

**PRESENTED AT**

38<sup>th</sup> Annual Nonprofit Organizations Institute

January 21-22, 2021

Austin, Texas

**Texas Legislative and Public Policy Update**

**Richard W. Meyer  
Ross Ramsey**

Richard W. Meyer  
Attorney at Law  
Austin, Texas  
[rick@richardmeyerlaw.com](mailto:rick@richardmeyerlaw.com)  
(512) 451-3000

Ross Ramsey  
The Texas Tribune  
Austin, Texas  
[rross@texastribune.org](mailto:rross@texastribune.org)  
(512) 716-8611

# TEXAS LEGISLATIVE AND PUBLIC POLICY UPDATE

## *Issues affecting nonprofit organizations in the 2021 session*

By Richard W. Meyer

*Presented at The University of Texas School of Law*

*38<sup>th</sup> Annual Nonprofit Organizations Institute, Austin, Texas, January 22, 2021*

## INTRODUCTION

Can nonprofit organizations, state associations and foundations find new opportunities in the coronavirus era? Can 2021 be a year of accomplishments to be remembered?

Nonprofit organizations and state associations that serve a growing and diversifying population and a dynamic Texas economy continue to be challenged by the events of the 2020 coronavirus era. While fulfilling their missions and assuring their own sustainability, they should not neglect the public policy and legislative arena, where new opportunities and new revenue streams will emerge to serve and operate in new ways. The 2021 Texas Legislature regular session begins January 12. Those organizations and persons who pay close attention to their interests, recognize beneficial opportunities, form alliances, and speak up can emerge stronger. In each session, bills and proposals impacting the nonprofit sector—positively or negatively—are heard and enacted, often without input from the parties and stakeholders most affected. Following are some policy, legislative, legal and regulatory issues that deserve attention and response in 2021:

Note: In the following, **HB** refers to a House Bill and **SB** a Senate Bill in the legislative session indicated. Bill numbers are in **BOLD**, and previously passed bills are underlined and BOLD (example: **SB 378**).

### I.

#### **Executive, judicial and local government authority will generate legislative attention**

##### **1. Emergency powers and pandemic-era declarations of the governor will be examined**

Beginning in February 2020, the Texas governor issued a succession of executive orders and disaster declarations in response to the coronavirus emergence, most under his authority granted in the Texas Disaster Act of 1974, Chapter 418, Tex.Govt.Code. These 30-day declarations can be extended repeatedly. The legislature can terminate a declaration but, obviously, must be in session to do so (not the case in year 2020). Those unfamiliar with his authority were surprised to find that the governor can also suspend any regulatory statute or agency rule, and the limits of that power may be restrained only by challenges in the courts on constitutional grounds. Texas Const., Art. I §28, generally forbids the suspension of laws except by the legislature. A score of lawsuits was filed across the state reflecting various private and business interests that were affected but none has succeeded to date. The Texas Supreme Court determined it could not issue

a writ of mandamus to the governor in response to a petition to do so. These emergency executive powers have taken the following form:

- Executive Orders
- Disaster Declarations (and numerous extensions)
- Coronavirus Emergency Supplemental Funds (CSEF) Program
- Select Waivers Issued by the Governor

Emergency orders and declarations of the governor can be found at [www.gov.texas.gov/coronavirus-executive-orders](http://www.gov.texas.gov/coronavirus-executive-orders) .

Early-filed bills on this subject include: **HB 905**, **HB 906**—restrictions on disaster declarations; **HJR 47**—convening the legislature in special session during disaster declaration periods

## 2. Emergency rules and orders by state agencies came from all directions in 2020

To adapt to the coronavirus conditions, many state agencies followed the governor’s lead. For months, the *Texas Register* has been full of proposed emergency rules by various state agencies covering a variety of topics: regulation of practice procedures of licensed healthcare professionals; practices and conditions in jails and prisons; access to public buildings and state employees; temporary changes to administrative hearing procedures; and changed operations of the Texas Workforce Commission to manage the overwhelming task of passing on federally-funded unemployment compensation benefits to millions of eligible persons affected by economic conditions. Within the governor’s executive orders and declarations were various exceptions. One common exception that benefitted many parties was that “essential government services” performed by a person, business or organization could exempt that party from a restriction or regulation. Various state agencies issued guidances or other written policy declarations defining available exceptions, and some provided written waivers to their vendors, contractors, suppliers or other essential support entities. Examples:

- The Texas Department of Health and Human Services has broad regulatory authority over social welfare programs and pandemic response programs involving child care facilities, nursing homes, Medicaid; see <https://hhs.texas.gov/services/health/coronavirus-covid-19/coronavirus-covid-19-provider-information> .
- The Department of State Health Services provides an up-to-date listing of various orders. See [www.dshs.state.tx.us/coronavirus/execorders.aspx](http://www.dshs.state.tx.us/coronavirus/execorders.aspx) .
- The Texas Workforce Commission (TWC) has carried the brunt of responding to job insecurity and unemployment relief during the 2020 pandemic conditions. Its local workforce commissions can partner with local social service organizations to serve vulnerable populations. See [www.twc.texas.gov/jobseekers/disaster-unemployment-assistance](http://www.twc.texas.gov/jobseekers/disaster-unemployment-assistance) .

