



# Texas Transportation Legislation Overview of the 86th Regular Legislative Session

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The 86<sup>th</sup> Texas Legislative Session was relatively uneventful with respect to transportation-related initiatives. The Session was dominated primarily by school finance reform and limitations on the ability of local governments to increase property taxes. A few social issues received attention, such as religious freedom and abortion-related issues, but otherwise the Session was generally free of the major polarizing issues of previous sessions.

For transportation advocates in general, there was good news in the form of a 10-year extension of the expiration date on the dedicated transportation funding provided under Proposition 1 from December 31, 2024, to December 31, 2034, as well as a simplification of the process for determining the “sufficient balance” required to be maintained in the “economic stabilization fund” to allow for the continued deposits of Proposition 1 proceeds into the state highway fund. For advocates of tolling and additional means for funding transportation infrastructure, it was a mix of small gains, damage averted, and missed opportunities:

Gains: In addition to the Proposition 1 extension referenced above, legislation passed which will clarify the obligations of toll authorities related to malfunctioning transponders and which will facilitate better information sharing among toll entities. Legislation was also passed to address abuses in the veteran’s toll discount programs implemented by some toll authorities.

Damage Averted: Several bills were filed which would have adversely affected tolling, including bills that would have precluded the use of system financing (an essential tool for development of regional infrastructure systems), imposed crippling fee limitations on local toll authorities dealing with toll violators, required the removal of tolls when project-related bonds were paid, and eliminated regional mobility authorities. None of these initiatives advanced significantly in the legislative process.

Missed Opportunities: Despite facing enormous funding shortfalls for major projects in urban areas, the Legislature again failed to reauthorize comprehensive development agreements (“CDAs”), which are the form of public-private partnerships (“P3s”) previously used for transportation projects in Texas. Also missed was an opportunity to expand the use of optional vehicle registration fees beyond the five counties currently authorized to implement these fees. Bills on both subjects advanced to varying degrees in the House of Representatives, but none even received a hearing in the Senate.

The failure (again) to re-authorize CDAs was particularly disappointing, given the acute need for funding to improve major corridors in the State. While states like Virginia, Florida, and Maryland have strategically used P3s to deliver major enhancements to their transportation systems, Texas is falling further behind in the quality of its infrastructure and the ability to keep up with the demands of a growing economy. Major corridors in Austin, Dallas-Fort Worth, and Houston need multi-billion dollar improvements and expansions. Yet, TxDOT can, at best, only fund piecemeal improvements that fall far short of meeting the overall need. Absent the ability to use P3s, the Texas Transportation Commission is left to balance the needs for major projects in urban areas against the needs of less populated areas of the State. There is simply not enough money to go around. This is likely to intensify debates between rural and urban areas, and those debates will not likely subside unless the State significantly increases funding or allows for more private sector investment, as Texas once did and other states are successfully doing.

TxDOT's budget for the next biennium increased by approximately \$5 billion, primarily due to increases in Propositions 1 and 7 funding. However, it is noteworthy that \$250 million was specifically directed to the Transportation Infrastructure Fund to be spent on energy-sector roads. Of the \$250 million, one-half is earmarked to come from the Economic Stabilization Fund, and the other one-half from TxDOT's budget. Some see the latter allocation as a diversion of state highway fund money and a return to a practice that many thought had ended in 2013 (when the diversion of funds to the Department of Public Safety from TxDOT's budget ceased).

One other unique aspect of the 86<sup>th</sup> Session was the almost complete turnover of the composition of the House Transportation Committee. Nine of the thirteen members had not previously served on the committee, including Chairman Terry Canales. Gone were some of the venerable and vocal members of past committees, including Rep. Joe Pickett, Rep. Larry Phillips, Rep. Ron Simmons, and Rep. Cindy Burkett. Notwithstanding the relatively new composition, the Committee did an admirable job of quickly learning key policy issues, advancing legislation, and proceeding in an efficient manner. Much credit goes to Chairman Canales and his staff for quickly organizing and getting off to an impressive start. The Senate Transportation Committee saw far less turnover, although Sen. Bob Hall, no fan of tolling or toll entities, was not on the committee for the 86th Session. As noted at the outset, this was not a session of big initiatives related to transportation policy, although Chairman Robert Nichols did shepherd through the important extension of the Proposition 1 authorization.

## Appendices

- Appendix "A" Toll Operations Legislation
- Appendix "B" Transportation Funding Legislation
- Appendix "C" Contracting and Procurement Legislation
- Appendix "D" Open Government Legislation
- Appendix "E" Other Legislation of Interest

The foregoing and the attached appendices are intended only to be a summary of the results of the 86th Regular Legislative Session. Interested parties should consult the text of specific legislation concerning the scope and application of new laws, changes to laws, and provisions of previously enacted laws. Questions may be directed to:

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## Appendix “A”

