Local Government Law

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I. Access to Government Information

In 1989, the 71st Texas Legislature completed a major revision of the Texas Open Records Act, including a provision which was promptly repealed only a few weeks later during a special session. Additionally, the legislature directed the Texas Supreme Court to promulgate a rule dealing with sealed court records and a committee has begun work on new Texas Supreme Court Rule 76a. The legislature modified the Texas Open

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1. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1990). The policy declaration set forth in section 1 of the Texas Open Records Act provides:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law, at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

2. The new statute provided that "information that identifies or serves to identify a person who, based on information in the possession of the governmental body, appears to have been the victim of an offense that is a felony" is exempted from public disclosure. A subd. (23) of subsec. 3(a) added by Acts 1989, 71st Leg., Chap. 326, § 1, eff. June 14, 1989, was repealed by Acts 1989, 71st Leg., 1st C.S., chap. 4, § 2, eff. July 21, 1989.

3. The Texas Legislature adopted section 22.010 of the Texas Government Code effective September 1, 1989, which provides that "The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." TEX. GOV'T CODE ANN. § 22.010 (Vernon Supp. 1990). The Texas Supreme Court submitted the issue to the Texas Supreme Court advisory committee and Chairman Luke Soles appointed a subcommittee to propose a draft rule. The subcommittee conducted two public hearings and the Supreme Court had a public hearing on November 30, 1989. A draft rule 76a was submitted to the Supreme Court and is expected to be effective in June, 1990.

4. Rule 76a as submitted to the court provides as follows:

A. Definitions

1. Compelling Need: “Compelling Need” means the existence of a specific protectible interest which overrides the presumption that all court records are open to the general public. The moving party must establish the following:

(a) that a specific interest of the person or entity sought to be protected by the sealing of the court records clearly outweighs the interest in open
court records and the specific interest will suffer immediate and irreparable harm if the court records are not sealed;
(b) that no less restrictive alternative will adequately protect the specific interest of the person or entity sought to be protected;
(c) that sealing will effectively protect the specific interest of the person or entity sought to be protected without being overbroad; and
(d) that sealing will not restrict public access to information that is detrimental to public health or safety, or to information concerning the administration of public office or the operation of government that violates any law or involves misuse of public funds or public office.
2. Protectible Interests: "Protectible interests" which may be the basis of an order under this rule include, but are not limited to, the following:
(a) a right of privacy or privilege established by law, including but not limited to, privileges established by these rules or by the Texas Rules of Civil Procedure;
(b) constitutional rights;
(c) trade secrets;
(d) the protection of the identity or privacy of an individual who has been the subject of a sexually related assault or injury.
3. Court Records: For purposes of this rule, the term "court records" shall include all documents and records filed in connection with any matter before any civil court in the State of Texas. This rule shall not apply to discovery materials not filed with a court or to documents filed with a court in camera solely for the purpose of obtaining a ruling on the discoverability of such documents.

B. Unless provided to the contrary by statute or other law, before a judge may seal any court records, the following prerequisites must be satisfied:
1. Hearing: A hearing shall be held in open court, open to the public, at which the parties may present evidence to support or oppose the motion to seal court records; however, the hearing may be conducted in camera upon request by any party, if the court finds from affidavits submitted or other evidence that an open hearing would reveal the information which is sought to be protected. At the hearing the court may consider affidavit evidence if the affiant is present and available for cross examination. Any person, not a party, desiring to support or oppose the sealing of court records, may intervene for the limited purpose of participating in the hearing and in any subsequent proceedings involving the motion to seal or the grant or denial of a sealing order.
2. Notice: The party seeking sealing shall file a written motion in support of the sealing request. After filing the motion, the moving party shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, at least fourteen days before the date set for the hearing, stating that a hearing will be held in open court on a motion to seal court records, stating that any person has an opportunity to appear and be heard concerning the sealing of court records, and stating the specific time and place of the hearing, the general type of case, the style of the case, and the case number. After posting such notice, the moving party shall file a copy of the notice with the clerk of the court in which the matter is pending and shall serve a copy of the notice with the clerk of the Texas Supreme Court, who shall post the notice in a public place.
3. Temporary Sealing Order: A temporary sealing order may be entered without the hearing or public notice provided for in paragraphs (B)(1) and (B)(2) above, upon the filing of a sworn motion showing compelling need and that immediate and irreparable harm will result before notice can be posted and a hearing can be held as otherwise provided herein. Whenever possible, the moving party shall serve the motion upon any other party who has already appeared. Every temporary sealing order granted without posted notice or public hearing shall be filed, shall be endorsed with the date and hour of issuance, shall contain the findings required by paragraph (B)(3), shall state why the order was granted without notice, and shall expire by its terms no more than fourteen days after its issuance, unless within the time so fixed, for good cause shown, the
Meetings Act, the Texas Government Code, and a number of other statutes concerning public access to government information. Although the Texas Attorney General issued fifty-four formal opinions and there were several important judicial decisions in the area, these legislative developments constitute the most significant events in the access to government information area.

A. Amendments To The Texas Open Records Act

The Texas Open Records Act states that all records in the possession of a governmental body are public unless specifically exempted from disclosure

order is extended for a longer period. The reasons for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed. If a temporary sealing order is granted without public notice and hearing, a motion for sealing order shall be filed, notice provided and a hearing set as elsewhere provided in these rules. On two days' notice to the party who obtained the temporary sealing order or on such shorter notice to that party as the court may prescribe, any person, whether or not a party to the lawsuit, may move dissolution or modification of the order and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

4. Findings: In order to seal court records, the court shall make specific findings demonstrating that a compelling need has been shown, but the findings shall not reveal the information sought to be protected.

5. Sealing Order: A sealing order shall be specific and shall state the case number, the style of the case, the specific findings, the conclusions of law, the time period for which the sealed portions of the court records are to remain sealed, and shall identify those portions of the court records which are to be sealed and those portions which are to remain open. The order shall not reveal the information sought to be protected. The motion to seal and the sealing order shall remain in the open portion of the file.

C. Continuing Jurisdiction: Any person may intervene as a matter of right at any time before or after judgment in connection with any motion to seal or to unseal court records. Notwithstanding the rights of appeal provided in this Rule, a court that enters a sealing order maintains continuing jurisdiction to enforce, alter, or vacate that order.

D. Appeal: Except as to a temporary sealing order under paragraph (B)(3), any sealing order, any sealing provision contained in any judgment, and any order granting or denying a motion to alter, vacate or enforce a sealing order shall be deemed to be a separate and independent final judgment and shall be subject to immediate and independent appeal by any party or intervenor who has requested, supported or opposed any sealing order.

5. TEX. REV. CIV. STAT. ANN. art. 6252-17 (Vernon Supp. 1990). Section 2(a) of the Texas Open Meetings Act provides:

Except as otherwise provided in this Act or specifically permitted in the Constitution, every regular, special, or-called meeting or session of every governmental body shall be open to the public; and no closed or executive meeting or session of any governmental body for any of the purposes for which closed or executive meetings or sessions are hereinafter authorized shall be held unless a quorum of the governmental body has first been convened in open meeting or session for which notice has been given as hereinafter provided and during which open meeting or session the presiding officer has publicly announced that a closed or executive meeting or session will be held and identified the section or sections under this Act authorizing the holding of such closed or executive session.

6. TEX. GOV'T CODE ANN.

under the Act. The 71st legislature exempted covered "information that identifies or serves to identify a person who, based on information in the possession of the governmental body, appears to have been the victim of an offense that is a felony." Law enforcement agencies construed the exemption broadly and refused to disclose substantial information regarding criminal activity. Five weeks after the exemption became effective, the legislature repealed the provision in a special session. Additionally, the legislature amended section 3 to exempt certain information in personnel files as well as the identity of applicants for the position of chief executive officer of institutions of higher education. As amended, Exemption provides that the home addresses and home telephone numbers of former officials and employees of governmental bodies and of peace officers as defined in the Act are exempt from public disclosure. The Act permits not only current employees, but also former officials and employees to choose whether or not to allow public access to their home address and telephone numbers. If the former employee or official fails to request that the information remain private, then the information is subject to public access.

The legislature amended Exemption 15, which prohibits disclosure of birth and death records maintained by the Bureau of Vital Statistics of the Texas Department of Health or by a local registration official.

10. The broad reading accorded the new provision by law enforcement officials provoked an outcry from the press and the public. See FOI Focus.
11. A Subd. (23) of Subsec. 3(a), added by Acts 1989, 71st Leg., Ch. 326, § 1, effective June 14, 1989, was repealed by Acts 1989, 71st Leg., 1st CS, Ch. 4, § 2, effective July 21, 1989.

   Information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, and transcripts from institutions of higher education maintained in the personnel files of professional public school employees; provided, however, that nothing in this section shall be construed to exempt from disclosure the degree obtained and the curriculum on such transcripts of professional public school employees; and further provided that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1990).