### **3. The Texas judiciary and Supreme Court were drawn into issuance of emergency orders and unique management decisions**

The Texas Supreme Court has consumed much of its time in 2020 responding to the challenges of operating the state's judicial system in the pandemic environment. Numerous emergency orders and guidances have been promulgated and published. Two significant issues have involved the court's emergency moratorium orders limiting residential property evictions and the methods for conducting jury trials, managing juror assembly and assuring due process for all parties. The emergency orders of the Supreme Court can be reviewed at [www.txcourts.gov/supreme/administrative-orders/2020](http://www.txcourts.gov/supreme/administrative-orders/2020) . Special judicial branch administrative matters managed by the Office of Court of administration and scores of local court operating plans can be found at [www.txcourts.gov/oca](http://www.txcourts.gov/oca) . Numerous renewals, extensions and amendments to previously-issued orders have been necessary.

### **4. Charities and nonprofit service organizations must become key partners in formalized state disaster funding and response programs**

Opportunities for formalizing the role of nonprofit and faith-based organizations in disaster response activities were authorized in the 2019 session. See **HB 3616**, **HB 2305** and **HB 1294**. A task force managed by the Texas Division of Emergency Management (TDEM) conducted interim work in anticipation of additional legislation in 2021. Members are representatives of faith-based organizations with the duty to develop a plan to improve data collection regarding faith-based disaster response activities, develop best practices for communicating and collaborating in disaster scenarios, and identify inefficiencies and opportunities to address gaps in the state's disaster response capacity. See §418.251, Tex.Govt.Code.

This legislative activity in 2019 did not contemplate a new kind of disaster experience for Texas: a unique coronavirus pandemic challenge. Early in 2020 it became clear that community-based nonprofits or statewide organizations were a quick and efficient resource for putting federally-funded coronavirus response monies into the hands of the persons or organizations intended. Since then, state agencies, cities and counties continue to channel large sums of relief funds to and through local nonprofits, charities and faith-based organizations. Given the scale and massive funding of coronavirus relief programs, most nonprofits would be wise to re-examine their mission statements, business plans and budgets to accommodate a new "line of business" called public disaster response and relief. Large statewide nonprofits or alliances of social service or faith-based agencies already have a broad footprint on the ground to facilitate government relief programs or funding:

- The Texas 2-1-1 service network is a portal for assistance and a link for local service organizations who can help the public. A number of its regional centers are operated by United Ways of Texas. See [www.211texas.org](http://www.211texas.org) and [www.uwtexas.org](http://www.uwtexas.org) .
- Texas Voluntary Organizations Active in Disaster (VOAD) represents a statewide alliance of volunteer-based service organizations experienced in coordinated disaster assistance. See [www.txvoad.comminityos.org/cms](http://www.txvoad.comminityos.org/cms) .

- The Communities Foundation of Texas and local foundations have the ability quickly to receive and distribute disaster assistance funds to eligible nonprofit organizations. See [www.cftexas.org/community-impact/disaster-relief-and-recovery](http://www.cftexas.org/community-impact/disaster-relief-and-recovery) .

## 5. Redistricting

Redistricting of congressional and legislative districts by the legislature following receipt of the 2020 U.S. census data by April 1 will occupy a lot of attention. District lines must be drawn for Texas House and Texas Senate seats, U.S. Congressional districts and the State Board of Education. Texas will gain at least three seats in the U.S. House of Representatives. If a redistricting bill is not accepted by the legislature, the Legislative Redistricting Board takes over; or, the issues may be finally resolved and district maps drawn through court proceedings.

- Already filed: **HB 282**—to establish an independent redistricting commission.