### Toll Operations Legislation

- **HB 803 (Patterson/Paxton)** (*Effective date: September 1, 2019*) – HB 803 requires a toll project entity to publish on its website a **report on its annual financial data**.
  - The report must be published not later than the 180th day after the last day of the entity’s fiscal year.
  - The report must include:
    - the **final maturity of all bonds** issued by the entity for a toll project or system;
    - **toll revenue for each toll project** for the previous fiscal year;
    - an **accounting of total revenue collected and expenses incurred** by the entity for the previous fiscal year, such as debt service, maintenance and operation costs, any other miscellaneous expenses, and any surplus revenue; and
    - a **capital improvement plan** with proposed or expected capital expenditures over a period determined by the entity.
  - As an **alternative to publishing the report**, a toll project entity **may publish graphs or tables from the entity’s certified audited financial report** or annual continuing disclosure report to comply with the reporting requirements.
  - A link to the report must be prominently displayed on the entity’s website and the report must be posted separately from the entity’s certified audited financial report.
  - For a toll project that is subject to a comprehensive development agreement (“CDA”), the toll project entity is only required to publish the name and cost of the toll project and the termination date of the CDA.
  - **Note:** Any toll project entity with a fiscal year end date on or after March 5, 2019 (180 days before the effective date of HB 803), should note the time period in which they must comply with the bill as their obligations will be triggered sooner than an entity with a fiscal year end date closer to the effective date. Additionally, the scope of the report is only required to be on a system basis, not by individual projects, unless a particular project has not been designated as part of an entity’s system.
- **SB 198 (Schwertner/Canales)** (*Effective date: September 1, 2020*) – SB 198 codifies various operational practices related to electronic toll collection (“ETC”).
  - Since the 85th Legislative Session, Sen. Schwertner has expressed concerns with situations in which an individual has a funded ETC customer account but his or her transponder is not read when traveling through a toll gantry, resulting in an invoice being sent to the address registered with his or her vehicle.
    - SB 198 addresses this concern by requiring a toll project entity to first determine whether there is an active and sufficiently funded ETC customer account corresponding to a transponder for the vehicle prior to sending notice of unpaid tolls and to satisfy an outstanding toll from the account at the standard rate.
    - However, the toll project entity is not subject to these obligations if:
      - the ETC customer failed to activate and mount the transponder **in accordance with the procedures provided by the toll project entity** and failed to provide **accurate license plate and customer contact information** to the toll project entity, including updating that information as necessary; or
      - the ETC customer account is insufficiently funded.
    - If the entity determines that a transponder issued to an ETC customer did not work correctly more than 10 times in a 30-day period and that it must be replaced, the entity must send a notice informing the customer that his or her transponder is not working and must be replaced. The entity is not required to send further notices if the customer fails to replace the transponder after the entity sends the notice.

- The bill permits a toll project entity to provide an invoice or notice to a person by first class mail **or email** (if the person has provided an e-mail address to the entity and has elected to receive notice electronically).
  - A notice or an invoice of unpaid tolls must clearly state that the document is a bill and the recipient is expected to pay the amount indicated.
  - TxDOT is required to provide ETC customers with the option to authorize automatic payment of tolls through withdrawals from the customer's bank account.
  - **A toll project entity is permitted to share ETC customer account information to another toll project entity** for the purposes of customer service, toll collection, enforcement, or reporting requirements, so long as the confidentiality of the information is ensured.
  - Finally, SB 198 states that a contract between toll project entities for the collection of tolls must specify which entity is responsible for making the determinations, sending notices, and taking of other actions described above, as well as include terms to ensure that customers do not receive invoices from more than one entity for the same transaction.
  - **Note:** The effective date is September 1, 2020, to allow TxDOT and NTTA to complete their current procurements and implementation of their new back office systems, which are part of the ETC process.
- **SB 1311 (Bettencourt/Raney)** (*Effective date: September 1, 2019*) - SB 1311 permits tolling entities to send an invoice or notice by e-mail if the recipient of the information agrees to the transmission of the information as an electronic record and on terms acceptable to the recipient.
  - **SB 1091 (Nichols/Ashby)** (*Effective date: June 14, 2019*) - SB 1091 seeks to limit abuse of veteran toll discount programs by creating an additional option for toll project entities to administer their programs using transponders, while also maintaining the option of operating a license plate-based program.
    - SB 1091 now permits a toll project entity **to limit to no more than two** the number of transponders issued to a participant in the entity's waiver program for which free or discounted use of the entity's toll projects is provided.
    - Any limit related to a participant's transponder must allow a participant to be issued **one extra transponder on a demonstration of hardship** by the participant, as determined by the toll project entity.
    - **Note:** Based on the language of this legislation, this new option is available only to toll project entities **that issue transponders**. An entity that does not issue transponders does not have a mechanism to allow a participant to be issued one extra transponder. However, it appears the intent of the legislation was to allow all toll entities to limit participants in its waiver program to registering no more than two transponders to receive the free or discounted use of the entity's toll projects.
  - **HB 1 (Nelson/Zerwas)** (*Effective date: September 1, 2019*) - Rider 39 in TxDOT's budget states that it is the intent of the Legislature that TxDOT, to the extent permitted by law, consider including in its contracts for processing and billing of toll transactions **provisions to provide incentives to encourage accurate assessing and billing of tolls, which may include compensated tolls per billing error** to each recipient of improperly sent notices or bills.