   The names of applicants for the position of chief executive officer of institutions of higher education must give public notice of the name or names of the finalists being considered for the position at least 21 days prior to the meeting at which final action or vote is to be taken on the employment of the individual. TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1990).
14. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(17) (Vernon Supp. 1990)
15. Id.
16. Id. § 3A.
17. The legislature added the following language to Exemption 15:

   (A) a birth record is public information and available to the public on and after the 50th anniversary of the date on which the record is filed with the Bureau of Vital Statistics or local registration official; and

   (b) a death record is public information and available to the public on and
The legislature cured a potential loophole in the Act regarding governmental bodies who engage independent contractors or consultants to perform governmental functions and claim not to be able to produce documents in the possession of those consultants.\textsuperscript{18}

The amendment clarifies and embraces the Texas Attorney General's construction of the Act, which held that information in the constructive possession of governmental bodies constituted public information.\textsuperscript{19}

The legislature added a new section 3B to the Act granting a special right of access to information that relates to the requesting party beyond that held by the general public.\textsuperscript{20} This special right of access to confidential information strengthens a prior attorney general ruling on the subject.\textsuperscript{21}

Under the Open Records Act, if a governmental body receives a request for information that the body believes exempt from disclosure, it must within ten days seek an attorney general's ("AG") opinion pursuant to section 7 of the Act.\textsuperscript{22} The 71st legislature amended this section in several respects. The Act now specifies that a governmental body must request an AG opinion no later than ten \textit{calendar} days after receiving the written request for information.\textsuperscript{23} Although the Act previously required that the governmental body furnish the attorney general with the documents which are the subject of the Open Records Act request,\textsuperscript{24} section 7(b) provides that the information in dispute should not be "disclosed to the public or the requesting party until a final determination has been made by the attorney general or, if suit is filed... until a final decision has been made by the court with jurisdiction over the suit."\textsuperscript{25} If the court issues a protective order, the statute allows discovery of the information by the requesting party in litigation.\textsuperscript{26} Any member of the public may submit written comments to the attorney general regarding the information.\textsuperscript{27} A new subsection to section 7 provides that if a party's privacy or property interest is implicated in a request for information from a governmental body, then such person has a right to submit the person's reasoning for withholding or releasing the infor-

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\item 18. The legislature amended section 3(a) to provide that: "all information collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only . . . ." TEX. REV. CIV. STAT. ANN. art. 6252-7a, § 3(a) (Vernon Supp. 1990) (emphasis added).
\item 20. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3B (Vernon Supp. 1990).
\item 22. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7(a) (Vernon Supp. 1990).
\item 24. Id.
\item 25. Id.
\item 26. Id.
\item 27. Id.
\end{itemize}
mation in writing to the attorney general.\textsuperscript{28}

One of the most significant amendments to the Act permits the court to assess litigation expenses and attorneys' fees incurred by a party to a lawsuit who substantially prevails in any litigation under the Act.\textsuperscript{29} The court retains discretion over the award of attorneys' fees, but the statute directs the court to consider whether the conduct of the government had a reasonable basis in law and whether the suit was brought in good faith.\textsuperscript{30}

Section 9 of the Open Records Act regarding copying costs as amended provides that "[t]he State Purchasing and General Services Commission shall from time to time determine guidelines on the actual cost of standard size reproductions. . . ."\textsuperscript{31} Charges for copies cannot exceed the actual cost of the copies as provided in the statute.\textsuperscript{32} In addition, public records must be furnished without charge or at a reduced charge if the government decides that such waiver or reduction is in the public interest.\textsuperscript{33} If the governmental body acts in bad faith in computing costs, the person requesting information may receive three times the amount of the overcharge.\textsuperscript{34}

Section 10 of the Act allows a governmental body seeking to challenge an attorney general opinion ten calendar days to file such a case rather than the three working days previously allowed by the statute.\textsuperscript{35} The amendment requires that the attorney general be a party and that venue rest exclusively in Travis County District Court.\textsuperscript{36}

The legislature added a new subdivision to section 14 dealing with civil discovery.\textsuperscript{37} The attorney general previously held that nothing in the Open Records Act purports to affect the scope of testimony of a witness taken in discovery proceedings.\textsuperscript{38} Dicta in a 1987 Texas Supreme Court case suggested that the Open Records Act actually creates privileges to civil discovery in law enforcement cases.\textsuperscript{39}

\textbf{B. Amendments to the Government Code}

The 71st legislature also passed a comprehensive amendment to the local

\textsuperscript{28} Id.
\textsuperscript{30} Id.
\textsuperscript{32} Id. at 5028.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{36} Id.
\textsuperscript{37} The amendment to the Open Records Act provides that:
"[T]his Act does not affect the scope of civil discovery under the Texas Rules of Civil Procedure. The exceptions from disclosure under this Act do not create new privileges from discovery."
\textsuperscript{39} See Hobson v. Moore, 734 S.W. 2d 340, 341 (Tex. 1987); see also Villarreal v. Dominguez, 745 S.W.2d 570 (Tex. App.--Corpus Christi 1988, no writ) (holding failure of city to timely assert Open Records Act privilege constituted waiver of right to nondisclosure).
government code entitled The Local Government Records Act. The code broadly defines "governmental record", but excludes notes, journals, diaries, and similar documents created by an officer or employee of the local government for the officers or employees' personal convenience. The Act provides that "[l]ocal government records created or received in the transaction of official business or the creation or maintenance of which were paid for by public funds are declared to be public property and are subject to the provisions of... [the Code]." The statute fails to define "public funds", but defines "local government" to include "[a]ll district and precinct offices of a county, municipality, public school district, appraisal district, or any other special-purpose district or authority."

The Act subjects local government records to the Open Records Act. Even government records to which access is denied under the Open Records Act are open to public inspection seventy-five years after originally created or received. Section 202.002 of the Act prohibits a local government from destroying any record the subject matter of which is known by the custodian to be in litigation. Likewise, governmental bodies cannot destroy records subject to a request under the Open Records Act. Section 205.009 prohibits any person under contract or agreement with the local government from refusing to provide the local government with requested records in a timely manner and in an accessible and usable format.

C. Amendments To The Open Meetings Act

The legislature amended section 2(t) of the Open Meetings Act to provide that the "Act does not require the Credit Union Commission to delib-
ate in open meetings regarding matters made confidential by law.”

As amended, section 406.012 of the Government Code provides that records concerning the appointment and qualifications of notary publics shall be kept in the office of the secretary of state as public information.

**D. Judicial Decisions Construing The Open Records Act**

The Texas Supreme Court construed the Open Records Act in *Houston Chronicle Publishing Co. v. Mattox.* The Houston Chronicle filed an Open Records Act request with the Houston Independent School District ("HISD") seeking the college transcripts of district administrators who had allegedly attained degrees from nonaccredited schools. The HISD refused the request and sought an attorney general opinion. Without waiting for the attorney general to rule, the Chronicle filed an application for a writ of mandamus in district court and claimed it was entitled to immediate relief because the attorney general had ruled that such transcripts were public information.

A related suit, *Chapman v. Mattox,* was pending concurrently in Harris County. In *Chapman,* professional school employees challenged the attorney general's interpretation of the Open Records Act requiring disclosure of employees' college transcripts. The plaintiffs contended that the release of such information violated their constitutional right to privacy. The attorney general and the plaintiffs entered into an agreed order which prohibited the attorney general from rendering any decisions requiring the disclosure of professional school employees' college transcripts pending completion of the 71st Legislature. At the time, lobbying was underway in the legislature on behalf of the teachers to exempt such information.

The trial court subsequently consolidated the *Houston Chronicle* case with the *Chapman* case over the Chronicle's objection. The trial judge refused the Chronicle's application for a writ of mandamus against the HISD, and held "[t]hat the Chronicle lacked standing under the Open Records Act since there had been no decision by the Attorney General that the transcripts were public records."

The Chronicle sought a writ of mandamus against the attorney general to compel the attorney general to comply with his mandatory duty under the Open Records Act. The supreme court agreed with the Chronicle; it held that neither the attorney general nor a judge has the authority to suspend a valid statute. The court decided that a judge may not supervise and direct the manner and method of a statute's enforcement by the officers of the exec-

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53. *Id.* at 697.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 698.
The court additionally noted that the Open Records Act does not require the attorney general to render a decision when it has already been determined that the requested information falls within an exception to the Open Records Act. The Open Records Act allows the attorney general to refuse to render a decision if he concludes that a previous determination has been made regarding the type of information requested; a refusal to render a decision may be reviewed by the courts on an abuse of discretion standard. In a unanimous decision, however, the court held that the attorney general must either hold that he had made a previous determination regarding the professional school employees' transcripts or "forthwith" render an open records decision. Finally, the court ruled that the attorney general's decision is not subject to a rigid deadline, but that the Act simply requires the attorney general to "act within a reasonable time and not delay beyond the time needed to reach his decision."

*Euresti v. Valdez* involved a writ of mandamus brought by the Cameron County attorney seeking to vacate an order of a district judge requiring disclosure of testimony before a grand jury. The plaintiff in a malicious prosecution action sought the information and the district judge had required that the documents be disclosed. The county attorney brought a mandamus action and claimed that a discovery privilege was created since the requested documents were not subject to the Texas Open Records Act. The court rejected this position, however, and held that "[t]he fact that the Open Records Act does not apply does not create a privilege. . . . There is nothing in the Open Records Act that indicates that items not covered in the Act are exempt from discovery." The court correctly anticipated the legislature's clarifying amendment that states "this Act does not affect the scope of civil discovery under the Texas Rules of Civil Procedure."

**E. Decisions Under The Open Meetings Act**

In *Texas Water Commission v. Acker*, the Austin Court of Appeals decided a critical issue under the Texas Open Meetings Act. The court held that provisions of the Administrative Procedure and Texas Register Act ("APTRA") overrode apparently conflicting provisions of the Texas Open

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58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. 769 S.W.2d 575 (Tex. App.—Corpus Christi 1989, no writ).
65. *Id.* at 577.
66. *Id.* at 578.
68. 774 S.W.2d 270 (Tex. App.—Austin 1989, writ granted).
69. *Supra,* note 49.
Meetings Act.\textsuperscript{71}

In *Acker*, the Texas Water Commission denied the plaintiff's application for a wastewater treatment permit. The hearings examiner recommended that the Commission grant Acker's permit and, subsequently, the Commission conducted a public hearing on the matter. During a recess, two of the commissioners were overheard discussing the application outside the hearing room. The commission then issued a written order unanimously denying Acker's permit.

Acker sued in district court for review of the agency order and claimed that the action of the Water Commission violated the Open Meetings Act. The trial court granted summary judgment finding that "deliberation of the Plaintiff's permit application by two of the three members of the Texas Water Commission in an unauthorized closed meeting without any notice during a recess of the Commission's November 26, 1986, hearing on said permit" constituted a violation of the Act.\textsuperscript{72} The district court declared the commission's order null and void and remanded the case to the commission for further proceedings.

On appeal, the commission argued that conversations between commissioners, limited to the hearing record, do not represent a meeting under the Open Meetings Act as a matter of law. The commission argued in the alternative that APTRA allows an agency member to communicate ex parte with other members of a multi-member agency in contested cases; therefore, such communication between agency members cannot violate the Open Meetings Act. In its opinion, the court noted that "APTRA explicitly permits agency members to communicate ex parte with other agency members on issues of fact or law."\textsuperscript{73} APTRA apparently conflicts with the Open Meetings Act which prohibits nonpublic verbal exchanges between a quorum of members attempting to arrive at a decision on any public business.\textsuperscript{74} The court noted that APTRA, adopted after the Open Meetings Act, is a specific statute with specific application, whereas the Open Meetings Act is a general statute with general application.\textsuperscript{75} "APTRA allows private communications between agency members . . . ;"\textsuperscript{76} thus, verbal exchange does not violate the Open Meetings Act.\textsuperscript{77} The Texas Supreme Court has agreed to review this decision.