## 6. Voting processes and voting security

Early filings indicate that hundreds of bills may be filed regarding voting rights and procedures in the state. Local government-based administration of voting will be examined as will numerous state and federal court pre-election rulings. Examples filed to date include:

- Voter registration procedures: **HB 58, HB 61, HB 124, HB 134, HB 680, SB 98**
- Polling place procedures: **HB 22, HB 230, HB 478, HB 611, SB 230**
- Voting by ex-felons: **SB 187**
- Election of the U.S. President by national popular vote: **SB 130**

## 7. Closer state law regulation of law enforcement officer standards, discipline and local agency transparency

Legislators of all stripes appear to agree that law enforcement training, techniques and oversight need a closer look. The Texas Commission on Law Enforcement, an agency unfamiliar to most, will be the focus of legislation and state government reforms. The commission's current status, enabling statute and rules (Chapter 1701, Tex.Occup.Code, 37 T.A.C. Part 7, Chapter 211 *et seq.*) are already the subject of a number of filed bills:

- Law enforcement policies, de-escalation of police response, use of force: **HB 562, HB 272, HB 563, HB 833, SB 161, SB 69**
- Control over local government reduction of law enforcement budgets: **HB 74**
- Access to employment records of licensed officers: **HB 709**
- Ban on law enforcement agencies participating in television reality shows: **HB 54, SB 223**

These and similar bills will require amendments to various parts of the Code of Civil Procedure, Penal Code, Occupations Code, Local Government Code and Government Code. The commission is currently under "sunset" review during the 2021 session and must be re-authorized to continue to exist. The Sunset Advisory Commission staff report required by the process concluded that the law enforcement commission's activities and current statutory scheme

demonstrate that “Texas’ approach to regulating law enforcement is ineffective...” (Sunset Advisory Commission final report, November 2020, p. 2).

## **8. Monument removal and changing place names will involve local governments, cultural and historical organizations and their donors**

The abrupt or unauthorized removal of historic monuments and markers and statues, and the changing of street, building, bridge and other place names by local governments generate strong feelings from those who swiftly amplify these controversies. Even the content of cemetery headstones is being questioned. There were numerous highly-publicized incidents nationwide and in Texas in 2020. These included the multi-year dispute over reconfiguring the historic Alamo plaza in San Antonio, moving the 1936 memorial cenotaph, closing streets and demolishing nearby historic structures. Determining the exact ownership rights over a certain physical monument is not always an easy process after the passage of decades. Often such historic objects were placed on public or private property with express donor restrictions or reverters, or by the formal declarations or ordinances of government entities. The placement of certain art objects owned or in the custody of cultural institutions has been questioned. Expect to see legislators file various bills to address these situations; some will likely seek to diminish the authority of local elected or appointed officials to decide these issues. See **HB 311, HB 446**. In the meantime, the state’s lead agency with limited jurisdiction over these subjects, the Texas Historical Commission, has initiated a discussion with proposed agency policies and rules. See:

- Proposed Rules 13 T.A.C.§17.2(1)(H) and 17.2(2)(A)(iv)—Relocation or Removal of Monuments from a Courthouse Square—published at 45 Tex.Reg. 8084 (Nov. 13, 2020)
- Proposed Rule 13 T.A.C.§21.13—Removal of Markers and Monuments—published at 45 Tex.Reg. 8087 (Nov. 13, 2020)
- Proposed Rule 13 T.A.C.§26.28—Removal of Designations for Privately or Publicly Owned Landmarks—published at 45 Tex.Reg. 8090 (Nov. 13, 2020)

## **II.**

### **Evergreen issues, re-filed bills and new proposals**

#### **1. Tax-exempt status of nonprofits is a growing “cost” to state government revenues**

The total value of longstanding exemptions granted to nonprofit entities of all varieties from the state’s property taxes, business revenue taxes, sales and other fees continues to increase. To state budget analysts, legislators and critics, these uncollected taxes are a cost to state government in that they represent revenues that could be collected if taxing schemes were applied without exemptions or waivers for some. What is the current “cost”? The State Comptroller’s most recent report, entitled *Tax Exemptions and Tax Incidence* (November 2020), reported to legislators that approximately \$58.6 billion in potential state tax revenue is bypassed due to previously enacted exemptions, credits, exclusions, deductions, waivers and preferences granted to commercial businesses, nonprofit organizations and quasi-governmental entities. Legislators taking the long view of the state’s fiscal health have filed the following bills to examine and

evaluate tax exemptions and the policies behind them—all of which should be of concern to the nonprofit sector as a beneficiary of these policies:

- In the 2019 session, **HB 3298**, **HB 4482** and **HB 3968** revived the legislative revenue reforms raised in earlier sessions with various methods to eliminate, reduce or “sunset” various exemptions.