- **SB 69 (Nelson/Capriglione)** (*Effective date: September 1, 2019*) – In 2013, the Legislature passed SJR 1<sup>1</sup> by Senator Nichols (also known as “Proposition 1” for its designation on the ballot for the November 4, 2014 constitutional amendment election), which directed 50% of oil and gas severance taxes above a 1987 baseline level to the state highway fund (“SHF”), but only after a “sufficient balance” is accrued in the economic stabilization fund (“ESF”). The implementing legislation for SJR 1 created the statutory framework for a select committee of five House and five Senate members to determine the sufficient balance.<sup>2</sup> This statutory framework was set to expire on December 31, 2024.
  - SB 69 repealed the process by which a select committee must determine the sufficient balance. The Comptroller will now determine when the transfer occurs by adopting for the state fiscal biennium an amount equal to 7% of the certified general revenue-related appropriations made for that state fiscal biennium.
  - The bill extends the date on which this Comptroller-determination framework will expire to December 31, 2034.
  - The bill also extends the date on which the transfer of severance tax revenue to the SHF would expire to December 31, 2034.
- **SB 962 (Nichols/Zerwas)** (*Effective date: September 1, 2019*) – SB 962 did not revise the sufficient balance framework as was done in SB 69, but it did provide for the same 10-year extension of the expiration date for the transfer of severance tax revenue to the SHF and the determination of the sufficient balance of the ESF.
- **Transportation Infrastructure Fund Grants**
  - **HB 4280 (Morrison/Flores)** (*Effective date: September 1, 2019*) – In 2013, the 83rd Legislature adopted SB 1747<sup>3</sup>, which created the Transportation Infrastructure Fund (“TIF”), to be administered by TxDOT, for the purpose of assisting counties to fund the repair and maintenance of their roads damaged by energy-related activity. Based on various criteria in the legislation, 191 counties were deemed eligible to receive grants from the TIF, a much broader number than was intended by the Legislature.<sup>4</sup>
    - HB 4280 ***narrows the criteria for counties to be eligible to receive grant funds from the TIF*** so that the funding is only for transportation infrastructure projects located in areas of the state affected by increased oil and gas production.
    - The bill requires a county to spend a TIF grant not later than the fifth anniversary of the date of the award of the grant.
    - Certain obligations are imposed on counties regarding ***competitive bidding of projects funded with a TIF grant***, including requirements to:
      - prepare a request for competitive bids that includes construction documents, estimated budget, project scope, estimated project completion date, and other information that a bidder may require to submit a bid;
      - advertise for bids for the contract in a manner prescribed by law;
      - receive competitive bids for the contract, publicly open the bids, and read aloud the names of the bidders and their bids;

<sup>1</sup> See Tex. SJR 1, 83rd Leg., 3rd C.S. (2013).

<sup>2</sup> See Tex. HB 1, 83rd Leg., 3rd C.S. (2013).

<sup>3</sup> See Tex. SB 1747, 83rd Leg., R.S. (2013).

<sup>4</sup> See Aman Batheja, *Road Funding Allocations Surprise Some Counties, for Better or Worse*, Tex. Tribune, Dec. 12, 2013, available at <https://www.texastribune.org/2013/12/12/road-funding-surprises-some-better-or-worse/>.

- award the contract to the lowest responsible bidder; and
  - document the basis of its selection and make the evaluations public not later than the seventh day after the date a contract is awarded.
- **SB 500 (Nelson/Zerwas)** (*Effective date: June 6, 2019*) – SB 500, the supplemental appropriations bill, appropriates **\$125 million from the ESF** to TxDOT to provide TIF grants.
- **HB 1** (*Effective date: September 1, 2019*) - Rider 47 in TxDOT's budget directs that **\$125 million from any available sources** of revenue be allocated to provide TIF grants. The rider explicitly states that the allocation of funds is a one-time allocation for the fiscal biennium ending August 31, 2021.



## Appendix “C” Contracting and Procurement

- **HB 1542 (Martinez/Hinojosa)** (*Effective date: September 1, 2019*) – HB 1542 prohibits a contractor selected for a TxDOT or RMA design-build contract from making changes to companies identified as part of the design-build team in a response to a request for proposals (“RFP”).
  - This **prohibition would not apply** if the identified company:
    - is no longer in business, is unable to fulfill its legal, financial, or business obligations, or can no longer meet the terms of the teaming agreement proposed for the project with the design-build contractor;
    - voluntarily removes itself from the team;
    - fails to provide a sufficient number of qualified personnel; or
    - fails to negotiate in good faith in a timely manner in accordance with provisions established in the teaming agreement proposed for the project.
  - Any **cost savings resulting from the changes in violation of this prohibition accrue to TxDOT or the RMA** and not to the design-build contractor.
  - **Note:** Current law allows TxDOT and RMAs to reject as nonresponsive any proposer that makes a significant change to the composition of its design-build team as initially submitted during the procurement process that was not approved by TxDOT or the RMA as provided in the RFP.<sup>5</sup>
- **HB 2830 (Canales/Hancock)** (*Effective date: September 1, 2019*) – HB 2830 revises the restriction on the number of design-build contracts TxDOT is permitted to enter into from three per year to six per biennium. The change is intended to provide more flexibility for TxDOT in scheduling design-build procurements.
  - The bill also revises the requirement that an RFP for a TxDOT design-build contract include a schematic design approximately 30% complete by deleting the term “schematic” so that now “a design approximately 30% complete” must be included.
  - **Note:** The RMA Act requires RMAs to include “a schematic design approximately 30 percent complete” in its design-build RFPs.<sup>6</sup>
- **HB 2899 (Leach/Hinojosa)** (*Effective date: June 2, 2019*) – HB 2899 creates a significant shift in a contractor’s exposure to liability in certain contracts with a governmental entity.

### Applicability:

- The scope of the bill is **limited to contracts with certain governmental entities, defined to include:**
  - a corporation formed under the Texas Transportation Corporation Act;
  - a regional mobility authority;
  - a regional tollway authority (e.g., NTTA);
  - a county toll road authority (e.g., HCTRA); or
  - TxDOT.

<sup>5</sup> See Tex. Transp. Code §§ 223.246(i), 370.406(h).