In another Open Meetings case, Collin County, Texas filed suit in federal court seeking a declaratory judgment regarding a highway project conducted in compliance with the National Environmental Policy Act.\textsuperscript{78} The defendants sought summary judgment against Collin County because it authorized

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\item[\textsuperscript{71}] *Acker*, 774 S.W.2d at 274.
\item[\textsuperscript{72}] Id. at 271-72.
\item[\textsuperscript{73}] Id. at 273.
\item[\textsuperscript{74}] Id.
\item[\textsuperscript{75}] Id. at 274.
\item[\textsuperscript{76}] Id.
\item[\textsuperscript{77}] Id.
\item[\textsuperscript{78}] Collin County, Texas v. Homeowners Ass'n for Values Essential to Neighborhoods (Haven), 716 F. Supp. 953 (N.D. Tex. 1989).
\end{itemize}
Plaintiff's suit in a meeting not complying with the Open Meetings Act.\(^79\) The court found that Collin County violated the Act by failing to identify the particular controversy to be discussed in executive session.\(^80\) At the summary judgment hearing the defendant conceded that Collin County could ratify its actions pursuant to a properly noticed and convened meeting.\(^81\) Based upon that concession, the court denied the defendant's motion for summary judgment and allowed Collin County thirty days within which to ratify its filing of the suit.\(^82\)

### F. Texas Attorney General Opinions Under The Open Records Act

The attorney general rendered the following decisions under the Texas Open Records Act during the survey period:

**ORD-507.** The attorney general held that records used or developed by the Department of Health in an investigation of a home health agency and made confidential under section 10(d) of article 4447u\(^83\) were exempt from public disclosure under section 3(a)(1) of the Texas Open Records Act.\(^84\) The attorney general rejected the argument that section 5.08(k) of article 4495b, the Medical Practices Act, authorizes the Department of Health to release a patient's medical records obtained in an investigation of a home health agency.\(^85\)

**ORD-508.** The attorney general required the release of the names of prisoners transferred from county jail to the Texas Department of Corrections after the completed transfer.\(^86\) The sheriff of Travis County had argued that the information should be protected from disclosure because the requesting party was an inmate who intended to use the information to injure another prisoner. The attorney general, however, rejected this argument finding that "[t]he motives of a person seeking information under the Act do not control whether specific information may be withheld."\(^87\)

**ORD-509.** The attorney general held that the Austin-Travis County Private Industry Council constitutes a “governmental body” within the meaning of the Open Records Act and, thus, bid proposals submitted to the council must be released after a contract is awarded.\(^88\)

**ORD-510.** In this decision, the attorney general determined whether a private university whose students were receiving tuition equalization grants pursuant to the Texas Education Code expended public funds or was supported by public funds within the meaning of section 2(1)(f) of the Texas

\(79.\) Id. at 960
\(80.\) Id.
\(81.\) Id.
\(82.\) Id.
\(85.\) Id.
\(87.\) Id.
Open Records Act. The attorney general decided that the university was not subject to the Act merely because its students received the equalization grants.\textsuperscript{89}

\textbf{ORD-511.} The attorney general held in this request that the Open Records Act requires attorneys for governmental bodies covered by the Act to determine whether the governmental body should claim exemption from disclosure under section 3(a)(3), which deals with information relating to litigation of a criminal or civil nature.\textsuperscript{90} The attorney general ruled that such information must be disclosed to the public once it has been seen by the parties in litigation with a governmental body.\textsuperscript{91}

\textbf{ORD-512.} The attorney general decided that the Open Records Act does not allow governmental bodies to deny requests for copies of public records.\textsuperscript{92}

\textbf{ORD-513.} Since the Open Records Act excludes the judicial branch from the definition of governmental body, the attorney general held that the Act does not apply to grand juries.\textsuperscript{93} An individual or entity acting as the grand jury's agent may have information that is in the constructive possession of the grand jury; therefore, this information is not subject to the Act.\textsuperscript{94}

\textbf{ORD-514.} The attorney general determined that the Secretary of State's contract to publish the official Texas Administrative Code is not protected from disclosure under the Act.\textsuperscript{95}

\textbf{ORD-515.} Complaints regarding a public employee's work performance that do not reveal crimes or the violation of specific laws to the officials enforcing those laws are not protected under the "informer's privilege."\textsuperscript{96} The attorney general also held that a governmental body seeking reconsideration of an attorney general's decision cannot raise exceptions that it failed to raise in its initial request unless it shows compelling reasons for initially withholding the information and subsequently raising the additional exceptions.\textsuperscript{97}

\textbf{ORD-516.} The Texas Attorney General Child Support Enforcement Office requested information from the Department of Public Safety ("DPS") regarding DPS employees. After providing partial information, the department refused to disclose the employees' home addresses and telephone numbers since the Open Records Act exempts such information from disclosure. The Department of Public Safety sought a determination of whether federal law overcame the exemption from disclosure under the Act. The

\textsuperscript{89} Tex. Att'y Gen. ORD-510 (1988).
\textsuperscript{90} Tex. Att'y Gen. ORD-511 (1988).
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Tex. Att'y Gen. ORD-512 (1988).
\textsuperscript{94} Id.
\textsuperscript{95} Tex. Att'y Gen. ORD-513 (1988).
\textsuperscript{96} Id.
\textsuperscript{97} Id.
attorney general held that "neither the federally-approved state child sup-
port plan [n]or federal law grants the state or its local child support offices
the authority to require that a state agency release information in violation
of the Open Records Act.98

ORD-517. The Secretary of State was asked to provide certain computer
programs developed in connection with NCR Corporation and a University
of Texas linguistics professor to conduct searches of the corporate and Uni-
form Commercial Code records stored in the Secretary of State's computer.
The attorney general acknowledged that computer programs are not gener-
ally considered a record but ruled that all information created by govern-
mental bodies is subject to the Open Records Act.99 The attorney general
found, however, that the legislature altered the method of access to com-
puter software and, thus, Article 4331a controlled the type of information at
issue.100

ORD-518. The district attorney of Tyler County asked the attorney general
whether the Open Records Act prohibited the release of information relating
to a bad check fund. The penal code creates the fund, which allows a person
charged with writing a bad check to make restitution through the prosecu-
tor's office. The district attorney sought to protect the names of persons who
paid bad check fees to the county. The attorney general held that these
names must be released to the public.101

ORD-519. The Bexar Metro 911 Network District is a governmental body
established to receive emergency telephone calls. The district asked the at-
torney general whether it must produce a recording containing a request for
aid in an incident involving the murder of four family members. The attor-
ney general ruled that when the district receives a request for one of the
tapes in its possession, it is prohibited from transferring the tape to another
governmental body in order to avoid disclosure.102 Once the tapes have
been transferred, the district must direct the requesting party to the govern-
mental agency for whom the call was taken.103

ORD-520. The San Antonio City Public Service Board received and
honored a request for the names and addresses of customers. However, the
Board objected to disclosure of the most recent utility bill and sales tax sta-
tus of commercial and industrial municipal utility customers. The attorney
general ruled that the tax status of the board's customers must be
disclosed.104

ORD-521. The Bexar County District Attorney's Office received three re-
quests for information regarding the death of an individual while in the cus-

100. Id.
103. Id.
tody of Bexar County. Article 49.18(b) of the Texas Code of Criminal Procedure provides that a report of the cause of a custodial death be filed pursuant to an investigation. The attorney general held that such a custodial death report, including its compilation and attachments, is not public information.

ORD-522. The Texas Racing Commission received Open Records Act requests for racetrack license applications. Section 2.15 of the Racing Commission Act provides that all nonconfidential records of the commission are open to public inspection. However, Section 2.15 explicitly prohibits disclosure of investigatory files except in criminal proceedings or in a commission hearing. The racing commission contended that an application for license is automatically a part of the investigatory file for the applicant. The attorney general rejected the argument and held that racetrack license applications are not exempt from disclosure by the Texas Racing Act. Only material regarding a person’s criminal history or management and concession contracts submitted as part of racetrack license applications may be withheld under the Racing Act.

ORD-523. The Texas Attorney General decided that the Open Records Act protects federal tax returns, tax return information and background financial information of a member of the Veteran’s Land Program from public disclosure.

ORD-524. This Open Records Act Request concerned the necessity of a university’s release of records regarding a deceased student. The attorney general ruled that upon the student’s death the university must disclose records previously held confidential under the Family Education Rights and Privacy Act and the Open Records Act.

ORD-525. The Secretary of State received a request for a listing of all complaints against notary publics under the Open Records Act. The Secretary of State released partial information; however, the agency refused to release the entire complaint file. The attorney general ordered the release of the entire file, except criminal history information provided by the Department of Public Safety.

ORD-526. This decision concerned the disclosure of teacher transcripts held by the Alief Independent School District. The attorney general held that an amendment to the Open Records Act passed by the 71st legislature requires the governmental body holding public school employee transcripts to edit

105. TEX. CODE. CRIM. PROC. art. 4918(b) (1990).
108. Id.
110. Id.
information other than the employee's name, degree obtained and the courses taken from such transcripts prior to disclosure. Thus, the district must delete grades as well as any extraneous information.

ORD-527. The Court Reporters' Certification Board requested an opinion from the attorney general regarding the disclosure of documents revealing the names and addresses of all shorthand reporters who received a notice of an informal disciplinary hearing and copies of all notices of formal hearings. The attorney general rejected the board's argument that the Open Records Act did not apply to its records and disagreed with a supreme court decision that exempted all of the board's records from public disclosure. Since the supreme court's decision conflicted with the Open Records Act, the attorney general ordered disclosure of the information.

