

NONPROFITS RECEIVING PUBLIC FUNDS SHOULD BE CONCERNED ABOUT SENATE BILL 943

By Richard Meyer

S.B. 943, filed February 21 as the “Contracting Transparency” bill (companion bill is H.B. 2189 by Rep. Capriglione), should be reviewed closely by all nonprofit organizations, contractors and grantees that receive public funds in any form—via contract, grant, appropriation, pass-through or indirectly. The bill, if passed, might subject your organization to the strict disclosure mandates and liabilities of the Texas Public Information Act, Chapter 552 of the Texas Government Code. Senator Watson has brought this issue back after his S.B. 408 failed in the 2017 legislative session because of widespread concern that it imposed PIA compliance responsibilities on thousands of local volunteer organizations and small businesses.

View the text and status of S.B. 943 at www.capitol.texas.gov.

Positive aspects of S.B. 943:

- The bill is an improvement from 2017 in that it does *not* designate a recipient of public funds a *government body* (a flaw that caused opposition by private parties) in order to bring it within the Public Information Act (PIA), Chapter 552, Tex.Gov.Code.
- Rather, the disclosures required in the bill focus on *contracting information* relating to the receipt or expenditure of public funds by an entity, as defined in Section 1 of the bill.
- The longstanding §552.110 exception to disclosure based on a claim of *proprietary information* is retained but with the addition of proposed §552.1101 in Section 2 of the bill. However, many items relating to contracting and bidding are excepted from the 552.110 exception and limit disclosure objections.
- The funds recipient or contractor can assert the proprietary privilege as currently done in Chapter 552, but within the proper time limit and with notice of the objection to the requestor.
- The government body involved in the contracting relationship can also assert a competitive or bidding exception in denying disclosure to a requestor (Section 5 of the bill).

Issues of concern in the bill:

- Whether a PIA request from anyone anywhere would have to be made to and through the government body involved, or could be sent by a requestor *directly to the funds recipient or contractor*, should be questioned. Section 7 of the bill should be read closely to determine if your organization comes under proposed §552.371 or §552.372. A disclosure request will be handled either by the government body, which in turn requests contracting information from its funds recipient or contractor; or, the funds recipient/contractor itself may be required to receive and respond to the PIA request in the manner and time frame specified in Chapter 552. How private funds recipient parties objecting to a disclosure request will secure an Attorney General open records opinion

remains to be clarified since the access to A.G. services are normally reserved to government bodies or officials.

Proposed §552.375 provides that a funds recipient or contractor knowingly failing to comply with a proper PIA request can have contracts terminated or be denied eligibility for further contracting. Notice of the agency's right to do so must be included in contracts.

- Section 6 specifically authorizes a complaining requestor to file a writ of mandamus to compel a “government body or an entity” to comply with the act—a stretch in that such a writ is traditionally thought to be used in extraordinary circumstances involving severe misconduct by a public agency or official, and not for a dispute surrounding public contracting information. News media organizations will undoubtedly use the “hammer” of a mandamus filing in court to get what they want.
- Permitting a requestor to submit a PIA disclosure request *directly* to a funds recipient or contractor will likely generate off-hand and spontaneous requests by a competitor, rival or angry member or employee, or even a customer of a business or nonprofit organization. The better practice would be that requests be directed to the government body, which likely has procedures and staff in place to accept and manage a PIA request even where it might mean, in turn, requesting the information from its vendor or contractor.
- Many local nonprofit organizations or volunteer-managed organizations will likely be subject to the PIA if the bill passes in its present form. These grassroots groups had a key role in defeating the similar proposals in S.B. 408 in the House in 2017.

Related bills:

S. B. 988 (= H.B. 2192) is a related proposal regarding an award of attorney's fees in a PIA disclosure case where documents or information was not properly or timely disclosed.

S.B. 944 (= H.B. 2191) defines a temporary custodian of government body information subject to the PIA as well as requirements to preserve such information.

Committee action expected: SB 943 has been referred to the Senate Business and Commerce Committee, and a hearing is expected to draw many interested parties. It's best to express your opinions and concerns to your senator or representative prior to the hearing, or plan to appear even if you don't intend to testify.