<sup>6</sup> See *id.* at § 370.406(a)(5).



- The types of contracts subject to the bill are **contracts for the construction or repair of a road or highway** of any number of lanes, with or without grade separation, owned or operated by a governmental entity and any improvement, extension, or expansion to that road or highway, including:
  - an improvement to relieve traffic congestion and promote safety;
  - a bridge, tunnel, overpass, underpass, interchange, service road ramp, entrance plaza, approach, or tollhouse; and
  - a parking area or structure, rest stop, park, or other improvement or amenity the governmental entity considers necessary, useful, or beneficial for the operation of a road or highway.

Restriction on Contractor Liability:

- HB 2899 provides that a **contractor is not civilly liable or otherwise responsible** for the accuracy, adequacy, sufficiency, suitability, or feasibility of any project specifications (plans, reports, designs, or specifications) which were prepared by a governmental entity or by a third party retained by a governmental entity under a separate contract.
- Additionally, a **contractor is not liable for any damage** to the extent caused by:
  - a defect in those project specifications, or
  - the errors, omissions, or negligent acts of the governmental entity, or of a third party retained by the governmental entity under separate contract, in the rendition or conduct of professional duties arising out of or related to the project specifications.
- **Note:** Affected governmental entities should review the provisions of contracts entered into on or after June 2, 2019, and **revise any covenant or promise that conflicts with this standard of liability, as they are deemed void and unenforceable** under HB 2899.
- HB 2899 also restricts a governmental entity from requiring that engineering or architectural services be performed to a level of professional skill and care beyond the level that would be provided by an ordinarily prudent engineer or architect with the same professional license and under the same or similar circumstances in a contract for engineering or architectural services or contains such services as a component part.
- **Note:** This may also require revisions to existing forms of certain professional services agreements.
- **SB 282 (Buckingham/Buckley)** (*Effective date: September 1, 2019*) – SB 282 requires TxDOT to establish a system to track liquidated damages, including road user costs, retained by TxDOT associated with delayed transportation project contracts.
  - The system must allow TxDOT to correlate the liquidated damages with the project that was the subject of the damages and each TxDOT district in which the project that was the subject of the damages is located.
  - On an annual basis, TxDOT is required to allocate the amount of money associated with the liquidated damages that was retained in the previous year that is attributable to projects located in the applicable TxDOT district to be used for transportation projects in that district.
- **SB 65 (Nelson/Geren)** (*Effective date: September 1, 2019*) – SB 65 primarily addresses issues related to state contracting and procurement, which are not within the scope of this legislative overview. An overriding theme during the 86th Session was the use of paid lobbyists by local governmental entities to advocate on their behalf at the Capitol. In an effort to address these concerns, the House adopted a floor amendment on May 22<sup>nd</sup> that mandated disclosure of certain contract information.
  - The amendment applies to a **political subdivision that enters or has ever entered into a contract for consulting services with a state agency**. It is unclear what contracts this is intended to apply to as political subdivisions do not typically enter into consulting agreements with state agencies.
  - For **contracts for services that would require a person to register as a lobbyist, a political subdivision is required to prominently display the following on its website:**
    - the execution dates;
    - the contract duration terms, including any extension options;
    - the effective dates;
    - the final amount of money the political subdivision paid in the previous fiscal year; and



- a list of all legislation advocated for, on, or against by all parties and subcontractors to the contract, including the position taken on each piece of legislation in the prior fiscal year.
- The political subdivision must also include a line item in its budget indicating expenditures for directly or indirectly influencing or attempting to influence the outcome of legislation or administrative action.
- While arguably already required by law, the amendment also states that a Form 1295 must be submitted to the Texas Ethics Commission for a contract for lobby services.
- **HB 1495 (Toth/Creighton)** (*Effective date: June 14, 2019*) – HB 1495 requires political subdivisions to include a **line item in its proposed budget indicating expenditures for directly or indirectly influencing or attempting to influence the outcome of legislation or administrative action.**
  - The bill also directs the form of the line item, stating that it must be provided in a manner allowing for **as clear a comparison as practicable** between those expenditures in the proposed budget and actual expenditures for the same purpose in the preceding year.
    - The section of code amended by HB 1495 requiring budget line items also required an itemization of expenditures for notices required by law to be published in a newspaper by the political subdivision. This line item is also subject to the clear comparison posting standard created by HB 1495.
  - As noted above in SB 65, HB 1495 clarifies that a Form 1295 must be submitted to the Texas Ethics Commission for a contract for lobby services.
  - **Note:** While it is likely that a contract with a person required to register as a lobbyist would be subject to this line item posting requirement, it is not as clear how to account for other expenditures related to influencing the outcome of legislation or administrative action, such as staff time spent on such efforts.
- **HB 793 (P. King/Creighton)** (*Effective date: May 7, 2019*) – HB 793 narrows the applicability of the **prohibition against contracts with companies that boycott Israel** so that it **only applies to a contract that is between a governmental entity and a company with ten or more full-time employees and has a value of \$100,000 or more** that is to be paid wholly or partly from public funds of the governmental entity. A **sole proprietorship is excluded** from the types of companies that are subject to the prohibition.
- **HB 2826 (G. Bonnen/Huffman)** (*Effective date: September 1, 2019*) – HB 2826 sets forth various contracting and procurement requirements a political subdivision must follow when selecting an attorney or law firm to enter into a **contingent fee contract for legal services.**
  - HB 2826 prohibits a political subdivision from requiring an attorney or law firm providing legal services under a contingent fee contract to indemnify, hold harmless, or defend the political subdivision for claims or liabilities resulting from negligent acts or omissions of the political subdivision or its employees. The attorney or law firm could defend the political subdivision or its employees in accordance with a separate contract for the defense of negligent acts or omissions of the political subdivision or its employees.
  - The bill requires that before or at the same time as posting the notice of the open meeting at which the political subdivision will consider approval of a contingent fee contract for legal services, **a separate public notice** with certain details related to the reasons for entering into the contract and the qualifications of the selected provider of the services.
  - Additionally, the **governing body of a political subdivision must make certain findings** upon approving a contingent fee contract supporting the decision to enter into a contingent fee contract as opposed to a legal services contract providing for payment of hourly fees.
  - A contingent fee contract for legal services is **not effective and enforceable until the political subdivision receives approval from the Attorney General** (“AG”).
    - The contract is considered approved if by the 90th day after receiving the contract, the AG does not approve the contract or notify the political subdivision that the AG is refusing to approve the contract.
    - The AG **may refuse to approve** the contract because:
      - the requirements set forth in HB 2826 were not fulfilled; or
      - the legal matter that is the subject of the contract presents one or more questions of law or fact that are in common with a matter the state has already addressed or is pursuing and the political subdivision’s pursuit of the matter will not promote the just and efficient resolution of the matter.