ORD-528. The attorney general determined whether a court appointed receiver for the State Board of Insurance must reveal information about an investigation into possible collusion between regulated companies in this decision. The attorney general held the liquidator-receiver subject to the Texas Open Records Act; thus, information in the possession of the receiver is public unless exempted from disclosure under the Act. In this case, since the receiver had not requested a ruling on the applicability of the Act to the requested information within 10 days from his receipt of the request, the information was presumed public. The attorney general held that "[t]he fact that a governmental body contends that it is not subject to the act does not relieve it of its responsibility to request a decision; the applicability of the act is but a necessary preliminary determination under section 7."

JM-1013. This Open Records Act request concerned Texas governors' removal of records created during their administration from state custody. The attorney general held that records compiled by the governor's office in carrying out its statutory duties constitute "public records" under the Texas Government Code and the Open Records Act and "governmental records" within the meaning of the Texas Penal Code. The attorney general noted that whether particular records sought to be removed by the departing governor are within the ambit of the Acts must be determined on a case by case basis.

116. Id.
117. Id.
118. Id.
120. Id.
121. Id.
125. Id.
G. Attorney General Opinions Construing The Open Meetings Act

**JM-985.** In this opinion the attorney general held that the Texas Open Meetings Act authorizes notice of two hours only for emergency meetings. Furthermore, ratification of the emergency meeting's minutes fails to validate violations of the Act.126

**JM-1004.** A member of a school district board of trustees sued the other members in federal court. While an appeal was pending, the member sought to attend an executive session held to discuss the defense of the lawsuit. The attorney general found that the other board members could meet without the plaintiff board member because this instance represented "an exception from the usual rule that each board member must have an opportunity to attend all board meetings."127 The attorney general noted that allowing the plaintiff to attend attorney/client conferences would inhibit attorney/client communications and undermine the efficacy of the adversary system.128

**JM-1037.** In this request, the attorney general considered whether an emergency meeting held by a city council complied with the Open Meetings Act. During a regularly scheduled meeting, the council reviewed pleadings of a lawsuit filed by an employee the same day he was terminated. The council posted a notice in order to hold an emergency meeting within two hours to discuss indemnifying the Alief City Council and hiring a law firm to represent the Alief City Council.129 Based upon the facts presented in the request, the attorney general found no "emergency" within the meaning of the Open Meetings Act.130 The attorney general clarified his opinion and stated that emergency meetings are limited to cases that involve imminent threats to public health and safety or unforeseeable situations requiring immediate action by the governmental body.131

**JM-1058.** The attorney general decided whether, under the Open Meetings Act, a governmental body may, without notice, hold briefing sessions to receive information from staff members. The attorney general held that meetings between members of a governmental body and its employees for the purpose of receiving information or asking questions are not subject to the Open Meetings Act.132 The 70th legislature added section 2A to the Open Meetings Act which requires governmental bodies to maintain a certified agenda or tape recording of executive sessions.133 Subsection 2A(h) of the Act provides: "[n]o individual, corporation, or partnership shall, without lawful authority, knowingly make public the certified agenda or tape recording of a meeting or that portion of a meeting that was closed under authority

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128. Id.
130. Id.
131. Id.
of this Act."\textsuperscript{134} In a separate opinion,\textsuperscript{135} Senator Kent Caperton requested a ruling determining whether subsection 2A(h) restricts speech rights of governmental employees. Caperton argued that local authorities had interpreted the provision as prohibiting persons present in an executive session from making statements regarding the subject matter of the session. Senator Caperton questioned whether this interpretation abrogated the guarantee of freedom of speech found in the First Amendment of the United States Constitution.\textsuperscript{136} The attorney general interpreted "subsection 2A(h) as applying only to the records of executive sessions which governmental bodies are required to keep pursuant to section 2A of the Act. It does not prohibit persons who are present at the executive session from afterwards talking about the subject matter of the session."\textsuperscript{137}

\textit{JM-1072.} The chairman of the House Public Education Committee asked the attorney general whether the Texas Open Meetings Act applies to school district trustee committees including less than a quorum of the board. The attorney general held that if one or more members of a school district board of trustees meets to discuss public business, then the committee meeting is subject to the Open Meetings Act.\textsuperscript{138}

\textbf{II. JUDICIAL DECISIONS CONCERNING ELECTIONS}

In \textit{State Democratic Executive Committee v. Raines}\textsuperscript{139} the Texas Supreme Court reviewed procedures for selecting replacement candidates in an election for the court of appeals. The Republican Party State Executive Committee had conducted a telephone poll and arrived at a replacement nominee. The supreme court decided that this telephone poll violated section 145.036(d) of the Texas Election Code.\textsuperscript{140} The Republican party relied on its party bylaws to validate the selection. The supreme court specifically held that party rules must be consistent with state law and that, pursuant to the Election Code, a telephone poll was not permitted.\textsuperscript{141} The court ordered the Secretary of State to alter his certification to encompass only candidates nominated in accordance with the Election Code.\textsuperscript{142}

The Texas Supreme Court also decided whether a county commissioner convicted of official misconduct could be removed from office based upon acts prior to his reelection.\textsuperscript{143} In a per curium opinion the supreme court held that since all the acts for which the commissioner was convicted occurred prior to his reelection, section 87.001 of the Local Government Code

\begin{itemize}
\item \textsuperscript{136} U.S. Const., amend. I.
\item \textsuperscript{137} Id.
\item \textsuperscript{139} 758 S.W.2d 227 (Tex. 1988).
\item \textsuperscript{140} Id. at 227. Tex. Elec. Code Ann. § 145.036(d) (Vernon 1986).
\item \textsuperscript{141} Raines, 758 S.W.2d at 228. Tex. Elec. Code Ann. § 145.036(d) (Vernon 1986).
\item \textsuperscript{142} Raines, 758 S.W.2d at 228. Tex. Elec. Code Ann. § 145.036(d) (Vernon 1986).
\item \textsuperscript{143} Talamantez v. Strauss, 774 S.W.2d 661 (Tex. 1989).
\end{itemize}
prohibited his removal from office.144

The Corpus Christi Court of Appeals decided three election cases during the survey period. In Medrano v. Gleinser145 the appellate court affirmed a lower court ruling that voided an election for a county commissioner in Goliad County.146 Ralph Medrano was certified as the winner of the election by a margin of one vote. The losing candidate, Leo Gleinser, filed an election contest suit and claimed that votes had been illegally cast in favor of Medrano. The closeness of the election and testimony at trial narrowed the decisional focus to one illegal voter, Nicholas Davila, who was disqualified from voting because of a prior felony conviction.147 Davila stated that he voted for Gleinser, but the trial court chose to disbelieve the witness. Although there was no way of directly proving that Davila had voted for Medrano rather than Gleinser, the appellate court held that the fact finder is not compelled to believe such a witness.148

State v. Fischer149 involved an effort to have a candidate for county attorney declared ineligible. The trial court found for the candidate but the Corpus Christi Court of Appeals reversed and rendered.150 Fischer, a candidate for Willacy County Attorney, faced challenge because he failed to continuously reside in Willacy County for the six months immediately preceding the filing deadline for a place on the primary election ballot. A jury found that the candidate had resided in the county for the requisite period. In reversing the trial court's decision, the appellate court first determined that a private attorney acting as Willacy County Attorney Pro Tem in this case had standing to file suit.151 Second, the court found no evidence to support the jury finding that the candidate had continuously resided in Willacy County for the requisite time period.152 "Even though a person need not remain in one place for a set length of time to establish residency, we [the court] cannot hold that these activities, standing alone, established Willacy County as appellee's residence or domicile . . . ."153

Lerma v. Raymond154 involved a candidate's attempt to prevent the placement of another candidate on the ballot for a general election for the position of county judge. On June 11, 1988, the incumbent county judge died and committees of the respective national parties selected a candidate. Baldemar Alaniz petitioned to have his name placed on the ballot as an independent candidate. The court, for the purposes of argument, agreed that strict interpretation of the Election Code is not mandated when reviewing

144. Id. at 662.
145. 769 S.W.2d 687 (Tex. App.— Corpus Christi 1989, no writ).
146. Id. at 688.
147. Id. at 689.
148. Id. at 690.
149. 769 S.W.2d 619 (Tex. App.— Corpus Christi 1989, writ dism'd w.o.j.).
150. Id. at 624.
151. Id. at 620.
152. Id. at 624.
153. Id.
154. 760 S.W.2d 727 (Tex. App.— Corpus Christi 1988, no writ).
the sufficiency of petition signatures.155 The court refused, however, to excuse "total omission of such information as the voter's registration number or the resident address entirely or the printed name or the signature. . . ."156

Love v. Veselka157 also involved a challenge to a petition to place a candidate on a ballot. Almost all of the persons signing the petition failed to designate the State of Texas as the signer's residence address. Section 1.005(17) of the Election Code defines the term "residence address" as "the street address and any apartment number, or the address at which mail is received if the residence has no address, and the city, state, and zip code that correspond to a person's residence."158 The court of appeals held that the Code did not require inclusion of the state in the petition.159

A voter petition was also at issue in Baugh v. Williams.160 In that case, a citizen filed a petition which, if effective, required the City of Alto to hold an election on approval of proposed indebtedness for rehabilitation of its sanitary sewer system. The petition contained seventy-eight signatures, but no other information accompanied the signatures. The city argued that the petition must comply with the Election Code which requires additional information before there can be an election. The court of appeals agreed and held that the petition failed.161

In Baber v. Rosser162 the Plaintiff sought to have an election incorporating the City of Rosser declared void. The trial court validated the election, but the Dallas Court of Appeals reversed and held that a city which is already incorporated and which has not been legally dissolved cannot be reincorporated.163

Finally, in Overton v. The City of Austin,164 plaintiffs sought to invalidate the City of Austin's at-large, majority place system for election of city council members under the Federal Voting Rights Act of 1965.165 The district court found no violation. The Fifth Circuit, in a per curium opinion, affirmed.166

