the TPIA that prevented the release of commercially sensitive information regarding private companies' business dealings with government entities. First, it held that private, third-party entities — not just the government entity receiving a request — may claim this "competitive bidding" exception, overturning decades of well-settled attorney general precedent.

Second, the Supreme Court concluded in Boeing that this exception can foreclose public access to contracting information upon a showing that the release of requested information would result in a competitive disadvantage to the company asserting the exception — even in cases where a governmental body has completed a competitive bidding process and awarded a final contract. As a result, the Boeing decision dramatically reduced citizens' access to important information regarding how taxpayer money is spent.

Since it was handed down in 2015, this decision had been cited more than 2,700 times in attorney general opinions foreclosing access to information under the TPIA. Many of those instances involved TPIA requests for information regarding final contracts, effectively foreclosing access to even the most basic information about government contracting and expenditures.

Senate Bill 943 reverses some of the harmful impacts that the Boeing decision had on the public's right to access contracting information, and it ensures that government entities are

obligated to reveal the core elements of their contracts with private companies — including the final dollar amount of the contract, key contract provisions, and line-item pricing. A similar bill, H.B. 81 by Rep. Terry Canales, D-Edinburg, also passed this session, ensures that taxpayer money spent on parades, concerts, and other entertainment can be publicly accessible. Canales brought this bill after the city of McAllen, relying on the Boeing decision, withheld the final payment amount that the city paid for a concert event featuring the recording artist Enrique Iglesias.

S.B. 943 seeks to balance private companies' interests in protecting proprietary information with the public's right to know how the government is spending taxpayer money.

It was sent to Texas Gov. Greg Abbott on May 25.

S.B. 944: Closing the "Custodian Loophole"

In 2013, the Legislature passed S.B. 1368 in response to several incidents in which government officials sought to circumvent public information laws by conducting official business through private emails. That law codified decades of AG opinions establishing that the content of a particular communication governed whether it was subject to public information requests, regardless of the device or server on which the communication was made.

However, in the years since that law was passed, some government agencies have been unable to comply with TPIA requests in situations where government officials conducted government business on private devices or through personal email addresses not owned by the government. Because the agency did not maintain custody and control over the information and had no means of obtaining it, it could not compel its production pursuant to a TPIA request.

The 2014 Third Court of Appeals' opinion, City of El Paso v. Abbott, highlighted this deficiency in the law:

> Our review of the PIA reveals no methods by which the City could compel the disclosure of public-information emails located on private email accounts, other than what the City did here—i.e., request the documents from the targeted individuals and change the City's policy regarding public business on private emails. In fact, other than requiring that the governmental body 'promptly' produce public information for inspection, duplication, or both … the PIA provides no guidance regarding the efforts a governmental body must take to locate, secure, or make available the public information requested.[2]

An omnibus TPIA reform bill, S.B. 944 by Watson and Capriglione, closes this loophole by making clear that officers or employees of governmental bodies do not have personal property or privacy rights to public information created or received as part of their performance of official duties.[3] Further, it requires that such employees and officers surrender privately held public information, and it gives a governmental body the ability and the responsibility to compel the surrender of any such information pursuant to a TPIA request.

This bill closes the long-running custodian loophole by giving government bodies the ability to obtain public information that had once been shielded from disclosure because it was stored on a private device.

It was sent to the governor on May 28.

S.B. 1640: "Walking Quorums" Under the Texas Open Meetings Act

On Feb. 27, 2019, the Court of Criminal Appeals issued an opinion partially striking down the portion of the Texas Open Meetings Act that prohibited "walking quorums."[4] A walking quorum refers to a particular practice by which government officials attempt to circumvent TOMA's open-meeting requirements.

TOMA requires that when a quorum of a government body is present to discuss official business, that government body must adhere to TOMA's open-meeting requirements, such as providing adequate public notice in advance of the meeting. In order to circumvent these requirements, some public officials have engaged in "walking quorums," conducting business by meeting in a series of successive meetings in which a quorum is never achieved, thereby avoiding triggering TOMA notice requirements.

TOMA contained a provision banning these walking quorums, but the Supreme Court ultimately held in Doyal that the provision did not pass constitutional muster. The Court of Criminal Appeals decision specifically concluded that the criminal penalties associated with violating TOMA's walking quorum provision was "hopelessly indeterminate by being too abstract" and struck down that portion of the statute.

Regardless of the constitutional infirmities, the legislative intent animating the now-unconstitutional provision was clear: to prevent circumvention of open-meeting requirements by meeting in a series of smaller, non-public gatherings to discuss public business. Acting swiftly to resuscitate this provision, Watson and Rep. Dade Phelan, R–Beaumont, successfully obtained passage of S.B. 1640, which provides more detailed language on TOMA's walking quorum ban. The intent of the bill is to remedy the constitutional concerns while providing government officials with additional clarity regarding the limits of the law regarding the prohibition on walking quorums.

It was sent to the governor on May 25.

H.B. 2840: Clarifying Open Meetings Laws

Many government entities have been the subject of criticism for the lack of meaningful opportunities for public input and comment during official government business. H.B. 2840 (by Canales) seeks to address this issue by amending current law to establish greater rights for members of the public to address a governing body of a political subdivision during open meetings.

The bill aims to provide a greater opportunity for members of the public to weigh in on decisions being made in several ways. First, it ensures that governmental bodies adopt reasonable rules governing public input at meetings. Second, it requires that governmental bodies allow each member of the public who desires to provide testimony regarding an item on an agenda for an open meeting of the body before or during the body's consideration of that item. Finally, the bill prohibits a governmental body from prohibiting public criticism of the governmental body, unless otherwise prohibited by law.

Ultimately, this bill will improve public participation in open meetings by facilitating and promoting public input on government decision-making.

It was sent to the governor on May 26.

S.B. 494: Open Meetings During a Disaster

Two Houston lawmakers, Sen. Joan Huffman and Rep. Armando Walle introduced S.B. 494 to address how the Texas Open Meetings Act would function in situations of natural or man-made disasters, or in the event of a terrorist attack.

The bill was brought in response to government entities' inability to fully comply with TOMA and the TPIA during the exigent circumstances of Hurricane Harvey. Specifically, S.B. 494 provides for the temporary suspension of several open-meeting requirements in the wake of an emergency situation or "imminent threat" of such a situation, such as the advance-notice requirement for open meetings.

Furthermore, the bill provides for a temporary suspension of TPIA obligations during a catastrophe if the government body involved passes a resolution establishing a temporary suspension and serves notice of a temporary suspension on the Office of the Attorney General.

It was signed by the governor on June 5 and takes effect on Sept. 1, 2019.

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Disclosure: The authors of this piece are members of the Texas Sunshine Coalition, a nonpartisan, grassroots organization dedicated to protecting Texas taxpayers by promoting greater access to public information and increasing government accountability and transparency at all levels of Texas government.

[1] Boeing Co. v. Paxton, 466 S.W.3d 831 (Tex. 2015).

[2] City of El Paso v. Abbott, 444 S.W.3d 315, 324-325 (Tex. App. – Austin 2014, pet. denied).

[3] This bill was also introduced by Representative Todd Hunter (R-Corpus Christi) as a standalone measure in H.B. 1700.

[4] State of Texas v. Doyal, __ S.W.3d ___, 2019 WL 944022, No. PD-0254-18 (Tex. Ct. Crim. App. Feb. 27, 2019).