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General Government

Committee hears testimony on public information requests

September 8 — The time local governments spend responding to requests for information under the state's Public Information Act (PIA) was on the agenda at a recent hearing of the House Government Efficiency and Reform Committee. One topic considered was whether a public entity should be able to satisfy the requirements of the law by directing people to its website for information.

The Public Information Act, under Government Code, ch. 552, establishes that government records, with certain exceptions for confidential or other excepted information, are open records to which the public should have access upon request. The law establishes a process for the public to request information and requires governmental bodies to respond "promptly" and without regard to the reason for the request. Under sec. 552.221, the governmental body must make the information available for inspection or duplication in its offices or send copies by U.S. mail. Under sec. 552.228(b), if a requestor requests data in an electronic medium and it exists in that form, the governmental body must provide it in an electronic medium under certain circumstances.

If a governmental body cannot make requested information available within 10 days, it must notify the requestor and indicate a date and time that it will be available, under sec. 552.221(d). Before releasing information, governmental bodies must determine what should be released and what should be withheld under the law. Questions about withholding information are resolved through letter opinions from the Open Records Division of the Office of the Attorney General. Prescribed fees may be charged for especially large requests.

The Government Efficiency and Reform Committee is charged this interim with reviewing the application of the PIA to requests for large amounts of electronic data and whether procedures and deadlines under the law give governmental bodies enough time to identify and protect confidential information when responding to such requests.

Witnesses at the Aug. 27 hearing said one way governmental bodies could save time in responding to requests is by directing a requestor of information to their public websites when the information is available there, rather than by gathering and providing the information directly to the requestor. They expressed particular concern that local governments sometimes spend significant time responding to requests for large amounts of information that are later used by the requestor for commercial purposes, such as for marketing or reselling, when that information would be more appropriately and efficiently obtained from the entity's website.

Under a letter opinion from the Open Records Division, ORD 682, issued in 2005, if a requestor agrees to obtain information from a governmental body's website, the requirements to respond are met, but if a requestor does not agree, the governmental body must meet the requirement to produce the information in the traditional way. In addition, under Government Code, sec. 552.222, a governmental body may not inquire into the reason for a request for public information, and under sec. 552.223, all requests must be treated uniformly, without regard to the position or occupation of the requestor.

Supporters of amending the law to allow governmental bodies to meet PIA requirements by referring requestors to websites say it would make information available more quickly to the public, while saving the government time and money. Concerns raised at the hearing about directing requestors to websites included how to provide information to those who lack Internet access and how to address problems with navigating government websites on which information is not easy to locate.

— by Laura Hendrickson

Taxation

Fee on certain tobacco products ruled unconstitutional

September 11 — The Third Court of Appeals in Travis County recently affirmed a lower court ruling that a fee on cigarettes and cigarette tobacco manufactured by certain small producers was an unconstitutional tax. The state is expected to appeal the ruling to the Texas Supreme Court.

The Aug. 15 ruling addressed a law enacted in 2013 that requires a fee on cigarettes and certain tobacco products offered for sale in Texas by producers that did not participate in the 1997 and 1998 comprehensive settlements between states and large tobacco companies. The producers subject to the fee sued the state, arguing that it was effectively a tax that violated a requirement under Tex. Const., Art. 8 that taxation be equal and uniform, among other claims.

The 1998 Comprehensive Settlement Agreement required large tobacco companies to pay the state for damages incurred by tobacco use, such as Medicaid expenditures, and to pay punitive damages for antitrust violations, deceptive advertising, and marketing to children. Under the agreement, the companies agreed to make large annual payments based on market share and were released from past and future claims of harm caused by tobacco use. Small tobacco producers were not involved in the settlement agreement, either because they did not exist in 1998 or were not accused of wrongdoing.

HB 3536 by Otto, enacted in 2013 by the 83rd Legislature, imposes a fee on cigarettes produced by manufacturers that did not participate in the agreement. The fee, which is collected when distributors buy tax stamps, is currently 56.65 cents per pack. The bill does not release the non-settling manufacturers from liability but would apply all fees paid by a manufacturer to any judgment or settlement on a claim brought against the manufacturer.

According to HB 3536, its stated intent was to:

- recover state health care expenditures attributable to the non-settling manufacturers;
- prevent non-settling manufacturers from undermining the state's policy of reducing underage smoking by offering products at prices substantially below those offered by other manufacturers;
- protect the tobacco settlement agreement and funding, which has been reduced by growth in sales of non-settling manufacturers' products; and
- ensure evenhanded treatment of manufacturers.