III. ANNEXATION

In City of Willow Park v. Bryant167 residents sought a declaratory judg-

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155. Id. at 730.
156. Id. at 729-30.
157. 764 S.W.2d 564 (Tex. App.—Houston [1st Dist.] 1988, no writ); see also Sears v. Strake, 764 S.W.2d 805 (Tex. App.—Houston [1st Dist.] 1988, mand. overr.) (relator sought to have respondent ordered to reject the application and petition of candidate for place on ballot because of defects in the petition).
158. Love, 764 S.W.2d at 564 (citing TEX. ELEC. CODE ANN. § 1.005(17) (Vernon 1986).
159. Id. at 565.
160. 762 S.W.2d 627 (Tex. App.— Tyler 1988, no writ).
161. Id. at 630.
162. 770 S.W.2d 629 (Tex. App.— Dallas 1989, writ dism'd w.o.j.).
163. Id. at 630.
164. 871 F.2d 529 (5th Cir. 1989).
166. Overton, 871 F.2d at 529.
167. 763 S.W.2d 506 (Tex. App.— Fort Worth 1989, no writ).
ment invalidating annexation ordinances. The district court held the ordinances invalid.\textsuperscript{168} The court of appeals held that failure to make the attorney general a party to the suit did not deprive the trial court of jurisdiction; however, a challenge to the validity of two of the annexation ordinances was barred by limitations because it was brought more than four years after passage.\textsuperscript{169} The court of appeals reversed part of the lower court's ruling regarding two of the three ordinances under attack.\textsuperscript{170} The court affirmed the trial court's holding that the residents had standing to bring the suit, but reversed the holding that one of the ordinances was void for lack of evidence.\textsuperscript{171} The appellate court further held that challenges to the two additional ordinances were barred by limitations\textsuperscript{172} and that these two ordinances were valid from the dates of enactment.\textsuperscript{173}

IV. TORT LIABILITY

The current Survey period includes decisions assessing both the validity of claims for damages resulting from governmental conduct and the scope of governmental immunity.\textsuperscript{174} This section addresses judicial decisions considering the notice requirements for claims against governmental entities, the federal cause of action for deprivation of civil rights,\textsuperscript{175} and the waiver of governmental immunity under Texas Tort Claims Act.\textsuperscript{176}

A. Notice Requirements

Pursuant to the Local Government Code,\textsuperscript{177} many cities impose notice requirements upon tort claimants.\textsuperscript{178} Failure to observe notice requirements has been held to foreclose any recovery.\textsuperscript{179} In City of Dallas v. Donovan,\textsuperscript{180} the Dallas Court of Appeals affirmed a judgment against the City of Dallas, in part because the city had actual notice of the hazardous condition that caused the Plaintiff's injury.\textsuperscript{181} The Plaintiff suffered injuries in a traffic collision at an intersection where a stop sign was down.

\begin{itemize}
  \item \textsuperscript{168} Id. at 508.
  \item \textsuperscript{169} Id. at 508-509.
  \item \textsuperscript{170} Id. at 512.
  \item \textsuperscript{171} Id.
  \item \textsuperscript{172} Id.
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} For a general outline of the scope of Texas governmental immunity, see Babcock & Collins, Local Government Law, Annual Survey of Texas Law, 35 Sw. L.J. 409, 452 (1981).
  \item \textsuperscript{175} 42 U.S.C. \textsection 1983 (1981).
  \item \textsuperscript{177} TEx. Loc. Gov't. Code Ann. \textsection 51.077 (Vernon 1988).
  \item \textsuperscript{179} LaBove v. City of Groves, 602 S.W.2d 395, 397 (Tex. Civ. App.—Beaumont 1980) (advisory letter to city not conforming to notice requirements failed to constitute notice), writ ref'd n.r.e. per curiam, 608 S.W.2d 162 (Tex. 1980); Bowling v. City of Port Arthur, 522 S.W.2d 270, 273 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.)(filing unverified notice with city manager instead of verified notice with city commission as required failed to constitute notice).
  \item \textsuperscript{180} 768 S.W.2d 905 (Tex. App.—Dallas 1989, no writ).
  \item \textsuperscript{181} Id. at 908.
\end{itemize}
The court noted that "[a] governmental unit is immune from liability for damages based on a claim arising from the removal or destruction of a traffic or road sign by a third party unless the governmental unit fails to correct the situation within a reasonable time after actual notice."182 Rejecting the city's argument that it never received actual notice,183 the court relied on (1) testimony that an accident witness reported the downed stop sign days prior to the accident, (2) evidence that the city required police officers and sanitation workers who routinely passed through the intersection to report any downed stop sign, and (3) testimony by four witnesses that the sign was down for at least several days.184

The Texarkana Court of Appeals considered the actual notice exception in *Rosales v. Brazoria County.*185 In *Rosales* the court rejected the county's argument that a Tort Claims Act' suit against a county requires direct notice of the claim to the county judge or the commissioner's court.187 Recognizing that "[t]he purpose of the notice is to insure a prompt recording of claims and to enable the governmental unit to investigate and gather information to guard against unfounded claims,"188 the court stated that "[i]f an agent or representative who received notice had a duty to gather facts and report, the notice is imputed to the government."189 In this case, the sheriff's department investigators arrived at the scene immediately after the automobile accident and filed both internal investigation and accident reports. The officers had a duty to investigate the accident and report their findings to the county; thus, the court imputed actual notice to the county.190 Accordingly, the court reversed summary judgment for the county.191

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182. *Id.* at 906 (citing TEx. Civ. PrAC. & REM. CODE § 101.060(a)(3) (Vernon 1986)).
183. 768 S.W.2d at 908. The court of appeals approved the trial court's definition of "actual notice" as "information concerning a fact actually communicated to or obtained by a city employee responsible for acting on the information so received or obtained." *Id.* (citing City of Texarkana v. Nard, 575 S.W.2d 648, 651-663 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.)).
184. 768 S.W.2d at 909. The court of appeals commented that even without the excited utterance of the accident witness, the circumstantial evidence of actual notice sufficiently supported the jury finding. *Id.*
185. 764 S.W.2d 342 (Tex. App.—Texarkana 1989, no writ).
186. TEx. Civ. PrAC. & REM. CODE ANN. § 101.101 (Vernon 1986) provides:
   (a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:
      (1) the damage or injury claimed;
      (2) the time and place of the incident; and
      (3) the incident.
   (c) The notice requirements . . . do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged.
187. 764 S.W.2d at 343.
188. *Id.* at 344 (citing City of Houston v. Torres, 621 S.W.2d 588, 591 (Tex. 1981)).
189. 764 S.W.2d at 344 (citing City of Galveston v. Shu, 607 S.W.2d 942 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); City of Texarkana v. Nard, 575 S.W.2d 648 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.)).
190. 764 S.W.2d at 345.
191. *Id.* In so doing, the court also discounted the county's argument that county government is more analogous to state government than to city government and that, therefore, the
In Woomer v. City of Galveston,192 as in Rosales, lack of formal notice failed to defeat suit against a city where it possessed actual notice of the injury, the probable cause of the injury and the names and addresses of all involved. In Woomer, the director of the Sheriff's Beach Control completed a written report after investigating a drowning at a beach marked by signs stating "no swimming." City representatives were present during the investigation. Reversing summary judgment in favor of the city and county, the court of appeals concluded that notice was not required because the investigator "was impliedly charged with disseminating the report to the interested authorities."193

1. Physical Incapacity

In Hatcher v. City of Galveston194 the Houston Court of Appeals recognized that physical incapacity precludes application of a city charter notice requirement.195 Although the Plaintiff detailed his injury and medical history in support of his incapacity, the trial court held that the Plaintiff's written notice to the city more than a year after his injury failed to comply with the city's forty-five day notice requirement. Pointing out that Texas courts have long recognized an exception to notice requirements in city charters for a party unable to comply, the court held that the exception encompassed physical as well as mental incapacity.196 The court accordingly reversed the summary judgment in favor of the City of Galveston.197

B. Liability Under 42 U.S.C. Section 1983

1. Qualified Immunity for Law Enforcement

During the Survey period, both state and federal courts addressed claims by individuals that municipalities and governmental entities deprived them of their civil or property rights. In Lockhart v. City of Garland198 city police officers arrested one of the Plaintiffs for failure to stop at a red light, driving without a license and driving without proof of mandatory insurance. In response, the Plaintiffs brought a civil rights action under 42 U.S.C. section 1983. The city argued that section 1983 liability may not be imposed upon a municipality solely because of the acts of its police officers. The Plaintiffs countered that the city ratified the officers' alleged misconduct two years

rule of agency should not apply to counties. The court of appeals reasoned that the rule of agency is particularly inappropriate to state government which is "vast and compartmentalized," especially when the three branches of state government - legislative, executive and judicial - are under no duty to report information to one another. Id. at 344.
193. Id. at 839. The court went on to state that "[i]f this were not so, then any department whose duties included that of investigating accidents under the Texas Tort Claims Act could defeat any action against the State or its political subdivisions by merely making the report and placing it in its file cabinet." Id.
194. 775 S.W.2d 37 (Tex. App.-Houston [1st Dist.] 1989, no writ).
195. Id. at 39.
196. Id. at 39.
197. Id.
after the arrest by indemnifying its officers for section 1983 liability. Granting the city summary judgment, the district court determined that the city's indemnification did not preclude application of Monell v. Dept of Social Services. Hence, the city could not be held liable merely as the employers of the officers.

The City of Garland also successfully defended a motorist's civil rights action against both the city and a city police officer in Gassner v. City of Garland. Gassner claimed that a city police officer used excessive force in arresting him without probable cause. While rushing to a shopping center with his wife to locate their lost eight year old son, the officer stopped Gassner for making an illegal right turn. After giving an urgent and evidently confusing explanation, Gassner attempted to leave; to prevent this, the officer applied a chokehold, handcuffed Gassner and arrested him. On appeal, the Fifth Circuit recognized that the Supreme Court defined the qualified immunity from suit enjoyed by police officers in Harlow v. Fitzgeral: "[G]overnmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Moreover, the Fifth Circuit noted that the Court in Anderson v. Creighton refined the qualified immunity test set out in Harlow: the contours of the right the official is alleged to have violated "must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right."