## 2. Expanding the scope of property tax exemptions for nonprofit entities

In every session there are numerous bills to expand or clarify nonprofits’ property tax exemptions under §11.18, Tex.Tax Code. The regular additions to §11.18 grow longer and longer and are often “local” bills addressing a specific situation or unpopular ruling by a local tax appraisal board or court. The overgrown girth of §11.18 and related statutes invites a holistic review of the significant tax revenues bypassed by state and local government. It also offers a critical look at the vast real estate holdings of nonprofits and whether they directly advance a charitable purpose. As local taxing authorities face new legislative limitations on tax revenue increases (**SB 2**, 86<sup>th</sup> Legislature, 2019), local tax appraisal districts and appraisal review boards will take a closer look at exemptions claimed under §11.18 and related provisions of the Tax Code.

Early-filed §11.18 bills for 2021 include: **HB 115**, **HB 349**—ad valorem tax exemption for housing for homeless persons owned by a charity; **SB 113**—more flexibility for a nonprofit’s participation in a community land trust.

## 3. Visibility in public affairs and use of public funds trigger expectations for transparency, disclosure and sound governance by nonprofit entities

Legislators in 2019 succeeded in crafting statutory language that requires disclosure of certain records of businesses, organizations or quasi-public entities that receive or spend public funds or perform governmental functions. Unsuspecting nonprofit organizations now find some of their records and data subject to disclosure under the Texas Public Information Act (PIA), Chapter 552, Tex.Govt.Code, even if they consider their status merely as a grantee or subcontractor under some government-related program using public funds of any kind:

Labeled the “contracting transparency bill”, **SB 943** passed in 2019, was the return version of SB 408, which failed to pass the House in 2017 after extensive debates and bill revisions. The bill creates a classification of *contracting information* and requires any entity receiving or expending certain public funds to comply with the Texas Public Information Act (PIA). It retained PIA exceptions for proprietary business information and trade secrets, but the bill excludes from those exceptions a list of information or data related to the public funds held or received by the responding party in some contracting or funding relationship. An organization opposing disclosure and claiming the protection of any of the PIA exceptions must be able to demonstrate with specificity why its interests would be harmed or why a competitive advantage might be compromised. The *contracting information* provisions of the bill are in the new §552.003(7), Tex.Govt. Code, new §552.0222, the amended §552.110, the new §552.1101, and new §§552.371-374.

#### **4. Nonprofits receiving large contracts or grants for privatized state agency operations enter a competitive commercial environment**

Texas state government trends continue to favor public agency “privatization” of programs, which involves identification of state government functions that arguably can be performed more efficiently and at lower cost by private or commercial contractors, consultants or nonprofit organizations. Texas nonprofits of all sizes and varieties have benefitted from this trend, with significant state agency functions outsourced under the contracting/procurement process or through periodic agency grants, sometimes specified in the legislative appropriations bill. Often, the legislature authorizes by statute creation of a nonprofit organization to conduct certain off-budget activities to support state programs (CPRIT, OneStar Foundation, Texas Windstorm Association). Successful nonprofits that prosper in this arena can become state vendors of considerable scale and no longer “fly under the radar”. They have chosen to enter a competitive marketplace that invites scrutiny and criticism, especially when nonprofits are given a special preference or “first-look” status in competing for a state contract. Competitors in the business community, trade associations or the HUB sector (historically underutilized businesses) are quick to complain about the unfair competitive advantage of tax-exempt operators. When nonprofit enterprises access state and federal disaster relief contracts and funding streams, they should be prepared for the competitive dynamics of the open marketplace.

#### **5. Protecting legal immunity and liability limitations for nonprofit entities**

Expect again to see various bills introduced to clarify or expand the legal immunities and limitations on liability enjoyed by charitable nonprofit entities that are contained in Chapter 84, Tex.Civ.Prac. & Rem. Code. Maintaining these protections becomes more crucial as nonprofits expand into hands-on disaster relief. Passed in the 2019 session were: **HB 4345** (protecting a nonprofit employer’s reporting of an employee’s alleged acts of sexual assaults, misconduct, or harassment); **HB 3365** (clarifying a charitable organization’s immunity in disaster response scenarios); and **HB 752** (limiting liability of a volunteer healthcare provider or healthcare institution in disaster relief operations).

\*\*\*

#### **RESOURCES**

- Stay current on developments during the 2021 regular 140-day January-May session at [www.nonprofitlawandpolicy.com](http://www.nonprofitlawandpolicy.com) .
- Review the text of any bill before the legislature, monitor committee deliberations and track the progress of bills of interest at [www.capitol.texas.gov](http://www.capitol.texas.gov) .
- The Legislative Budget Board provides a deeper look at the state’s budgeting and appropriations process at [www.lbb.state.tx.us](http://www.lbb.state.tx.us) .
- Briefings and reports on related policy issues before the U.S. Congress and federal agencies can be found at [www.councilofnonprofits.org](http://www.councilofnonprofits.org) .
- Current state government issues reported at [www.texastribune.org](http://www.texastribune.org) .