- A political subdivision may contest the AG's refusal to approve a contract through a contest case hearing with the State Office of Administrative Hearings.
- Note: Certain provisions of HB 2826 appear to apply to the ***procurement and selection of bond counsel services***. While bond counsel agreements are not generally considered contingent fee services, their structure may subject them to these new requirements.

During the 85<sup>th</sup> Legislative Session, bi-partisan legislation failed to pass that would have addressed concerns of open government advocates stemming from two 2015 Texas Supreme Court decisions: [Boeing Company v. Paxton, 466 S.W.3d 831 \(Tex. 2015\)](#) and [Greater Houston Partnership v. Paxton, 468 S.W.3d 51 \(Tex. 2015\)](#). In *Boeing*, the Court held that a private party may assert the exception under Section 552.104(a) of the Public Information Act (“PIA”) to protect its competitively sensitive information, which enabled third parties to protect from disclosure information that would, in most instances, have been made public prior to *Boeing*. In *Greater Houston Partnership*, the Court held that to be a “governmental body” under the PIA, an entity must be “sustained” by public funds, rather than “supported in all or in part”, which resulted in a narrower scope of entities being subject to the PIA and its disclosure requirements.

The bi-partisan efforts to amend the PIA law were renewed in the 86<sup>th</sup> Legislative Session, resulting this time with the passage of SB 943 by Senator Kirk Watson and Representative Giovanni Capriglione, which seeks to scale back the impacts of *Boeing* and *Greater Houston Partnership*, as described in further detail below.

- **SB 943 (Watson/Capriglione)** (*Effective date: January 1, 2020*) – SB 943 addresses Boeing by **preventing the use of the exception to disclosure under Section 552.104 by third parties** (i.e., vendors or potential vendors) and by requiring that a *governmental body* demonstrate that the release of information it is seeking to protect from disclosure would harm its interests in a particular ongoing competitive situation or in a particular competitive situation in which *the governmental body* establishes the situation at issue is of a recurring nature. SB 943 therefore essentially codifies the interpretation of Section 552.104 that was used by the Office of the Attorney General prior to *Boeing*.
  - Third parties are not left without any means of protecting their competitive information, as they can still avail themselves of the exceptions under Section 552.110 of the PIA for trade secrets and commercial or financial information, the disclosure of which would cause substantial competitive harm. Additionally, SB 943 creates a **new exception under the PIA for certain information submitted to a governmental body** by a current or potential vendor or contractor. This exception, codified in Section 552.1101 of the PIA, applies to information that:
    - would reveal an individual approach to work, organizational structure, staffing, internal operations, processes, or pricing related information (discounts, methodology, cost data, or other pricing information that will be used in future solicitation or bid documents); and
    - give advantage to a competitor.
  - The new exception in Section 552.1101 does not apply to information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body or communications sent between a governmental body and a vendor or contractor related to the performance of a final contract. Neither Section 552.110 nor the new exception in Section 552.1101 can be asserted for certain contract or offer terms such as:
    - the overall or total price the governmental body will or could potentially pay;
    - delivery or service deadlines;
    - remedies for breach of contract;
    - items or services to be delivered with the total price for each;
    - identities of contracting parties and all subcontractors;
    - execution and effective dates and contract duration; or
    - information indicating whether a vendor or contractor performed its duties under a contract, including information regarding breach of contract, contract variances or exceptions, remedial actions, amendments, liquidated damages, progress reports, and final payment checklists.

➤ **Revised Definition of “Governmental Body”: Greater Houston Partnership**

- SB 943 addresses the *Greater Houston Partnership* decision by specifying that certain types of entities are now considered a “governmental entity” subject to the PIA (for example, certain privately run jail facilities, civil commitment housing facilities, and an entity that manages the daily operations or restoration of the Alamo). Additionally, the bill specifically excludes from the definition of “governmental entity” an economic development entity whose mission or purpose is to develop and promote the economic growth of a state agency or political subdivision with which the entity contracts, but only if the entity does not receive \$1 million or more in public funds from a single state agency or political subdivision in the current or preceding state fiscal year or does not provide particular services set forth in the legislation. The implication is that economic development entities that do not fall within that exclusion are governmental bodies for purposes of the PIA.