The court then addressed two critical issues: first, whether a reasonable officer in the arresting officer's position could have concluded that there was probable cause to arrest plaintiff for refusing to comply with the officer's lawful order; and, second whether the offense of refusing to comply with a lawful order related to the offense with which Plaintiff was actually charged. Since the arresting officer could have required the Plaintiff to stay at the scene for a reasonable period of time, the court concluded that a reasonable officer would have considered Plaintiff's attempt to leave the scene a failure to follow a police officer's lawful order. The court also

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199. 436 U.S. 658 (1978) (holding section 1983 liability may not be imposed upon a city solely because of its employee's acts).
201. 864 F.2d 394 (5th Cir. 1989).
202. 864 F.2d at 396.
203. Id.
204. 457 U.S. 800 (1982).
205. 864 F.2d at 396 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
206. 864 F.2d at 397 (quoting Anderson, 483 U.S. at 640).
207. 864 F.2d at 399. In Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982), the Fifth Circuit previously stated that the legality of an arrest can be established by proving probable cause to believe that the Plaintiff had committed a crime other than the one with which he eventually was charged existed, provided that the "crime under which the arrest is made and [the] crime for which probable cause exists are in some fashion related." United States v. Atkinson, 450 F.2d 835, 838 (5th Cir. 1971) (quoting Mills v. Wainwright, 415 F.2d 787, 790 (5th Cir. 1969), cert. denied, 406 U.S. 923 (1972)).
208. 864 F.2d at 399-400.
concluded that the disorderly conduct offense arose out of the same conduct as the plaintiff's failure to follow a police officer's lawful order; thus, the two offenses were related.\textsuperscript{210} The court held that the arresting officer was entitled to qualified immunity because a reasonable officer would have had probable cause to believe that Plaintiff was committing a crime related to that with which he was actually charged. Accordingly, the court rendered judgment rendered in favor of the arresting officers.\textsuperscript{211}

The Fifth Circuit considered another civil rights claim against a city and its chief of police in \textit{McConney v. City of Houston.}\textsuperscript{212} In \textit{McConney}, police officers arrested the Plaintiff for public intoxication and detained the Plaintiff pursuant to the city's four hour detention rule although a booking officer determined that he was not intoxicated. Relying upon the Plaintiff's concession that the chief of police enjoyed qualified immunity under \textit{Anderson v. Creighton}\textsuperscript{213} and upon the lack of evidence establishing a connection between the chief of police and either Plaintiff's arrest or the four hour detention rule, the Fifth Circuit reversed the trial court's judgment against the chief of police.\textsuperscript{214}

The court stated that the city can be liable under section 1983 "only if a municipal policy caused the deprivation of a right protected by the Constitution or federal laws."\textsuperscript{215} The city argued on appeal that the post-arrest detention of those charged with public intoxication is constitutional; therefore, its policy did not deprive the plaintiff of his constitutional right. Relying on the First Circuit's approach to a similar issue in \textit{Thompson v. Olson},\textsuperscript{216} the Fifth Circuit concluded that "a person may constitutionally be detained for at least four or five hours following a lawful warrantless arrest for public intoxication without the responsible officers having any affirmative duty during that time to inquire further as to whether the person is intoxicated, even if requested to do so. However, once a responsible officer actually does ascertain beyond reasonable doubt that one who has been so arrested is in fact not intoxicated, the arrestee should be released."\textsuperscript{217} The court then noted that even though city authorities knew that the Plaintiff had not been intoxicated the city failed to challenge the sufficiency of the evidence supporting the jury finding that the city policy contemplated continued unbailable detention for four hours.\textsuperscript{218} Accordingly, the court affirmed the judgment against the city.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{210} \textit{Id.} at 400.
\item \textsuperscript{211} \textit{Id.}
\item \textsuperscript{212} 863 F.2d 1180 (5th Cir. 1989).
\item \textsuperscript{213} 483 U.S. 635 (1987).
\item \textsuperscript{214} 863 F.2d at 1188.
\item \textsuperscript{215} \textit{Id.} at 1184 (citing Monell v. Dept. of Social Services, 436 U.S. 658, 691 (1978)).
\item \textsuperscript{216} 798 F.2d 552 (1st Cir. 1986), \textit{cert. denied}, 480 U.S. 908 (1987).
\item \textsuperscript{217} 863 F.2d at 1185 (footnote omitted).
\item \textsuperscript{218} There was considerable testimony that Plaintiff was diabetic and that at the time of his arrest, if not before, he was having an insulin reaction.
\item \textsuperscript{219} 863 F.2d at 1189. The failure of the city to challenge the sufficiency of the evidence to support the jury's liability finding limited appellate court review to "whether there was any evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was
2. Violation Of Property Rights

Several decisions during the Survey period concerned section 1983 claims that actions by municipalities violated property rights. In *Glagola v. North Texas Municipal Water District*220 the Plaintiff claimed that he was deprived of a property right without procedural due process when the district fired him. The Plaintiff argued that two provisions of the water district personnel policy manual established the proposition that he could be terminated only for just cause, thereby creating a property interest in continued employment.221 Recognizing that a property interest must be derived from state law, the district court examined Texas decisions addressing whether employee handbooks or personnel manuals may alter the general employment-at-will rule in Texas.222 The district court held that:

The cases . . . exhibit a general rule in Texas that employee handbooks or personnel manuals unilaterally issued by an employer, standing alone, may not expressly or impliedly limit an employer's ability to terminate an employee at will. In order to alter the employment at-will rule, a plaintiff must rely on something more than an employee handbook; there must be evidence of an oral agreement specifically adopting the handbook as in *Brown*, or a course of conduct on the part of the employer and employees treating the handbook as a contract, as exemplified in *Aiello*.223

The Plaintiff relied solely upon the water district's personnel policy manual for the existence of a property interest; thus, the district court concluded that the Plaintiff's evidence was legally insufficient to alter his at-will status and granted the water district summary judgment.224

*City of Houston v. Trapani*225 involved an ordinance applicable to portable signs. The ordinance provided for the appointment of a sign administrator authorized to enforce the ordinance. The Plaintiffs dismantled their billboards in response to the sign administrator's notice of an impending removal deadline to sign owners. After passage of the deadline for erecting new signs the Plaintiffs learned that the city's notice stemmed from a mistaken reading of the ordinance. Asserting that the city violated their prop-

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221. 705 F. Supp. at 1221.
222. *Id.* at 1221-22 (citing Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536 (Tex. App.—Corpus Christi 1982, no writ); *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196 (5th Cir. 1987); *Joachim v. AT&T Information Systems*, 793 F.2d 113 (5th Cir. 1986); *Vallone v. Agip Petroleum Co.*, 705 S.W.2d 757 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *United Transportation Union v. Brown*, 694 S.W.2d 630 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.); *Molder v. Southwestern Bell Telephone*, 665 S.W.2d 175 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).
223. 705 F. Supp. at 1223.
224. *Id.* at 1224. The district court also declined, in the absence of case citations by the plaintiff, to adopt plaintiff's argument that public employers should be treated differently from private employers with regard to the creation of a property interest in continued employment. *Id.* at 1223-24.
225. 771 S.W.2d 703 (Tex. App.—Houston [14th Dist.] 1989, writ denied).
Property rights under 42 U.S.C. section 1983, the Plaintiffs sought and obtained a judgment on a jury verdict against the city.\textsuperscript{226} The Houston Court of Appeals held that the Plaintiffs possessed a property interest under state law and proceeded to the determinative issue of "whether the sign administrator qualifies as a policymaker, or whether that policymaking authority resides elsewhere - such as in the City Council."\textsuperscript{227} The city argued that final authority to make policy resided exclusively in the City Council. In response, the Plaintiffs pointed to both the ordinance itself and the testimony of the assistant sign administrator. The court rejected the city's restrictive interpretation of the term "policymaking authority," including the argument that ad hoc council review of particular decisions precluded a determination that the sign administrator possessed policymaking authority.\textsuperscript{228} Such an argument, reasoned the court, would allow a municipality to enact a "mechanism for council veto, and then contend that no policy was ever final until an aggrieved party lost an appeal to the council."\textsuperscript{229} Accordingly, the court concluded that the acts of the city sign administrator represented official policy and affirmed the jury finding of liability against the city.\textsuperscript{230}

In \textit{Alamo Carriage Service, Inc. v. City of San Antonio},\textsuperscript{231} the Plaintiffs sued the city for revoking their permits to operate horse carriages and claimed that their procedural due process rights had been violated. The court of appeals examined whether the Plaintiffs possessed any protected property rights. Since state law creates and defines property rights,\textsuperscript{232} the court considered and found controlling numerous Texas decisions holding that no property right exists to conduct a business in and over the streets and highways for profit.\textsuperscript{233} Accordingly, the court affirmed the judgment in favor of the city.\textsuperscript{234}

\textsuperscript{226} 771 S.W.2d at 704.
\textsuperscript{227} Id. at 705. The court of appeals recognized that "[m]unicipal liability under § 1983 must be predicated on governmental custom or policy . . .," and that the City of Houston cannot be liable "[i]f the conduct of the sign administrator fails to qualify as execution of official policy . . .." \textsuperscript{Id. (citing Monell v. Dept. of Social Services, 436 U.S. 658 (1978)).}
\textsuperscript{228} 771 S.W.2d at 707.
\textsuperscript{229} Id.
\textsuperscript{230} Id. at 708.
\textsuperscript{231} 768 S.W.2d 937 (Tex. App.—San Antonio 1989, no writ).
\textsuperscript{232} Id. at 940 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985)).
\textsuperscript{233} 768 S.W.2d at 940-41; see City of San Antonio v. Bee-Jay Enters., 626 S.W.2d 802 (Tex. App.—San Antonio 1981, no writ) (no vested right exists in Texas to use streets and highways in carrying on commercial business); City of San Antonio v. Fetzer, 241 S.W. 1034, 1035 (Tex. Civ. App.—San Antonio 1922, writ ref'd) (streets held in trust by state for benefit of public at large); Greene v. City of San Antonio, 178 S.W. 6 (Tex. Civ. App.—San Antonio 1915, writ ref'd) (no right exists to use street for prosecution of private business and use for reprosecution of private business may be prohibited or regulated as state or municipality deems best for public good); Tex. Rev. Civ. Stat. Ann. art. 1175, subd. 3 (Vernon Supp. 1988) (as a home rule city, San Antonio has "exclusive dominion, control, and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards").
\textsuperscript{234} 768 S.W.2d at 943.
C. Liability Under Texas Tort Claims Act

1. Motor Vehicles

Numerous decisions during the Survey period discussed the scope of the waiver of governmental immunity contained in the Texas Tort Claims Act.\(^{235}\) In *Mount Pleasant Indep. School Dist. v. Estate of Lindburg*,\(^ {236}\) the estate brought a negligence action in connection with the death of a child struck by an automobile after exiting a school bus.\(^ {237}\) The Texas Supreme Court rendered judgment that the Plaintiff take nothing.\(^ {238}\) The court noted that the school district properly raised the defense of sovereign immunity by special exception and stated that a Plaintiff must obtain a finding that the damages suffered were proximately caused by a public employee's negligence and that they arose "from the operation or use of a motor-driven vehicle . . ." to avoid a sovereign immunity defense.\(^ {239}\) The court held that the Plaintiff failed to obtain a jury finding on this issue and concluded that sovereign immunity barred the Plaintiff's claim because the evidence did not show, as a matter of law, that the "operation or use of a motor-driven vehicle caused the child's death."\(^ {240}\)

2. Emergency Medical Services

Two decisions during the Survey period, *Jordan v. City of Dallas*\(^ {241}\) and *Mejía v. City of San Antonio*,\(^ {242}\) reached different results for Plaintiffs who received injuries involving emergency ambulance services. In *Jordan*, the Plaintiff's son died of an irregular heart rhythm. The Plaintiff sued the city

\(^{235}\) *Tex. Civ. Prac. & Rem. Code* § 101.021 (Vernon 1986) provides that a governmental unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

\(^{236}\) 766 S.W.2d 208 (Tex. 1989), rev'd 746 S.W.2d 257 (Tex. App.—Texarkana 1987).