The state argued that the fee does not violate the equal taxation clause because the Legislature's decision to place a fee on the products of non-settling manufacturers and not those of settling manufacturers was based on a reasonable distinction between them. The court rejected the assertion that because big tobacco entered into the settlement agreement and small tobacco did not, the entities could be treated differently. The court said the proper test was to examine the kinds of products produced. The court, finding no difference, concluded that the fee unacceptably violates the constitutional requirement that taxation be equal and uniform. The court said HB 3536 was "an apparent attempt to prevent Big Tobacco from losing market share to Small Tobacco" and that "protecting one company's market share over another's does not justify the unequal treatment of identical products."

The fee is still being collected. If the Supreme Court does not accept the state's appeal or issues a final ruling against the fee, the Comptroller's Office is expected to return collected fees under guidance from the courts.

— by Tom Howe

State Budget, Transportation

Lawmakers to revisit use of State Highway Fund money

September 19 — State lawmakers are expected in 2015 to consider dedicating all of the money from the State Highway Fund (Fund 6) to highway construction and maintenance, rather than using some of it for law enforcement or other needs. Dedicating these funds is one of several proposals lawmakers have reviewed since 2013 to address anticipated shortfalls to Fund 6, the primary funding mechanism for Texas highways.

In a May 2014 press release, Speaker Joe Straus said the House will propose a budget in 2015 that dedicates all the money in Fund 6 to highway needs. According to the statement, this would increase funding for roads by about $1.3 billion during fiscal 2016-17. The Texas Department of Public Safety (DPS) and other agencies that currently receive Fund 6 dollars would be funded by other means.

The Texas Department of Transportation (TxDOT), which receives funding largely from fuel taxes and vehicle registration fees that contribute to Fund 6, has projected a need of $5 billion to pay for highway repair, maintenance, and mobility projects not currently covered in its budget. This projected need — which has been attributed to the rising costs of building and maintaining roads and to diminishing gas tax revenues resulting from increased fuel efficiency — comes amid uncertainty about federal funding levels. TxDOT also has statutory authority to issue bonds and to enter into comprehensive development agreements with private investors to build and maintain toll roads, but according to the department, bonding programs enacted by the Legislature will be exhausted by 2015.

Other proposals. Various proposals have been considered since 2013 to address anticipated highway funding needs, including increasing the revenue going into Fund 6. Advocates for raising the taxes and fees that support Fund 6 say they have not kept pace with the rising costs of highway construction and maintenance. Efforts in the 2013 legislative session to increase the vehicle registration fee were unsuccessful. In addition, a proposed amendment on the November 4 general election ballot would allocate to Fund 6 a portion of general revenue from oil and gas production that currently goes to the rainy day fund. According to TxDOT, even if the proposed amendment (Proposition 1) is approved by voters, it will not fully address the state's highway funding needs.

Funding DPS. Other proposals have aimed to free more Fund 6 dollars for highways by creating a separate source for DPS funding. The 83rd Legislature in 2013 considered HB 3666 by Darby, which would have generated about $260 million each year in general revenue by imposing a $15 public safety fee on vehicle inspections, according to the Legislative Budget Board. The new fee would have created a dedicated revenue stream for DPS, while restoring money to Fund 6 that currently provides partial funding for the department. HB 3666 died in the House Calendars Committee.

Supporters of dedicating Fund 6 money to highways say it would provide needed transportation revenue without a tax increase, while making the state budget more transparent, which taxpayers favor. Fund 6 is largely composed of user fees, such as taxes on motor fuels and vehicle registrations, which supporters say should be dedicated to the purposes for which they are collected — maintaining and expanding the state's transportation network. The strength of the Texas economy will allow the Legislature to fund DPS and other affected agencies through general revenue instead of Fund 6 diversions, they say.

Opponents of dedicating Fund 6 money to highways say this measure would force DPS and other affected agencies to compete with other state priorities for limited resources as the state struggles to meet existing needs through general revenue. Excluding DPS from state highway funding would be particularly inappropriate, they say, because both the Texas Constitution and the Transportation Code explicitly authorize using Fund 6 revenue for policing state highways. DPS enforcement activity helps ensure the safety of motorists, a task directly related to the taxes and fees that contribute to Fund 6, opponents say.