➤ **New Defined Terms: “Contracting Information” and “Trade Secret”**

- SB 943 revises the existing exception to the release of a trade secret under Section 552.110(a) of the PIA so that the term “trade secret” is now defined in statute, whereas previously the term was construed based upon the definition of a “trade secret” found in section 757 of the Restatement of Torts and adopted by the Texas Supreme Court in *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). SB 943 defines “trade secret” to mean all forms and types of information, including a list of nearly two dozen specific examples, if (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret and (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information. Additionally, the bill codifies the standard historically followed by the Attorney General’s office that it must be demonstrated, based on specific factual evidence, that the information is a trade secret.
- SB 943 also includes as a new defined term “contracting information,” which is defined to include the following information maintained by a governmental body or sent between a governmental body and a current or potential vendor or contractor:
  - information in a voucher or contract **relating to the receipt or expenditure of public funds** by a governmental body;
  - **solicitation or bid documents** relating to a contract with a governmental body;
  - **communications** sent between a governmental body and a current or potential vendor or contractor during the solicitation, evaluation, or negotiation of a contract;
  - documents, showing the **criteria by which a governmental body evaluates each potential vendor or contractor** responding to a solicitation and, if applicable, an explanation of why the vendor or contractor was selected (notably “bid tabulations” are specifically listed here); and
  - communications and other information sent between a governmental body and a vendor or contractor **related to the performance of a final contract** with the governmental body **or work performed** on behalf of the governmental body.

➤ **New Procedures Regarding Information in the Custody of Contractors**

- Finally, SB 943 includes a new procedure applicable to requests for “contracting information” (as that term is now defined as set forth above) in the custody or possession of a government contractor and not maintained by a governmental entity. The procedure applies if a **contract has a stated expenditure of at least \$1 million or results in the expenditure of at least \$1 million in a fiscal year.**
- A governmental body must **send the PIA request to the contracting entity that maintains the requested information within three business days** of receipt and request that the entity provide the responsive information to the governmental body. The deadlines for seeking a decision from and submitting information to the Attorney General under the PIA are pushed back by three business days to allow time to obtain information from the contractor.
- The bill also provides a grace period if a governmental body is unable to obtain information from a contractor in a timely fashion despite a good faith effort, provided that the governmental body complies with statutory requirements within eight business days of receipt of the information from the contractor.
- A contract to which these new procedures apply must include provisions requiring a contracting entity to preserve contracting information and promptly provide it to the governmental body upon request, and a governmental body is prohibited from contracting with an entity that has knowingly or intentionally failed to comply with these requirements.

- A contract may be terminated for failure to comply with these new requirements following required notice to the contracting entity.
- SB 943 does not take effect until January 1, 2020, and applies only to requests for public information received on or after that date.

### **Other Public Information Act Legislation**

- **SB 944 (Watson/Capriglione)** (*Effective date: September 1, 2019*) - SB 944 includes several amendments related to PIA procedures. First, the bill seeks to ensure that public information maintained by current or former officers and employees on **privately-owned devices** is subject to disclosure under the PIA, by requiring the individual to **forward or transfer** the public information to the governmental body or to **preserve the public information in its original form** in backup or archive on the privately-owned device for the required retention period. An officer for public information is required to make **reasonable efforts to obtain public information** that is subject to a PIA request from an officer or employee who maintains such information on a privately-owned device.
- SB 944 also provides that a current or former **officer or employee of a governmental body does not have a personal or property right to public information** the person created or received while acting in an official capacity and requires surrender or return of such information upon request by the governmental body. An officer or employee must surrender or return the information no later than the tenth day after receiving a request for the information from the officer for public information. Further, the bill provides that a PIA request is considered to have been received on the date that the officer or employee surrenders or returns the information for purposes of calculating deadlines for seeking a decision from and submitting information to the Attorney General under the PIA.
- Additionally, the bill:
  - Creates a new exception to disclosure under the PIA for sensitive healthcare information provided to a governmental body by an out-of-state healthcare provider.
  - Permits a governmental body to **designate one e-mail address and one mailing address for receiving written requests for public information**. If these addresses are posted on the governmental body's website or on the required PIA sign, the governmental body is **not required to respond to a written request for public information that is not received at one of those addresses**, via hand delivery, or by another method approved by the governmental body (which could include fax or website submission).
  - Directs the **Attorney General to create a public information request form** that provides a requestor the option of excluding from a request information that the governmental body determines is 1) confidential or 2) subject to an exception to disclosure that the governmental body would assert if the information were subject to the request. If a governmental body allows requestors to use the request form created by the Attorney General, the governmental body must post the form on its website.
- SB 944 takes effect on September 1, 2019, and does not apply to a request for information that is received prior to that date. The bill requires the Attorney General to create the public information request form no later than October 1, 2019.
- **HB 81 (Canales/Hinojosa)** (*Effective date: May 17, 2019*) – HB 81 provides that certain information relating to the receipt or expenditure of public or other funds by a governmental body for a **parade, concert, or other entertainment event** paid for in whole or part with public funds may not be excepted from disclosure under Section 552.104. The bill specifies that a provision may not be included in a contract for these events that would prohibit or otherwise prevent the disclosure of the information.
- HB 81 has been referred to as “Boeing-light” or “mini-Boeing” given its narrow scope in comparison to SB 943. Note that this legislation was effective immediately upon signature by the Governor, unlike SB 943. As a result, until January 1, 2020, the *Boeing* decision applies to all public information with the exception of information covered by HB 81 (parade, concert, or other entertainment event).
- **SB 988 (Watson/Capriglione)** (*Effective date: September 1, 2019*) – SB 988 prohibits a court from assessing costs of litigation or reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails in an action brought by a governmental entity seeking to withhold information from a requestor under the PIA, unless the court finds the action or the defense of the action was groundless in fact or law.