\(^{237}\) The child did not cross the highway toward her home after exiting the bus, although other children did so safely while traffic was stopped. Instead, after the bus left, she walked along the shoulder of the highway and then ran into the highway. At the time the automobile hit her, the school bus was approximately one-quarter of a mile away. *Id.* at 209-10, 212.

\(^{238}\) *Id.* at 213.


\(^{240}\) 766 S.W.2d at 212. Significantly, the supreme court reaffirmed the principle that a plaintiff must disprove the application of sovereign immunity under the Texas Tort Claims Act even when a defendant's special exception, asserting sovereign immunity, has been overruled. *Id.* at 211-212.


\(^{242}\) 759 S.W.2d 198 (Tex. App.—San Antonio 1988, no writ).
and alleged that emergency ambulance services paramedics failed to transport her son to a hospital. The district court decided that the operation of emergency ambulance services was a governmental function and not a proprietary function, rejected Plaintiff's argument that governmental immunity had been waived under the Texas Tort Claims Act by virtue of the city's non-use of the emergency ambulance services and granted summary judgment to the city based on governmental immunity. In Mejia, however, the San Antonio Court of Appeals reversed a summary judgment in favor of the City of San Antonio in a wrongful death and survival action. The Plaintiff alleged that city emergency medical service ("EMS") technicians negligently treated her son for injuries sustained in an automobile collision. The EMS technicians transported the Plaintiff's son to his home instead of a hospital; on the same day, the son checked himself into a hospital and died shortly thereafter.

The city argued that EMS constitutes a governmental function; thus, no exception to governmental immunity under the Texas Tort Claims Act applied in the case. The court agreed that providing emergency medical services represents a governmental function, but rejected the city's argument that section 101.055 of the Tort Claims Act immunizes employees responding to emergency calls who comply with applicable laws. After reviewing the evidence, the court concluded that the city failed to show, as a matter of law, that the actions of the EMS technicians were "in compliance with any applicable laws or ordinances so as to leave no genuine question of fact . . . ." The court also decided that the city had failed to show that there was no "use" or "operation" of the EMS vehicle within the meaning of the Texas Tort Claims Act. The use of the EMS vehicle to transport Plaintiff's son to his home gave rise to the fact issue whether his death "arose from" the use or operation of the EMS vehicle.

3. Use Of Tangible Personal Property

Several appellate decisions during the Survey period examined the Tort
Claims Act provision that "[a] governmental unit in the state is liable for . . . personal injury . . . so caused by . . . use of tangible personal . . . property . . . ."252 In Texas Dep't of Corrections v. Winters253 the Plaintiffs sued the department for sending a telegram mistakenly advising them that their husband/father had died while an inmate at the Texas Department of Corrections when, in fact, he had not died. The court concluded that "[t]he machine used to transmit the message was certainly tangible personal property, and its misuse falls within the Act,"254 and affirmed a jury verdict for the Plaintiffs.

In Quinn v. Memorial Medical Center255 a patient sued the Nueces County Hospital District for alleged negligence in dispensing an abortifacient drug. The court of appeals reversed judgment for the defendant and held that "the dispensing of a drug by a hospital pharmacy is use of tangible personal property and falls within the waiver provisions of the [Texas Tort Claims Act]."256 The court also rejected the Defendant's argument that it did not waive preserved immunity because the drug was used by an off-duty resident outside its premises and after control by Defendant had ceased.257

In Montoya v. John Peter Smith Hospital258 the wife of an emergency room patient who died of a heart attack brought a wrongful death action against a public hospital. The Plaintiff argued that a nurse failed to fill out the triage slip used to assign priority to an emergency patient, and that such failure contributed to her husband's death.259 The Fort Worth Court of Appeals affirmed judgment for the hospital and interpreted the [Salcedo] court's definition of 'use' to exclude 'nonuse' or failure to use property. The failure to use the triage slip does not state a cause of action within this construction of the Act.260 In dicta the court also mentioned that a triage slip is not tangible personal property within the meaning of the Tort Claims Act.261

254. Id. at 532 (citing Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 32 (Tex. 1983)).
255. 764 S.W.2d 915 (Tex. App.—Corpus Christi 1989, no writ).
256. Id. at 917 (citing Salcedo 659 S.W.2d at 32; Overton Memorial Hosp. v. McGuire, 518 S.W.2d 528, 529 (Tex. 1975)).
257. 764 S.W.2d at 917. The Plaintiff, who had been dating the resident, was injured during an abortion induced with the drug. Under the terms of both his license and hospital policy, the resident had authority to prescribe only for hospital patients and himself. To avoid this issue, he initially presented the prescription for the drug to the hospital pharmacy in blank. When challenged, he inserted his own name as the patient. The pharmacy attendants then dispensed the drug to him, despite the apparent lack of any authorized patient.
258. 760 S.W.2d 361 (Tex. App.—Fort Worth 1988, writ denied).
259. Specifically, Plaintiff argued that the triage slip should have been prepared before and not after her husband's collapse.
260. 760 S.W.2d at 363 (citing Floyd v. Willacy County Hosp. Dist., 706 S.W.2d 731, 733 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); Vela v. Cameron County, 703 S.W.2d 721, 724-25 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); Brantley v. City of Dallas, 545 S.W.2d 284 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.)).
261. 760 S.W.2d at 364. The court conceded that an electrocardiogram graph has been held to be tangible personal property. But cf. Salcedo, 659 S.W.2d at 33 (the court noted that the blank triage slip did not record a tangible situation as in Salcedo). The court also noted that the existence of a blank triage form is merely incidental to the alleged failure of the triage nurse to timely take action. 760 S.W.2d at 364. Finally, the court mentioned that if a blank
Robinson v. Central Texas MHMR Center addressed whether the waiver of governmental immunity applies not only to misuse of tangible personal property but also to the nonuse of such property. In Robinson, a mentally retarded epileptic drowned at Lake Brownwood while under the Defendant’s supervision. The decedent’s mother brought a wrongful death action and claimed that the Defendant negligently failed to provide a life preserver for her son. The trial court rejected the Defendant’s governmental immunity argument and rendered judgment based on the jury verdict in favor of the Plaintiff. The court of appeals reversed in favor of the Defendant, and stated that “this is clearly a ‘nonuse’ case and not a ‘misuse’ case.” Further, the court held that “the failure to provide a life preserver did not constitute the ‘use’ of tangible personal property.” Thus, the court reasoned, the waiver of immunity under the Tort Claims Act did not apply.

The Texas Supreme Court, despite a strong dissent, reversed judgment for the Defendant. The court’s majority called on the Texas legislature to clarify the scope of the governmental immunity waiver, but proceeded to find the present case indistinguishable from Lowe v. Texas Tech Univ. In Lowe the supreme court ruled that Plaintiff stated a cause of action within the waiver of immunity based upon the Defendant’s failure to provide a knee brace to a football player. The Robinson majority accordingly concluded that the Defendant’s failure to provide a life preserver constituted a use of personal property within the meaning of the Tort Claims Act.

4. Special Defects

Two decisions by the Houston Courts of Appeals, Payne v. City of Galveston and Blankenship v. County of Galveston address the duty imposed upon municipalities by section 101.022(b) of the Tort Claims Act. In

263. 758 S.W.2d at 396 (citing Green v. City of Dallas, 665 S.W.2d 567 (Tex. App.—El Paso 1984, no writ)).
264. 758 S.W.2d at 396-97.
265. Id. at 397.
266. 780 S.W.2d 169, 171 (Tex. 1989).
267. Id. at 171 (citing Lowe v. Texas Tech Univ., 540 S.W.2d 297 (Tex. 1976)). Justice Hecht dissented and argued that Lowe is distinguishable. 780 S.W.2d at 173-74.
268. 540 S.W.2d at 300.
269. 780 S.W.2d at 171. But see 780 S.W.2d at 176 (dissent of Justice Cook stating “If life is not death, black is not white and, under the statute, use is not non-use”).
270. 772 S.W.2d 473 (Tex. App.—Houston [14th Dist.] 1989, writ denied).
271. 775 S.W.2d at 439 (Tex. App.—Houston [1st Dist.] 1989, no writ).
272. Section 101.022 of the Texas Tort Claims Act provides, in pertinent part:
(a) If a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.
(b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060.
Payne, the Plaintiffs sought damages arising out of the deaths of their family members when their surrey fell over the edge of the Galveston seawall.\textsuperscript{273} For several days before the accident, the Plaintiffs walked along the seawall and observed the seawall's sharp drop-off and the boulders at its base. In affirming judgment for the city the court of appeals rejected the Plaintiffs' contention that the seawall is a "special defect" under section 101.022(b) of the Texas Civil Practice & Remedies Code.\textsuperscript{274}

In \textit{Blankenship} the Plaintiff similarly slipped on algae growing on granite rocks at the base of the Galveston seawall stairway and argued that an issue of fact existed whether the condition constituted a special defect. The court of appeals rejected the Plaintiff's argument and stated that "[t]he condition was certainly not an 'excavation or obstruction' on a highway, road, or street, which constitute[s] a 'special defect' under the express terms of the statute."\textsuperscript{275}

\section*{V. Police Power}

During the Survey period several courts discussed the police power of local governments. In \textit{Medlin v. Palmer}\textsuperscript{276} anti-abortion activists challenged the constitutionality of a Dallas city ordinance prohibiting the use of amplified sound near medical and educational facilities. At a time when anti-abortion activists were picketing clinics in Dallas, the city council amended an ordinance to prohibit loudspeaker use within 150 feet of a hospital, nursing home or any facility that provides outpatient surgical services.\textsuperscript{277} On appeal by Plaintiffs, the Fifth Circuit addressed the constitutionality of the amended ordinance.\textsuperscript{278} The Fifth Circuit noted that "city ordinances which are content neutral with only time, place and manner restrictions, and which are designed to serve a substantial governmental interest and do not unreasonably limit alternative communication are acceptable."\textsuperscript{279} Applying this

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\textsuperscript{273} 772 S.W.2d at 474.