— by Blaire D. Parker

Natural Resources

State lawmakers review options for federal Clean Power Plan

September 25 — Texas would have to reduce carbon dioxide emissions from its coal-fired power plants to 39 percent below 2012 levels by 2030 under proposed rules released by the U.S. Environmental Protection Agency (EPA) in June. State officials in Texas have discussed whether to prepare to comply with the rules when they are finalized in 2015 or to challenge them in court. The Texas House Committee on Environmental Regulation, charged this interim with reviewing the proposed rules and their impact on Texas, is scheduled to meet on September 29 and 30 to discuss them.

The Clean Power Plan. The goal of the EPA's proposed rules, known as the Clean Power Plan, is to decrease by 2030 the nationwide carbon emissions from power plants by 30 percent from 2005 levels. The EPA regulates carbon dioxide pollution on the premise that it contributes to climate change and poses public health risks. Power plants are the primary emitters of carbon pollution in the country, according to the EPA.

The proposed federal rules assign unique carbon emission reduction goals to each state based on that state's energy mix and ability to integrate the reduction measures, or "building blocks," described in the plan. The EPA has calculated both an interim goal and a final 2030 goal for each state. The proposed rules require states to develop plans to meet their goals, either independently or with other states, and submit them to the EPA by June 2016 (or June 2017, if they are granted an extension). The EPA will develop a compliance solution for states that fail to submit their own plans.

The Clean Power Plan includes four building blocks on which states may base their plans — improving efficiency of existing coal plants, relying more heavily on natural gas, increasing use of renewable energy sources, and enhancing energy efficiency of homes and businesses. The EPA says it has authority to regulate carbon emissions from power plants under the Clean Air Act, sec. 111(d).

Twelve states have filed a joint lawsuit against the EPA. They say that because the EPA issued emission standards for existing power plants in 2012 under sec. 112 of the Clean Air Act, the agency may not use sec. 111(d) to regulate the same type of source, citing *American Electric Power Company, Inc. v. Connecticut*. Texas has not joined the lawsuit and may wait until the rules are finalized to decide whether to challenge them. The EPA is accepting public comment on the rules until December 1.

One mechanism that has been suggested for the state to prepare to comply with the Clean Power Plan is to give the Texas Commission on Environmental Quality (TCEQ) explicit statutory authority to develop a plan to meet the EPA's interim and final goals.

Supporters of the Clean Power Plan say Texas leads the nation in carbon emissions produced by power plants and that working with the EPA to decrease the state's carbon footprint could make the state a leader in clean energy. Texas is already reducing carbon emissions through improved technology and decreased reliance on coal. Complying with the plan would create jobs and spur investment in renewable energy. Investing in energy efficiency could lower costs for consumers.

Supporters say it would be unproductive and costly for taxpayers and industry for Texas to resist compliance and that the state has had little success fighting EPA regulations in the past. Texas should develop its own plan, rather than wait for the EPA to design one for the state, they say.

The abundance of natural gas in Texas would make compliance relatively painless, supporters say, and the increased demand for natural gas would benefit the industry. Relying more on other energy resources also would put less strain on the state's limited water resources, as coal-fired power plants require substantial amounts of water to operate.

Supporters also say that the effects of climate change, such as severe drought, rising sea levels, and more intense natural disasters, are already evident in Texas. The cost of its effects is substantially higher than those of complying with the federal rules, supporters say.

Critics of the Clean Power Plan say that it is an example of extreme federal overreach and complying with the rules would harm Texas' economy and its coal industry. The rules would force several coal plants to close, resulting in lost jobs and the premature retirement of some facilities, opponents say. Increasing reliance on energy sources that are more expensive to produce could also result in higher costs for consumers.

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The benefits of successfully lowering carbon dioxide emissions through the Clean Power Plan would be minuscule and could have drawbacks, according to opponents. Attempting to reach the specified goal, if attainable, could threaten the reliability of electricity for consumers, with those living in rural areas being the most vulnerable to outages.

Critics also say that the EPA's statutory authority to implement the Clean Power Plan under the Clean Air Act, sec. 111(d) is questionable and should be challenged.

Some critics question whether scientific evidence has shown conclusively that climate change is occurring or that human activity is wholly or partially responsible.

— by Mary Beth Schaefer