- [SB 494 \(Huffman/Walle\)](#) (*Effective date: September 1, 2019*) – SB 494 addresses procedures related to both the PIA and the Open Meetings Act (see below) in the event of an emergency, urgent public necessity, or catastrophic event. With respect to the PIA, SB 494 allows for the **temporary suspension of certain PIA requirements during a catastrophe**.
  - A “catastrophe” means a condition or occurrence that interferes with the ability of a governmental body to comply with the requirements of PIA, including:
    - fire, flood, earthquake, hurricane, tornado, or wind, rain, or snow storm;
    - power failure, transportation failure, or interruption of communication facilities;
    - epidemic; or
    - riot, civil disturbance, enemy attack, or other actual or threatened act of lawlessness or violence.
  - To effectuate a suspension of PIA requirements, a governmental body must submit notice to the Attorney General on the prescribed form (which the Attorney General is directed to create as soon as practicable after September 1, 2019) and must provide notice to the public in a readily accessible place and in each location where the governmental body is required to post meeting notices. The Attorney General is required to post the notice on its website for a year.
  - The initial suspension period may not exceed seven consecutive days, but can be extended once for an additional seven-day period.
  - A request for public information received by a governmental body during a suspension period is considered to have been received by the governmental body on the first business day after the date the suspension period ends.
  - PIA requirements related to a request for public information received by a governmental body before the date an initial suspension period begins are tolled until the first business day after the date the suspension period ends.

### **Open Meetings Act (“OMA”) Legislation**

- [SB 1640 \(Watson/Phelan\)](#) (*Effective date: June 10, 2019*) – SB 1640 is intended to address the Texas Court of Criminal Appeals decision in *State v. Doyal*, No. PD-0254-18, 2019 WL 944022 (Tex. Crim. App. Feb. 27, 2019), which struck down the OMA’s prohibition against a “walking quorum” (meeting of less than a quorum to evade the OMA) as unconstitutionally vague.
  - The statutory provision prohibiting a walking quorum was revised so that a member of a governmental body commits an offense if the member:
    - **knowingly** engages in at least one among a series of communications that each occur **outside of an open meeting and concern any public business** of the governmental body where individual communications are among fewer than a quorum of members but the members engaging in **the series of communications constitute a quorum**; and
    - **knew at the time** that the member engaged in the series of communications that the series involved or would involve a quorum and would constitute a deliberation once a quorum of members engaged in the series of communication.
- [HB 2840 \(Canales/Hughes\)](#) (*Effective date: September 1, 2019*) – HB 2840:
  - Requires a governmental body to allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting to address the body regarding the item at the meeting **before or during** the body’s consideration of the item.
  - Permits a governmental body to **adopt reasonable rules** regarding the public’s right to address the body, including time limits.
  - Provides that, unless a governmental body uses simultaneous translation equipment, a person who addresses the body through a translator must be given at least twice as much time to testify as a person who does not use a translator in order to ensure that non-English speakers receive the same opportunity to address the body.
  - States that a governmental body **may not prohibit public criticism** of the governmental body, including criticism of any act, omission, policy, procedure, program, or service.



- **SB 494 (Huffman/Walle)** (*Effective date: September 1, 2019*) – As noted above, SB 494 sets forth procedures related to both the PIA and the OMA in the event of an emergency, urgent public necessity, or catastrophic event. With respect to the OMA, the bill:
  - Broadens the situations in which an emergency or urgent public necessity exists beyond simply when there is an imminent threat to public health and safety or there is a “reasonably unforeseeable situation” to specify that it can include:
    - fire, flood, earthquake, hurricane, tornado, or wind, rain, or snow storm;
    - power failure, transportation failure, or interruption of communication facilities;
    - epidemic; or
    - riot, civil disturbance, enemy attack, or other actual or threatened act of lawlessness or violence.
  - Allows a governmental body to meet to **deliberate or take action on an emergency or urgent public necessity with one hour notice**. A governmental body may not deliberate or take action at a meeting posted in compliance with the emergency meeting requirements except with respect to matters directly related to responding to the emergency or urgent public necessity identified in the notice, and the Attorney General may bring suit to stop, prevent, or reverse a violation of that provision.

*Appendix D was prepared with the assistance of Lori Fixley Winland with Ogletree, Deakins, Nash, Smoak & Stewart, P.C., who can be reached at (405) 546-3759 (lori.winland@ogletree.com).*