\textsuperscript{274} 772 S.W.2d at 476-77. The Tort Claims Act does not define the term "special defect," but rather gives examples such as excavations or obstructions on highways. The Texas Supreme Court in County of Harris v. Eaton, 573 S.W.2d 177-179 (Tex. 1978), construed "'special defect' to include those defects of the same kind or class as the ones expressly mentioned." Courts of appeals have subsequently identified a number of special defects. 772 S.W.2d at 476-77 (citing Chappell v. Dwyer, 611 S.W.2d 158 (Tex. Civ. App.—El Paso 1981, no writ) (condition created by thick brush hiding arroyo running alongside a park road and unmarked break in brush appearing to be an intersecting road but in fact was a drop-off into arroyo); State v. McBride, 601 S.W.2d 552 (Tex. Civ. App.—Waco 1980, writ ref’d n.r.e.) (slick, muddy portion of a highway which was being resurfaced); Miranda v. State, 591 S.W.2d 568 (Tex. Civ. App.—El Paso 1979, no writ) (two feet of flood water covering low water crossing on roadway in pre-dawn darkness)).

\textsuperscript{275} 775 S.W.2d at 442.

\textsuperscript{276} 874 F.2d 1085 (5th Cir. 1989).

\textsuperscript{277} For a transcription of the ordinance, see 874 F.2d at 1087 n.1.

\textsuperscript{278} The court rejected the plaintiffs' initial argument that summary judgment in favor of Defendants was inappropriate because Defendants failed to attach a single affidavit to their motion for summary judgment. 874 F.2d at 1088-89 (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)).

\textsuperscript{279} 874 F.2d at 1089 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986)). While recognizing the "public forum" doctrine which "dictates that restrictions
standard, the court decided that the amended ordinance made no reference whatsoever to the content of speech and, therefore, satisfied the content neutral definition. The court also concluded that the amended ordinance served a substantial governmental interest in protecting people suffering from ill health, the aged and school children. The court further held that the amended ordinance did not prohibit unamplified speech, the distribution of written material, the display of signs and placards and that, therefore, it fell way short of precluding alternative avenues of communication. Finally, the court rejected Plaintiffs' challenge that the amended ordinance was unconstitutionally vague.

In Brewster v. City of Dallas the Plaintiffs filed an action challenging the constitutionality of a Dallas city sign ordinance intended "to promote the safety of persons and property, improve communications efficiency, protect the public welfare, and enhance the [c]ity's appearance." In particular, the Plaintiffs contended that the ordinance violated their freedom of speech and deprived them of property without due process of law. Addressing the Plaintiffs' free speech argument, the district court noted that "[a] restriction on otherwise protected commercial speech is valid only if it . . . seeks to implement a substantial governmental interest, directly advances that interest . . . , and . . . reaches no further than necessary to accomplish the given objective." Since the Plaintiffs failed to dispute the ordinance's goal of implementing three substantial governmental interests: promoting traffic safety, communications efficiency, and landscape quality and preservation, the district court only addressed the two remaining inquiries: whether the ordinance directly advanced these interests and whether the ordinance

placed upon speech are typically subject to higher scrutiny when the speech occurs in areas historically associated with first amendment activities such as streets, sidewalks and parks," 874 F.2d at 1089 (citing Hague v. C.I.O., 307 U.S. 496, 1423 (1939)), the court pointed out that "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions . . . is not absolute . . . ." 874 F.2d at 1089 (quoting Hague, 307 U.S. at 515-16).

280. 874 F.2d at 1090.
281. Id.
282. 874 F.2d at 1090 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). The court of appeals was not persuaded by Medlin's assertion that he needed to use a bullhorn in order to save his voice for his vocation or that the desired audience could not be reached without resort to bullhorns because of the physical configuration of the clinic and the adjacent sidewalks.

283. 874 F.2d at 1091. Plaintiffs contended, inter alia, that the ordinance failed to define what constitutes a mechanical loudspeaker or sound amplifier and that the phrase "within 150 feet" is not sufficiently specific. Id. at 1091. The court stated that it was "unable to disagree with the district court's conclusion that the terms of the ordinance are not so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application. 874 F.2d at 1091 (citing Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926)).
285. 703 F. Supp. at 1262 (citing Revised Code of the City of Dallas § 51-7.101). The ordinance, among other things, regulates the location of signs within business and non-business districts, restricts the size, luminance, and movement of signs and the number of signs at a given location. The ordinance also provides for a ten year amortization period in which owners may terminate nonconforming signs and recoup their investment. 703 F. Supp. at 1262.
reached any further than necessary to do so. With respect to the first inquiry, the district court discounted the Plaintiffs' affidavit evidence because it failed to establish that the ordinance did not promote communications efficiency, safety or aesthetics. As to the second inquiry, the district court stated that “[a]s long as a content-neutral regulation advances a substantial governmental interest, the regulation is not overbroad.” Addressing the Plaintiffs’ due process argument, the district court noted that the Plaintiffs bore a heavy burden of demonstrating constitutional invalidity because of the presumption of validity attached to the ordinance. Recognizing that the “method of terminating non-conforming uses is a decision to be made by the City’s legislative body . . .” and that the “legislative termination plan need only be reasonable . . .,” the court concluded that the ordinance did not violate due process concerns because amortization provides a reasonable method to terminate non-conforming signs. The Plaintiffs failed to adduce sufficient evidence to create a fact issue concerning the constitutional validity of the ordinance; thus, the district court granted summary judgment to the city.

In City of Angeles Mission Church v. City of Houston, the district court addressed a challenge by a religious organization to a city ordinance prohibiting solicitation of funds for charitable purposes from occupants of vehicles on public streets. The City of Houston defended the ordinance on “grounds of safety and public convenience (i.e., traffic flow).” Having determined that the ordinance impinged on the Plaintiff’s speech interest, the district court

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287. 703 F. Supp. at 1264-65. The district court recognized that “[a]s long as the City has a reasonable basis for believing that the restriction of commercial speech directly advances the government interest at issue, the court will not disturb that decision.” 703 F. Supp. at 1264 (citing Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 340 (1986); Metromedia, 453 U.S. at 509; Lindsay v. City of San Antonio, 821 F.2d 1103, 1109-10 (5th Cir. 1987), cert. denied, 48 U.S. 1010 (1988) (judge’s ruling that portable sign ordinance barely improved city's appearance was wrongful substitution of his judgment for that of city officials)).

288. 703 F. Supp. at 1265 (quoting SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1276 (5th Cir. 1988)). The district court then concluded that the “[o]rdinance's regulation of on-site advertising is sufficiently tailored in the [o]rdinance to accomplish the [c]ity's interest.” 703 F. Supp. at 1266.

289. 703 F. Supp. at 1266.

290. Id.

291. Id.

292. Id. (citing City of Houston v. Harris County Outdoor Advertising Association, 732 S.W.2d 42, 49-50 (Tex. App.—Houston [14th Dist.] 1987, no writ)); see, e.g., SDJ, Inc. v. City of Houston, 837 F.2d at 1278 (ordinance allowing limited amortization period proper use of police powers); Murmur Corp. v. Bd. of Adjustment, 718 S.W.2d 790, 794-95 (Tex. App.—Dallas 1986, writ ref’d n.r.e.) (amortization reasonable use of police power even if owner will not recoup full value from amortization and depreciation scheme).

293. 703 F. Supp. at 1267.


295. 716 F. Supp. at 984. City Ordinance art. V § 36-80(a) states:

   It shall be unlawful for any person to solicit funds for charitable or welfare purposes from an occupant of any motor vehicle which is on a public street or on a street, roadway or parking area of any city park, whether or not the person soliciting funds is or is not on a public street or other public property.

296. 716 F. Supp. at 984. The court held that the solicitation of funds for charitable purposes constitutes a “speech interest” that is within the protection of the First Amendment.
court stated that the government had the burden to show not only the validity of its asserted interest, but also the absence of less intrusive alternatives.\textsuperscript{297} The court then concluded that the city had made no showing that the legitimate interests of safety and public convenience could not be "fulfilled by a more narrowly-drawn provision."\textsuperscript{298} The court accordingly declared the ordinance void and enjoined its enforcement.\textsuperscript{299}


\textsuperscript{298} 716 F. Supp. at 985. In part, the court relied upon the fact that the city had allowed newspaper vendors to sell newspapers on street corners, that it continues to allow the sale of frozen food on Houston streets and that the sale of flowers to occupants of motor vehicles is tolerated by the City. The court found "[t]here is no evidence that the solicitation of funds for charitable purposes creates any greater safety or traffic flow concern than does the sale of frozen desserts or newspapers on city streets." 716 F.Supp. at 984. The district court also found that the ordinance violated plaintiff's right to equal protection under the law because the city "made no showing of justification for denying the right to solicit funds for charitable purposes while allowing the purely commercial activities of frozen dessert vendors and the sale of newspapers." 716 F.Supp. at 986.

\textsuperscript{299} 716 F. Supp. at 986.