## Appendix “E”

### Other Legislation of Interest

#### ➤ Camino Real RMA/ Texas Parks and Wildlife - Wyler Aerial Tramway

- [SB 2248 \(Rodriguez/Ortega\)](#) (*Effective date: June 14, 2019*) – SB 2248 permits a city-created regional mobility authority (“RMA”) to develop an aerial cable car or aerial tramway for the transportation of persons or property, or both. This legislation was intended to allow the Camino Real RMA to work with Texas Parks and Wildlife to rehabilitate the Wyler Aerial Tramway at Franklin Mountains State Park in El Paso. The bill also clarifies that all RMAs are permitted to enter into an agreement with a state agency.
- [SB 500 \(Nelson/Zerwas\)](#) (*Effective date: June 6, 2019*) – SB 500, the supplemental appropriations bill, appropriates **\$5 million from the ESF** to the Texas Parks & Wildlife Department for overhaul and necessary construction related to the Wyler Tramway in El Paso.
- [SB 604 \(Buckingham/Paddie\)](#) (*Effective date: September 1, 2019*) – SB 604 was the Sunset legislation for the Texas Department of Motor Vehicles (“TxDMV”). The House adopted an amendment which **requires TxDMV to adopt rules by December 31, 2020, governing the use of digital license plates.**
  - The rules must allow the owner of a vehicle to attach the digital license plate to the rear of the vehicle but require a physical license plate to be attached to the front of the vehicle.
  - A vehicle may be equipped with a digital license plate only if the vehicle is **part of a commercial fleet**, is **owned or operated by a governmental entity**, or is **not a passenger vehicle**.
  - The rules adopted by TxDMV may:
    - allow for the **display of a vehicle’s registration insignia** on the digital license plate in lieu of attaching it to the windshield;
    - preclude a digital license plate provider from contracting with TxDMV for the marketing and sale of personalized or specialty license plates;
    - authorize the **use of a digital license plate for electronic toll collection or to display a parking permit**, and
    - establish procedures for displaying emergency/public safety alerts, vehicle manufacturer safety recall notices, static logo displays (e.g., an entity’s logo on their fleet vehicles), or advertising approved by TxDMV.
  - TxDMV must set the specifications and requirements for digital license plates, including that the digital license plates must have wireless connectivity capability and provide benefits to law enforcement that meet or exceed the benefits provided by physical license plates as of the time of enactment of SB 604 and as determined by the Department of Public Safety (“DPS”).
  - DPS has the **ability to prevent the rules from taking effect** if it timely submits a notice invalidating the rule within 30 days of it being posted.
  - TxDMV is authorized to contract with digital license plate providers for the issuance of digital license plates, including any services related to the issuance. These services could include the sale, lease, and installation of and customer service for a digital license plate.
  - A digital license plate provider with whom TxDMV contracts:
    - must make available a digital version of each specialty license plate;
    - may contract with the private vendor who has the contract with TxDMV for the marketing and sale of personalized license plates in order to make available a digital version of a personalized license plate;

- must promptly update the display of a vehicle registration insignia to reflect the current registration period for the vehicle and, on request of TxDMV, suspend the display of the registration insignia or indicate on the license plate that the registration insignia for the vehicle is expired.
- **HB 1631 (Stickland/Hall)** (*Effective date: June 2, 2019*) – HB 1631 prohibits the use of photographic traffic signal enforcement systems, also known as “red light cameras”.
- **HB 71 (Martinez/Lucio)** (*Effective date: May 24, 2019*) – HB 71 allows for the **creation of a regional transit authority** by Cameron, Hidalgo, or Willacy Counties. Generally, these authorities would be able to acquire, construct, develop, plan, own, operate, and maintain a public transportation system.
- **HB 799 (Landgraf/Nichols)** (*Effective date: September 1, 2019*) – HB 799 provides that, except in certain limited situations set forth in the bill, the **owner of a vehicle is strictly liable for any damage to a bridge or underpass that is caused by the height of the vehicle.**
  - The bill also creates a Class C misdemeanor offense if a person operates or attempts to operate a vehicle over or on a bridge or through an underpass if the height of the vehicle, including load, is more than the vertical clearance of the structure.
  - The offense is increased to a Class B misdemeanor if it is shown that the person was not in compliance with all applicable license and permit requirements for the operation of the vehicle. The Class B misdemeanor is punishable by a fine not to exceed \$500 and/or confinement in county jail for a term not to exceed 30 days.
- **SB 969 (Hancock/Landgraf)** (*Effective date: June 10, 2019*) – In 2017, the 85th Legislature adopted SB 2205<sup>7</sup> in order provide a statutory framework of minimum safety requirements for automated motor vehicles. Similarly, SB 969 was passed to create a regulatory framework for a new technology: the operation of personal delivery and mobile carrying devices.
  - The bill defines a “**mobile carrying device**” as a device that transports cargo while remaining within 25 feet of a human operator to actively monitor the device.
  - A “**personal delivery device**” is defined as a device that is manufactured primarily for transporting cargo in a pedestrian area (a sidewalk, crosswalk, school crosswalk, school crossing zone, or safety zone) or on the side or shoulder of a highway and is equipped with automated driving technology, including software and hardware, that enables the operation of the device with the remote support and supervision of a human.
    - A person is **authorized to operate a personal delivery device only if that person is a business entity** (a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit).
    - The bill states that the business entity is considered the operator of the device unless an agent of the business entity controls the device in a manner that is outside the scope of the agent’s office or employment, in which case the agent is considered to be the operator.
  - A personal delivery or mobile carrying device may be **operated only in a pedestrian area at a speed of not more than 10 mph or on the side of a roadway or the shoulder of a highway at a speed of not more than 20 mph.** However, a local authority may establish a maximum speed of less than 10 mph (but not less than 7 mph) in a pedestrian area if it determines that a maximum speed of 10 miles per hour is unreasonable or unsafe for that area.
  - A business entity that operates a personal delivery device must maintain an insurance policy that includes general liability coverage of not less than \$100,000 for damages arising from the operation of the device.

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<sup>7</sup> See Tex. SB 2205, 85th Leg., R.S. (2017).

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